

## Public Health Priority: Hazards of Tobacco Consumption, Legal Response And The Need For Its Effective Implementation

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Consumption of tobacco and exposure to tobacco smoke cause death, disease and disability. India has a strong legal regime to regulate tobacco activity and to protect the rights of non-smokers. It, inter alia, prohibits smoking of tobacco in public places. Landmark court decisions have held that smoking of tobacco in public places is unconstitutional and violates the right to life of non-smokers. The law, however, is not implemented effectively. Participation of the general public is critical in ensuring effective implementation of the law. Creative use of the Consumer Protection Act is a way to secure participation of the general public in effective implementation of the Tobacco Act.

### INTRODUCTION

The use of tobacco for human consumption is fraught with irreversible dangers. The WHO (World Health Organisation) Framework Convention on Tobacco Control<sup>1</sup> (FCTC) recognizes the unequivocal scientific evidence establishing that consumption and exposure to tobacco smoke cause death, disease and disability.<sup>2</sup> The WHO webpage, spelling out reasons as to why tobacco is a public health priority, informs that “tobacco use kills 5 million people per year.”<sup>3</sup> In the 1990s, use of tobacco caused around 3 million deaths a year. According to WHO estimates, this figure is expected to rise to 10 million deaths per year by 2020 or early 2030, with 70% of these deaths occurring in developing countries.<sup>4</sup> About 90-95% of lung cancer, 80-85% of chronic bronchitis and emphysema, and 20-25% of deaths from heart disease and stroke are attributable to tobacco in populations where cigarette smoking has been common for several decades.<sup>5</sup> According to a 2010 study,

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1. WHO Framework Convention on Tobacco Control (FCTC), May 21, 2003, WHO Doc. A56/VR/4, 2302 U.N.T.S. 166 (2003) entered into force on Feb. 27, 2005, available at [http://www.who.int/entity/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/entity/tobacco/framework/WHO_FCTC_english.pdf) (last visited Aug. 15, 2011).
2. *Id.*, Preamble.
3. Available at [http://www.who.int/tobacco/health\\_priority/en/](http://www.who.int/tobacco/health_priority/en/) (last visited Aug. 15, 2011).
4. WORLD HEALTH ORGANISATION, TOBACCO OR HEALTH: A GLOBAL STATUS REPORT 1 (1997).
5. C. CHOLLAT-TRAQUET, EVALUATING TOBACCO CONTROL ACTIVITIES: EXPERIENCES AND GUIDING PRINCIPLES 2 (1996).

tobacco related deaths are on the rise in India and by 2010, tobacco use will be responsible for one million deaths in India annually.<sup>6</sup> A 2011 WHO report says that “tobacco use continues to be the leading global cause of preventable death. It kills nearly 6 million people and causes hundreds of billions of dollars of economic damage worldwide each year.”<sup>7</sup>

The WHO had started expressing its concern about the ill effects of tobacco consumption way back in 1970. The World Health Assembly (WHA) in its resolution adopted then, took a serious view of the hazards of smoking and acknowledged that it causes serious diseases and as a first measure to curb smoking, particularly in the interest of non-smokers, the Assembly requested its Member delegations to refrain from smoking during meetings of the Assembly and its committees.<sup>8</sup> Starting with these early concerns, the WHO finally came up with its first ever treaty, the FCTC, as an international legal response to the menace of tobacco. Before India ratified FCTC, in 2004, it had its own domestic legal provisions in place to respond to the challenges of tobacco activity.<sup>9</sup> India has enacted, a national legislation, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975. As there has been more awareness on health hazards of passive smoking, the High Court of Kerala took the lead in holding smoking of tobacco in public places as a violation of right to life of non-smokers and later the Supreme Court of India too ruled the same. These efforts finally ensured enactment of a more comprehensive national legislation superseding the 1975 Cigarettes Act. Thus came, the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003<sup>10</sup> (hereinafter ‘the Tobacco Act’). However, despite these efforts, the cases of death, disease and disability due to tobacco consumption are on the rise. Provisions of law, particularly the ones banning smoking of tobacco in public places, are not effectively implemented. Smoking of tobacco in public places is a common phenomenon in India despite its being forbidden by law. This article discusses some aspects of legal regime to tame tobacco activity and concludes in recommending effective participation of the general public for better implementation of provisions of law, specifically referring to the creative use of Consumer Protection Act, 1986 *vis-a-vis* tobacco products.

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6. Rijo M. John *et al.*, *The Economics of Tobacco and Tobacco Taxation in India*, International Union Against Tuberculosis and Lung Disease, Paris (2010), available at [http://www.tobaccofreeunion.org/assets/India\\_Tobacco\\_Economics\\_full\\_en.pdf](http://www.tobaccofreeunion.org/assets/India_Tobacco_Economics_full_en.pdf) (last visited Aug. 20, 2011).
  7. WHO Report on the Global Tobacco Epidemic, 2011: Warning about the dangers of tobacco, available at [http://whqlibdoc.who.int/publications/2011/9789240687813\\_eng.pdf](http://whqlibdoc.who.int/publications/2011/9789240687813_eng.pdf) (last visited Aug. 20, 2011).
  8. See Resolution of the World Health Assembly, WHA 23.32, May 1970, available at [http://www.who.int/tobacco/framework/wha\\_eb/wha23\\_32/en/index.html](http://www.who.int/tobacco/framework/wha_eb/wha23_32/en/index.html) (last visited Aug. 20, 2011).
  9. Tobacco activity includes tobacco consumption, production, trade, advertisement etc.
  10. Act No. 34 of 2003.

### I. ENVIRONMENTAL TOBACCO SMOKE

Besides the harm that tobacco brings to its consumers, those sharing /living in an environment with tobacco smokers are also vulnerable to its ill effects. Scientific research has brought to light that exposure to environmental tobacco smoke (ETS) adversely affects human health. It causes diseases as serious as lung cancer and cardiovascular disease in non-smokers.<sup>11</sup> ETS contains over 4000 compounds, many of which are pharmacologically active, toxic, mutagenic and carcinogenic (there are 43 known carcinogens in tobacco smoke).<sup>12</sup>

The US Surgeon General's report of 1972 mentioned that an atmosphere contaminated with tobacco smoke contributes to the discomfort of many individuals.<sup>13</sup> In the report of 1986, the Surgeon General highlights three major conclusions:

1. Involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers.
2. The children of parents who smoke compared with the children of the non-smoking parents have an increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung functions as the lung matures.
3. The simple separation of smokers and non-smokers within the same air space may reduce, but does not eliminate, the exposure of non-smokers to environmental tobacco smoke.

In one of the earliest authoritative instances in India, the dangers inherent in passive smoking (i.e. when non-smokers involuntarily inhale the smoke of nearby smokers) have been noted in a judgment of the Kerala High Court, banning smoking in public places.<sup>14</sup> Wives, children and friends of smokers are a highly risk prone group, the judgment says. Inhalation of sidestream smoke by a non-smoker is more dangerous than the one who is actively smoking the cigarette. Sidestream smoke is understood to contain more nicotine, tar and ammonia (three times more nicotine, and fifty times more ammonia).<sup>15</sup>

The judgment points out that the hospital rate for children of smokers in India is as high as 28%. These children suffer from acute lower respiratory infection, decreased lung function, increased eczema and asthma as well as high cases of cot death. Besides, children of heavy smokers tend to be shorter.<sup>16</sup> The judgment also notes that environmental tobacco smoke contributes to

11. Stanton A. Glantz *et al.*, *Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents*, 274(3) JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 222 (1995).

12. Luk Joossens, *From public health to international law: possible protocols for inclusion in the Framework Convention on Tobacco Control*, 78(7) BULLETIN OF THE WORLD HEALTH ORGANISATION 293 (2000).

13. Stanton A. Glantz *et al.*, *supra* note 11, at 222.

14. K. Ramakrishnan and Another v. State of Kerala and others, 1999 AIR (Ker.) 385.

15. *Id.*, at 388.

16. *Id.*

respiratory morbidity of children. Increased platelet aggression also occurs when a non-smoker smokes or is passively exposed to smoke. There is now sufficient evidence to conclude that passive smoking is associated with additional episodes and increased severity to asthma in children who already have the disease. Its effect can be as severe as altering children's intelligence and behavior. Passive smoke exposure in children may be a risk factor for developing into lung cancer as an adult.<sup>17</sup> The Kerala judgment refers to an investigation in Bristol, which found that children of parents, who smoke, have a high level of cotinine, a metabolite of nicotine, in their saliva. It further indicated that children who had both their parents as smokers, were taking in as much nicotine as they would have if, they themselves smoked no less than eighty cigarettes a year.<sup>18</sup> Thus, through this judgment, the Kerala High Court has led the way to ridding the populace of environmental tobacco smoke.

By way of a public interest litigation, the petitioners, in Kerala case, highlighting the public health issue of the dangers of passive smoking, petitioned the Kerala High Court to declare that smoking of tobacco in any form, whether in the form of cigarette, cigar, *beedies* or otherwise in public places is illegal, unconstitutional and violative of Article 21 of the Constitution of India.<sup>19</sup> The petitioners further requested the Court to issue a writ in the nature of *mandamus* or such other appropriate writ requiring the respondents to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places, treating the said act as satisfying the definition of 'public nuisance' as defined under Section 268 of the Indian Penal Code.<sup>20</sup> The High Court, delivering the judgment, held:

Public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise is illegal, unconstitutional and violative of Article 21 of the Constitution of India. The continued omission and inaction on the part of the respondents to comply with the constitutional mandate to protect life and to recognize the inviolability of dignity of man and their refusal to countenance the baneful consequences of smoking on the public at large has resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Article 21 of the Constitution

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17. *Id.* at 389.

18. *Id.* at 390.

19. *Id.* at 387.

20. *Id.* According to Indian Penal Code, § 268, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.

of India. Tobacco smoking in public places falls within the mischief of the penal provisions relating to “public nuisance” as contained in the Indian Penal Code and also the definition of “air pollution” as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air (Prevention and Control of Pollution) Act, 1981.

The Court directed the District Collectors of all the districts of Kerala to promulgate an order under Section 133 (1) (a) of the Criminal Procedure Code prohibiting public smoking within one month from the date of the judgment.<sup>21</sup> Further, it directed the police chief of Kerala to issue instructions to the police to take appropriate and immediate measures to prosecute all persons found smoking in public places, treating the said act as satisfying the definition of “public nuisance” as defined under Section 268 of the IPC.<sup>22</sup>

This judgment is significant in not only holding public smoking illegal and unconstitutional, and thus upholding the right to life, but also in its important

21. *Id.* at 398. Code of Criminal Procedure, 1973 (Act no. 2 of 1974), § 133 reads: “Conditional order for removal of nuisance. (1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers- (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or (b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or (c) that the construction of any building, or, the disposal of any substance, as is likely to occasion configuration or explosion, should be prevented or stopped; or (d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or (e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or (f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order- (i) to remove such obstruction or nuisance; or (ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or (iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or (iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or (v) to fence such tank, well or excavation; or (vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute. (2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court. Explanation- A” public place” includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.”

22. *Id.*

observations on various aspects of smoking. On smoking generally, the Court observed that according to the Indian Medical Association, one million Indians die every year from tobacco related diseases, which is more than the number of deaths due to motor accidents, AIDS, alcohol and drug abuse put together.<sup>23</sup> On passive smoking, or the Environmental Tobacco Smoke Exposure, the Court noted that inhalation of sidestream smoke by a non-smoker is definitely more harmful to him than to the actual smoker as he inhales more toxins (sidestream smoke is the smoke issued from the burning end of a cigarette between puffs). Passive smoking is associated with an overall 23 percent increase in the risk of coronary heart disease among men and women who had never smoked. Passive smoking ranks behind active smoking and alcohol as the third leading preventable cause of death. The Court further noted that the systematic reviews from the Wolfson Institute, the California Environmental Protection Agency, make it clear that exposure to ETS is a cause of lung cancer, heart disease and other serious illnesses.<sup>24</sup>

On the issue of public nuisance, the Court held that “there can be no doubt that smoking in a public place will vitiate the atmosphere so as to make it noxious to the health of persons who happened to be there. Therefore, smoking in a public place is an offence punishable under Section 278 IPC.”<sup>25</sup>

Stressing the rights of non-smokers, the court further stated, “(s)mokers dig not only their own graves prematurely but also pose a serious threat to the lives of lakhs of innocent non-smokers who get themselves exposed to ETS thereby violating their right to life guaranteed under Article 21 of the Constitution of India. A healthy body is the very foundation for all human activities. In a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.”<sup>26</sup> Later, the Supreme Court of India, supporting the position of Kerala High Court, held, “(f)undamental right guaranteed under Article 21 of Constitution of India, *inter alia*, provides that none shall be deprived of his life without due process of law. Then why a non-smoker should be afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places? Is it not indirectly depriving of his life without any process of law? The answer is obviously-yes. Undisputedly smoking is injurious to health and may affect the health of smokers but there is no reason that health of passive smokers should also be injuriously affected. In any case there is no reason to compel non-smokers to be helpless victims of air pollution.”<sup>27</sup>

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23. *Id.* at 387.

24. *Id.* at 392.

25. *Id.* at 395. Indian Penal Code, 1860, § 278 reads: “Making atmosphere noxious to health. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.”

26. *Id.* at 398.

27. *Murli S. Deora v. Union of India and others*, AIR 2002 SC 40.

## II. HUMAN RIGHT AND TOBACCO CONSUMPTION

The kind of serious risks that tobacco consumption poses to human health and enough scientific and medical evidence which go on to prove it, leaves no doubt that tobacco activity either negates human rights or violates them. There are at least four aspects of international human rights law, which are relevant here, viz. (1) right to life, (2) right to health, (3) right to clean environment, and (4) right to an international social order of human welfare. As William Onzivu puts it, “a strong link exists between human rights and the tobacco problem. The increasing deaths resulting from tobacco consumption is a denial of human rights. The personal freedom of individuals to smoke (which too affects their health) must be balanced against the freedom of others to live in a smoke-free environment, and the responsibility of the State to protect public health of citizens and the expenses incurred by the State arising from tobacco use and problem.”<sup>28</sup> The most fundamental human right is right to life, which has no meaning without right to health. The right to health has been internationally recognized as a fundamental human right.<sup>29</sup> The right to health care, as an international human right, is founded on the edifice of the prescriptions of the United Nations Charter and the Constitution of the World Health Organisation. Various human rights instruments like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All forms of Discrimination Against Women, and the Convention on the Rights of the Child, establish and widen the scope of right to health in the international human rights law.

### *The Universal Declaration of Human Rights (UDHR)*

The UDHR<sup>30</sup>, though technically a mere declaration, is a forerunner in the international human rights jurisprudence. It has acquired the status of customary principle of international law.<sup>31</sup> The UDHR has some provisions which are of particular importance in curbing the use of tobacco. They include: everyone has the right to life<sup>32</sup>, and everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the

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28. William Onzivu, *International Legal and Policy Framework for WHO Framework Convention on Tobacco Control* 17 (paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, 7-9 January, 2000, New Delhi).

29. B. Errabi, *The Right to Health Care: Need for its Conversion into a Statutorily Enforceable Basic Human Need – An Indian Perspective*, 20 DELHI LAW REVIEW 51 (1999).

30. United Nations General Assembly Resolution, 217 A (III) of 10 December 1948.

31. SCOT DAVIDSON, HUMAN RIGHTS 66 (1990).

32. The Universal Declaration of Human Rights, Art. 3.

right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>33</sup> The declaration also provides for special care and assistance for motherhood and childhood.<sup>34</sup>

*Constitution of the World Health Organisation (WHO)*

The constitution of the World Health Organisation proclaims in clear terms that the “enjoyment of the highest attainable standard of health is one of the most fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”<sup>35</sup> Further, it provides that “the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.”<sup>36</sup> In addition, the WHO spells out its objective as “the attainment by all peoples of the highest possible level of health.”<sup>37</sup> The World Health Assembly, through its resolutions, has also affirmed that smokers violate the right to health of non-smokers, and that tobacco use in any form is incompatible with the attainment of health for all.<sup>38</sup>

*International Covenant on Civil and Political Rights (ICCPR)*

On the right to life, the International Covenant on Civil and Political Rights clearly provides that every human being has the inherent right to life, which shall be protected by law, and no one shall be arbitrarily deprived of his life.<sup>39</sup>

*International Covenant on Economic Social and Cultural Rights (ICESCR)*

The State parties to the International Covenant on Economic Social and Cultural Rights recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the State parties to achieve the full realization of this right shall include those necessary for the improvement of all aspects of environment, hygiene, and the prevention, treatment and control of epidemic, endemic and other diseases.<sup>40</sup>

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33. *Id.*, Art. 25 (1).

34. *Id.*, Art. 25 (2).

35. The Constitution of the World Health Organization, Preamble.

36. *Id.*

37. *Id.*, Art. 1.

38. See for example, Resolution of the World Health Assembly WHA 39.14, 1986.

39. International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171, entered into force March 23, 1976, Art. 6 (1).

40. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966), 993 UNTS 3, entered into force Jan. 3, 1976, Art. 12.



*Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)*

There are some provisions in the Convention on the Elimination of All forms of Discrimination Against Women, on the right to health. The Convention obligates the State parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services;<sup>41</sup> and eliminate discrimination against women in order to ensure to them equality with men in the field of education and in particular to ensure, on a basis of equality of men and women access to specific educational information to help to ensure the health and well-being of families.<sup>42</sup>

*Convention on the Rights of the Child (CRC)*

Some relevant provisions pertaining to a child's right to life, health and development, provided for in the Convention on the Rights of the Child are: (a) every child has the inherent right to life<sup>43</sup> and the State parties are obliged to ensure to the maximum extent possible the survival and development of the child;<sup>44</sup> (b) the child has the right to the enjoyment of the highest attainable standard of health<sup>45</sup> and the State parties are required to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to health of children.<sup>46</sup> In addition to these provisions, the Committee on the Rights of the Child has identified the issue of tobacco consumption as within the scope of the CRC. Under the State Party Reporting Guidelines established by the Committee, States are requested to, "...provide information on legislative and other measures taken to prevent the use by children of alcohol, tobacco and other substances which may be prejudicial to their health..."<sup>47</sup> The then director of UNICEF, Carol Bellamy, stated, "Children have a right to be protected from the tobacco's collateral effects – they have a right to health and development and their use of tobacco is frequently a consequence of denial of those rights. The main violators of children's rights are the easily obtained legal substances, tobacco and alcohol."<sup>48</sup>

41. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 513, entered into force Sept. 3, 1981, Art. 12 (1).

42. *Id.*, Art. 10 (h).

43. See the Convention on the Rights of the Child (CRC) (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990), Art. 6 (1).

44. *Id.*, Art. 6 (2).

45. *Id.*, Art. 24 (1).

46. *Id.*, Art. 24 (3).

47. William Onzivu, *supra* note 28, at 20.

48. The Plan of Action for Implementing the World Declaration on the Survival of, Protection and Development of Children in 1990s, ¶ 24, available at <http://www.un-documents.net/>

On the issue of tobacco and the rights of the child, the WHO, in a report entitled “Tobacco and the Rights of the Child”, states that “tobacco poses a major obstacle to children’s rights, infringing upon their basic health and welfare.”<sup>49</sup> While releasing the report, the WHO encouraged countries to abide by the terms of the CRC by taking all necessary legislative and regulatory measures to protect children from tobacco, and ensure that the interests of children take precedence over those of the tobacco industry.<sup>50</sup>

#### *The U.N. Charter*

The U.N. Charter puts a general obligation on the member States to protect human rights. The Charter documents the determination of the peoples of the United Nations to reaffirm faith in fundamental human rights,<sup>51</sup> and sets out respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion, as one of its primary objectives.<sup>52</sup> Further, the Charter obligates the member States to take joint and separate action in co-operation with the Organisation for the achievement of, *inter alia*, universal respect for, and observance of, human rights and fundamental freedoms.<sup>53</sup>

Thus, the structure of human rights provisions makes it quite clear that the right to health is a universal human right, fundamental to the enjoyment of the right to life. Every human being has an inherent right to life, and no one is to be deprived of this right arbitrarily. Enjoyment of the highest attainable standards of health is a fundamental human right of every human being. Children are to be particularly taken care of such that their right to life and right to enjoyment of the highest attainable standard of health are not obstructed. The United Nations is primarily responsible to protect human rights and the member States of the United Nations have pledged to do the same.<sup>54</sup>

Against the backdrop of these provisions, there are three aspects of tobacco activity, which could be considered as either violating these provisions or negating them:

1. Tobacco causes a number of serious diseases – the consumers of tobacco are, therefore, restricted from the right to the enjoyment of the highest attainable standard of health.
2. Consumption of tobacco kills a large number of people the world over – the consumers of tobacco are thus deprived of their life.

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wsc-plan.htm (last visited Aug. 20, 2011).

49. *Tobacco Poses A Major Obstacle To Children’s Rights – Report*, WHO Press Release (May 4, 2001), available at <http://www.who.int/inf-pr-2001/en/pr2001-24.html> (last visited Aug. 20, 2011).

50. *Id.*

51. U.N. Charter, Preamble.

52. *Id.*, Art. 1(3).

53. *Id.*, Art. 55.

54. *Id.*, Art. 56.

3. Passive smokers inhale the tobacco smoke from the environment, which is even more harmful than the primary smoking, and thus succumb to the ill effects of tobacco. Child smokers can also be treated in the category of passive smokers, as they are not capable of making a free choice.

In the case of the first two aspects, where adult human beings exercise their freedom of choice and choose to consume tobacco, it can be safely argued that the consumption of tobacco is a negation of human right to the enjoyment of the highest attainable standard of health, and also of the right to life. Had the tobacco product been safe and there would have not been any risks associated with its consumption, the argument on the basis of the right to smoke could have held some ground for the tobacco industry. Human beings are not given any such right, exercise of which would mean a negation of their most fundamental human rights.

As far as the third aspect is concerned, there is no doubt that passive smokers are victims of violation of their human rights. Therefore, the Supreme Court of India held that public smoking of tobacco in any form is violative of the right to life.<sup>55</sup> Similarly, rights of children are also violated – it is well evident that the tobacco industry has been targeting and trapping children to pursue its business interests. As, an author puts it, "... given the irrefutable addictive nature of the product, it has to be asked: what happens to the human rights of someone who has been enticed via sophisticated advertising and led to smoking addiction in a young age? It is with regard to children and the youth that 'the human right to health' is of particular relevance for the global tobacco control initiatives."<sup>56</sup> Of course, the advertising of tobacco products is banned by FCTC, the addictive nature of the substance in these products does not change the concern of the trap that is raised.

In accordance with their obligations of good governance, it is the responsibility of the governments of all countries to protect the health of its people, particularly of children. "Government action on behalf of the welfare of society as a whole is generally upheld as valid even if it runs counter to the interests of some individuals, and particularly when there is a compelling necessity for such action. In the case of tobacco, the right of government to protect the health of its people by restricting the promotion of tobacco or controlling smoking in public places has been held to take precedence over the freedom of the tobacco industry to promote its harmful product."<sup>57</sup>

The tobacco industry, at times has been adopting the issue of human rights to serve its business interests. Thus, in an instance of its deceptive and misleading

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55. *Supra* note 27.

56. Iraj Abedian, *Situation Analysis: An Overview of the Role of the World Bank and WHO in Global Tobacco Control* 14 (paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a Framework Convention on Tobacco Control, 7-9 January 2000, New Delhi).

57. RUTH ROEMAR, *LEGISLATIVE ACTION TO COMBAT THE WORLD TOBACCO EPIDEMIC* 9 (1993).

tactics, the Philip Morris brought out full-page newspaper advertisements in the United States, in 1989. The advertisements, which were brought out on the eve of the 200th anniversary of the Bill of Rights, carried a reprint of the original version of the Bill of Rights, and warned readers not to fall into the trap of taking the rights guaranteed by the first ten amendments to the US Constitution for granted.<sup>58</sup> On this effort of the tobacco industry to portray itself as a great defender of the people's liberties, John F. Banzhaf, Professor of Law, George Washington Law School, and Executive Director of Action on Smoking and Health (ASH) in the United States, commented, "It is ironic that the manufacturer of the only legal product that enslaves most of its users is associating itself with freedom."<sup>59</sup>

The industry argument would appear to be that everyone has a right how he should enjoy life and for that purpose what to consume for personal pleasure or physical or psychological relief. This is almost like the criminal law argument of causing bodily harm to someone who has consented to receive such harm. Such a viewpoint is not only socially immoral, but also legally untenable. No criminal law system today excuses the culpability of the offender if the offence is murder, man-slaughter or grievous injury, even if the victim consented to suffer the consequences of the offence.

Smoking leads to slow death. Hence, consent regime cannot provide immunity to the industry, which is the offender. Secondly, no consent regime can ever apply in the case of children, as they are, by legal definition, incapable of giving consent. Thirdly, more often than not, public advertisements or other statements by the industry have been a deliberate exercise in deception and consent induced through deception is no consent.

### III. THE LAW OF CONSUMER PROTECTION

There are certain basic consumer rights recognized by the diverse legal systems of the world. In the context of tobacco activity, there are at least four such rights which are most relevant. These are (1) the right to safe products and services; (2) the right to information; (3) the right to redress; and (4) the right to healthy environment.<sup>60</sup>

There is a whole lot of evidence demonstrating that tobacco is a harmful product. In accordance with the consumer right to a safe product, the tobacco industry is obligated to manufacture and market a product, which is absolutely safe to use by the consumer. On the contrary, the industry is in the business of a

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58. *Id.*

59. *Id.*

60. Sri Ram Khanna, Roopa Vajpeyi, and Mary Asunta, *Consumer Protection and Tobacco – NGO Strategy for Combating Tobacco Proliferation in Developing Countries of Asia* 15-16 (paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, 7-9 January, 2000, New Delhi).

product which is dangerous and addictive. Ironically, the industry is well aware of this fact.<sup>61</sup> Moreover, the industry, as a business policy has been targeting children and young people.<sup>62</sup> The industry has been luring them to consume a product, which is a known killer even for the adult consumers. In fact, tobacco is probably “the only consumer product that kills when used exactly as the manufacturer intended.”<sup>63</sup>

Consumers’ right to information envisages that consumers need to know everything about a product. It means the right of the consumers to be given the facts needed to make an informed choice or decisions about factors like quality, quantity, safety etc. The tobacco industry has a responsibility, in adherence to this right, to provide adequate information about its product to its consumers. The industry never discharged its responsibility, it never disclosed the information about its product, which it possessed, and over which the consumers had a right.<sup>64</sup> The statutory warning that a tobacco product bore before the adoption of FCTC, did not in any way inform a consumer about the hazardous nature of the product. Such a warning was so general that it was just a fulfillment of a statutory requirement; it did not satisfy the consumers’ right to information.

Consumers have a right to redress against the defects and ill effects of a product. Accordingly, the manufacturer of a product is required to respond positively in redressing the grievances of its consumers. The tobacco industry has never shown willingness to do so. The industry, instead of compensating its consumers against their injuries or losses, adopted an aggressive strategy to anyhow defend itself.<sup>65</sup>

61. The internal industry documents show that the industry had discovered the fact that smoking was addictive way back in 1950s. See Walburn, *infra* note 65, at 16.

62. RJ Reynolds, Domestic Operating Goals (26 November, 1974) (Minnesota Trial Exhibit, cited in WHO, CUTTING THROUGH THE SMOKESCREEN: AN ANALYSIS OF TOBACCO INDUSTRY ARGUMENTS AGAINST TOBACCO CONTROL POLICIES 20 (2000)). A document carrying RJ Reynolds’, a leading cigarette manufacturer, marketing goals for 1975, included the following: “Increase our young adult franchise... in 1960, this young adult market, the 14-24 age group, represented 21% of the population... they will represent 27% of population in 1975. They represent tomorrow’s cigarette business... Thus our advertising strategy becomes clear for our established brands: Direct advertising appeal to the younger smokers...”

63. Khanna, *et al.*, *supra* note 60, at 15.

64. The world came to know of the misconduct of tobacco industry during the third wave of tobacco litigation, particularly, when the internal industry documents were disclosed as a result of Minnesota litigation. See Michael V. Ciresi *et al.*, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 (2) WILLIAM MITCHELL LAW REVIEW 480 (1999).

65. The tobacco industry managed not to pay even a single penny to the plaintiffs who sued the industry in different US courts for serious health hazards that tobacco consumption caused them. The oft cited reasons for the success of the defendant tobacco companies in such cases are its willingness to devote virtually unlimited resources to defeating its adversaries and its industry’s ferocity in employing scorched-earth tactics in litigation; and industry’s ability to keep hidden internal documents which contain damning admissions. See Roberta B. Walburn, *The Prospect for Globalising Tobacco Litigation* (paper presented at the WHO International Conference on Global Tobacco Control Law: Towards a Framework Convention

Another consumer right relevant to the tobacco activity is the right to a healthy environment. This right has no meaning, particularly in the case of cigarettes. It is a known fact, established by scientific evidence, that cigarette smoke contains hazardous chemicals, which pollute the environment.<sup>66</sup> In addition, the environment lobby claims that tobacco cultivation and production of tobacco products cause soil erosion and contamination, deforestation, climate changes and uses up non-renewable energy resources.<sup>67</sup>

#### IV. THE GATT JURISPRUDENCE

The GATT jurisprudence, although scarce in the area of public health, does provide measures under 'General Exceptions' to protect public health. Article XX (b) of GATT provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption of enforcement by any contracting party of measures... necessary to protect human, animal or plant life or health...

Hence, a contracting party can adopt or enforce such measures as are necessary to protect human health, as long as such measures are not applied in a manner which would constitute (a) *a means of arbitrary or unjustifiable discrimination* between the countries where the same conditions prevail; and (b) *a disguised restriction* on international trade.

##### A. The GATT Panel Decision on Thai Cigarettes Case

The *Thai Cigarettes Case*<sup>68</sup> concerned prohibitions on import and export of tobacco and tobacco products imposed by Thailand against US cigarettes. Thailand sought to justify such trade prohibitions under Article XX (B) of the GATT, on the grounds that it had adopted measures to control smoking which could only be effective if import of cigarettes was prohibited. Further, Thailand argued that chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. The United States requested the Panel to find that the cigarettes import restrictions were inconsistent with Article XI:1<sup>69</sup> of the General Agreement and were not covered by any of the

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on Tobacco Control, 7-9 January, 2000, New Delhi). See also Ciresi *et al.*, *id.*

66. Tobacco smoke contains as many as 4000 chemicals of which at least 43 are carcinogenic.

67. Khanna *et al.*, *supra* note 60, at 16.

68. See the Report of the Panel adopted on November 7, 1990, BISD 37/S/200, reprinted in PIERRE PESTACORE, *ET AL.*, HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 580 (vol. 1, 1997).

69. GATT, Art. XI:1 provides: "No prohibitions or restrictions other than duties, taxes or other

exceptions in the General Agreement, in particular Articles XI: 2(c)(i)<sup>70</sup> and XX (b), or by the provisions of Thailand's Protocol of Accession.<sup>71</sup> It further requested the Panel to find that the taxes on cigarettes were contrary to the national treatment provisions of Article III.<sup>72</sup> The United States asked the Panel to recommend that Thailand eliminate its quantitative restrictions on the importation of cigarettes into conformity with its obligations under the General Agreement.<sup>73</sup>

On the issue of Thailand's justification of import restrictions in question, under Article XX (b) of the GATT, the Panel accepted that "smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b)."<sup>74</sup> According to the Panel, this provision clearly allowed contracting parties to give priority to human health over trade liberalization. But a measure to be covered under Article XX (b) had to be "necessary".<sup>75</sup> For a definition of the term "necessary", the Panel relied on a previous panel [Report of the panel on "*United States – Section 337 of the Tariff Act of 1930*" (L/6439, adopted on 7 November 1989)], which had discussed the meaning of the term in the context of Article XX (d) of the GATT, and had stated:<sup>76</sup>

A contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX (d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

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charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

70. The relevant part of Art. XI:2(c)(1) reads: The provisions of paragraph 1 of this Article shall not extend to the following: ... (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced..."
71. Thailand's 1982 Protocol of Accession records its intention to bring as soon as possible its business and excise taxes in conformity with Art. III of the General Agreement, *see Pestacore et al., supra* note 68.
72. GATT, Art. III provides for national treatment on internal taxation and regulation.
73. *See Pestacore et al., supra* note 68, at 580.
74. *Id.* at 583.
75. *Id.*
76. *Id.*

The Panel in the present case could not see any reason why under Article XX the meaning of the term “necessary” under paragraph (d) should not be the same as in paragraph (b). According to the Panel, in both paragraphs the same term was used and the same objective intended, i.e. to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable.<sup>77</sup> Thus, the Panel concluded that the import restrictions imposed by Thailand could be considered to be “necessary” in terms of Article XX (b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy.<sup>78</sup> The Panel noted that a non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4, requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. Further, it took note of the view expressed by the WHO that the demand for cigarettes, in particular the initial demand by the young, was influenced by cigarette advertisements and that bans on such advertising cigarettes of both domestic and foreign origin would normally meet the requirement of Article III:4.<sup>79</sup>

The Panel also examined the resolutions of the WHO on smoking and noted that the health measures recommended by it in these resolutions were non-discriminatory and concerned all not just imported cigarettes.<sup>80</sup> Thus, the end result of the Panel decision in this case was against the measures adopted by Thailand to control smoking in its territory as the measures were found contrary to Article XI:1, and not “necessary” within the meaning of Article XX (b) of the GATT. Nevertheless, the significance of the decision is not belittled by the end result. As far as control of trade in tobacco is concerned, the decision of the Panel is of tremendous significance in as much as it accepted that smoking constituted a serious risk to human health and that it is implied that WTO member states can adopt strong tobacco control measures, as long as such measures are aimed at protecting health and are not discriminatory.

#### *B. The GATT Agreement on Technical Barriers to Trade*

There are some provisions in the Agreement on Technical Barriers to Trade which are relevant in controlling the tobacco activity. Article 2.2 spells out the idea of the Agreement:<sup>81</sup>

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77. *Id.*

78. *Id.* at 583-584.

79. *Id.* at 584-585.

80. *Id.* at 586.

81. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT Secretariat 139 (1994).



Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*, available scientific and technical information, related processing technology or intended end uses of products.

The Article says that technical regulations to international trade can be adopted by Members, if they are not unnecessary and serve a legitimate objective. It also lays out the criteria to assess the validity of adopting such technical regulations. Now, for the purpose of curbing tobacco activity, the Article is relevant principally in two ways. One, technical regulations can be adopted by Members to control the trade in tobacco in order to fulfill the legitimate objective of (a) the prevention of deceptive practices (as is evident, the tobacco industry is largely based on the deceptive business practices); and (b) protection of human health or safety (consumption of tobacco is hazardous to health, it causes serious diseases and kills people). Two, the criteria for assessment of the risks associated with the non-fulfillment of the aforesaid objectives includes the consideration of: (a) available scientific and technical information (there is no dearth of scientific information on the health hazards of tobacco consumption); and (b) intended end uses of tobacco products are well known – there is enough evidence to show that the industry has no good intentions about the product.

Liberalisation of trade has been linked to a greater risk of increased tobacco consumption, particularly in low and middle income countries. A study, examining empirically the relationship between cigarette consumption and global trade in tobacco products has estimated that reduced trade barriers have had a large and significant impact on cigarette consumption in low income countries and a small but significant impact in middle income countries.<sup>82</sup> It is important, therefore, to explore various provisions within the international trade law regime to control trade in tobacco on the basis of its associated risks to human health.

## V. THE TOBACCO ACT

The Tobacco Act extends to the whole of India.<sup>83</sup> It prohibits smoking of tobacco in any form in public places and puts a complete ban on any kind of advertising or promotion of tobacco products. There is a prohibition on sale

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82. See Allyn L. Taylor and Douglas W. Bettcher, *WHO Framework Convention on Tobacco Control: A global "good" for public health*, 78 (7) BULLETIN OF THE WORLD HEALTH ORGANISATION 924 (2000).

83. The Tobacco Act, § 1 (2).

of cigarettes and other tobacco products to a person below the age of eighteen years and in an area within the radius of one hundred yards of an educational institution. The Act provides that no tobacco product is to be produced, supplied, distributed and sold unless its package carries the specified warning.

#### *A. Prohibition of Public Smoking*

The Act prohibits smoking of tobacco in any form in public places.<sup>84</sup> The punishment for violation of this provision is fine which may extend to two hundred rupees.<sup>85</sup>

#### *B. Ban on Advertisement of Tobacco Products*

The Act completely bans any kind of advertising or promotion of tobacco products.<sup>86</sup> The provision casts the obligation to refrain from advertising of tobacco products not only on the manufacturer or trader but also on the owners of the medium of advertising and others who would help such advertising directly or indirectly for pecuniary benefits.<sup>87</sup> This provision does not include advertisement on packages of tobacco products and on the shops or warehouses where such products are offered for sale or distribution.<sup>88</sup> Violation of this provision will attract a punishment of imprisonment for a term which may extend to two years or fine which may extend to one thousand rupees or both, in the case of first conviction.<sup>89</sup> The punishment in the case of second or subsequent conviction is imprisonment for a term which may extend to five years and also a fine which may extend to five thousand rupees.<sup>90</sup>

#### *C. No Sale to Minors*

There is a prohibition on sale of cigarettes and other tobacco products to a person below the age of eighteen years<sup>91</sup> and in an area within the radius of one hundred yards of an educational institution.<sup>92</sup> The violators of these provisions are to be punished with a fine which may extend upto two hundred rupees.<sup>93</sup>

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84. *Id.*, § 4.

85. *Id.*, § 21 (1).

86. *Id.*, § 5.

87. *Id.*

88. *Id.*, § 5 (d) (A) & (B).

89. *Id.*, § 22 (a).

90. *Id.*, § 22 (b).

91. *Id.*, § 6 (a).

92. *Id.*, § 6 (b).

93. *Id.*, § 24.

#### D. Provision on Warning

The Act provides that no tobacco product is to be produced, supplied, distributed and sold unless every package of such products carries the specified warning including a pictorial warning.<sup>94</sup> The specified warning has to be legible and prominent, conspicuous to the size and colour<sup>95</sup> and to be printed on the package in such a manner so as to be seen by the consumer before she/he opens it.<sup>96</sup> The warning shall appear on not less than one of the largest panels of packages.<sup>97</sup> The language of the warning has to be the same which is used on the label of the package.<sup>98</sup> In case where any foreign language is used on the label, the warning has to be in English.<sup>99</sup> The Act also prohibits import of tobacco products, not bearing the required warning, for distribution, supply or sale in India.<sup>100</sup>

The punishment for contravening these provisions is, in the case of a producer or manufacturer, imprisonment upto two years or a fine upto five thousand rupees or both for the first conviction.<sup>101</sup> For the second or subsequent conviction, it is imprisonment upto five years along with a fine of rupees ten thousand.<sup>102</sup> In the case of a seller or distributor, the punishment is imprisonment upto one year or a fine upto one thousand rupees or both, for the first conviction.<sup>103</sup> For the second or subsequent conviction, it is imprisonment upto two years along with a fine upto three thousand rupees.<sup>104</sup>

#### E. Disclosure of Nicotine and Tar

Indication of the levels of nicotine and tar contents of tobacco products and their permissible limit, on the labels of their packages has been made mandatory in the Act.<sup>105</sup> It makes illegal, the production, manufacture, supply or sale of any tobacco product containing nicotine or tar more than the

94. *Id.*, § 7 (1 & 2). Originally, the Act provided for pictorial depiction of skull and cross-bones but later this provision was amended by an Amendment Act no. 38 of 2007, replacing the requirement of depiction of skull and cross bones to just any specified pictorial warning. This dilution of the provision on warning is certainly not reflective of legislature's strong desire to protect consumers and passive smokers of tobacco from its various drastic health hazards. It is unfortunate that citizenry in general failed in making the legislature support a stronger provision for desired results.

95. *Id.*, § 8 (1).

96. *Id.*, § 8 (3).

97. *Id.*, § 7 (4).

98. *Id.*, § 9.

99. *Id.*

100. *Id.*, § 7 (3).

101. *Id.*, § 20 (1).

102. *Id.*

103. *Id.*, § 20 (2).

104. *Id.*

105. *Id.*, § 7 (5).

permissible limit.<sup>106</sup> The punishment for violation of these provisions is the same as in the case of failure to give specified warning (above).

The FCTC has similar mandates on all of the aforesaid grounds. Thus, providing for the protection from exposure to tobacco smoke,<sup>107</sup> regulation of contents of tobacco products,<sup>108</sup> regulation of tobacco product disclosures,<sup>109</sup> specifications on packaging and labelling of tobacco products<sup>110</sup> and ban on advertising.<sup>111</sup> The FCTC also requires general public's participation in the efforts to control tobacco<sup>112</sup> and to raise their awareness level about ill effects of tobacco consumption.<sup>113</sup>

#### VI. IMPLEMENTING THE PROVISIONS OF TOBACCO ACT THROUGH CONSUMER PROTECTION MECHANISM

The discussion in this paper, so far, clearly shows that India has a strong legal regime to protect nonsmokers' rights. However, two aspects are critical for its success. First, is the need for a mechanism ensuring effective implementation of the Tobacco Act. Secondly, such a mechanism must encourage and ensure general public's involvement into its processes. The formal courts in India are too overburdened to effectively respond to implementation needs of the Tobacco Act at the grassroots level. They are also too lawyer-centric to secure wide participation of general public. Therefore, there is a need for exploring an alternative mechanism. Exploring the domain of the Consumer Protection Act (CPA)<sup>114</sup> could provide the desired alternative mechanism.

The CPA, being a central Act is applicable throughout the territory of India except the State of Jammu and Kashmir.<sup>115</sup> The CPA aims to protect the interests of consumers.<sup>116</sup> In order to protect and promote the rights of the consumer,<sup>117</sup> the CPA establishes two sets of bodies, namely: the Consumer

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106. *Id.*

107. The FCTC, Art. 8.

108. *Id.*, Art. 9.

109. *Id.*, Art. 10.

110. *Id.*, Art. 11.

111. *Id.*, Art. 13.

112. *Id.*, Art. 12.

113. *Id.*

114. The Consumer Protection Act, 1986 (Act No. 68 of 1986).

115. *Id.*, § 1 (2).

116. *Id.*, Preamble.

117. *Id.*, § 6 enumerates the rights of the consumers such as,

- (a) the right to be protected against the marketing of goods and services which are hazardous to life and property;
- (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices;
- (c) the right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
- (d) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums;

Protection Councils<sup>118</sup> (the Councils) and Consumer Dispute Redressal Agencies,<sup>119</sup> (Consumer Forums) at the District, State and National levels. The Councils are informal bodies working for the promotion and protection of consumer rights.<sup>120</sup> On the other hand, Consumer Forums are formal bodies redressing consumer complaints at three levels. The District Consumer Dispute Redressal Forum (District Forum)<sup>121</sup> at the district level, the State Consumer Dispute Redressal Commission (State Commission)<sup>122</sup> at the state level and the National Consumer Dispute Redressal Commission (National Commission)<sup>123</sup> at the national level. These forums are not formal law courts<sup>124</sup> yet they have all the powers of a civil court in discharging their functions of hearing a consumer complaint.<sup>125</sup> Thus, Consumer Forums have all the powers of a civil court in respect of “the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath; the discovery and production of any document or other material object producible as evidence; the reception of evidence on affidavits; the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source; issuing of any commission for the examination of any witness, and any other matter which may be prescribed.”<sup>126</sup> In addition, these agencies have the power of a judicial magistrate of the first class for the trial of offences under the CPA.<sup>127</sup>

Consumer Forums encourage direct complaints from consumers without the support of lawyers.<sup>128</sup> Consumer organizations, groups of consumers or a single consumer on behalf of a class of consumers can also file class actions before

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- (e) the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
  - (f) the right to consumer education.

118. *Id.*, § 4, 7 and 8A.

119. *Id.*, § 9.

120. The CPA states that the objective of Consumer Protection Councils is to promote and protect consumer rights. However, it is silent as regards how these Councils can achieve these objectives.

121. The District Consumer Dispute Redressal Forum has jurisdiction over consumer complaints where the amount involved in the dispute i.e. value of goods or services or compensation sought, is up to rupees twenty lakhs (two millions).

122. A state commission has jurisdiction to entertain consumer complaints where amount involved in the dispute i.e. value of goods or services or compensation sought, is more than rupees twenty lakhs but not more than rupees one crore (ten millions).

123. The National Commission exercises its jurisdiction over a consumer complaint which involves more than rupees one crore (ten millions).

124. *See* Consumer Protection Regulations, 2005, § 3 (1), available at <http://ncdrc.nic.in/> (last visited Oct. 15, 2011).

125. CPA, § 13 (4).

126. *Id.*

127. *Id.*, § 27 (2).

128. *Supra* note 124, § 26 (4).

these forums.<sup>129</sup> These Forums comprise of judicial officers<sup>130</sup> and members of the public,<sup>131</sup> thereby lending a public-oriented complexion to them rather than making them a judge-lawyer centric institution. This explains the people-friendly nature of Consumer Forums. Furthermore, the inclusion of at least one woman<sup>132</sup> member makes these forums gender-sensitive. Representation of people from different walks of society<sup>133</sup> in Consumer Forums, providing for less expensive<sup>134</sup> and speedy justice,<sup>135</sup> a countrywide presence in all the six-hundred odd districts in India,<sup>136</sup> are the other features of Consumer Forums inviting participation from general public.

What makes Consumer Forums more approachable is their appearance. The dais of the hall where a forum conducts its hearing is usually not more than 30 centimeter in height as compared to the place earmarked for the parties to sit.<sup>137</sup> The President and other members of the Forum are required to use the same type of chairs as made available to all others in the hall.<sup>138</sup> They are required to wear simple and sober dress,<sup>139</sup> to avoid any display of affluence.<sup>140</sup>

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129. CPA, § 2 (b).

130. The CPA requires that no more than fifty percent members from amongst persons having judicial background can be appointed in State Commissions and the National Commission.

131. A District Consumer Dispute Redressal Forum comprises of three members, including its President. The president of the Forum is either a serving or a retired district judge or is one who has the eligibility to become the district judge. The other two members are appointed from amongst the members of the general public (CPA, § 10). Similarly in cases of State Commissions, the President is a serving or retired high court judge. The other members (not less than two) are appointed from amongst the general public (CPA, § 16). The National Commission also has the similar composition. The President is either a serving or a retired judge of the supreme court and rest of the members (not less than four) come from the general public (CPA, § 20).

132. CPA, § § 10, 16 & 20.

133. Members of these forums come from varied fields like economics, commerce law, accountancy, industry, public affairs and administration. CPA, § § 10 (1) (b) (iii), 16 (1) (b) (iii) & 20 (1) (b) (iii).

134. There is a nominal court fee for filing a consumer complaint before the forums. Accordingly, the maximum fee payable at the District Forum is five hundred rupees (about US Dollars 10), whereas the minimum fee is rupees one hundred (about US Dollars 2) only. The fee for a complaint before a State Commission is between rupees two thousands to rupees four thousands (about US Dollars 45 to 90). In the case of the National Commission, the fee is rupees five thousands (about US Dollars 100). See Consumer Protection Regulations, 2005.

135. The CPA requires the consumer forums to dispose of consumer complaints within a period of three months from the date of their admission if they do not require any laboratory testing of goods. The time limit for disposal of complaints requiring laboratory testing of goods is five months. However, if a forum cannot dispose of a complaint within the given time-frame, it has to records the reasons for the same in its decision. See CPA, § 13 (3A).

136. Total number of districts in India, excluding 15 districts of the State of Jammu and Kashmir, where the CPA is not applicable, is 612. Available at <http://districts.nic.in/dstats.aspx> (last visited Nov. 20, 2011).

137. The Regulations, *supra* note 124, § 3 (2).

138. *Id.*, § 3 (3).

139. *Id.*, § 4 (1) (a).

140. *Id.*, § 4 (1) (b) (i).

They are required not to dress up like Judges of a High Court or a District Court.<sup>141</sup> Advocates can appear in their usual uniform but without a gown.<sup>142</sup> The Regulation requires giving of proper respect and courtesy to the parties appearing in person<sup>143</sup> and to dispose of cases involving old and infirm parties on a priority basis.<sup>144</sup>

The grounds of complaints before a Consumer Forum, *inter alia*, are:

- (a) 'unfair trade practice';
- (b) 'sale of goods hazardous to life and safety';
- (c) 'misleading advertising'; and
- (d) 'offering goods for sale in contravention to statutory requirements'.

In accordance with the provisions of the Tobacco Act, legal action can be initiated against advertising of tobacco products, non-stating of warnings, non-compliance with the specifications on the packages and ban on sale to minors. One can bring a complaint against tobacco manufacturer, trader or seller, on a number of grounds. One of the grounds is that of unfair trade practice. This includes, *inter alia*, advertising of tobacco products and their sale to minors. Second is that of particular goods being injurious to life being sold not in conformity with the requirements of the Tobacco Act. In addition, tobacco products being offered for sale in contravention to the requirements of the Tobacco Act can come under the category of defective goods,<sup>145</sup> hence, providing another basis for complaints.<sup>146</sup>

Sale of tobacco products to minors can also come under the category of unfair trade practice<sup>147</sup> because it is violative of a statutory requirement.<sup>148</sup> An action brought against tobacco traders under such an unfair trade practice will directly protect non-smokers given the reasoning that minors are passive smokers even if they engage in active smoking. Minors are not competent of voluntarily deciding to smoke and hence their act of smoking constitutes an involuntary action.

Violation of the rights of the consumer to 'safe products'<sup>149</sup> and 'healthy environment'<sup>150</sup> may form other grounds of potential legal action against tobacco traders. After all, the right to a healthy environment is a fundamental

141. *Id.*, § 4 (1) (b) (iii).

142. *Id.*, § 4 (2).

143. *Id.*, § 26 (3)

144. *Id.*, § 26 (6).

145. CPA, § 2 (f).

146. *Id.*, § 2 (c) (ii).

147. The CPA does not give an exhaustive definition of the term unfair trade practice. Hence it has scope for inclusion of other similar trade practices in its category.

148. *Supra* note 114.

149. *See* rights of the consumer, *supra* note 114.

150. The United Nations Guidelines for Consumer Protection, as expanded in 1999, provide for environmental protection as a consumer right. Above all, the right to a safe environment is a human right.

right recognized as a component of the Constitutional guarantee to the Right to Life.

On finding the allegation of a complaint to be true, Consumer Forums can order the defendant, *inter alia*, to:

- (a) remove the defects in goods;<sup>151</sup>
- (b) discontinue the unfair trade practice or not to repeat it;<sup>152</sup>
- (c) withdraw the hazardous goods from being offered for sale;<sup>153</sup>
- (d) cease manufacture of hazardous goods;<sup>154</sup>
- (e) pay compensation to the aggrieved party<sup>155</sup> and also to not easily identifiable consumers;<sup>156</sup> and
- (f) issue corrective advertisement at its own cost to neutralize the effect of misleading advertisement.<sup>157</sup>

Non-compliance with an order of Consumer Forums is punishable with a minimum imprisonment of one month to a maximum of three years or with fine of not less than two thousand rupees and not more than ten thousand rupees.<sup>158</sup>

In sum, initiating legal action against tobacco activity through Consumer Forums is simple, less expensive and thereby encourages general public's participation. Such legal actions against tobacco activity through Consumer Forums will generate awareness which will help in effectively regulating overall tobacco activity. Extensive involvement of people in using Consumer Forums will ensure successful implementation of the Tobacco Act. Law school clinics have an important role in this regard. They can mobilize community support for effective implementation of the Tobacco Act by generating awareness and pursuing cases before Consumer Forums. The Consumer Forums have not only wide powers but they also have the support of overarching judicial pronouncements on the rights of non-smokers. The Constitutional provisions and International Commitments, to protect rights of non-smokers, further consolidate and strengthen the mandate of Consumer Forums. Therefore, Consumer Forums provide befitting mechanism to protect non-smokers from the onslaught of tobacco activity.

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151. CPA, § 14 (e).

152. *Id.* § 14 (f).

153. *Id.* § 14 (h).

154. *Id.* § 14 (ha).

155. *Id.* § 14 (d).

156. *Id.* § 14 (hb).

157. *Id.* § 14 (hc).

158. *Id.* § 27 (1).



## CONCLUSION

India has a strong legal regime to control tobacco activity. In a major Indian response to the threat posed by tobacco activity, the Tobacco Act seeks to reduce the exposure of people to tobacco smoke (passive smoking), prevent the sale of tobacco products to children and to protect them from falling into the trap of tobacco advertisements. Before the enactment of this law, the highest court of law in India, the Supreme Court of India, had held that public smoking of tobacco in any form violated the non-smoker's right to life. In addition, India has ratified the Framework Convention on Tobacco Control and has thus taken the obligation to abide by all its provisions. The right to life enshrined in the Constitution of India and the provision of Article 47<sup>159</sup> mandate the State to protect the health of its citizens.

The Tobacco Act extends to the whole of India. It prohibits smoking of tobacco in any form in public places. The Act puts a complete ban on any kind of advertising or promotion of tobacco products. This provision casts the obligation to refrain from advertising of tobacco products, not only on the manufacturer or trader but also on the owners of the medium of advertising and others who would help such advertising directly or indirectly for pecuniary benefits. There is a prohibition on sale of cigarettes and other tobacco products to a person below the age of eighteen years and in an area within the radius of one hundred yards of an educational institution.

The Act provides that no tobacco product is to be produced, supplied, distributed and sold unless every package of such products carries the specified warning. The specified warning has to be legible and prominent, conspicuous to the size and color and to be printed on the package in such a manner so as to be seen by the consumer before she/he opens it. The warning shall appear on not less than one of the largest panels of packages. The language of the warning has to be the same which is used on the label of the package. In case where any foreign language is used on the label, the warning has to be in English. The Act also prohibits import of tobacco products, not bearing the required warning, for distribution, supply or sale in India.

Indication of the levels of nicotine and tar contents of tobacco products and their permissible limit, on the labels of their packages has been made mandatory in the Act. Further, it makes illegal, the production, manufacture, supply or sale of any tobacco product containing nicotine or tar more than the permissible limit.

Undoubtedly, the Tobacco Act is reflective of good public-health legislation. However, two aspects are critical for its success. One, it needs a mechanism to

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159. Constitution of India, Art. 47 provides: "(t)he State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

ensure effective implementation of its provisions. Secondly, such mechanism must encourage and ensure general public's involvement into its processes. The formal courts in India are too overburdened to effectively respond to implementation needs of the Act at the grassroots level, and they are too lawyer-centric to encourage participation of general public. Therefore, there is a need to explore other mechanisms for the success of this important public-health law. The realm of India's Consumer Protection Act (CPA) has a lot to satisfy this quest. The mechanism of the CPA can take care of both the concerns, i.e. effective implementation of the Tobacco Act and participation of general public in such implementation.

The CPA was enacted to provide for the better protection of the interests of consumers and for that purpose to make provisions for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for other connected matters. It strives to protect certain rights of consumers. The right to a safe and healthy environment and the right to safe products are two such rights which are important from the point of view of the non-smoker's rights.

The CPA establishes consumer dispute redressal forums at the District, State and National levels. These forums are not formal law courts yet they have all the powers of a civil court. They encourage direct complaints from consumers without the support of lawyers. Consumer organizations, groups of consumers or a single consumer on behalf of a class of consumers can also file class actions before these forums. Apart from judicial officers, members of the public are appointed on these forums. This makes their appearance people-centric rather than lawyer-centric. Above all, these forums are mandated to provide inexpensive and speedy justice to consumers. These forums have a country-wide presence and are vested with wide powers. They are fully functional in all the six hundred odd districts in India.

Wide involvement of general public in using the forums of the CPA will ensure successful implementation of the Tobacco Act. It will benefit non-smokers both directly and indirectly – directly through class actions for safe and healthy environment and for safe products and indirectly by effective regulation of the overall tobacco activity and by the generation of mass awareness about the rights of the non-smoker and health hazards of tobacco consumption. Law school clinics have the potential to effectively respond to many aspects of the public health priority discussed in this article.