
Tobacco Control Litigation: Broader Impacts on Health Rights Adjudication

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1. Introduction

There is perhaps no area of law that so effectively protects human health and thereby advances the right to the highest attainable standard of health, as tobacco control. Globally, tobacco is responsible for 1 in 10 adult deaths, and is on track to kill 10 million people per year, mostly in developing countries, representing a US\$200 billion drain on the global economy.¹ Yet experience in recent decades has shown that a range of tobacco control measures, such as comprehensive bans on smoking in public places, tobacco taxes, and limits on tobacco advertising, can greatly reduce smoking prevalence. These measures have slowly curtailed the epidemic, despite strong opposition from various sectors led by the tobacco industry. It is fitting that tobacco control is the focus of a recent, widely ratified global treaty (the Framework Convention on Tobacco Control²) and of increasing national litigation, often directly linked to countries' human rights commitments.

The potential of tobacco control litigation is epitomized by a 2001 case in India where the Supreme Court itself banned smoking in public places throughout the country, including schools, libraries, railway waiting rooms, and public transport.³ Much of the more recent litigation on tobacco control comes from Latin America. For example, in 2010 the Colombian Constitutional Court ruled on the constitutionality of a tobacco control law that, among other policies, prohibited all forms of tobacco advertising. The Court stated that this prohibition "is a measure suitable for accomplishing the constitutionally-binding purpose of the State of guaranteeing the health of the inhabitants and the environment...in this case by discouraging the consumption of tobacco products."⁴ In its decision, the Court not only affirmed the constitutionality of the tobacco control law, but also found that the right to health obliged the Colombian government to institute such a ban. Colombian health advocates have pointed to the decision as a key factor in the effective implementation of the law.

Health rights litigation, initiated by individuals or groups, has the potential to secure people's health rights. In particular, courts in countries like South Africa, India, Argentina, Colombia, and Brazil have increasingly influenced public health policies. The

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incidence of health rights litigation has drastically risen since the 1990s, particularly in resource-poor countries. These suits have covered a wide range of health-related issues, such as access to health services and medication, discriminatory labor practices, public health, and basic determinants of health (such as food, water, shelter, and a healthy environment). Many of these cases have required courts to play a more active role in assessing and ultimately developing public policies. This phenomenon is sometimes referred to as the “judicialization of politics,” a process “in which judges who carry out constitutional judicial review end up making, or substantially contribut-

lacking capacity to deal with the complexities of public policy debates, court interventions may cause unanticipated harm. Moreover, governments often fail to implement strong judicial decisions that have adjudicated health-related rights claims.⁹

Without taking a position on the merits of these claims in general, in this paper we argue that emerging tobacco control litigation is an area of law where these concerns are attenuated. This both explains the frequent success of tobacco control litigation (when based in fundamental/human rights) and suggests that litigation will continue to be a powerful tool for tobacco control. As we will show in the cases under

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ing to the making of public policy, thus broadening the scope of ‘judge-made law.’”⁵ It has emerged in Europe,⁶ Latin America,⁷ and several other countries such as Israel, New Zealand, South Africa and Canada,⁸ often in cases that raise health-related claims. Health rights litigation often includes a request for courts to play a more active role in the definition of public health policies, and tobacco control litigation is no exception.

Questions persist about the proper role of litigation in effectuating the right to health and other economic, social, and cultural rights, with critics raising concerns about courts’ technical competence and institutional appropriateness — as the unelected branch of government — to issue judgments that could profoundly impact public policy. Some of these critics contend that courts’ interventions in public policies violate the separation of powers, disrupting the balance among different branches of government. They also argue that when deciding public policies, courts cannot analyze the full budgetary implications of their decisions or the other resource trade-offs, and thus they may inadvertently be affecting other public policies. In addition, in many cases determination of the adequacy of public policies requires technical knowledge, which courts generally lack. Critics continue to argue that by

analysis, courts’ adjudication in the context of tobacco control policies does not always conflict with the role of other branches; scientific evidence on the effectiveness of tobacco control measures is enshrined in international law; courts’ impact on public resources is not that significant; and governments have effectively implemented recent decisions. Moreover, in recent tobacco cases, courts have developed overarching human rights principles and standards, with potential implications for health rights litigation more broadly. Successful tobacco control litigation is therefore contributing to a strengthening of the justiciability of health rights.

This paper compares traditional health rights litigation, which mainly focuses on claims for access to health goods and services (including medication),¹⁰ with that of tobacco control litigation. We start by briefly presenting the relationships among international law, the Framework Convention on Tobacco Control (FCTC), international human rights law, and domestic incorporation of international legal obligations. These linkages are becoming increasingly important as they strengthen tobacco control enforceability through judicial claims. We then analyze how recent tobacco control litigation avoids some of the pitfalls of traditional health rights adjudication. In

the final section, we explore the potential contribution of tobacco control litigation to the justiciability of health-related rights more broadly.

2. Tobacco Control Litigation: A Success Story?

2.1 FCTC, Human Rights Law, and Domestic Incorporation

2.1.1 THE FCTC AS AN INTERNATIONAL LEGAL STANDARD

As the figures mentioned above show, tobacco consumption represents a serious public health threat worldwide. Developing countries are increasingly feeling its deleterious effects, as tobacco marketing intensifies in the poorest regions of the world, likely in response to strong tobacco control laws and higher taxes imposed in the wealthier countries in North America and Europe.¹¹ In Latin America, there are currently more than 120 million smokers, and more than half will die from a tobacco-related illness.¹² Alarming, those unexplored, economically disadvantaged markets in Africa, Asia, Eastern Europe, and Latin America¹³ now receiving the brunt of the tobacco industry's efforts are ill-equipped to counteract industry advertising and prevent tobacco consumption or to take on the resulting health and financial consequences. As a result, the major health and financial havoc caused by tobacco consumption is now becoming disproportionately concentrated on the poorest individuals,¹⁴ who tend to have the highest tobacco consumption rates.¹⁵

In response to the globalization of the tobacco epidemic, tobacco control efforts intensified worldwide, culminating in the negotiation and ratification of a treaty to establish legal standards for tobacco control regulation.¹⁶ The World Health Organization's Framework Convention on Tobacco Control (FCTC) entered into force in 2005 and, as of January 2013, 176 countries have ratified the treaty. Approximately 87 percent of the world's population is now subject to its provisions on tobacco control, which obviously still require implementation and enforcement by the countries that are party to the Convention.¹⁷ The FCTC imposes obligations on states parties to implement tobacco control measures such as smoke-free environments, prohibitions on tobacco advertising, promotion and sponsorship, and health warnings.¹⁸ The FCTC has played a central role in defining the content of the right to health as it relates to tobacco control, by providing clear tobacco control standards and guidelines that states can use to effectively promote the right to health.

United Nations treaty monitoring bodies have recommended that countries implement the FCTC's tobacco control policies, including countries that have not yet ratified the FCTC.¹⁹ This is an interesting example of how tobacco control implementation

is also linked to other international treaty obligations, especially the obligation of states to protect health. In its 2010 review of Argentina, for instance, the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee) highlighted the relationship between the tobacco industry's current promotional strategies targeting women and the State's international obligations under the Convention on the Elimination of All Forms of Discrimination Against Women²⁰ (CEDAW). In order to fulfill CEDAW's obligations, the CEDAW Committee specifically urged Argentina to "ratify and implement the World Health Organization's [FCTC] and put in place legislation aimed at restricting tobacco advertising and banning smoking in public spaces."²¹ Similarly, in 2011's periodic review of Argentina, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) recommended that "the State party [Argentina] ratify and implement the WHO Framework Convention on Tobacco Control and develop effective public awareness and tax and pricing policies to reduce tobacco consumption, in particular targeting women and youth."²²

Regardless of whether states have ratified the FCTC, it serves as a legal standard for interpreting obligations that arise from the right to health with respect to the tobacco epidemic. Moreover, judicial bodies have gone as far as to declare the FCTC a human rights treaty, rather than merely a health law treaty that relates to tobacco control. In a recent case before the Constitutional Tribunal of Peru, for instance, in upholding the constitutionality of a tobacco control law, the Tribunal held that the FCTC creates human rights obligations.²³ Specifically, the Constitutional Tribunal of Peru stated that the "FCTC is a human rights treaty, since it seeks to clearly, expressly and directly protect the basic right to health protection recognized in Article 7 of the Constitution."²⁴ The Tribunal further declared, the "FCTC is a human rights treaty, because although it does not recognize the right to health protection as a 'new right'... it obliges State Parties clearly and directly to take steps that contribute to optimizing its effectiveness."²⁵ Along the same line, the Constitutional Chamber of the Costa Rican Supreme Court has also recently stated that the FCTC is a human rights treaty.²⁶ However, regardless of whether the states view the FCTC as a human rights treaty or merely a health law treaty, at a minimum the FCTC functions as a legal standard that specifies the content of the obligation to protect the right to health in the face of the tobacco epidemic. The Constitutional Court of Belgium embraced this latter position, stressing the need to consider the protection of health in combination with the FCTC when addressing tobacco control legislation.²⁷

2.1.2 *Right to Health and Tobacco Control at the Domestic Level*

The argument can be made that given the burden of tobacco-related diseases worldwide, states have an obligation to intervene to protect the right to health of their citizens regardless of whether they have ratified the FCTC.²⁸ First, the obligation to respect human rights requires states to refrain from either directly or indirectly violating human rights or impeding their realization. In the realm of tobacco control, this means that, for example, states are prohibited from promoting, advertising or sponsoring the use of tobacco prod-

a major threat to public health, judges are moving in concert with the legislative and executive branches of government when implementing further restrictions on tobacco.³³ In fact, “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.”³⁴ Thus, by protecting health rights in the course of tobacco control litigation, courts are helping States to comply with their international legal obligations. Because the FCTC provides a legal standard to assess potential violations, the rights in this context are more clearly defined than

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ucts.²⁹ Second, the obligation to protect human rights requires that, in addition to refraining from carrying out such activities, states must take additional measures to prevent third parties from interfering with human rights. In order to effectively protect the right to health, governments have a legal duty to regulate the tobacco industry to ensure that fewer individuals are subject to the negative health consequences of tobacco products. Finally, the obligation to fulfill human rights requires governments to adopt all appropriate legislative, administrative, budgetary and other measures, which encompasses comprehensive tobacco control policies.³⁰ In the absence of effective tobacco control legislation, or of the enforcement and monitoring of such legislation, tobacco control adjudication provides an opportunity for courts to rectify any legislative, enforcement or monitoring shortcomings and bring states’ policies into compliance with their international legal human rights obligations.³¹

The process leading to FCTC implementation at the national level has pushed governments and public health groups to better understand the role that law, including tobacco control litigation, can play in protecting the right to health.³² Since the FCTC provides a standard of minimum domestic tobacco control policies, courts faced with tobacco control litigation can use this treaty to legitimize and guide determinations that would substantively affect national public policies. Moreover, because states, in ratifying the FCTC, have already acknowledged the tobacco epidemic as

other economic or social rights. Some countries have already used litigation as a catalyst for tobacco control policies. For example, Mexican public health advocates used tobacco control litigation in an attempt to strengthen a weak federal tobacco control law, arguing that the law failed to fulfill the minimum standards of protection officially recognized by the State through its ratification of the FCTC, which they connected with human rights obligations.³⁵

2.2 *Tobacco Control Rights-Based Litigation*

Litigation to further tobacco control first requires alleging the violation of a legal *right*; it is not sufficient to claim that the government has simply neglected an important social good. In the case of tobacco control, such a right could come either under the general right to health or under any number of subcategories of the right to health, such as the right to a healthy environment, freedom from discriminatory labor practices, or access to drug rehabilitation/cessation programs. The basis for such litigation is particularly strong in countries that have explicitly enshrined the right to health in their national constitutions and legislation, or have incorporated regional and global treaties recognizing the right to health into domestic law, which will be the ones analyzed in this paper. However, even in countries lacking an explicit recognition of a right to health, litigation may succeed,³⁶ either by inferring it through other rights (such as the right to life) or by relying on human rights instruments in international

law, such as the International Covenant on Economic, Social and Cultural Rights.³⁷

India is one of the countries where the judiciary has recognized and protected the right to health as a concomitant part of the constitutional right to life since the 1970s, and such an approach has resulted in several significant advancements in the area of tobacco control regulation.³⁸ Due to the failure of policymakers to legislate on tobacco control, judicial intervention — brought about by public interest litigation — has been an important driver of Indian tobacco control law. In 1999, the High Court of the State of Kerala issued a groundbreaking judgment in response to a petition filed by a woman complaining of severe health problems caused by exposure to second-hand tobacco smoke during frequent bus travel.³⁹ This petition was the first of its kind in the country, claiming that secondhand smoking violates the right to life guaranteed under Article 21 of the Indian Constitution. As a result of this petition, the High Court banned smoking in public places. This order was applicable throughout the State of Kerala, and included a ban on smoking in theatres, bars, restaurants, shops, schools, trains, bus stands and footpaths.⁴⁰ In November 2001, upholding this judgment, and recognizing the failure of the legislature to develop appropriate nationwide tobacco regulations within a reasonable amount of time, the Supreme Court of India extended the ban nationally and directed the sub-national and local governments to take the necessary actions to ensure the ban's implementation.⁴¹

Similarly, advocates in Mexico challenged that country's new national tobacco control law as inadequately protecting the rights to health, information and life guaranteed by the Mexican Constitution and the right to health with regards to the tobacco epidemic as required by the FCTC.⁴² Moreover, they argued that the law amended previous health laws in a way that stripped away important powers that the Ministry of Health had previously used to regulate tobacco products. The Court ultimately dismissed the case due to procedural arguments before it had a chance to discuss the substantive issues. However, the case is nevertheless significant because, by granting the petitioner standing to bring the case, the Court affirmed the State's positive obligations respecting economic, social, and cultural rights, such as the right to health.⁴³ This was a groundbreaking decision in Mexico, as the standing rules had traditionally posed a significant barrier to litigating social, economic, and cultural rights. The impact of this decision therefore extends beyond tobacco control, affecting justiciability more broadly.

In a different type of case, 5,000 Peruvians challenged the constitutionality of a tobacco control law that prohibits smoking in certain public places, including outdoor areas of educational facilities.⁴⁴ They argued that these limits infringed their rights to personal autonomy and economic freedom and thus that the Peruvian Constitutional Tribunal should allow smoking in outdoor areas of institutions for higher learning for adults and in special smoking areas. The Tribunal dismissed the claimants' suit and confirmed the constitutionality and legality of the law. The Court held that the law satisfied a proportionality test, according to which the right to health was placed above the rights allegedly violated. It further ruled that the smoking ban was the ideal means to comply with FCTC provisions requiring protection from exposure to tobacco smoke. As we will later see, the Tribunal used this case to significantly advance the way in which it interprets and applies the principle of progressive realization of economic social and cultural rights.

We could consider the Indian and Mexican cases as “offensive” litigation and the Peruvian case as “defensive” litigation. In offensive litigation, a plaintiff is seeking greater protection of health than currently provided by the legal framework. This was the case in Mexico, where plaintiffs challenged the national tobacco control law as inadequately protecting their right to health. On the other hand, the Peruvian one would be an example of “defensive” litigation involving a judicial claim seeking to weaken effective tobacco control measures. This differentiation between offensive and defensive litigation is relevant to some of the ideas we will be discussing shortly.

2.3 Challenges to Adjudication of Social Rights in the Context of Tobacco Control Litigation

During the second half of the last century, scholarly debates on the nature of economic, social and cultural rights (ESCR) were influenced by those who denied that these rights were “legal” rights, on the basis that they were not of “immediate application” but merely aspirations of “progressive realization” (subject to the availability of resources).⁴⁵ According to Minta, even in the event that one could consider that ESCR entailed “obligations of some sort,” these were simply “obligations of conduct” in contrast to civil and political rights, which entailed essentially “obligations of result.”⁴⁶

There is now a growing recognition that this differentiation is unsustainable. This growing consensus understands that:⁴⁷

- rights are interrelated and interdependent;
- civil and political rights also require resources;
- the principle of progressive realization in ESCR creates immediate obligations;
- components of ESCR impose obligations of immediate effect (non-discrimination, and somewhat more arguably, the minimum core obligations); and
- there are ways to measure all aspects of ESCR (e.g., progressive realization, maximum available resources).

Critiques of ESCR have also questioned the proper reach of health rights litigation. In the following section, we will briefly present some of the most important arguments against judicial adjudication of health rights while suggesting that those challenges are somehow attenuated in tobacco-control litigation.

2.3.1 LEGITIMACY AND COMPETENCY: THE ANTI-DEMOCRATIC ARGUMENT

One of the most important criticisms of judicial realization of health rights is the lack of legitimacy, which relates to the classic question of the appropriateness of unelected judges modifying the decisions of a democratically elected legislative branch. As summarized by Eric Christiansen:

[i]n the context of social rights adjudication, the traditional concerns about judicial review are exacerbated by the inherent policy-based and financial nature of the decisions the courts would have to make. A judgment that placed a positive duty upon or required significant funding from the state, rather than merely a cessation of government activity, intrudes upon more non-judicial concerns than just the single issue before the court.⁴⁸

As explained by Roberto Gargarella, courts “have the final authority to determine whether the decisions of the political branches should be upheld or not,” which, according to this author, is a matter of concern considering that “judges can decide cases with almost total discretion.”⁴⁹

Throughout Latin America, courts have ordered governments and public authorities to provide treatment for a range of conditions based on right to health claims. Such claims have been particularly numerous in Costa Rica, Colombia, Brazil and increasingly in Argentina, whose constitutions all enshrine the right to health and where courts are particularly accessible to the generally public.⁵⁰ In Argentina, for instance,

access to health care, treatment, and medicines comprise 72% of right to health cases. These claims mainly seek increased access to health services, and medicines (drugs for HIV/AIDS, asthma, diabetes and other diseases). Claims requesting basic reforms in public health policies and facilities only account for 11% of the total right to health cases.⁵¹

Tobacco control litigation may avoid these problems of democratic legitimacy, depending on whether it is defensive or offensive. Defensive tobacco control litigation does not push courts to develop public policy, but rather to either confirm or reject a specific public policy already approved by a legitimate executive or legislative authority. Accordingly, defensive tobacco control litigation in which courts uphold appropriate tobacco control measures (such as the cases mentioned before in Colombia and Peru) does not affect the separation of powers. Rather, these cases strengthen the enforceability of the right to health (and health-related rights) while stressing that legislative and administrative bodies are not only allowed to regulate on tobacco control but actually bound to do so given the obligations arising from the right to health. Defensive litigation on tobacco control is very frequent as the tobacco industry, more often than not, challenges tobacco control regulations, arguing they infringe constitutionally protected rights.⁵²

Offensive tobacco control litigation may require courts to play a more significant role in the delineation of public policies. However, sometimes the issues are limited and do not have a significant impact on public policy. For example, in Belgium, applicants filed an action to partially or totally annul that country’s tobacco control legislation, arguing provisions in the law that allowed for smoking in some public closed places were unconstitutional. The Court struck down exemptions that permitted smoking in certain establishments whose principal activity was to provide drinks on site and which served only pre-packaged food. The Court found that these exceptions violated the Belgium Constitution, the Revised European Social Charter, and the European Convention on Human Rights, including the rights to equality before the law, non-discrimination, respect for private and family life, dignity, safe and healthy working conditions, and protection of health. From the Court’s perspective, the exposure to tobacco smoke could not be reasonably justified based on whether and what type of food was for purchase.⁵³ Categorizing a case as defensive or offensive is not always an easy task. In this case, even if the initial petition is for a partial or total annulment of a certain law, the case can be considered offensive as the applicants were

challenging the law on the basis that it did not offer an adequate level of protection for the right to health. By striking down exceptions, the Court is re-shaping a public policy previously defined by the legislature. As seen in this example, the lack of legitimacy criticism remains applicable for offensive tobacco control litigation as well: judges will have an impact in shaping the decisions of more legitimate authorities on matters of public health, even if that impact may be minimal.

the ICESCR is necessarily far more intricate than it is in the case of the ICCPR. Economic, social, and cultural rights present issues of considerably greater complexity and scope — in most cases requiring different kinds of information and greater expertise to resolve than civil and political rights.⁵⁵

The complexities of health policy issues have been obstacles for courts wishing to intervene on the defi-

Despite its potential to hold states accountable to their national and international legal obligations to respect, protect and fulfill the right to health, one concern with litigation is that it is not designed primarily for that purpose. Instead, claims are often motivated by individual health concerns that need to be remedied, and litigation is used by rights-holders to access treatment and goods when the system is not meeting their needs. Litigation may lead to misallocation of scarce public resources.

2.3.2 COURTS' TECHNICAL KNOWLEDGE ABOUT COMPLEX HEALTH POLICIES

Another main criticism of judicial realization of health rights involves competency. Courts are not necessarily an appropriate fora for debating complex health policy matters. According to Christiansen:

[t]hese alleged failings include procedural limitations, especially concerns about the suitability of any particular plaintiff to represent the general class of affected persons; informational problems, including the absence of the specialized, unbiased fact-finding available in a legislative setting; and remedy-related difficulties, particularly where the limited range of judicial remedies would be inadequate or politically inappropriate.⁵⁴

One of the reasons for asserting that courts lack the competency to effectively adjudicate health-related issues is that, arguably, judges lack the technical capacity to handle the information required for public policy development. Along these lines, when writing about the optional protocol of the ICESCR — which will allow individual communications (petitions) to be brought in front of the UN Committee on Economic, Social and Cultural Rights — Dennis and Stewart argue that:

[t]he original negotiators well understood what proponents of the optional protocol now choose to ignore: the task of assessing compliance with

of those policies: “(t)he margin of discretion granted to the political branches has tended to be broader — and thus, the space for judicial control narrower — when a decision corresponds to a field of technical expertise which is considered to be part of their sphere of knowledge and alien to the judiciary.”⁵⁶

However, the unique nature of tobacco control, and in particular, the existence of internationally codified tobacco control policies in the form of the FCTC, allows courts to overcome any supposed lack of technical capacity to assess public policies. Before the FCTC, tobacco control litigation was hindered by courts' lack of technical capacity. In Uganda, for instance, in 2003 the Environmental Action Network Ltd (TEAN) sued British American Tobacco Limited (BAT), claiming that BAT had failed to warn consumers of the danger of its tobacco products, violating consumers' right to life. TEAN requested that the Court order BAT to provide sufficient information on health risks to consumers in advertisements and on packets. However, due to a lack of expertise, the Court chose not to determine which kind of information should be included in labels and publications.⁵⁷

Today, a lack of technical capacity is less likely to affect tobacco control litigation. The FCTC entails a mixture of legal provisions backed by medical and scientific evidence. In fact, the treaty's official foreword states that “(t)he WHO FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health.”⁵⁸ Thus, many of the technical questions in

the area of tobacco control have already been answered and courts looking to discuss the implementation of public policies on this matter may look to evidence-based scientific standards. From a general perspective, for example, in supporting any tobacco control policies, courts may rely on the text of the FCTC to support the conclusion that the use of tobacco is *per se* harmful to health, because the treaty's preamble recognizes that:

scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases.⁵⁹

Similarly, immediately prior to establishing an obligation to implement smoke-free environments, Article 8 of the FCTC states that “[p]arties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.”⁶⁰ Consequently, regarding tobacco control, courts can use the FCTC as a legal tool to facilitate their management of technical knowledge and legitimize a certain degree of intervention in public policies.

2.3.3 JUDICIAL INTERFERENCE WITH PUBLIC POLICIES AND THE DISTRIBUTION OF PUBLIC RESOURCES

Despite its potential to hold states accountable to their national and international legal obligations to respect, protect and fulfill the right to health, one concern with litigation is that it is not designed primarily for that purpose. Instead, claims are often motivated by individual health concerns that need to be remedied, and litigation is used by rights-holders to access treatment and goods when the system is not meeting their needs.⁶¹ Litigation may lead to misallocation of scarce public resources. Moreover, according to some authors, those most vulnerable will lack the resources needed to litigate, and thus judicialization may worsen inequalities and have a negative/regressive impact overall.

Indeed, evidence shows that a significant proportion of health rights litigants do not come from the most vulnerable socioeconomic groups. According to Ferraz Motta, referring to Brazil, “(i)t is likely that the increasing amount of resources spent to fund the health benefits granted to successful claimants (hundreds of millions of dollars in some states, mostly consumed to purchase expensive new drugs) is diverted at least in part from current or future health programs that would benefit larger and more disadvantaged

groups who cannot easily access the courts to protect their interests.”⁶²

As a result of this concern, even when dealing with access to important health-related interventions, courts in some jurisdictions refuse to intervene. An example of this approach to health rights adjudication is illustrated by *Soobramoney v. Minister of Health*, in which the South African Constitutional Court held that the State had not violated the right to access health care, or to life, or the guarantee of emergency medical treatment after the claimant was denied access to renal dialysis in a public hospital. In reaching that conclusion, the Constitutional Court deferred to both the hospital's guidelines for rationing treatment and the provincial authorities' allocations for the general health budget. The Court stated that “the provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities to be met.”⁶³ Whether or not the decision was fair, the case does illustrate that the scarcity of public resources could be an obstacle for courts to impose resource-intensive decisions on governmental agencies.

Some other courts have supported petitioners' claims based on the right to health, even when this could have significant resource implications. The Argentinean government raised the public resource argument in a case where plaintiffs asked that the State ensure access to HIV/AIDS treatment in public hospitals. The State claimed that a finding in favor of petitioners would affect the distribution of resources for public health, and that allocating resources for HIV treatment was a policy determination not subject to judicial review. The Argentine Supreme Court⁶⁴ ruled in favor of the petitioners, stating that the court was not illegitimately affecting the distribution of public resources. The Court took upon itself to enforce a legal duty established in the national constitution and in a national law on HIV/AIDS.⁶⁵

An interesting aspect of tobacco litigation is that it also shows how fulfilling socioeconomic rights does not always require investing public resources. This is partially because implementation costs are borne by private citizens rather government. For instance, restaurants and bars owners play key roles in implementing smoke-free environments measures, and their compliance is usually secured with the establishment of deterrent sanctions. Other tobacco control policies are not resource intensive either (e.g., bans on tobacco advertisement, promotion and sponsorship). More-

over, in the case of tobacco control policies, upholding health rights results in net savings for government. According to the WHO, “evidence shows that tobacco control interventions are affordable in all countries.”⁶⁶ One study in particular modeled price increases, workplace bans, health warnings, and bans on advertising for 23 countries. The study’s authors, quoted by the WHO, stated that “over 10 years (2006–2015), 13.8 million deaths could be averted by implementation of these interventions, at a cost of less than US\$0.40 per person per year in low-income and lower middle-income countries, and US\$0.50–1.00 per person per year in upper middle-income countries (as of 2005).”⁶⁷

Since so many factors vary between country-specific tobacco control measures, it is difficult to compare the cost-effectiveness of various interventions. Evaluations that have a narrow perspective — for example, that consider the benefits solely to the public sector and over a relatively short period — may indicate low rates of return. However, taking a broader perspective that includes the interests of the community over a longer period, many programs can yield high rates of return, particularly given the high social costs of tobacco.⁶⁸ This research strongly refutes the argument of a highly criticized report, funded by Philip Morris, that stated that smoking actually saved money “due to reduced health-care costs, savings on pensions and housing costs for the elderly — all related to the early mortality of smokers.”⁶⁹ In reaction to the strong evidence contradicting its funded report, Philip Morris had to issue a public apology.⁷⁰ However, despite the low cost of interventions, a WHO report stated that in 2008 less than 10% of the world’s population was fully covered by any of the tobacco control demand reduction measures outlined in the FCTC.⁷¹

The low cost of tobacco control interventions is the principal reason why tobacco control litigation has a minimal impact on the availability of public resources even when courts order positive action by government. As a result, courts are more willing to intervene, given that their decisions have very limited effects on the capacity of regulatory health agencies to develop and invest in other health policies. The upfront cost of enforcing tobacco control policies is low, and moreover leads to public savings in the long-term, which can be redirected to health needs. The Peruvian Constitutional Tribunal addressed this issue, stating that the State has the obligation to take all the necessary steps to significantly reduce the costs created by a behavior that indirectly reduces the State’s ability to meet its legal obligation to protect and guarantee the basic rights of all people. The Tribunal stated that “it is consti-

tutionally valid to seek to reduce the health costs incurred from treatments for tobacco-related diseases by significantly reducing its use through bans on smoking in enclosed public spaces and smoking in open areas located in or near adult educational centers.”⁷² The cost-effectiveness of tobacco control policies facilitated the Court’s decision, as upholding the smoke free environments law would not have any unintended consequences, financial or otherwise, on other health policies.

2.3.4 IMPLEMENTATION OF JUDICIAL DECISIONS

As with many other economic, social and cultural rights, right-to-health litigation faces the challenge of implementation. As stated by Gloppen:

[d]espite increasing instances of such court cases, affirming rights at the formal level does not necessarily bring changes on the ground. To realistically assess the accountability potential of health rights litigation, we need to know to what extent the judgments are accepted and implemented and under what circumstances litigation brings changes to health systems and policies.⁷³

This perspective is also shared by Flood and Chen who assert that “one needs to look beyond the successes or failures of the lawsuits themselves to truly ascertain whether or not a rights-based approach to health care is achieving progressive or regressive outcomes.”⁷⁴

Even in famous cases such as *Grootboom*⁷⁵ and *Treatment Action Campaign (TAC)*,⁷⁶ official responses asserted a willingness to comply with the Court’s orders but implementation was inconsistent and incomplete.⁷⁷ South African studies have monitored this implementation challenge. According to AfriMap and Open Society Foundation for South Africa, the government’s record in complying with court orders concerning economic, social and cultural rights has hardly been satisfactory.⁷⁸ As Mbazira states, “[n]on-compliance with court orders could therefore be described as a major stumbling block in the way of the realisation of socio-economic rights. Successful litigants have been rendered hopeless and the judiciary helpless in the face of the government’s recalcitrance.”⁷⁹

The South African Constitutional Court has made particular efforts to require the government to heed their decisions. In *Dingaan Hendrick Nyathi v. Member of the Executive Council for the Department of Health Gauteng, and Another*,⁸⁰ for example, the court invalidated a law that protected State officials from liability for noncompliance with court orders. That decision has strengthened the possibility of

securing compliance. The Supreme Court of Argentina took a similar approach in *Mendoza, Beatriz S. y otros c. Estado Nacional y otros*, a case dealing with water sanitation, health and environment.⁸¹ The Court mandated the State to comply with a specific program addressing health and environmental problems, imposing fines for non-compliance on individuals in charge of the non-complying agencies.

Analyzing compliance with decisions relating to health rights litigation specifically, Mæstad, Rakner and Motta Ferraz distinguish individual cases from collective cases. In general, compliance seems to be high for individual cases in countries such as Costa Rica and Brazil. On the contrary, the situation is clearly different for collective cases. In Brazil, Argentina, South Africa, and India, there have been enormous difficulties in enforcing structural orders for the improvement of basic sanitation systems, hospitals and health and educational services for certain groups.⁸²

As opposed to other types of health rights litigation, tobacco control litigation cases have not had many problems with implementation, even for collective cases. In the previously mentioned case in India, the Supreme Court of India imposed a smoking ban in public places throughout the country and directed the sub-national and local governments to take the necessary actions to ensure the ban's implementation.⁸³ These sub-national and local governments proceeded to issue tobacco control regulations. At the state level, after the High Court of Kerala issued its decision, two tobacco control laws were approved by other state governments.⁸⁴ At a national level, the Ministry of Health acknowledges that the Cigarettes and other Tobacco Products (prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) Act of 2003 built on the decision delivered by the Supreme Court.⁸⁵

Although the cases were different in nature, the decisions of the Colombian Constitutional Court in 2010 and the Peruvian Constitutional Tribunal in 2011 not only upheld tobacco control laws but also strengthened them, and allowed health regulatory agencies to issue regulations to advance the implementation of tobacco control policies. In particular, the 2010 case of the Colombian Constitutional Court provides an example concerning the issue of implementation of health rights court decisions. While dealing with a constitutional challenge to the national tobacco control law, the Court provided a more precise interpretation of a particular legislative provision in the article on tobacco advertisement (article 16), stating that such article:

must be understood as a broad clause, implying a comprehensive ban on the advertising of tobacco products, upon the terms set out in the FCTC. (...) In conclusion, the Court considers that the interpretation that best describes the legal sense inherent in the term *promotion* and that which best conforms to the compliance with the international commitments of the Colombian State in terms of tobacco control, is that which considers it the equivalent to a comprehensive ban of the advertising of tobacco products and their derivatives, upon the terms described in the FCTC.⁸⁶

The Court's interpretation strengthened both the article on tobacco advertisement regulation (article 16) and the health regulatory agency itself, enabling the Health Ministry to issue regulations applying the interpretation criteria. The Peruvian Constitutional Tribunal, while discussing the constitutionality of smoke-free policies, goes even further than the Colombian Constitutional Court by stating that "the questioned legislative measure in this proceeding is not just a constitutionally valid measure, but also required by International Human Rights Law and the obligation to protect the right to health."⁸⁷ Such a clear judicial stance does have a positive impact on the implementation of these tobacco policies.

Similarly, the Guatemalan Constitutional Court strengthened a challenged tobacco control law leading to more effective implementation. The Guatemala Chamber of Commerce brought a general claim of unconstitutionality arguing that Article 3(a) of the Smoke-free Environments Law violates Article 2 of the Constitution, establishing the principle of legal security, insofar as the language of Article 3(a) does not define the term "enclosed public space" and remains devoid of the certainty necessary for effective enforcement. The Court held that the absence of a definition of "enclosed public spaces" in Article 3(a) was not grounds for unconstitutionality. The "very meaning of its words" satisfies the "intellection" of the term, which here is deemed to be related to "the purpose of protecting non smokers exposed forcefully to second-hand smoke in places that, due to their enclosed structures, retain the smoke for a certain time forcing its inhalation."⁸⁸ In this way, the Court gave regulatory authority to the Executive branch, which then had more flexibility to implement the law.

3. Potential Contributions of Tobacco Control Litigation to the Overall Enforceability of Health Rights

Tobacco-control litigation is making novel contributions to the overall justiciability of health rights. Perhaps the nature of tobacco control policies and its litigation has made courts more prone to develop overarching human rights principles. In this section we argue that specific tobacco control cases in Mexico, Peru and Colombia made concrete contributions to the justiciability of health rights in those countries.

3.1 Legal Standing: Mexico

As mentioned before,⁸⁹ advocates in Mexico requested substantive judicial intervention in tobacco control policies. This case represented a huge step forward to advance the justiciability of health rights, even though the Supreme Court ended up rejecting the claim itself. This claim was channeled through an *amparo*, which is a legal action used in court for the protection of a constitutional right. *Amparos* also protect the constitution by ensuring that its principles are not violated by statutes or State action or, as in this case, by inaction.⁹⁰ It is an essential legal instrument to assure the protection of rights, including ESCR. Historically, Mexican courts have had a high threshold for granting standing in *amparo* cases, requiring evidence of “personal and direct” effects on fundamental rights.

In 2011 the Mexican Supreme Court ruled that Balderas Woolrich, the petitioner in the Mexican case mentioned above, had legal standing, clearly changing its position towards standing for right to health claims. The Court took a robust, substantive position on the right to health and was clear in linking it to the right to information and affirming the State’s obligation to protect people from third parties — in this case the tobacco industry and its allies. According to the Court, given the fact that the constitution includes rights such as the right to health, it is no longer possible to understand it as a mere declaration. Thus, the State should assure access to legal actions for the effective protection of the right to health.⁹¹ The Court clearly stated that “concluding that a case such as the one under analysis should be rejected due to the lack of legal standing would be based in a mistaken conception of the content and normative density of the right to health.”⁹²

Despite that important step forward on legal standing, the court rejected the claim without examining the merits of the case. The court explicitly acknowledged that it could not provide an adequate remedy because the *amparo* procedure denies the possibility to make decisions with *erga omnes* effects. This

limitation is enshrined in the *fórmula Otero* or the principle of relativity of *amparo* decisions. According to this principle, successful constitutional challenges may only affect/benefit the plaintiffs arguing the case. Mexican constitutional law scholars have historically argued that this rule of the *amparo* system needed to be revised.⁹³ Although in some instances it is difficult to clearly identify and assess the impact judicial decisions have on broader legal reforms, a few months after this case was decided, the legislature approved an amendment to the constitution establishing a new procedure for *amparos*.⁹⁴ This new procedure would have allowed the Supreme Court to issue a decision with *erga omnes* effects in the Balderas Woolrich case.

3.2 Progressive Realization and Non-Retrogression: Peru

The principle of progressive realization has often been characterized as undermining the nature of ESCR as real rights, making more difficult the enforcement of ESCR. Importantly, the principle of progressive realization encompasses the principle of non-retrogression, i.e., the prohibition on implementing retrogressive measures. The CESCR explains:

the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. (...) the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant, which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁹⁵

Determining whether a specific public policy overall entails a clear retrogression on the fulfillment of health-related rights has always been a challenge. However, in the case of tobacco control litigation, courts can look to clearly defined legal and technical standards — based on universally accepted scientific knowledge — when faced with the question of whether states are progressively realizing the right to health and when measures are retrogressive. This has in part allowed courts to approach the principle of progres-

sive realization in the context of tobacco control litigation in a more dynamic way.

The Peruvian Constitutional Tribunal, for instance, took into account the FCTC as the accepted scientific evidence on tobacco control policies. FCTC provisions clearly establish that 100% smoke-free environments are protective of health whereas separate smoking areas are not, and the Peruvian Constitutional Tribunal used this to elaborate on the principle of progressive realization/non-retrogression in a very concrete way, stating:

vious cases, the reference to this principle was much weaker and there was no consideration to the non-retrogression aspect of it. In 2004, in a case on access to HIV/AIDS medicines, the Constitutional Tribunal made only a general reference to the progressive realization principle, stating that “the State must take constant and effective measures to progressively achieve the full realization of the ESCR.”⁹⁷ In 2007, the Tribunal had a similar approach in a mental health case, making merely a general reference to the principle and quoting CESCR general comment 14.⁹⁸ The Tri-

Tobacco control litigation mitigates some of the arguments against ESCR adjudication. As we analyzed in this paper, tobacco control cases are allowing courts to expand notions of standing, progressive realization, and state obligations enshrined in the right to health. Key to this judicial trend is the FCTC, which provides a legal standard — supported by scientific evidence — defining concrete measures states should take to address the tobacco epidemic. This highlights the importance of substantive international standards in the fulfillment of the right to health, which does not necessarily happen for other kinds of right-to-health litigation.

Taking into consideration the criteria explained in the preceding legal grounds, namely that the State has the duty to protect the right to health at the maximum level possible, that smoking is an epidemic, that rights must be protected through progressive steps, meaning that except in highly exceptional circumstances the legal steps taken to protect health mark a point of no return, and that according to Article 3 of the WHO Framework Convention on Tobacco Control the aim of reducing the use and exposure to tobacco smoke must be achieved ‘continually,’ it is found constitutionally prohibited that, in the face of the tobacco epidemic, any steps, legislative or otherwise, be taken in the future that would provide a lesser degree of protection to the fundamental right to health than is presently provided by current legislation. (Emphasis and underlined added)⁹⁶

In its judgment, the Peruvian Constitutional Tribunal used accepted technical knowledge to justify its decision to unequivocally require the government to progressively realize the right to health. Considering the jurisprudence of this tribunal, this approach to the progressive realization principle with regards to the right to health was a significant step forward. In pre-

bunal’s approach in this tobacco control case strengthens the progressive realization principle by including for the first time a reference to its non-retrogressive aspect. This decision has consequences that go beyond tobacco control, as the Tribunal’s interpretations of progressive realization and non-retrogression would also apply to the right to health more broadly, and to other economic, social and cultural rights.

3.3 Health and Legitimate Restrictions on Commercial Freedoms: Colombia

It is not uncommon for health rights cases to elucidate tensions between commercial rights and measures aiming at fulfilling the right to health. The discussion usually centers around the analysis of which types of restrictions on commercial rights are justified to properly protect the right to health. Courts use different analytical frameworks to clarify potential tensions, such as reasonableness and proportionality.

In its 2010 decision, the Colombian Constitutional Court clearly stated that health goals are legitimate reasons to restrict commercial freedoms, even to a degree of restriction not seen before — such as a complete ban on tobacco advertisement and promotion. The Court started by connecting this measure with the protection of the right to health, arguing that “imposing intense restrictions on such activities is a

measure suitable for accomplishing the constitutionally-binding purpose of the State of guaranteeing the health of the inhabitants and the environment (Article 49 C.P.) in this case by discouraging the consumption of tobacco products.”⁹⁹ The Court then explained that “the degree of restriction of commercial advertising admissible is directly proportional with the level of impact on goods of constitutional value. In the case under analysis, the full prohibition of advertising and promotion, and the broad restriction of sponsorship, are justified by the *devastating* effects — as characterized by the WHO — caused by the consumption of tobacco products.”¹⁰⁰

The FCTC and WHO played key roles in positioning the Court to justify restrictions of commercial rights in order to properly fulfill the right to health. This included the Court’s clear reference to the obligation to protect the right to health from third parties’ interference (i.e., the tobacco industry through advertisement). One could argue that overall, this decision made an important contribution to the practical enforceability of the right to health, strengthening the possibilities of implementation while making clear that the right to health mandates affirmative state action.

4. Conclusions

Tobacco control litigation throughout the world is strengthening the justiciability of the right to health and health-related rights. This is connected with how tobacco control litigation mitigates some of the arguments against ESCR adjudication. As we analyzed in this paper, tobacco control cases are allowing courts to expand notions of standing, progressive realization, and state obligations enshrined in the right to health. Key to this judicial trend is the FCTC, which provides a legal standard — supported by scientific evidence — defining concrete measures states should take to address the tobacco epidemic. This highlights the importance of substantive international standards in the fulfillment of the right to health, which does not necessarily happen for other kinds of right-to-health litigation.

Another important difference between tobacco control litigation and other right-to-health litigation relates to the cost-effective nature of tobacco control measures. This is particularly true for basic tobacco control policies, such as mandatory health warnings or banning smoking in certain places. More complex measures, such as educational campaigns or monitoring tobacco industry interference on public policy development, could be more expensive. Because courts are currently dealing mostly with initial tobacco control measures, the relatively low costs in

terms of impact on government budgets could also be the reason why the implementation process has been quite successful in this area. It will be interesting to see how courts deal with other tobacco control policies that could mean greater impacts on the public budget. The cost-effectiveness is not an exclusive feature of tobacco control policies. There are many other health-related policies that would result in overall net saving for governments. Highlighting this aspect of certain health policies could be appealing for courts dealing with health policy decisions.

We argued that successful tobacco litigation offers lessons for litigating right-to-health claims in other areas. Firstly, the tobacco control movement has always backed its policy recommendations with strong scientific evidence. The WHO not only led the FCTC negotiations, but also developed and linked scientific research to concrete policy recommendations. This has played a major role in this process. Scientific evidence could be especially important to further the application of the progressive realization principle. Courts will have reliable evidence-based information to assess, for example, when a government action could be considered retrogressive.

Secondly, the FCTC is the international legal standard for guiding government action to fulfill the obligations arising from the right to health as it relates to tobacco control. The general obligation to protect health could be interpreted as meaning different things in various contexts. The FCTC, however, provides a practical answer for what it means with regards to one particular threat to public health: the tobacco epidemic. A similar approach could be taken either for other specific health issues, or for giving content to broader states responsibilities in health, i.e., to build consensus around the main concrete responsibilities that arise from the obligation to protect health. Connected to this later point, it will be interesting to follow the developments of the Joint Learning Initiative on National and Global Responsibilities for Health which intends to forge an international consensus around solutions to four critical challenges: “(i) defining essential health services and goods; (ii) clarifying governments’ obligations to their own country’s inhabitants; (iii) exploring the responsibilities of all governments towards the world’s poor; and (iv) proposing a global architecture to improve health as a matter of social justice.”¹⁰¹

We have also identified a trend in tobacco control litigation and tried to draw conclusions about some of its potential impact on broader health rights litigation. Although we understand that this trend is mainly coming from Latin America, we think that tobacco control litigation with overarching implications could

emerge in other regions as well. The key elements are present (i) an evidence based treaty — the FCTC — that when linked with human rights instruments or fundamental rights provides for mutual reinforcement, and (ii) a growing awareness about dangers associated with tobacco consumption and about the need to take measures to prevent third parties from worsening tobacco epidemics. These elements, connected with the nature of tobacco control measures, e.g., cost-effectiveness, provide a promising scenario for successful justiciability of health rights.

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 86. Colombian Constitutional Court, Expediente D-8096 - Sentencia C-830/10, 2010, at 26.3.
 87. Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3º de la ley N. 28705 - Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011, at 81.
 88. Constitutional Court of the Republic of Guatemala (2009), Docket No. 2158, Corte de Constitucionalidad [CC][Constitutional Court] (Guat.), at V. (unofficial translation for this paper).
 89. Mexican Supreme Court of Justice, Jorge Francisco Balderas Woolrich, revised amparo 315/2010 against 1791/2008, 28/03/2011.
 90. C. Sanchez Mejorada, *The Writ of Amparo*, 243 *Essential Human Rights* 107 (1946).
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 94. National Decree amending articles 94, 103, 104 y 107 of Mexican National Constitution, June 6, 2011.
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 96. Peruvian Constitutional Tribunal. *Jaime Barco Rodas contra el Artículo 3º de la ley N. 28705 - Ley general para la prevención y control de los riesgos del consumo de tabaco*, unconstitutionality proceeding, July 2011, at 148 (unofficial translation for this article).
 97. Peruvian Constitutional Tribunal, *Jose Luis Correa Condori*, EXP.N.º2016-2004-AA/TC, October 2004, at 11 (unofficial translation for this article).
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 99. Colombian Constitutional Court, Expediente D-8096 - Sentencia C-830/10, 2010, p. 28.
 100. Colombian Constitutional Court, Expediente D-8096 - Sentencia C-830/10, 2010, p. 29.2.
 101. The Joint Action and Learning Initiative on National and Global Responsibilities for Health (JALI) has been formed to investigate and forge consensus around answers to fundamental questions about countries' responsibilities to improve the health of their own populations and the health of the world's population, especially disadvantaged individuals and communities. JALI's central goal is to have these responsibilities, and governance structures that can effectively realize these responsibilities, form the basis of the post-Millennium Development Goals global health framework, possibly through a Framework Convention on Global Health. L. Gostin et al, "National and Global Responsibilities for Health," *Bulletin of the World Health Organization*, no. 88(2010): 719-719A.