

HUMAN RIGHTS,
TOBACCO ADVERTISING
AND PATERNALISM

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ABSTRACT

The research approaches the human rights implications in relation to tobacco advertising concerning a paternalistic behaviour of the State as a measure to deal with the public health policies and to enforce the tobacco control, mainly, with regard to tobacco control. In this thesis which has the discussion of the correlation among human rights concerning the violations of the right to health and right to an adequate information, and consumer rights concerning the practices of advertising. In the analysis will be used the Framework Convention on Tobacco Control (FCTC) and regional documents around the world that the subject is concerned to tobacco control to understand the system of each region in relation to the matter.

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Introduction

This study aims to illustrate how the effects of tobacco advertising lead to human rights implications addressing tobacco control as an important instrument, mainly, with regard to advertising regulations to combat possible harmful effects concerning the public health environment and satisfactory information. A conceptual and comparative analysis will be conducted of tobacco advertising and marketing efforts, proposing satisfactory approaches to the challenge of promoting among business and corporate entities the obligation to respect and promote human rights, and to provide effective remedies where appropriate.

The research will at whether there is a connection with the subjects human rights and consumer rights and how this occurs with reference to the analysis of the consumer vulnerability and the private sector focusing on the tobacco consumption as a dangerous problem to the public health to smokers and non-smokers. One of the concerns of the study is to highlight whether the tobacco advertising could be configured as already misleading or false advertising. Besides that, this study looks at which human rights would be violated without an approach of tobacco control, and to what extent the lack of advertising legislation might be malefic to human rights concerning tobacco consumption. Moreover, it will be discussed why the paternalism could be useful as a capable and recurrent tool to the State to prevent the damage that the tobacco consumption is, nowadays, to developing countries when it is common the lack of tobacco control legislation.

The methodology used in the research will focus on the analysis of the concepts of advertising, the analysis of both human rights and consumer rights legislations, using official documents of intergovernmental organizations, and articles and books that offer practical and theoretical perspectives on the subject concentrating in the Framework Convention on Tobacco Control (FCTC) and regional documents around the world that the subject is concerned to tobacco control to understand the system of each region in relation to the matter. Moreover, it will be addressed in this dissertation the possible human rights violations which without an advertising policy in relation to tobacco control can be harmful to basic rights as the right to health and right to adequate information, using the figure of the State as a remedy for a consumer protection.

1. Human Rights and Consumer Rights

Whether we think in decades ago we might not imagine the connections between these two regulations: human rights law and consumer rights law. It is understandable because first movements with human rights approach were only concerning public law specifying, generally, war issues. It was unthinkable in an internationalization of human rights law to discuss the connection with the private law where the subjects of the private sector were not subjects of human rights being the subjects restricted only concerning the public sector.

For instance, in the mid of 1939, before the Second War, during the inter-war period with the extinct League of Nations we could see, in low intensity, an increase tendency of the international recognition of human rights that was integrated to face the fight against fascism¹. Also, in 1945, we can start seeing all the World in a great human rights discussion after the Second War creating the United Nations Organization (UN) with all the huge abuses from the Third Reich power and other fascism governments².

Regarding the Classic International Law, theory that was used before the Second War period, only States were subjects which had rights and duties, becoming part of the international law atmosphere³. Afterwards, we could see an addition for international organizations as a subject, mainly because of the creation of the League of Nations, but individuals were not recognized as subjects, they were treated as objects and their human rights complaints should be done in the domestic law⁴.

The big bang for the internationalization of human rights have occurred after the World War Two. Everyone in that determined time might agree that if an effective international system for the protection of human rights might be done several those abuses during the Hitler's time in power might be avoided⁵.

Sadly, human rights approaches have developed with destructions, abuses and

¹ Gómez Isa, 2009, pp. 22-28.

² Idem.

³ Idem.

⁴ Idem.

⁵ Idem.

violations of rights of others in which could be learnt whether the society has had more consciousness and human rights education.

1.1. Human Rights and Private Sector

Nowadays the private sector has a strong role to carry out on the human rights law⁶. We can understand when we see the impact of the huge companies in so many important matters currently in question. There are multinational companies that may have the power according with their policy approach of having the change capacity and affecting issues such as the environment, employment, economy etc. For instance, they can have much more money circulation than diverse countries, their employment capacity can uphold the economy of thousands of families and their lack of sustainable policy can aggressively destroy the environment contributing with problems as the climate change, deforestation, extinction of animals, pollution of drinkable water and so on.

While transnational treaties were by tradition related to obligations of the State parties to ensure the satisfaction of rights, the occurrence of State duties to standardize regulations concerning non-State involvement and companies in the private sector has appeared as one of the most essential features of the human rights utterance in progress⁷. The duty of States to carry on non-State actors accountable to violations of rights and treaty duties in the areas of health, women's rights, minority rights, and rights of persons with disabilities has become prominent in this time of globalization and transnational corporations⁸. The initial obligation to protect against corporate abuse is

⁶ United Nations Document A/HRC/17/31, 21 March 2011, p. 6.

⁷ Ratner, The Yale Law Journal, 2001, at <http://yalelawjournal.org/the-yale-law-journal/article/corporations-and-human-rights:-a-theory-of-legal-responsibility/> (consulted on 5 July 2012). With the pressure to confront this characteristic, it is with no discussion that the state as the only centre point of an international legal duty has increased concerning the necessity of regulation to the behaviour of non-state actors.

⁸ United Nations Document A/RES/54/263, 25 May 2000, paras. 7-9; United Nations Document A/45/49, 18 December 1990, paras. 13-16.

earning currency and has to be scrutinized concerning the tobacco control⁹. At the moment that globalization has experienced several positive results¹⁰, the globalization of tobacco has only bad and unsafe costs over worldwide health and welfare.

For these reasons, it was necessary a different concern adding the companies as an important subject of human rights policy. Regulations as labour rights law, business law and consumer rights law get started to become part of the whole process of human rights concerns and one of the important targets for avoiding negative implications. In no distinct country is this so understood as unambiguously as in China in which a new trade concerning multinational tobacco industries and new conflict extents over tobacco control have ascended¹¹. The American efforts over the Chinese government to live up to its duties of human rights on the one hand, and on the other, the unregulated American authorization to U.S. tobacco companies to spread in the market the damages of the tobacco consumption to China and other countries has made a reasoning disagreement¹².

In accordance with fresh and latest studies, associated to tobacco diseases will demand three million Chinese lives a year by the middle of the twenty-first

⁹ Gruner, Highbeam Business, at <http://business.highbeam.com/61320/article-1G1-19534207/export-us-tobacco-products-developing-countries-and> (consulted on 5 July 2012). As deaths from diseases in relation to tobacco consumption rapidly rise in developing countries, there is a better necessity for private companies to be held responsible: "Since 1970, in developing countries [lung cancer] has risen by sixty-seven percent. Globally, lung cancer is skyrocketing, and ninety percent of this increase is attributable to cigarette smoking. In a developing country like India, for example, where deaths would be expected to result from infectious diseases, the World Health Organization (WHO) estimated that 800,000 deaths would result in 1990 from tobacco use. In 1990, the WHO gauged that the number of deaths per year in the world due to smoking had reached three million, the equivalent of eight thousand deaths per day. The WHO expects this figure to at least triple by the time today's teenage smokers reach middle age. By the year 2025, ten million people are expected to die each year from tobacco use. Seven million of these deaths will occur in developing countries, with two million deaths per year in China alone".

¹⁰ Carothers, T., 1999, pp. 95-101; Trubek & Galanter, University of Wisconsin Law School, at <http://www.law.wisc.edu/facstaff/trubek/sisero.pdf> (consulted on 5 July 2012); Trubek, JSTOR, at <http://www.jstor.org/stable/795251> (consulted on 5 July 2012); Alford, JSTOR, at <http://www.jstor.org/stable/1342446> (consulted on 5 July 2012). The booming market in China, the non-existence of the Soviet Union and the spreading trade in a comprehensive variety of other countries as well as countries in process of transition from socialism to market economies and countries in process of transition from controlled, protected markets to markets with the approach of the efficiency standard which has deposited a globalization of markets unparalleled in human history. It is related to a discussion of variations in the law and the expansion of evolving markets.

¹¹ Alwis & Daynard, 2009, pp. 308-311.

¹² Idem.

century¹³. One more report prognosticates that tobacco consumption will be the reason to the premature death of more than fifty million people now living in China¹⁴. Unfortunately, the age of first-time is not the only concern in this country when Chinese women are the newest victims of tobacco consumption¹⁵.

As Rene Scull, then a vice-president of Phillip Morris Asia, stated in 1985: “No discussion of the tobacco industry in the year 2000 would be complete without addressing what may be the most important feature on the landscape, the Chinese market. In every respect, China confounds the imagination”¹⁶. The Chicago Tribune has assumed that the United States has facilitated to “plant time bombs of illness and death”¹⁷. Others have discussed correlations with the American tobacco worldwide trade to the clearance of nuclear waste¹⁸.

The American government, identifying the lack of better corporate social responsibility, set up the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms) in 2003¹⁹. By tradition, States were ordered to represent an essential role in well regulating and holding responsible corporate activities according to human rights. Nevertheless, the Norms disclose a clear change in the direction of more efforts over States to hold corporate actors liable for rights violations. While the Norms highlight that governments tolerate the main accountability for the protection of human rights, the

¹³ Collin, Lee, & Bissel, 2002, p. 273. “Trade liberalisation [sic] has led to increased consumption of tobacco, but while it has no substantive effect on higher income countries, it has a large and significant impact on smoking in low-income countries and a significant, if smaller, impact on middle-income countries.”

¹⁴ Arms, Business Highbeam, at <http://www.highbeam.com/doc/1G1-57395362.html> (consulted on 5 July 2012).

¹⁵ Parker, University of Pennsylvania Law School, at [http://www.law.upenn.edu/journals/jil/articles/volume21/issue1/Parker21U.Pa.J.Int'lEcon.L.211\(2000\).pdf](http://www.law.upenn.edu/journals/jil/articles/volume21/issue1/Parker21U.Pa.J.Int'lEcon.L.211(2000).pdf) (consulted on 5 July 2012).

¹⁶ Idem; Sesser, New Yorker, at http://www.newyorker.com/archive/1993/09/13/1993_09_13_078_TNY_CARDS_000363943 (consulted on 5 July 2012).

¹⁷ Beck, at http://articles.chicagotribune.com/1997-11-16/news/9711160125_1_american-tobacco-companies-tobacco-related-illnesses-american-cigarettes (consulted on 5 July 2012).

¹⁸ Parker, University of Pennsylvania Law School, at [http://www.law.upenn.edu/journals/jil/articles/volume21/issue1/Parker21U.Pa.J.Int'lEcon.L.211\(2000\).pdf](http://www.law.upenn.edu/journals/jil/articles/volume21/issue1/Parker21U.Pa.J.Int'lEcon.L.211(2000).pdf) (consulted on 5 July 2012).

¹⁹ United Nations Document E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, para. 7.

Norms, on the other hand, enforce duties over multinational companies and other business corporations to defend standards documented in national and international law²⁰.

Moreover, the Article 13 is the most pertinent section of the Norms concerning tobacco control. The present article discourses the duties of businesses on the topic of consumer protection. It highlights firmly that companies cannot “produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers”²¹ While a literal interpretation of these Norms would propose that legal concordance with them would reduce the trade of tobacco products unpredictable with the Norms, not less than, the regulation involves the industries of tobacco to break directing children and other vulnerable groups.

Another important extent is that all human rights are relevant to business and everything is traced in a sphere of influence. Understanding a company’s sphere of

²⁰ Idem. Articles 13 and 16. Especial concerning what it is highlighted in the Article 13: “Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers”; University of Minnesota (Human Rights Library), at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> (consulted on 5 July 2012). “(b) Transnational corporations and other business enterprises shall observe relevant international standards for the protection of consumers. (...) Transnational corporations and other business enterprises shall ensure that all marketing claims are independently verifiable, satisfy reasonable and relevant legal levels of truthfulness, and are not misleading. Further, they shall not target children when advertising potentially harmful products; (c) Transnational corporations and other business enterprises shall ensure that all goods and services they produce, distribute, or market are (...) safe for intended and reasonably foreseeable uses, do not endanger the life or health of customers, and are regularly monitored and tested to ensure compliance with these standards, in the context of reasonable usage and custom. They shall adhere to relevant international standards so as to avoid variations in the quality of products that would have detrimental effects on consumers, especially in States lacking specific regulations on product quality (...); (e) Where a product is potentially harmful to the consumer. transnational corporations and other business enterprises shall disclose all appropriate information on the content and possible hazardous effects of the products they produce through proper labelling, informative and accurate advertising and other appropriate methods. In particular, they shall warn if death or serious injury is probable from a defect, use, or misuse. Transnational corporations and other business enterprises shall supply appropriate information of potentially harmful products to the relevant authorities (...).” It is further to mention that the Article 16 of the Norms encourages non-governmental organizations (NGO's) to practice the Norms to support their efforts to seek accountability by companies. Exactly, NGO's should practice the Norms as a standard for their monitoring activities and to hold tobacco corporations straight accountable for violations of human rights.

²¹ United Nations Document E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, Article 13; University of Minnesota (Human Rights Library), at <http://www1.umn.edu/humanrts/links/commentary-Aug2003.html> (consulted on 5 July 2012).

influence may be achieved by outlining interested party groups influenced by a business' operations. A key stakeholder group which will usually be located at the centre of any company's sphere of influence will be employees. Other groups will come next which can be business partners, suppliers, trade unions local communities, and customers. The last group will usually be government and the wider society²².

1.2. Human Rights and Consumer Vulnerability

Regarding consumer rights law, we should understand that is not all subjects in the matter that we can put on human rights law. Although, we are learnt in this regulation that all consumers may be vulnerable to damage. Vulnerability may be as a result of a consumer's psychological or financial circumstance or the kind of a sale. For instance, Service providers might be in good place to feed on an afflicting person's sense of regret and blame to put up for sale merchandise with a price too expensive or until deceptive which the consumer would habitually refuse.

There are frequently special considerations from governments which occasionally bring in targeted measures to set in order problems to situations which influence in vulnerable and disadvantaged consumers. Nevertheless, remedies which provide advantages to vulnerable consumers require to be cautiously schematized in order to not having accidental or neglected consequences on more other consumers. For example, they could outcome in a mix of low standing restrictions with limitations over the selection of products in a market²³.

Day by day we deal with various types of consumptions which may contribute to human rights violations whether is not regulated or may hurt ourselves with the no access to due information. Actually, the regulation it would not be significant if we have had a better collective consciousness with the which unhappily it is not the truth. The reality of many enterprises is fuelled from the capitalist mind-set which the main and

²² Office of the High Commissioner of Human Rights, at <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf> (consulted on 5 July 2012).

²³ Idem.

essential goal is the profit. It does not matter where the profits have impacted, the only concern is the financial gain.

We can imagine distinct consumptions which may impact the World and peoples' lives in different ways. For instance, I would mention undrinkable water; poisoned foods; financial credits with deceptive offers; hotels that contribute to violations in labour rights; and, my major concern in this dissertation, the misleading advertising of tobacco consumption.

1.3. Human Rights and Tobacco Consumption

The tobacco consumption still adopts a significant position to public health warning in poor regions²⁴. Persons that live in continents as Latin America, Eastern Europe, Asia and Africa face the heavy complications which tobacco companies influence with the deceptive advertising. They are responsible with this strategy in using for benefit the lack of regulation ravaging poorer countries which are not supplemented either to restrict tobacco consumption or to handle with higher health aftereffects²⁵.

The violence touching the lack of assets is too unfair for that poorer zones which, for instance, the same does not happen in developed countries where the tobacco control has increased and the health conception has upheld for government. If we start to search studies regarding the hazards, smoking is a practice which are much used associated with poor countries that keep within the boundaries throughout of those States²⁶. According to World Health Organization (WHO), 84 per cent of smokers live in developing and transitional economy²⁷.

Other aspect regarding the connection between education and tobacco consumption, a study in Brazil have informed that 26 per cent of people with four or

²⁴ Gostin, 2007a, pp. 2056-2059; Gostin, 2007b, pp.. 2537-2539.

²⁵ Cabrera & Gostin, 2011, pp. 285-286.

²⁶ Idem.

²⁷ World Health Organization (WHO), at: www.who.int/mediacentre/news/releases/2004/pr36/en/ (consulted on 5 July 2012).

less years of schooling were smokers. The percentage decrease with nine or more year of schooling, becoming only 17 per cent. The study was approached independent of the income levels. In other words, those with less education also tend to have significantly higher rates of smoking²⁸.

In relation to poverty, poor smokers use their limited household income in tobacco consumption, increasing their vulnerability. I could stress that tobacco and poverty are becoming even and even more a vicious circle. For instance, in Vietnam, statistics have showed that annual household expenditure on tobacco is 1.7 times higher than expenditure on education, and 1.5 times higher than that for health²⁹.

The tobacco consumption solution of these developing countries would have a better intervention on the States concerning a human rights protection of their citizens against for the negative effects giving a better health, life and standard of living for them³⁰. Furthermore, with these studies mentioned before, whether the tobacco consumption extremely induces poor people, it is a concerned time to make uneasy provisions for those tobacco industries which create so much problems, becoming tobacco control to those developing countries a State priority³¹. The United Nations (UN) Independent Expert on Human Rights and Extreme Poverty urged the Human Rights Council to give priority “to persons living in extreme poverty to ensure that they enjoy their civil and political rights and at the very least a minimum core content of all economic, social and cultural rights”³².

²⁸ World Health Organization (WHO), at www.who.int/tobacco/resources/publications/wntd/2004/en/index.html (consulted on 5 July 2012).

²⁹ Programs for Assessment of Technology in Health (PATH) & Work for a Better Bangladesh, at http://www.wbbtrust.org/mediafile/file/18_T_Tobacco_poverty.pdf (consulted on 5 July 2012).

³⁰ Cabrera & Gostin, 2011, p. 287.

³¹ *Idem*.

³² United Nations Document A/HRC/15/41, 6 August 2010, p. 53.

1.3.1. Tobacco Consumption and Second-Hand Tobacco Smoke

After the tobacco control in the legislations have more impact and prohibitions, discussions concerning the smoke-free law and right to property are one of the measures to agree with the tobacco consumption in places as restaurants, nightclubs, cafes etc. Even though the division by smokers and non-smokers in these business establishments do not permit individuals to prevent the hazard caused by second hand tobacco smoke. In other words, the State can transgress several other human rights whether it start a weakness policy ratifying smoke-free area laws and permitting persisted uncovering to the damage of second-hand smoke³³. Below a human rights perspective, the second-hand smoke affects many fundamental rights exalted in international law, such as the right to health; the rights of the child; the right to equal protection; the right to just, equitable and satisfactory conditions of work; and the right to a healthy environment³⁴.

Scientists and government agencies have advised that there is “no safe level of exposure to second-hand smoke”³⁵. Just in United States, according to California Environmental Protection Agency (Cal EPA), second-hand smoke is consequence for 3.400 lung cancer deaths and between 23,000 and annually 70.000 heart disease deaths³⁶. Several organisations have positively supported which to long-term health second-hand smoke endangerment produces a serious damage, in general, for the society.

The World Health Organization, in 2011, has touched in the extent that is estimated six million annual deaths around all the World because of the tobacco³⁷. In a report of Pan American Health Organization (PAHO) is stressed that “there is no level

³³ Cabrera & Gostin, 2011, pp. 287-288.

³⁴ Pan American Health Organization (PAHO), at http://new.paho.org/hq/dmdocuments/2009/HR_SHS_eng_tool.pdf (consulted on 5 July 2012).

³⁵ U. S. Department of Health and Human Services, U. S. Surgeon General, at www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet7.html (consulted on 5 July 2012).

³⁶ California Environmental Protection Agency (Cal EPA), at www.arb.ca.gov/regact/ets2006/isor.pdf (consulted on 5 July).

³⁷ World Health Organization (WHO), at www.who.int/nmh/publications/ncd_report2010/en/ (consulted on 5 July 2012).

of exposure at which [second-hand smoke] has been found to be harmless to humans”³⁸. The subject becomes more serious when it is found, searching for diverse studies, no controversy in the medical and scientific communities concerning this awareness³⁹. Some Peruvian and Ugandan judgments against India have ordered austere attitudes to bring up effective tobacco control preventing violations which have occurred in fundamental rights including the right to health, the right to life and the right to a safe, clean environment⁴⁰.

A strong example which happened in 2002, in Canada, Ontario Workplace Safety and Insurance Board shows that a tobacco control for second-hand smoke can be dangerously fateful. In the judgement of the case, a non-smoking waitress was entitled to a compensation as a result of her incurring terminal lung cancer caused by quotidian exposure to second-hand smoke in the period of her workdays, affecting the right to just, equitable and satisfactory conditions of work⁴¹. Alike case laws in America such as United States have also applied the same method found a causal connection between smoke-filled workplaces and lung cancer⁴².

According to recommendations from the WHO, the policy needs to prevent the exposure to second-hand smoke State which there is no safe level of Environmental Tobacco Smoke (ETS) contact⁴³, as mentioned before. By ending, the FCTC establishes a legal minimum standard concerning safe and healthy working conditions that in the Article 8 stresses State parties have a duty to protect their inhabitants from undue, involuntary exposure to second-hand tobacco smoke⁴⁴.

³⁸ Pan American Health Organization (PAHO), at http://new.paho.org/hq/dmdocuments/2009/HR_SHS_eng_tool.pdf (consulted on 5 July 2012).

³⁹ Cabrera & Gostin, 2011, p. 288.

⁴⁰ Pan American Health Organization (PAHO), at http://new.paho.org/hq/dmdocuments/2009/HR_SHS_eng_tool.pdf (consulted on 5 July 2012).

⁴¹ Laghi, B., The Globe and Mail, at www.theglobeandmail.com/news/national/ailing-ex-waitress-wins-second-hand-smoke-case/article489722/ (consulted on 5 July 2012).

⁴² Douglas, C., Public Health Law Center at William Mitchell College of Law, at www.wmitchell.edu/tobaccolaw/resources/douglas.pdf (consulted on 5 July 2012).

⁴³ World Health Organization (WHO), at http://whqlibdoc.who.int/publications/2007/9789241563413_eng.pdf (consulted on 5 July 2012).

⁴⁴ WHO Document A56/VR/4, 16 June 2003, Article 8.

1.4. Individual Rights and Human Rights

Regulations vis-à-vis the tobacco control have fortified since strength measures have been implemented in the States parties. Nevertheless, when claims from the tobacco industry are faced human rights approaches, an important question starts around the tobacco consumers: the freedom to smoke.

It is significant to scrutinise the merit of these claims, whether or not the tobacco industry can have reasons. The freedom to smoke or, for another scholars, the right to smoke has no foundation in law regulations. Overall, laws are regulating the right to prohibit or control substances which can be dangerous and habit-forming to the society.

The one remaining, specific claims have some basis in law, for instance, concerning those in regard to commercial freedom, however, these regulations are not absolute and may be modified. The strategy over what way human rights approaches might be practiced to advance tobacco control attempts is applying a penetrating structure to measure in what form diverse rights associate with one another and, whether it might happen a conflict, in what way to control which right might predominate⁴⁵.

The jurisprudence around the world is also changing. Courts in different countries are concerned with the damages of tobacco consumption, taking measures to recognise the connection with the human rights law over tobacco control, and determining cases in favour of a restricted legislation which impedes the dangerous interests of the tobacco companies. It is notable to stress that there is also fortifying an international support which could be a huge step which makes pressure in the States to implement due measures⁴⁶.

Whatever is the result of the prevalence, these proportionality of the rights of industry and the rights of individuals has an indispensable reminder in relation to the

⁴⁵ Cabrera & Gostin, 2011, pp. 290-292.

⁴⁶ Idem.

“little or no redeeming value for tobacco consumption”⁴⁷ which “any balancing or proportionality tests applied to tobacco regulation are likely to weigh heavily in favour of more far reaching restrictions, more regulation and less misleading information”⁴⁸. In return, the industry is counter-attacking insistently the cuts of their law benefits. Also, the tobacco industry claims are not only founded over the rights of commerce and speech, on the other hand, now it is included trade, investment and intellectual property treaty rights.

Notwithstanding, there is no possibility to the tobacco consumption not becoming regulated. Whether commercial speech were armoured below the right to freedom of expression, that armouring would not be able to permit the intervention of the State for interest in public health⁴⁹. For instance, it is a duty from the government to stop or to put a limit in speeches which are damaging promotion of tobacco extensively pondered to belong to this group.

An important highlight to put in this discussion is the consequences that happens whether the tobacco control were not used to the society and how dangerous the companies could be without this concern. An analysis from the giant company Philip Morris in relation to the economy is a standard illustration of the extent where the tobacco industry⁵⁰ has practiced on the last vast years to safe recent markets in developing countries.

⁴⁷ O'Neill Institute for National and Global Health Law at Georgetown University, Georgetown Law, at http://www.law.georgetown.edu/oneillinstitute/documents/2012_OneillTobaccoLitGuide_ENG.PDF (consulted on 5 July 2012).

⁴⁸ *Idem*.

⁴⁹ The Freedom Forum, at www.freedomforum.org/packages/first/curricula/educationforfreedom/supportpages/L04-LimitsFreedomSpeech.htm (consulted on 5 July 2012).

⁵⁰ Sugarman, Berkeley Law at University of California, at http://www.law.berkeley.edu/faculty/tobacco/Tobacco_Ch.9.pdf (consulted on 5 July 2012). Philip Morris International is the bigger company which dominates the greater portion of the market concerning tobacco products. By including British-American Tobacco (BAT), and Japan Tobacco, it is configured more than half of all total sales of cigarettes outside of China. Philip Morris, which is based in the United States, participates with its sales approximately in a portion sixteen per cent of the worldwide market of tobacco. BAT, the English company, has developed closely as huge as the American company due to its union with Rothmans International in 1999. Japan Tobacco, the based in Japan, has controlled nearly ten per cent of the world market since 1999, when it purchased the international rights to R.J. Reynolds' cigarette brands.

The multinational enterprise had based on a 2001 remunerated study justifying the revocation of limitations over tobacco consumption in the Czech Republic with shameful words. Philip Morris used in its defence that the tobacco consumption had saved the Czech government about \$147,000,000 in reduced health care costs, pensions, and housing expenditures for the elderly due to smokers' early deaths⁵¹.

The industry's tactics have also incorporated in developing countries techniques of advertising which have been forbidden in the United States⁵², deception campaigns premeditated to unclear the health consequences of tobacco consumption and clandestine political lobbying targeted at frustrating the adoption of effective tobacco control legislation⁵³.

Analysing all those examples, we can notice the significance of a legislation in relation to tobacco control and some points which should be discussed. Legislations against the tobacco consumption demonstrate that there is no way to smoke having a health life. Also, it is highlighted a warning in relation to the second-hand smoke which there is no safe level. The State needs to assume the duty of to take care of that society, in an idea of soft paternalism, that is intrinsically in its birth as a State is created. It is an obligation of the State to reach the level of well-being in its territory.

⁵¹ Arthur D. Little Incorporation International at University of South Carolina, at <http://hadm.sph.sc.edu/Courses/Econ/Classes/cbacea/czechsmokingcost.html> (consulted on 5 July 2012).

⁵² American Law, 15 U.S.C. § 1331, 2002. Supporting clear, truthful, and uniform tobacco labelling and advertising requests which satisfactorily update the public concerning the confrontational health effects of tobacco consumption; American Law, 15 U.S.C. § 1335, 2002. Prohibiting tobacco advertisements on any medium of electronic communication; PAHO Doc. CD43/13, 16 July 2001, paras. 2-18. Confirming that tobacco promotion is largely unregulated outside of North America.

⁵³ Pan American Health Organization (PAHO), at http://www.paho.org/English/HPP/HPM/TOH/profits_over_people.pdf (consulted on 5 July 2012); Hammond, R., Taking On Tobacco, at <http://www.takingontobacco.org/addicted/addicted.html> (consulted on 5 July 2012).

2. Definition of Advertising

For us to understand the nature of misleading advertising, we must first understand the definition of advertising. As several traditional authors have pointed out, advertising is any remunerated practice of impersonal marketing and promotion of products, services or ideas by an recognized sponsor⁵⁴. However, impersonal marketing, also called traditional marketing, is a quality that is not rule nowadays.

We may also find advertising with a personal marketing, for instance, making phone calls to key persons in a certain group instead mailing pamphlets. This direct marketing is now more used because of the dynamism in the face-to-face contact creating a wide visibility for consumers⁵⁵.

Concerning the recognized sponsor, this definition today does not differentiate sponsoring from advertising, as sponsoring is therefore a type of advertising⁵⁶. It falls in disuse when we analyse diverse formats of non-spot advertising on media in which the distinct type of product placement indeed are also categorized as program sponsoring⁵⁷. Another old concept is that advertising consists of the communication of a message to the audience for being purposed to reach a variable objective, basing on if the advertisement serves a business or public goal⁵⁸.

Concerning the business and public goals, it is impossible in my opinion to separate public goals and business goals in an advertising because they walk in the same way for the same objective, being different meanings, but fundamental approaches for each other. Mainly, it is untenable for my understanding an advertising conception not to collide in the business aim.

Even though we do not indirectly drive to this idea, the consequence indirectly will define it. For instance, if an individual promotes a good for a friend not necessarily he angles for it, however, the consequence has created a business aim. The author of the

⁵⁴ Kotler et al., 2000, p. 578. Lancaster & Massingham, 2001, p. 241.

⁵⁵ Idem.

⁵⁶ Kaptan, 2002, p. 1.

⁵⁷ Hansen, 2003, p. 259.

⁵⁸ Firestone & Institute of Canadian Advertising, 1967, p. 1.

concept even tries with examples to separate the goals, however, this disconnection has essentially no fundament. The concept of advertising is widely linked with the situation of the marketplace and not with the purpose. The purpose in fact is only a characteristic of the advertising work.

Some doctrines believe that meanings of advertising do not live on so much time, as they do not continue the mutation regarding the concept and other formats of marketing promotion⁵⁹. Even though, I can consider Kaptan's definition a condensed and very actual understanding which advertising is merely a public notice meant to transmit information and invite sponsorship or some other response with the purpose of informing and persuading a consumer⁶⁰.

Notwithstanding, we may not forget that advertising has a social structure comprehending three elements. These three elements are linked each other. They are the communicator, the recipient of the advertising message and the media⁶¹. The last element, we can find corporations and institutions both private and public which control the mass media instruments⁶².

The second element, for instance, it is the role of the customer. And finally, the first element, generally, is the figure of the advertiser which may be businessmen, governments or institutions. Nevertheless, it is significant to cite the role of the political parties and non-governmental organizations (NGO's) as a communicator using also the same manner of manifestation⁶³.

By finishing, advertising may comprehend the distinction surrounded by triumph and fiasco for the producer. To the same extent as one-third of the total sales, producing, and marketing costs of satisfied low-cost, often, acquired products are consumed on advertising⁶⁴.

⁵⁹ Hansen, 2003, pp. 257-258.

⁶⁰ Kaptan, 2002, p. 1.

⁶¹ Firestone & Institute of Canadian Advertising, 1967, p. 2.

⁶² Idem.

⁶³ Hansen, 2003, p. 257.

⁶⁴ Patis, 1996, p. 8.

2.1. False and Misleading Advertising

Misleading may approximately be understood as making a false impression of a competitor's own products or services. It may be the single most prevalent form of unfair competition. On the contrary, misleading can have quite serious consequences, relying on incorrect information, may suffer financial or more harmful prejudice. The dishonest competitor loses clients and the transparency of the market diminishes with adverse consequences for the economy as a whole and economic welfare⁶⁵.

We may dissect the meaning of false advertising as “an unfair and deceptive act or practice in commerce and is therefore unlawful.”⁶⁶ Generally, false advertising has to be misleading in a substantial respect. Nevertheless, my concern during this dissertation is to approach the human rights violations in misleading and false advertising whether or not the advertising configure in misleading or false. So, using misleading, false or even deceptive advertising, I am going to address the same parallel concerning possible human rights implications.

The sum total of deceptive advertising has diminished more and more as a result of the situation which the government is protecting the public from such damage through several preservation mechanisms as principles, codes, laws and regulations⁶⁷.

Concerning advertising regulation systems which I am going to approach in the next chapter, specifying the regulation regarding tobacco advertising, it is important to mention that the Federal Trade Commission (FTC), in relation to both acts and omissions for the constitution of the product and consequences of its utilization are considered as described in the advertisement⁶⁸. It is common in the commerce that we find in various countries special legislations regarding the misleading. Whatever, there is a general agreement concerning if the definition of misleading is restrained neither to

⁶⁵ World Intellectual Property Organization (WIPO), 2004, pp. 144-148.

⁶⁶ Kaptan, 2002, p.123.

⁶⁷ Patis, 1996, p. 8.

⁶⁸ Kaptan, 2002, p. 123.

innately false affirmations or to affirmations which have indeed taken a false impression the part of the consumer⁶⁹.

It is also in concordance that it is intangible the precise form of a deceptive advertising. Then, it does not matter the modelling of the allegation, indication or presentation of the advertising, being the mode of the message the aspect that we need to analyse, whatever is the form of the misleading. Overall, misleading is merely questioned if happens an effect in an affirmation over a target person regardless the way that an affirmation is mentioned⁷⁰.

Another important aspect is the communication has to be analysed with caution concerning the meaning and content of the message. In other words, the neutrality of the enunciation must take into account for examining misleading Statements. Although, an advertising can lead to error consumers, even if it is a half-truth.

Then, for defining a misleading advertising the format is limited to allusions that should cause misunderstandings in the message.⁷¹ For instance, whether it has showed in an advertisement regarding a thinner cereal bar, explaining that this food product hold less calories than others, the lack of this mention may produce same damages for a consumer if it were not mentioned.

2.2. Tobacco Advertising

The right to health becomes to be inserted as a subject of main concern in the human rights system when in the 1980s when the HIV/AIDS crisis presented to the society the mix association surrounded by health and human rights⁷². The World Health

⁶⁹ World Intellectual Property Organization (WIPO), 2004, pp. 144-148.

⁷⁰ Idem.

⁷¹ Idem.

⁷² Mann, 1996, pp. 195-204. Dr. Mann made the ground breaking argument which common values of transnational human rights law should leader governments in their reactions to HIV and AIDS. His article reproduced a influential worldwide idea which the only suitable replies to HIV and AIDS pandemic would connect human rights to public health; Wojcik, 1998, p. 129; Tarantola, Harvard School of Public Health, at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP8-Tarantola.pdf (consulted on 5 July 2012).

Organization (WHO) has recognized that a human rights' line of attack is crucial to avoidance and precaution of the AIDS and has advised governments to endorse a human rights standard of AIDS precaution and avoidance⁷³. This type of tactic to health should in addition be practiced to tobacco control. As the predominance of tobacco consumption tumbles in the United States, multinational tobacco companies are in search of new markets and destining all their efforts in the Asian continent and other zones with developing countries in which information about the damage of smoking has still with lacks in the regulation; therefore, the basic for a human rights-based method to address tobacco is all the more pertinent and direct⁷⁴.

This convention plays a vital part for the connection of human rights and tobacco control. This international binding document expresses in its Article 1 that "tobacco advertising and promotion means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly"⁷⁵. When we read the FCTC, we also find imposed duties⁷⁶ for the State parties diverse areas such as implementations concerning policies and programmes, and provisions to the individuals with the right to require ratifying States to fulfil with the treaty⁷⁷. One of the mentioned duties is concerning advertising issues. For the parties in agreement with the convention, it is further to stress the recognition which it is possible to reduce tobacco consumption

⁷³ Gruskin & Tarantola, Harvard School of Public Health, *Health and Human Rights*, at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP10-Gruskin_and_Tarantola.pdf (consulted on 5 July 2012).

⁷⁴ Schwartz, 1998, p. A1. "Chinese consumption has jumped-from 100 billion cigarettes a year in the early 1950s to 500 billion in 1980 and 1.8 trillion today. Average daily consumption rose from one per Chinese man in 1952 to four in 1972 and 10 in 1992". Tobacco corporations are quickly turning the developing countries into main markets. World Bank, 1999, pp. 1 and 25. "By 2020, seven out of every ten people killed by smoking will be in low- and middle-income nations." China, India, and Southeast Asia will be one of different and worst affected regions. Bo-Qi Liu et al., 1998, p. 1421. Mentioning and settling numerous of the expectations made by British epidemiologist Richard Peto in the late-1980s where, for instance, China's present one million tobacco attributable deaths per year, the highest in the world, could rise to two million by the year 2025.

⁷⁵ WHO Document A56/VR/4, 16 June 2003, Article 1.

⁷⁶ O'Neill Institute for National and Global Health Law at Georgetown University, Georgetown Law, at http://www.law.georgetown.edu/oneillinstitute/documents/2012_OneillTobaccoLitGuide_ENG.PDF (consulted on 5 July 2012).

⁷⁷ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

facing a different perspective of advertising policies, banning also its promotion and sponsorship.

It is significant to analyse that there are strong efforts with the parties in the convention expressing their repudiation against the tobacco industry. Moreover, a vital extent which need to stress is each party shall “prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions”⁷⁸

We may not disagree that there is a tobacco epidemic and it is one of the most alarming and infiltrating public health worries which the world confronts currently. There is a legal duty for governments to control specially the tobacco industry devoting a human rights law approach. It is rational and understandable this duty because it is important an interference concerning those rights as the right to health, right to information, right to adequate standard of living and other human rights⁷⁹. For instance , governments has to forbid misleading advertisement of tobacco products so as generally to protect human rights and rights of consumers⁸⁰.

Whatever be the place, the question is how we can make efforts for facing the tobacco industry and the answer can appear in advertising policies. There are diverse gaps and lacks in this policy and the tobacco industry avail itself of this no regulation as much as it can. In other words, it is an epidemic may be managed if governments puts into effect suitable control measures. Another important aspect for better measures is the human rights law, a stronger legal instrument which may be exercised as in a domestic law perspective as an international law perspective. Besides, human rights approaches are used in political speeches, they commonly has the ability to affect policy

⁷⁸ Idem.

⁷⁹ Cabrera & Gostin, 2011, pp. 288-289.

⁸⁰ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

considerations and they has a spread comparable to the global dimension of the tobacco epidemic as a speech zone that is employed universally⁸¹.

⁸¹ Idem.

3. Human Rights Documents and Tobacco Control

With the concern to examine the practices where smoking and related wears away human rights environment, it is important to know which human rights treaties can be useful and applicable to control the tobacco consumption. Referring to the right to health, the valuable protection is preserved in several human rights' international documents⁸². At the outset, the introductory draught of the United Nations, the U.N. Charter represents a list of human rights that searches for resolutions to “international economic, social, health, and related problems”⁸³. The Universal Declaration of Human Rights identifies the right to an adequate standard of living in relation to the health and well-being of an individual⁸⁴.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), stimulates in a detailed way, as a basis of the International Bill of Human Rights, the right to health⁸⁵ in which its Article 12 says that State parties extend the facto recognition to the right to the present Covenant recognize the right to joy the maximum possible standard of health both physically and mentally to all the persons⁸⁶. The official document also sets up a variety of duties which are included prenatal, postnatal, and child health care; ecological and manufacturing sanitary measures; control of epidemics; and medical care for severe diseases. Besides, second-hand smoke's exposures are highlighted resolutely in Article 12 (b) of the ICESCR that requests to the development in relation to all environmental and industrial hygiene's aspects⁸⁷.

In its Article 12.2 (b), the Committee on Economic, Social, and Cultural Rights

⁸² Alwis & Daynard, 2009, pp. 299-302.

⁸³ United Nations, Articles 55- 56.

⁸⁴ United Nations Document A/810, 12 December 1948, Articles 3 and 25. The article preserves the right to life and Article 25 the right to health. The UDHR rights are the introductory rights and mould the centre of the international documents in human rights. Even though the UDHR is not binding, these rights are unconditional rights, or rights with no derogation. Likewise, even when countries have not ratified the CEDAW, CRC, or ICESCR, these customary human rights are binding by the importance of their essential nature.

⁸⁵ United Nations Document A/44/49, 2 September 1990, Article 12.

⁸⁶ *Idem*.

⁸⁷ *Idem*, Article 12 (b).

(CESCR) has expressed its opposition to the tobacco consumption⁸⁸. In concordance with General Comment 14, the right to health addressed in Article 12 of the ICESCR increases not only to well-timed and proper health care, but also to the fundamental elements of health. For instance, it can be mentioned the access to adequate and drinkable water and sufficient hygiene; the adequate quantity of safe food, nutrition and housing; healthy work-related and eco-friendly settings; and access to health-related education and information which comprises information concerning sexual and procreative health⁸⁹.

When it was applied the General Comment 14, the Committee has evolved precise entitlements to various fundamental elements of the right to health as well as “preventive, curative and rehabilitative health services”⁹⁰. Besides, the General Comment 14 discerns that “States parties are bound by both the collective and individual dimensions of Article 12”⁹¹.

Collective rights have an main significance into the subjects personal right to health, and to avoid illnesses and to promote the health promotion⁹². Furthermore, a failure of the State to become effective all the essential actions to guarantee individuals within its dominion from human rights violations such as violations occurred by third parties or companies on the right to health demonstrates a disrespect of its duties in Article 12. For instance, the violation which could be visualized over the aspects of tobacco control is “the failure to discourage production, marketing and consumption of tobacco”⁹³.

⁸⁸ United Nations Document E/C.12/2000/4, 11 August 2000, paras. 15 and 64. Special concerning in the Article 12 of the International Covenant on Economic, Social and Cultural Rights, which is found the Right to the Highest Attainable Standard of Health.

⁸⁹ *Idem*, para. 11. The Committee on Economic, Social, and Cultural Rights (CESCR), the checking and interpreting body for the International Covenant on Economic, Social and Cultural Rights (ICESCR) has detailed that the requirements of the Article 12.2 are comprised simply by method of demonstration and are not projected to be an exhaustive list of duties of state. *Idem*, para. 7.

⁹⁰ *Idem*, para. 17.

⁹¹ *Idem*, para. 27.

⁹² *Idem*.

⁹³ *Idem*, para. 51.

An important aspect is the General Comment 14 in addition endorses the “prevention and reduction of the population's exposure to harmful substances such as... harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”⁹⁴. Besides, the official document requires that be instituted preventive measures and creations of education programs for behaviour-related health worries.

As the Committee clarifies in General Comment 14, as every human rights, the right to health enacts three categories or stages of duties on States Parties: “the obligation to respect, protect and fulfil”⁹⁵. These three requirements bring to the States Parties the necessity “to take measures that prevent third parties from interfering with Article 12 guarantees” and “to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realization of the right to health”⁹⁶.

The U.N. Committee on the Rights of the Child has similarly prepared general endorsements in relation to the lack of extra tobacco information campaigns in effect and the prominence of limitations with regard to tobacco advertising. Emphasized in 2003, in the Committee in General Comment No. 4, was traced as a duty of the States Parties to encourage cost-effective actions as well as actions through laws, policies, and programs on the subjects of the abuse of alcohol consumption, tobacco consumption, and other unsafe substances⁹⁷.

Therefore, whether State or non-State parties the right to health's basic components and tobacco control require to refrain from infringing the right to health of individuals with tobacco consumption prohibitions in public places, including positive measures to interfere to the extreme point of its available resources to safeguard citizens from the massive strategies of the tobacco advertising of the multinational tobacco

⁹⁴ Idem, para. 15.

⁹⁵ Idem, para. 33.

⁹⁶ Idem.

⁹⁷ United Nations Document CRC/GC/2003/4, 1 July 2003, para. 10. Concerning the adolescent health and development in the context of the Convention on the Rights of the Child.

companies⁹⁸.

The International Covenant on Civil and Political Rights (ICCPR) ensures various human rights which has a connection with tobacco control. By way of illustration, the right to life and the right to information which have a direct bearing on tobacco control are examples pointed out in the transnational document⁹⁹. By linking human rights to tobacco control it is allowed restrictions of free speech for the bigger public good¹⁰⁰ which examining these restrictions to the right to free speech it is discovered significance and urgency in the scope of the tobacco companies' tactics of the right to free speech to excuse their continuous employment of new tobacco consumers.

As contrasting to the theoretical “marketplace of ideas”¹⁰¹, in the authentic marketplace the cozenage with regard to the mentioned and inferred in tobacco industry marketing has had a close market control since an extended period¹⁰². The austere inequity in the market concerning tobacco company cozenage and precise statistics over the health complications of smoking has moved all but the most, in a scientific way, refined users, and particularly groups which need a special attention due to their

⁹⁸ Alwis & Daynard, 2009, pp. 305-307.

⁹⁹ United Nations Document A/6316, 16 December 1966, Articles 6, 19 (2) and 19 (3). The Article 6 defends the intrinsic right to life and executes a responsibility on the state to take positive measures to safeguard the right to life as well as steps to decrease infant mortality rates, stop industrial accidents, and defend the environment. Article 19 (2) defends the liberty to seek, receive, and impart information and ideas of all kinds. On the other hand, the Article 19 (3) (b) mentions that the implementation of this right may be limited for the safeguard of national security or public order or of public health. Consequently, it does not offer a complete freedom for tobacco business advertising campaigns. The right to be correctly informed is included in the Right to Speech and Information: Satisfactory information comprises being conscious that specific illnesses are caused by tobacco consumption and precisely rising the meaning, severity, and probabilities of emerging tobacco related illnesses.

¹⁰⁰ Idem, Article 4. The article permits rights to be restricted for the inordinate public good. Therefore, the right to free speech influences tobacco corporations frequently use to legitimize unconstrained tobacco advertising that may be encountered with Article 4 of the mentioned document which defends the reining in of rights at the same time that is prerequisite by morality, public order, or the general welfare.

¹⁰¹ The exemplification of the marketplace of ideas is the standard furthestmost categorized upon by the United States Supreme Court in resolutions concerning cases of free-expression. Justices have employed the concept in the settlement of almost each zone of First Amendment law, in spite of cumulative occurrences over the concept. For the most part, on the other hand, the Court does not identify a distinct, general marketplace of ideas, nevertheless, various mini-marketplaces, everyone with its own dynamics, parameters, regulatory scheme, and audience.

¹⁰² Alwis & Daynard, 2009, pp. 305-307.

vulnerability as children and others who are least capable to repel the covert calls and links through the marketing, advertising, and sale of tobacco¹⁰³.

As a consequence, the tobacco industry disagreement that its advertising might not be measured centred over free speech may not protect children and other susceptible groups who are impotent to understand the acquired facts presented in the commerce in a reliable way with their concerns and right to safeguard their own health. They, for that reason, have a right to be protected by controlling the rights of the discourse of those propagating unsafe products and treaty requirements preventing speech in circumstances of excessive hazard to life and health are relevant¹⁰⁴.

In the task to face the tobacco company's business evaluation which tobacco consumption makes progress with employment and subsistence concerns in agreement with the right to employment, it is intrinsic to analyse the damages of productivity loss due to health care spending and higher rates of mortality. The World Bank, in an examination associated, clarified that a production of tobacco is a remaining portion of most marketplaces, generally in agrarian countries, and the tobacco companies' parcel of employment could not be so subjected to loss of jobs having even more employment opportunities in the case of an international decrease of smoking¹⁰⁵.

In relation to concerns with children, it is approached in the Convention on the Rights of the Child (CRC) matters concerning the influence of straight consumption of tobacco and second-hand smoke on the children health or maternal health. The convention, with a significant importance for being the most extensively ratified in the world, suggests an extensive dimension for safeguarding the rights to children. It is mentioned with respect to children that in all proceedings it will be addressed as a primary consideration the best interests of the child¹⁰⁶. Conferred the evident confirmation that

¹⁰³ Idem.

¹⁰⁴ Lester, 1997, p. 615.

¹⁰⁵ Lo, 2006, p. 569; World Bank, at http://www1.worldbank.org/tobacco/reports_pdf.asp (consulted on 5 July 2012).

¹⁰⁶ United Nations Document A/44/49, 2 September 1990, Article 3. "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

consumption of tobacco unfavourably disturbs a health of child, natural biological functioning, and decreasing life expectancy, it consequently influences the child's "inherent right to life"¹⁰⁷. Therefore, it is an obligation of the States to inhibit access of children to smoking and to diminish exposure of children to smoking with the view to guarantee in the best way achievable the survival and development of the child"¹⁰⁸.

Article 13 of the CRC emphasizes the child's freedom of expression and take into account all types of information and concepts' acquisition along with commercial speech in relation to legal products; considering the circumstance which underage individuals are illustrated as unable to exercise their complete free choice autonomy which information without restrains can be cut in order to the best interest of the child¹⁰⁹. Furthermore, Article 24(2)(d) of the CRC in additional addresses "appropriate pre-natal and post-natal health care for expectant mother" that might be delivered as well as Article 12 of the CEDAW on health rights of women rights¹¹⁰. becoming once more tobacco industry's claims concerning right of freedom of speech and expression unreasonable due to the mainly right to life's protection of these minority groups.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), also called the Women's Bill of Rights, may be utilized to adhere the State and tobacco corporation responsible for violations of women's rights¹¹¹. In consonance with already mentioned in Article 12 of the CEDAW, it is stretched that "States Parties shall take all appropriate measures to eliminate discrimination against

¹⁰⁷ Idem, Article 6 (1).

¹⁰⁸ Idem, Article 6 (2). Also, it is further to stress a special observation in the Article 24 and its paragraphs which "recognize[s] the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." Idem, Article 24 (1).

¹⁰⁹ Idem, Article 13 (2). Special concern which there is a statement that the right to information "may be subject to certain restrictions" as well as "public health or morals".

¹¹⁰ United Nations Document A/RES/34/180, 18 December 1979, Article 12. "1. States Parties shall 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, including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

¹¹¹ Idem, Article 12 (1).

women in the field of health care”¹¹². Explaining more, the rule denotes in detail the right to adequate nutrition and care in the course of the postnatal period.

Concerning second-hand smoke, this kind of indirect damage from smoking is not merely a danger to both pre- and postnatal health. Frequently, necessities concerning nutrition of both women and children are surrendered due to the environment of the tobacco consumption¹¹³. Men smokers which have the role of a breadwinner could take part of the family budget to spend essential needs such as food, medicine, or education for children. Along these lines, tobacco consumption is a nonstop hazard to the children's and women's right to food, health care, and education. Creating a framework according to the aim of exclusion in all the practices of discrimination, the CEDAW make a fragmentation over the non-natural difference enclosed by the public and the private fields and has the exclusive capability to confront dangers and obstacles to health of women, both within the private field of the home and public places such as work or school¹¹⁴.

The Convention on the Rights of Persons with Disabilities (CRPD), in April 2007, came into operation and accepted in its text that disability is subject of human rights. This approach affords in addition one more implement in our approaches collection to conflict tobacco consumption. Besides, the CRPD addresses the more than one discrimination practices confronted by women with disabilities¹¹⁵ and children with

¹¹² Idem. Article 12. The present article also offers to women the identical right to protection of health and safety in working conditions as well as the protection of the function of reproduction.

¹¹³ Programs for Assessment of Technology in Health (PATH) & Work for a Better Bangladesh, at http://www.wbbtrust.org/mediafile/file/18_T_Tobacco_poverty.pdf (consulted on 5 July 2012). People buy cigarettes instead of buying food for their children.

¹¹⁴ United Nations Document A/RES/34/180, 18 December 1979, Article 2 (e). The international document highlights the importance of the state parties “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.” This is the first time a human rights convention has held private parties accountable under the Convention.

¹¹⁵ United Nations Document A/RES/61/106, 13 December 2006, Article 6. Concerning women with disabilities: “1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. 2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention”.

disabilities¹¹⁶, and in distinct studies ensures women and children complete and equal enjoyment of all human rights and fundamental freedoms.

3.1. Framework Convention on Tobacco Control (FCTC)

Demonstrated that a non-binding regulation concerning tobacco control measures would not produce satisfactory results and that WHO was a more correct forum than the United Nations for the cooperation of a global public health treaty, in May 1999, the Member State of WHO approved a resolution that intensified the velocity of the process for converting and implementing the Organization's first treaty, the WHO Framework Convention on Tobacco Control¹¹⁷. The WHO has, before the adoption of the treaty, never used its constitutional power to support the advance of a compulsory transnational settlement in any worldwide public health area.

In spite of whether the FCTC is configured as a human rights treaty, it is imperative to stress that the convention has implications for human rights dialogue. The Framework Convention on Tobacco Control (FCTC) is a binding treaty which infers significant stipulations and goals in relation to international human rights issues¹¹⁸. In the body of the legal document it is found complementary guidelines for the States parties to take the first steps in standards with equal levelling each other which must implement reduction of the harmful effects of tobacco products¹¹⁹.

¹¹⁶ *Idem*, Article 7, Concerning children with disabilities: “1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. 2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. 3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”.

¹¹⁷ Taylor & Bettcher, SciELO Public Health, at http://www.scielosp.org/scielo.php?pid=S0042-96862000000700010&script=sci_arttext&tlng=en (consulted on 5 July 2012).

¹¹⁸ *Idem*.

¹¹⁹ O'Neill Institute for National and Global Health Law at Georgetown University, Georgetown Law, at http://www.law.georgetown.edu/oneillinstitute/documents/2012_OneillTobaccoLitGuide_ENG.PDF (consulted on 5 July 2012). To date, the Conferences of the Parties have issued interpretative guidelines to several articles of the Framework Convention on Tobacco Control (FCTC). There are specifically full

The convention has already 172 countries which had ratified since January 2011¹²⁰, then, the legal treaty is used by almost 87 per cent of the globe¹²¹. Nonetheless, the FCTC is theoretically not a human rights treaty, consequently, there are other issues related such as environmental threats and, mainly, public health implications¹²². The convention has collided business zones impelling a favourable growth in benefit to tobacco regulation and is a good example of international legal instruments that we can reach transnational problems such as the struggle with the globalized tobacco epidemic¹²³.

With the ratification of the treaty, the State parties recognize that the tobacco contagion is a key point to public health and that the treaty is an essential average for the public's health protection. In other words, the FCTC generates a standard in which State parties need to conclude outlining minimum actions in order to address a tobacco control enforcement¹²⁴.

Examining an international perspective, it may be possible the importance that by ratifying the convention a State visibly and officially accepts the least possible requests for protecting health. As an international settlement, it may be used as a model to estimate whether States satisfy their duties under international human rights law as they link to the right to health. The interesting point is during the practice, the process mentioned above is always occurring.

It is further to stress that the FCTC deposits the onus over States parties to undertake proper actions to protect generations during the present and the future from the overwhelming health, social, environmental, and economic costs of tobacco

guidelines to the Articles 5.3, 8, 9 and 10 and partial guidelines to the Articles 11, 12, 13 and 14. The binding nature of these guidelines is still the subject of debate, and escapes the scope of this article.

¹²⁰ World Health Organization (WHO), at www.who.int/fctc/signatories_parties/en/index.html (consulted on 5 July 2012).

¹²¹ Framework Convention Alliance, at www.fctc.org/index.php?option=com_content&view=article&id=401:updated-status-of-the-who-fctc-ratification-and-accession-by-country-afghanistan-and-cote-divoire&catid=173:general&Itemid=200 (consulted on 5 July 2012).

¹²² Idem.

¹²³ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹²⁴ Idem.

consumption and contact to second-hand smoke¹²⁵. The consequence of these actions are States evolving regulations at the domestic level that employ these basic transnational standard protection and, consequently, protection to the right to health¹²⁶.

The option of employing the FCTC as regulation which may be compulsory and related to domestic spheres is indeterminate. Straight imposition of international tools within domestic spheres is still doubtful in many States¹²⁷. Furthermore, the text of the convention is frequently imprecise and becomes an obstacle to domestic law. Nevertheless, civil society can exercise it to require governments in direction of the action over tobacco control. The FCTC offers an endorsed model of minimum domestic tobacco control policies which affords an association surrounded by the FCTC and human rights law¹²⁸.

Concerning domestic law of the State parties, the implementation of FCTC has moved governments and public health groups to improve the comprehension of the law function that can set in shielding the public's health¹²⁹. Nevertheless, some authors criticize the FCTC in relation to the uncertain situation that the convention is directly legal enforceable in domestic courts. The question starts because of the prominent imprecision of the text which cedes to the State parties' domestic law the liability for a tobacco control becoming the legal text even more ambitious¹³⁰. For instance, the FCTC has instituted a wide-ranging structure with few requirements to fulfil which State parties may advance their tobacco legislation and its application has a margin of appreciation.

With the convention in debt regarding adoptions of better employment tactics,

¹²⁵ WHO Document A56/VR/4, 16 June 2003, Article 3.

¹²⁶ *Idem*.

¹²⁷ Cabrera & Madrazo, *Biblioteca Virtual en Salud México*, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹²⁸ *Idem*.

¹²⁹ O'Neill Institute for National and Global Health Law at Georgetown University, *Georgetown Law*, at http://www.law.georgetown.edu/oneillinstitute/documents/2012_OneillTobaccoLitGuide_ENG.PDF (consulted on 5 July 2012).

¹³⁰ Cabrera & Madrazo, *Biblioteca Virtual en Salud México*, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

it is recommended by the FCTC a subsidiary scheme for evolving the purposes of the settlement. The Article 5(5) requires States Parties to “cooperate as appropriate with competent international and regional intergovernmental organizations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties.”¹³¹. This is a normal provision in most framework conventions because unsuccessful administrations' attempts can set out tobacco control advances in the effect to infringe directed fundamental rights of their populations¹³², and transnational or national human rights organizations might become a part of a dangerous situation by conducting these attempts.

According to the legal interpretation, as the States exist below international human rights law, the FCTC may measure as criteria certain circumstances in which they are satisfying or they are not satisfying duties concerning the right to health. The work of the convention is to set the precise content of the minimal duties of these States on the part of tobacco control. Whether a State party in the FCTC implementation becomes deficient in respect to basic tobacco control measures, it could be configured a violation of its obligations, for instance, under the right to health.

Passing by the adoption of the FCTC, the deals have fortified many State parties for reconsiderations in their domestic law approach concerning tobacco control and this has delivered chances for additional knowledge, organization and consciousness to construct an improved implementation among State parties¹³³.

These agreements are also key points to generate good perspectives giving the chance to intensify the interaction to governments or non-governmental organizations (NGOs) which fluctuate between triumphs and bureaucracies that have preserved a dynamic presence at all the discussing meetings¹³⁴. The NGOs have created a union that is called Framework Convention Alliance (FCA), with more than 180 groups around 70

¹³¹ WHO Document A56/VR/4, 16 June 2003, Article 5.

¹³² Appleberry, 2001, pp. 84-88; Dhooge, 1998. pp. 414-424; Wike, 1996, pp. 351-352. There has been no methodical examination of the practicability of using human rights institutions to discourse concerning between human rights violations and tobacco consumption violations by governments.

¹³³ Hammond & Assunta, 2003, pp. 241-242.

¹³⁴ Idem.

States in the world. These members have organized their interferences with the provision to daily matter backgrounders for FCTC delegates. These interferences have been published in a daily newsletter and have had an informally influence between meetings¹³⁵.

At last, concerning FCTC recommendations, States parties have to assume a range of domestic actions directed to decrease the demand for and the supply of tobacco products within their territories¹³⁶. The countries, actually, receives the encouragement to implement proper value and tax procedures, defend the community from exposure to second-hand smoke, require companies and exporters to divulge true knowledge in relation to the tobacco products' substances, undertake general consciousness campaigns over tobacco control, give the support to tobacco use's stops and appropriate medical and psychological treatments to combat the tobacco dependence, sanction bans over tobacco trade to minors, afford in an economical way workable options to tobacco cultivation and trades, and efficiently regulate packaging, labelling, promotion, sponsorship, illegal trade and advertising in tobacco products¹³⁷.

The formation of constant or essential worldwide criteria is projected to diminish the occurrence among the boundaries such as trafficking and advertising leakages by way of foreign television broadcasts, print media, and the Internet¹³⁸. With additional efforts to safeguard the tobacco control, the companies will not be able to abuse markets where has a predominance of weak legislation or implementation competences.

The treaty has highlighted the significance of the transference of scientific, technical and legal know-how including technology and financial support to developing country administrations and State parties governments in a transitional economy, and the necessity to advance, in an economical way, feasible options to tobacco

¹³⁵ The FCA was established by the U.S.-based Campaign for Tobacco-Free Kids in consultation with Action on Smoking and Health-London, and with co-funding from the American Lung Association.

¹³⁶ Crow, 2004, pp. 4-5.

¹³⁷ WHO Document A56/VR/4, 16 June 2003, Articles 6-17.

¹³⁸ Crow, 2004, pp. 4-5.

production¹³⁹. The financial assistance support during the negotiations became a matter carried with much controversy¹⁴⁰ and continues to be enacted by the Conference of the Parties.

The great system in relation to touch in all the sensible parts regarding tobacco control in the FCTC is a proof to the obstinate struggles in favour to developing country governments to avoid a small portion of developed countries which took the opposition side of the treaty such as United States, Germany, and Japan which from restricted its requirements¹⁴¹. The disagreement of these countries to abundant key requirements, as well as advertising limitations and minimum size requests for caution labels on cigarette packages¹⁴² reproduces a wish to protect the tobacco commerce comforts¹⁴³.

3.2. “Respect, Protect and Fulfil” Structure and FCTC

The “Respect, Protect and Fulfil” framework is a basis used in international documents over human rights implemented by the Committee on Economic, Social and Cultural Rights (CESCR)¹⁴⁴. These three actions are concentrated on the category of

¹³⁹ Hammond & Assunta, 2003, pp. 241-242.

¹⁴⁰ Many developing countries and countries with economies in transition favoured the establishment of a global trust fund, which most developed countries opposed.

¹⁴¹ Hammond & Assunta, 2003, pp. 241-242.

¹⁴² Nullis, Tobacco.Org, at <http://archive.tobacco.org/news/118732.html> (consulted on 5 July 2012); Wolfensberger, Tobacco.Org, at <http://archive.tobacco.org/news/118734.html> (consulted on 5 July). The American mediators recurrently emphasized that they might not approve to the advertising prohibition and cautionary label requests on the grounds which the requests would infringe the doctrines of the free speech alive in the First Amendment to the American Constitution. Even though, it is well recognized that a widespread prohibition on tobacco advertising decreases tobacco consumption far more successfully than advertising limitations do, the FCTC comprises an allowance for nations with such constitutional restraints; WHO Document A56/VR/4, 16 June 2003, Articles 13 (3)-13 (4); Saffer, 2000, pp. 215-236. Condensing observed research from 102 countries proving that a widespread set of tobacco advertising prohibitions may decrease consumption of tobacco, despite the fact a limited set of advertising prohibitions will have least effects.

¹⁴³ British American Tobacco, at http://www.bat.com/oneweb/sites/uk__3mnfen.nsf/0/6d511f5596943d4b80256bf400033148?OpenDocument (consulted on 5 July 2012); Japan Tobacco International, at http://www.jti.com/english/industry_regulation/who.aspx (consulted on 5 July 2012). The tobacco business has often censured the FCTC as an only answer for all the problems into tobacco control which unsuitably infringes the power of sovereign in the States..

¹⁴⁴ For the determinations of associating tobacco control and human rights, one of the most pertinent treaties is the International Covenant on Economic, Social and Cultural Rights, whose treaty monitoring body

State obligations which States have obligations to respect, to protect and to fulfil all human rights that may apply over civil and political rights or economic, social and cultural rights¹⁴⁵.

The obligation to respect involves States to avoid actively stimulating the use of tobacco products¹⁴⁶. The idea is that the State both direct way or indirect way have to avoid violations of human rights or interventions with their recognition. States have to not indulge in developing regulations, policies and laws which harmfully impact on human rights. In addition, States have to avoid undertaking in any behaviour which damagingly harms human rights¹⁴⁷.

Subsequent, the obligation to protect is that governments have a legal duty to control the tobacco industry preventing and avoiding human rights violations such as the right to health and other human rights¹⁴⁸. It is indispensable an increase and intense human rights approach found in this duty to a better tobacco control. The idea of protection demands States to proceed with standards to hold off third parties' interference with human rights¹⁴⁹.

Lastly, the obligation to fulfil requires governments to put in force ample tobacco control legislation which certifies human rights such as the right to health.

is the Committee on Economic, Social and Cultural Rights (CESCR), also called "Committee". CESCR has obviously detailed that tobacco control measures are an essential element of the right to health's safeguard, delivering precise endorsements to tobacco control, through the country reporting instrument. Particularly, in the 2009 periodic review of Brazil, CESCR specifically welcomed the Brazilian government's ratification of the FCTC. The Committee makes a specific link between the right to health's recognition and ratification of the FCTC. The specificity of the recommendation highlights the circumstance that Committee members used the convention as an average to reach state acquiescence with its duties preserved in the right to health. The Committee makes an exact linking between recognition of the right to health and ratification of the FCTC. The specificity of the recommendation highlights the fact that Committee members used the convention as a standard to measure state compliance with its obligations preserved in the right to health. In Latin America, domestic courts in the member states, for instance in particular, high courts, such as Supreme Courts had considered ending observations and the reports from treaty-monitoring bodies when distributing their decisions.

¹⁴⁵ Koch, 2005, pp. 81-103.

¹⁴⁶ WHO Document A56/VR/4, 16 June 2003, Article 5 (3).

¹⁴⁷ Cabrera & Gostin, 2011, pp. 287-289.

¹⁴⁸ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%202%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹⁴⁹ Cabrera & Gostin, 2011, pp. 289-290.

Moreover, after putting the legislation in force, governments have to constitute a basic structure to implement such legislation producing the expected result which contain mechanisms of coercion and control¹⁵⁰.

It is further to stress that this duty requires governments to embrace all applicable administrative, budgetary, legislative and other measures necessary for the human rights comprehension¹⁵¹.

The idea is that this State obligation helps to produce circumstances for individuals to enjoy human rights¹⁵². Furthermore, it has noticed that human rights integrate a collection of essential rights to life, liberty and equality of opportunity demanding to governments that provide satisfactory resources, contributory to the health and well-being of the persons.

This threefold typology was created by Asbjørn Eide's scholar¹⁵³ which have nowadays added more than these three levels of State obligation putting, also, the obligation to facilitate that is understood as well to the obligation to assist, the obligation to promote, the obligation to provide¹⁵⁴ and the obligation to ensure, where the last one is also stressed by Van Hoof¹⁵⁵. Furthermore, Steiner and Alston have also integrated the group of authors which adopt different level of classifications¹⁵⁶.

It is important to mention that before this threefold classification of human rights obligations, a classification over the nature of the right¹⁵⁷. Actually, it is a twofold characterisation¹⁵⁸ which were by tradition classified into two broad categories: negative and positive rights.

¹⁵⁰ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹⁵¹ Cabrera & Gostin, 2011, pp. 289-290.

¹⁵² Jacobson & Soliman, 2002, pp. 705-715.

¹⁵³ Eide et al, 2001, pp. 29-54.

¹⁵⁴ Idem.

¹⁵⁵ Sepúlveda, 2003, pp. 158-161.

¹⁵⁶ Idem.

¹⁵⁷ Cabrera & Gostin, 2011, p. 289-290.

¹⁵⁸ Koch, 2005, pp. 81-103.

According to this classification, positive rights were understood as economic, social and cultural rights due to require States to participate in favour to positive actions, and develop positive measures to abide with human rights duties, containing the spending of resources, whereas negative rights were understood as civil and political rights because of the impressive duties on States to hold off certain practice.

In agreement with this twofold division, economic, social and cultural rights were noted as positive, imprecise and resource-demanding rights, capable of advancing cognizance¹⁵⁹; for instance, they may be thought through ambitioned aims and not concrete, enforceable rights¹⁶⁰. In an opposed way, civil and political rights had understood as negative, precise and cost-free, capable of immediate effect¹⁶¹.

On the other hand, the ambiguity of these polarized rights does not support below precise analysis. Habitually discerned as exigent only avoidance from the State, some civil and political rights feel the necessity of positive actions as well. For instance, we can demonstrate the right to a fair trial which is linked with the right to due process and natural justice that does not only needs States to avoid human rights violations¹⁶².

Even though, the right to a fair trial also needs States to enshrine supplies to create an effective judicial system which may ensure a fair trial, with the addition of the right to counsel. Other examples that can be conform with rights usually assumed as positive rights are the right to education that requires States to ensure the access for minorities without discrimination with the public education system¹⁶³.

¹⁵⁹ Koch, 2005, p. 82.

¹⁶⁰ Idem.

¹⁶¹ Idem.

¹⁶² Cabrera & Gostin, 2011, p. 289-290.

¹⁶³ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

4. Regional Human Rights Documents and Tobacco Control

It can also be used as a tool various regional treaties which enshrine human rights approaches such as the right to health which has the same aim of the mentioned above that is to combat the tobacco control. Giving an illustration, the African Charter that came into operation in 1983 employs special importance concerning rights and duties of the community with a special attention for issues such as the family, society, and nation. The Charter holds economic, social, and cultural rights of the third generation which are comprised the right to a healthy environment. Article 16 (1) of the treaty highlights that “every individual shall have the right to enjoy the best attainable State of physical and mental health”¹⁶⁴. Besides, Article 18 identifies the accountability of the State to protect the family and pay attention of its “physical health and moral”¹⁶⁵. Moreover, the African Charter embraces States liable to safeguard contrary to transnational monopolies which involve in “foreign economic exploitation”¹⁶⁶.

New progresses demonstrate a growing attention in relation to the position of women's rights in Africa. A strong happening is the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁶⁷ which was adopted in 2003 that sets up the common welfare of women which is liable over rights to equality, health, education, and political participation in economic, electoral, and customary institutions¹⁶⁸.

The American Declaration of the Rights and Duties of Man, also called American Declaration, recognized by the Organization of American States (OAS) ensures urban settings which suggest opportunities for a healthful, productive, and full life. Article 11 sets up that every individual has the right to the protection of his health through hygienic and common procedures with regard to food, clothing, housing and

¹⁶⁴ OAU Document CAB/LEG/67/3, 27 June 1981, Article 16.

¹⁶⁵ *Idem*, Article 18.

¹⁶⁶ *Idem*, Article 21.

¹⁶⁷ Organization of African Unity (OAU), at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> (consulted on 5 July 2012).

¹⁶⁸ *Idem*.

medical care, to the level acceptable by public and community resources¹⁶⁹. The Additional Protocol of the American Convention on Human Rights improves the objectives of the American Declaration by offering that the right to health comprises “the enjoyment of the highest level of physical, mental and social well-being”¹⁷⁰.

Even though, there is a lack concerning international documents in the Asian continent which it does not ensure with alike human rights settlements or instruments. Nevertheless, the Declaration of the Basic Duties of Association of Southeast Asian Nations (ASEAN) Peoples and Governments that was adopted in 1983 has some protections in relation to the right to life and health-related rights to Asians¹⁷¹. The States Parties in this regional treaty as Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalam.

Regarding the European area, adopted in 1950, the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms preserves the right to life in Article 2(1)¹⁷². Another document adopted in 1961, the European Social Charter, in Article 11, addresses the right to protection of health forcing obligations upon the State parties to the decision to “take appropriate measures designed inter alia: ... to remove as far as possible the causes of ill-health”¹⁷³. The determinations to limit the advertising and use of tobacco products from the European Union in its zone have been used as is highlighted in the Directives¹⁷⁴. Consequently, Member States are

¹⁶⁹ OAS Document OEA/Ser.L.V/II.82, 30 April 1948, Article 11.

¹⁷⁰ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 10(1), opened for signature Nov. 17, 1988, O.A.S. Treaty Series 69, reprinted in 28 I.L.M. 156 (entered into force Nov. 16, 1999). The Inter-American system for protecting human rights has three distinct legal sources: (1) the Charter of the OAS, (2) the American Declaration, and (3) the American Convention on Human Rights.

¹⁷¹ Declaration of the Basic Duties of Association of Southeast Asian Nations [ASEAN] Peoples and Governments, Dec. 9, 1983, in 1 Asia-Pacific Human Rights Documents and Resources 170 (Fernand de Varennes ed., 1998).

¹⁷² European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art 2(1), opened for signature Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention] (entered into force Sept. 3, 1953).

¹⁷³ European Social Charter art. 11, Oct. 18, 1961, Europ. T.S. No. 35, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965).

¹⁷⁴ European Law, Council Directive 89/552/EEC, O.J. (L 298) 23, 1989. The European Union, in 1989, issued Directive 89/552/EEC, that delivered a legal framework for television broadcasting in the domestic market. In the Article 13 of the legal document, it was obliged Member States to prohibit all the forms of tobacco advertising on television. Therefore, EU Member States which had not yet banned this kind of

progressively endorsing domestic legislation which achieves the obligation concerning what is exposed in each Directive.

The European Court of Human Rights (ECHR) has the authorization to extract manifestations over petitions from any person, NGO, or group requesting to act symbolizing in favour to a victim of a violation by a State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European HR Convention) of any of the rights defended by that mechanism¹⁷⁵. The ECHR has delivered decisions answering to singular requests that claimed in relation to right to life's violations as well as respect for private and family life and freedom to receive information founded over numerous characteristics of States Parties' tobacco control regulation.

Even though, the European HR Convention does not enclose a right to a unpolluted environment or right to health. Both the right to life, expressed in Article 2; and the right to respect private life and home, expressed in Article 8; have been used in the allegations to execute positive obligations on the State¹⁷⁶. For instance, when it was alleged Article 2 for a protection of the right to life in the case-law *McCann v. U.K.* the ECHR, the Court imposed a duty on the State not only to persist the life protection, however, to take applicable and correct measures to defend life as well¹⁷⁷. The ECHR

television advertising concerning cigarettes were obliged to do then; European Law, Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 Amending Council Directive 89/552/EEC, O.J. (L 202) 60, 1997. The European Parliament and Council, in 1997, modified the Directive 89/552/EEC to “clarify certain definitions or obligations.”; European Law, Directive 98/43/EC, O.J. (L 213) 9, 1998; Case C-376/98, *F.R.G. v. European Parliament and Council of the European Union*, 2000 E.C.R. I-8419. Council Directive 98/43/EC, in 1998, further prolonged duties of Member States to prohibit tobacco advertising. This Directive obliged Member States to forbid all tobacco advertising practices, including tobacco corporation brand name sponsorship of public events within their state. Planned as an ample advertising prohibition, the Directive was intended to ban all forms of direct and indirect tobacco advertising, sponsorship, and promotion. Nevertheless, the power of the Directive was tested and, in 2000, it was cancelled by the European Court of Justice (ECJ); European Law, Council Directive 2003/33/EC, O.J. (L 152) 16, 2003. The European Parliament and European Council approved Directive 2003/33/EC, in 2003. The legislation of the Member States to be approached is intended to safeguard public health by regulating the advertising of tobacco, an addictive product accountable for over half a million deaths in the Community yearly, thus escaping a situation in which young people initiate tobacco consumption at an early age as a result of tobacco advertising and become addicted.

¹⁷⁵ European Convention, *supra* note 107, art. 34.

¹⁷⁶ *Idem*, Articles 2 and 8.

¹⁷⁷ Discussed in the case-law *McCann v. U.K.*, App. No. 18984/91, 21 Eur. Ct. H.R. Rep. 97 (1995).

has understood Article 8 to shelter the rights of individuals independently and directly influenced by environmental pollution¹⁷⁸.

There is a judgement concerning *Fadeyeva v. Russia* which recommends that the State must take effective actions to safeguard individuals from the damaging complications of even a private party¹⁷⁹. Also, the case-law *Lopez Ostra v. Spain*¹⁸⁰, the Court held that the positive obligations enacted over the State has the meaning of a respect for private life which can comprise the implementation of actions draught to safe for private life respect even in the relation of individuals' circle surrounded by themselves. It is a significant and drastic comprehension of the decision and spreads the accountability of the State to control the behaviour enclosed by private parties in situations in which the State could prudently be likely to act.

Simultaneously, tobacco consumers can allege that Article 8 safeguards their right to smoke in the privacy of their homes. A reflection of the proportionality of the intervention with rights of smokers expressed by Article 8 calls for indicated concerns of the exposure dangers to second-hand smoke so as to make equivalent the rights of both smoker consumers and non-smoker consumers in the perspective of Article 8. One more extent to reflect is that the ECHR criteria offer a base of safeguard, not a top limit protection, and States may address in advance than what the European HR Convention wants delivered which it does so in a perspective that is not unable to get along with other rights in the treaty.

In 1998, a judgement in the European Commission on Human Rights known as *Wockel v. Germany*¹⁸¹, had a complaint from a non-smoker which the regulation in Germany failed to afford non-smokers effectively protected; and as a result, under the applicable requirements of the European HR Convention, the German State must

¹⁷⁸ Discussed in the case-laws *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28, ¶ 96 (2003) and also *Fadeyeva v. Russia*, App. No. 55723/00, ¶¶ 68-70 (2005), at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (consulted on 5 July 2012).

¹⁷⁹ *Idem*.

¹⁸⁰ Discussed in the case-law *Lopez Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277, ¶51 (1995).

¹⁸¹ Discussed in the case-law *Wockel v. Germany*, App. No. 32165/96, 25 Eur. H.R. Rep. 156 (1998) (Commission Report), quoted in 1 Health Bill, 2005, H.C. Bill [69] (U.K.), at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/96/9604.htm> (consulted on 5 July 2012).

promulgate regulations banning tobacco consumption in public in order to safeguard non-smoker consumers. The Commission in the case-law established that bearing in mind the challenging concerns of the claimant as a non-smoker and of the concerns of other persons to endure smoking and the margin of appreciation left to the German authorities, the non-attendance of a general ban over advertising of tobacco products and over smoking does not quantify to a failure concerning the German State's measures to guarantee the applicant's rights expressed by Article 2 and 8 of the Convention¹⁸².

It is important to mention that Wockel represents the position of the Commission under the European HR Convention, the new development of non-smoking standards in Ireland, Norway, Sweden, Italy, Great Britain, and France proposes that whether the example had ascended today, the consequence could well have been diverse. To be sure, the adhesion of Germany and of the European Community to the Framework Convention on Tobacco Control, which requires Member States to assume actions “providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places”¹⁸³, in addition to the Guidelines on Protection from Exposure to Tobacco Smoke, as go into detail by the second session of the Conference of the Parties in June and July of 2007¹⁸⁴, explain that “protection” in this setting requires widespread ban of tobacco consumption in the pertinent spaces. This practically without doubt proposes Wockel with regard to its exact details.

¹⁸² *Idem*. This resolution of the European Commission on Human Rights offers control as regards the scope of States Parties' promises to defend non-consumers from the dangers of second-hand smoke exposure. Even though, the European Commission stated unacceptable a demand of German citizen for an order requiring the German legislature to endorse more far-reaching bans on tobacco consumption in public compliant with Articles 2 and 8 of the European Convention, the Commission noted that this decision rested on the circumstance that the German government had already assumed a public information campaign over the health risks of tobacco consumption, enforced limits on tobacco advertising, and forbidden smoking in certain public spaces. This decision endorses that Articles 2 and 8 of the European Convention execute convinced positive obligations on States Parties to safeguard non-smokers' rights through public education and legislation.

¹⁸³ WHO Document A56/VR/4, 16 June 2003, Article 8 (2).

¹⁸⁴ WHO Document A/FCTC/COP/2/DIV/9, 20 September 2007, paras. 15-22.

5. Human Rights Violations and Tobacco Control

The link enclosed by human rights and tobacco control is something that there is no discussion and may be discovered for many manners such as reduction actions concerning a stronger health at personal and population levels¹⁸⁵. On or to the contrary, tobacco regulation scarcity concerning subjects as regulation of consumption, distribution, sale and advertising products might present serious human rights violations such as right to health and right to information¹⁸⁶.

By highlighting the right to health, it is significant to detail a main position and whatever is the subject concerning tobacco consumption, the right to health needs to be always moving forward and firstly evolved. In international human rights law, the right to health is described the right of every person to the enjoyment of the uppermost possible average of physical and mental health. The purport of this right plus the detailed duties incorporated inside are elaborated by the Committee on Economic, Social and Cultural Rights in its General Comment 14¹⁸⁷.

The right to health may offer important assistance to systems of tobacco control essentially due to the duty of the State which has to respect the right to health by refraining from dissemination of smoking around the world. This duty is destined to avoid States from becoming a tobacco industry's tool to endorse smoking. Consequently, the States parties to the FCTC enforce on top of themselves a duty to preclude themselves from neglecting to respect the right to health of its citizens¹⁸⁸. It can be a good example the Mexico's ignominious "Smoker's Paradise" media campaign,

¹⁸⁵ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹⁸⁶ *Idem*.

¹⁸⁷ Moreover, in tobacco control, the obligation to promote plays a central role. Such obligation requires States to set up the circumstances that maximize the possibility of persons to gain access to the good or service in question. For instance, tax subsidies for first time family owners (property); ad campaigns promoting healthy eating habits (right to health); free wireless internet access (right to information), etc.

¹⁸⁸ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

where the State tragically fell through¹⁸⁹. It is further to stress that a State proprietorship of a tobacco industry may also be problematic from the viewpoint which States generate a natural conflict of interest among their duties of human rights and other roles of the government¹⁹⁰. Briefly, States must refrain from entering into conflict with activities which in a straight way overstep the right to health by motivating the consumption of tobacco.

Concerning the right to health protection, the State has mandatorily to protect individuals from the tobacco hazard which requires to control private entities whether their approaches overstep human rights¹⁹¹. It is one of the main insertions of the policies spread out in the FCTC the protection of the right to health from third parties such as to protect from exposure to tobacco smoke in public areas¹⁹². By limiting tobacco consumption in public spaces, for instance, workplaces and public transportation, it is a duty to the State to protect specially smokers and non-smokers equally from the damage which second-hand smoke indicates.

Regulations, tests and measures of the contents and emissions of tobacco products¹⁹³ are more than that a policy which defends smokers from the intensification and use of tobacco products which tobacco companies have long added in the trade. The

¹⁸⁹ In 2004, just as Mexico's Senate has ratified the FCTC, Mexico's Ministry of Health contributed in a pact with both Phillip Morris and British American Tobacco where it decided not to strengthen tobacco regulation or increase taxes on tobacco in argument for a stable monetary "contribution" for every packet vended. For the period the agreement of the Ministry of Health, it was undertaking a "ending campaign" named "*El Paraiso de los Fumadores*" where it showed several images the tobacco business was forbidden by law from illustrating. For instance, it showed people smoking while doing sports, pregnant women smoking, parents smoking around their children etc. All independent specialists referred by the authors who have observed the ad campaign decided which rather than discouraging people from smoking, it does quite the opposite.

¹⁹⁰ Is it defensible that the State profit from the sale of a damaging product to its citizens? The answer, obviously, is negative. Even though it is not understood as the State should under no condition become part in the cigarette sales. State ownership may itself be a practice of regulation: State regulation of substance markets controls the market and saves the offer side of the sameness from trying to exhaust the possibilities of sales and profits. Such an instrument is realized in the articles 23, 27 and 28 of the UN's Single Convention on Narcotic Drugs of 1961 as a method of making sure the market for unsafe substances is preserved under control such as legal opium, coca and marihuana.

¹⁹¹ Cabrera & Madrazo, *Biblioteca Virtual en Salud México*, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%202%20vol%2052/22-human.pdf (consulted on 5 July 2012).

¹⁹² WHO Document A56/VR/4, 16 June 2003, Article 8.

¹⁹³ *Idem*, Article 9.

text of the Article 10 which stress that the duty to “adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce”¹⁹⁴ is including a protecting extent as well.

Safeguarding that “tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions”¹⁹⁵ similarly are becoming the measure of a State achievement which protects rights of individuals to health and information. Outstandingly, forbidding tobacco advertising, promotion and sponsorship is a essential strategy to protect in an useful way the right to health and likewise the right to information from problems produced by companies of tobacco¹⁹⁶.

In other words, we might see these actions at the moment that the State manage measures such as smoking prohibitions in public spaces which safeguard from instinctive exposure to second-hand smoke the health of people; or prohibitions concerning the advertising and promotion of tobacco products, which safeguard from marketing which will probable growth the spread of the tobacco contagion existing or possible consumers¹⁹⁷. At last in this trilogy, the State has also to fulfil the right to health by applying every pertinent procedures including law regulations and economic distributions which will become conducive in the sense to make operative rules regarding tobacco control¹⁹⁸.

By emphasizing these tasks, it is necessary to remind that obligations which are included in other types of structure, for instance, obligations to facilitate, provide, or promote, it could found measures such as facilitating access to tobacco consumers in programs which give the support of the tobacco use’s interruption (obligation to facilitate); preventing using campaigns which gives the information both special groups

¹⁹⁴ Idem, Article 10.

¹⁹⁵ Idem, Article 11 (1).

¹⁹⁶ Idem, Article 13.

¹⁹⁷ Idem.

¹⁹⁸ Idem.

directed by the tobacco companies and the common population concerning the hazards which correlate with smoking (obligation to promote); and providing health services for individuals disturbed by sickness originating from consumption of tobacco (obligation to provide)¹⁹⁹.

It is approached in the articles of the convention good examples which has significance to the advancement of the right health. For instance, warning labels²⁰⁰ certify information at the same time that they stimulate the right to health. It is also found two examples, as mentioned above, publicity to the right to health in educational programs which contain health hazards and addictive nature of tobacco²⁰¹ by satisfying the rights to education and information; and policies which intensifies costs of selling and enforce taxes on tobacco products²⁰², that additionally help the advancement to the right to health. Over and done with price and taxes regulations, the governments may promote health by disheartening beginnings of tobacco consumption and providing motivations for cessation²⁰³.

We could also find other important human rights which are connected with tobacco control. For instance, it is achieved the right to information, the right to education, and, depending of the perspective, rights that are related with consumer protection. These examples of rights are interconnected with the right to health in some extent or they transmit their own importance in the human rights scope. By way of illustration, at the moment that is fulfilled the right to information is also reached both the promotion and the protection of the right to health. The act of coverage to the population giving sufficient information concerning the effects of tobacco demonstrate from States a protection misleading advertising's risks of tobacco products²⁰⁴.

By touching consumers' rights, they also have a special role. Conditions which tobacco companies abundantly reveal to the State the components used to the end

¹⁹⁹ Idem.

²⁰⁰ Idem, Article 11 (1) (b).

²⁰¹ Idem, Article 12 (a).

²⁰² Idem, Article 6.

²⁰³ Idem, Article 14 (2).

²⁰⁴ Idem.

product is a manner to safeguard that there is some sanitary regulation on unsafe product in the market. It can also be comprehended that warning tags are not merely an assurance of the right to information. It is further to highlight that these labels have a specific call for the consumers to figure out which probable dangerous components of the product they are consuming. Some scholars believe that consumer rights do not belong the roll of fundamental rights.

At last, health education is reflected as a significant element of the right to health at the same importance of the other rights mentioned above. Nonetheless, a factor to consider is that the health education is additionally related in a distinct right, the right to education. Health subjects associated to smoking in school programmes in a fractional way warrant the right to education and foment the right to health. On the condition that specific rights become validated State by State, other connections between rights which support tobacco control strategies should be inspected in closer aspect in the respective State. The above explanation is non-comprehensive and helps to exemplify the possibility of utilizing a structure of human rights which is incorporated tobacco control measures as a abridgement of the best pertinent links²⁰⁵.

²⁰⁵ Cabrera & Madrazo, Biblioteca Virtual en Salud México, at http://bvs.insp.mx/rsp/_files/File/2010/suplemento%20%20vol%2052/22-human.pdf (consulted on 5 July 2012).

6. Paternalism²⁰⁶ and Tobacco Control

I have highlighted in some chapters above concerning the struggle between the freedom to smoke and the importance of a policy regarding tobacco control informing the prejudices that the smoking habit does. It happens that for some persons the right to access of information is not the big deal that does which they start the tobacco consumption. These people who completely realize the concomitant dangers of a tobacco consumption still smoke and the reasons are varied. Generally, the useful speech is that they believe that the life is too short and the great pleasure which the smoking brings a risk that can be accepted giving less significance to the health concerns.

Nevertheless, it is also intrinsic to remember the role of the State as an authority carried with sovereignty and, therefore, there are reasonable motives for the State to adopt paternalist measures. We can use the public concerns, mainly, with children and young adults, and the negative consequences of tobacco consumption even for situations that is configured a caution by second-hand smoke to justify why it is necessary for the State to become a guide dog for the fatal blindness of the society which consume tobacco. For instance, lost productivity, medical costs, and family suffering after premature death can be classic reasons which excuse the need of a public intervention.

When it is related products which may produce possibilities of dependence or undesirable bad costs with the health, some argue that government policies considered to conflict those problems which grapple with the risk of paternalism²⁰⁷. The motive is

²⁰⁶ Black's Law Dictionary defines paternalism as a "government's policy or practice of taking responsibility for the individual affairs of its citizens, [especially] by supplying their needs or regulating their conduct in a heavy-handed manner".

²⁰⁷ Weise, USA Today, at http://www.usatoday.com/printedition/life/20081022/d_energy_drinks22.art.htm (consulted on 5 July 2012). "The drinks are advertised as able to increase endurance, reaction time and concentration, with names such as Full Throttle, Amp Energy and No Fear"; Nas, 1996, pp. 1-2. Debating analyses of cost-benefit concerning consumers accomplish every day; Jordana & Levi-Faur, 2004, p.189. Concluding that consumers are capable to their valuation of a product and whether to buy it; Rizzo & Whitman, 2009, pp. 689-91. Offering policy advices on the subject of why consumers are influenced by regulations of the government; Soderlind, 2001, p. 245. On condition that give a provision of an economic and marketing perspective to government regulation; Dworkin, The Stanford Encyclopedia of Philosophy, at

simple. For instance, in United States, consumers use the excuse that they are free to choose whatever is the product that they want and a paternalistic regulations would infringe this essential right independent whether the products are dangerous being free to make their own mistakes²⁰⁸.

On the other hand, it is incontestable that a government that has a standard carried with paternalistic control is not revolutionizing anything at the hand of the paternalism is a principle which cross law regulations from time to time²⁰⁹. What is counting in my concern is not the differentiation between “soft paternalism” and “hard paternalism”, the main problem would occur if the former shift drastically to the latter²¹⁰.

A theoretical change of soft and hard paternalism doctrines formed nowadays the idea called “new paternalism”²¹¹. Supporters of the new theory belief that the new

<http://plato.stanford.edu/entries/paternalism/> (consulted on 5 July 2012). Outlining paternalistic regulation; Glaeser, 2006, p.133. Providing an impression of regulation philosophy; Jolls & Sunstein, 2006, pp. 200-201. Arguing the fluctuating gradations of paternalistic regulation; McCann, 2004, pp. 1175-78. Explanation concerning the choice of the consumer’s theory in relation to food purchases; Basic Economics, at <http://www.basiceconomics.info/theory-of-consumer-choice.php> (consulted on 5 July 2012). Clarifying that consumers connect budget restrictions and preferences when selecting determined products.

²⁰⁸ Idem.

²⁰⁹ Rizzo & Whitman, 2009, p. 685. In accordance with the meaning of the Stanford Encyclopedia of Philosophy, “paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm”. Dworkin, The Stanford Encyclopedia of Philosophy, at <http://plato.stanford.edu/entries/paternalism/> (consulted on 5 July 2012); Glaeser, 2006, p. 133. Giving a general idea of hard and soft paternalism.

²¹⁰ Rizzo & Whitman, 2009, p. 688; Orbach, 2009, pp. 569-570. Discussing “new paternalism” and objections to this ideology when it is articulated in contrast to his theory of new paternalism which “Rizzo and Whitman focus on the slippery-slope criticism against regulation and specifically the argument that soft paternalism may lead to hard paternalism, or in their words: ‘moderation is not sustainable (...) slippage is most likely’”.

²¹¹ Rizzo & Whitman, 2009, p. 686. “The new paternalism is supported by a growing body of research in behavioral economics showing that individuals are not fully ‘rational,’ as economists understand that term, but instead are subject to a variety of cognitive errors and biases”; Orbach, 2009, pp. 569-571. On the other hand, “while Rizzo and Whitman raise serious valid concerns about potential sliding on slippery slopes, they do not examine actual changes in ideological hard paternalism with the rise of soft paternalism. Ideological hard paternalism has always been around and probably will never disappear”. Controversial illustrations of hard paternalism comprise: bans on sodomy, restrictions on same-sex intimate relationships, bans on abortions, bans on same-sex marriage, prohibitions against teaching evolution in public schools, and criminalization of fornication. As a case in point, in United States, some of these practices of hard paternalism were already debased on account of courts held them unconstitutional. Others are still in effect at least in some states. There is no theoretical connection between soft paternalism that proposes to advance singular decision-making and ideological hard

paternalism “distinguish their views from hard paternalism by emphasizing the moderate character of their proposals.”²¹² By explaining more, the recent ideology offers in the abstract a conventional model potentially appropriate to tobacco control, an important development regarding public health and wellbeing perhaps made over and done with a limited and straightforward intrusion from government which could not restrict by far freedom or independence of the State²¹³.

Teachers as Mario Rizzo and Douglas Whitman have highlighted severe oppositions to the new paternalism’s methodology which “claims that careful policy interventions can help people make better decisions.”²¹⁴ The authors have dedicated to criticize over the danger due to the possibility of a State with to get an abrupt overturn that soft paternalism may go before hard paternalism in which “moderation is not sustainable, slippage is most likely”²¹⁵.

By checking the history, it is found cases that have occurred a slippage from soft to hard paternalism. The Pure Food and Drug Act of 1906²¹⁶, an American regulation, presented a combination of regulative improvements which incorporated the two types of paternalism mentioned above. The directives barred the domestic trade in any article of adulterated or poisonous food or drugs²¹⁷, and the manufacture of such substances in the District of Columbia and the zones related²¹⁸.

Also, it was introduced soft paternalism by forbidding misbranding of any article of food or drugs²¹⁹, demanding producers to mention “on the label of the quantity

paternalism. Nevertheless, the governing political trend in the new regulatory era gives the impression of being unfriendly towards ideological hard paternalism. It is consequently vague that the number of prohibitions, mandatory requirements, and other forms of hard paternalism is probable to growth.

²¹² Rizzo & Whitman, 2009, p. 687; Jolls & Sunstein, 2006, pp. 200-201. Regarding the theoretical variation of soft and hard paternalism “Christine Jolls and Cass Sunstein frequently refer to their proposals for debasing behaviour through law as a middle ground between laissez-faire and more heavy-handed paternalism, one that is a less intrusive, more direct, and more democratic response to the problem of bounded rationality”.

²¹³ Rizzo & Whitman, 2009, p. 687. Explaining the chief purpose of the new paternalism ideology.

²¹⁴ *Idem*, p. 685.

²¹⁵ *Idem*, p. 688.

²¹⁶ American Law, Pub. L. No. 59-384, 34 Stat. 768 (1906).

²¹⁷ *Idem*, para. 2.

²¹⁸ *Idem*, para. 1; Hutt & Hutt II, 1984, pp. 35-47.

²¹⁹ American Law, Pub. L. No. 59-384, paras. 1-2.

or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.”²²⁰

An instance is what had occurred in 1914 that the soft paternalism slipped a bit with a legal document called Harrison Act²²¹, which executed enrolments and recording conditions concerning the manufacture and trade of opium and cocaine. In 1938, another example related have emerged an inevitable slippage where with dubious expert, the FDA understood the 1938 Food, Drug, and Cosmetic Act²²² to permit it to require drug prescriptions²²³.

Besides, in 1951, the American Congress provided its permission to this understanding and change of mind²²⁴. Some consider that the bans in contrariety to drugs are generally unwelcome²²⁵. Peltzman, an important teacher, elucidate the application of prescription exclusively, regulations did not considerably recover the health of drug users²²⁶. It can better be that the United States may and should develop its drug policies, however, it newly keeps on extremely doubtful if all hard paternalism’s methods in this dominion are rejected.

Placed basically, the unexpected shift between these two concepts can signify a monitoring progress due to prohibitions and obligatory prerequisites, or professed “hard paternalism,” can be socially desirable. A positive and comparative relation of accessible regulatory bases, at the same time with the social expenditures of deficiency of rules, is obligatory so as to regulate if some practice of “hard paternalism” is essential.

Other authors are concerned in relation the transitions of the paternalist concepts create the impression to be moulded by their general mind-set of government

²²⁰ *Idem*, para. 8.

²²¹ American Law, 38 Stat. 785 (1914).

²²² American Law, Pub. L. No. 75-717, 52 Stat. 1040 (1938).

²²³ American Law, 3 Fed. Reg. 3168 (Dec. 28, 1938).

²²⁴ American Law, Pub. L. No. 82-215, 65 Stat. 648 (1951); Peltzman, 1987, p. 207; Temin, 1979, p. 91.

²²⁵ Miron & Zwiebel, 1995, p. 175.

²²⁶ Peltzman, 1987, p. 207; Temin, 1979, p. 91.

competency²²⁷. In other hand, an article from a Rebecca Bratspies gives to us the support of the opposite side bringing certain structure for positivity²²⁸. The author express that the inevitable indecision under which regulatory agencies operate consumes public trust. She spreads out principles of administration which can put in order the doubt and build credibility.

Concerning consumption, we already know that the decisions from a custom are essentially personal. Adversaries of sin taxes contend that each person might have the autonomy to decide if the benefits the consumer comes from the utilization of a product which goes beyond the harmful health consequences due to the product. In other words, government imposition into this decision-making procedure, over and done with the obligation of disproportionate taxes over the product, amounts to an undesirable paternalism which disrespects over personal freedoms.

During the 1980's, the antismoking campaign was at least complex by an opposing image of smoking as an way to exercise the personal freedom, not to become restricted by government²²⁹. This anti-paternalism fashioned unpromising coalitions such as evaluation calls for drastic restraints over tobacco advertising, various civil rights supporters combined forces with companies to protect the right of the smoker to be allowed from extreme government interference²³⁰.

However, it is also fundamental to highpoint actual changes in conceptual hard paternalism with the rise of soft paternalism. The first concept mentioned has continually been surrounding and in all likelihood will not in the least pass out of sight. For instance, bans on sodomy²³¹, restrictions on same-sex intimate relationships²³², bans

²²⁷ Rizzo & Whitman, Brigham Young Law Review, at <http://lawreview.byu.edu/archives/2009/4/4Rizzo.FIN.pdf> (consulted on 5 July 2012).

²²⁸ Bratspies, 2009, p. 575.

²²⁹ Kyle & Hansell, California Society of Addiction Medicine, at <http://www.csam-asam.org/sites/default/files/pdf/misc/NationalAssociationofCounties.pdf> (consulted on 5 July 2012). The results are from a survey given to 500 county law enforcement officials in forty-five states.

²³⁰ Hilt, 1993, p. A12. Observing the “extent to which anti-paternalism suffuses popular and elite values” has affected public response to tobacco as a health threat).

²³¹ American Law, Ala. Code § 13A-6-60, 65. The regulation defines “deviate sexual intercourse” as “any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another” and banning such sexual misconduct; American Law, Ga. Code

on abortions, bans on same-sex marriage, prohibitions against teaching evolution in public schools²³³, and criminalization of fornication²³⁴ can be controversial examples which is included the significance of the theory.

Of course that we could find some States with a hard paternalism approach that are still in influence. However, an improvement is happening. Certain judgements already have held the unconstitutionality of some hard paternalism's practices that could not be used. So, the excuse to limit the hard paternalism cannot be logic since wrong mistakes of the past have already abandoned.

There is no theoretical connection enclosed by soft paternalism which aspires to enhance distinct decision-making and conceptual hard paternalism. It gives the impression in being aggressive on the way of the ideological hard paternalism even that the governing political incline to the new regulatory era²³⁵. It is consequently uncertain that the quantity of prohibitions, compulsory requests, and additional hard paternalism's practices are expected to growth.

Ann. § 16-6-2, 2009. "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another".

²³² American Law, Mich. Comp. Laws Ann. §750.338 (2004). "Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony(...)" ; American Law, Tex. Penal Code Ann. § 21.06(a) (2003). "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.". The prohibition of Texas was affirmed unconstitutional in the case-law Lawrence v. Texas, 539 U.S. 558 (2003).

²³³ American Law, Tennessee Anti-Evolution Act of 1925. "It shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals"; Scopes v. State, 154 Tenn. 105 (1927). This act was the centre for the renowned "Scopes Monkey Trial", where John Scopes was sentenced for teaching the evolution theory in the American state member of Tennessee.

²³⁴ American Law, Ga. Code Ann. § 16-6-18 (2009). "An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person (...)" ; American Law, Mass. Gen. Laws Ann. ch. 272, § 18 (2000). "Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars"; American Law, Idaho Code Ann. § 18-6603 (2009). "Any unmarried person who shall have sexual intercourse with an unmarried person of the opposite sex shall be deemed guilty of fornication (...)" ; American Law, Ill. Comp. Stat. Ann. 720/11-8 (2009). "Any person who has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious".

²³⁵ American Law, Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 22, 2009), Instructing heads of executive departments and agencies to extend certain spousal benefits to same-sex partners.

Additionally, explaining more in relation to the “soft paternalism” which describes the innovative monitoring period that can swiftly shift to hard paternalism, for instance, bans on use of grocery plastic bags, or bans over tobacco consumption, out there in question. Nevertheless, the problem persists if this depreciation is bad or wrong in a crucial extent. The structure of both liberty and autonomy is habitually commensurate and can become limited at the moment that their employment involves damage or detriments to more than one.

It is not found a disagreement nowadays which tobacco consumption and other examples that attacks the environment such as the habit of using plastic bags in supermarkets are publically expensive. Nevertheless, it can be hard to enumerate these kind of expenses. Tobacco consumption is used elementally to keep smokers with the satisfaction of the act of smoking, it means the tobacco addiction.

It is consequently imprecise that the prohibitions for a better tobacco control are essentially publically unwelcome becoming the same situation to other hard paternalism’s practices. Whether we analyzed less than a century ago, preventions against child labour, for instance, were divisive in United States²³⁶ and these matter, nowadays a notorious violation of human rights, is not debatable anymore. Then, it is further to express that the meaning of the hard paternalism is not only malicious or erroneous.

²³⁶ Discussed in the case-law *Hammer v. Dagenhart*, 247 U.S. 251, 1918. Holding that the Keating-Owen Child Labor Act of 1916 that restricted child labour was unconstitutional.

7. Conclusion

By studying the aspects of the thesis, we may encounter different types of perceptions in relation to an adequate information concerning tobacco products. When it is faced the real perspective of the tobacco damages, becomes only personal reasons to a smoker keeps with the tobacco consumption. Moreover, it is significant to highlight the problem of the nicotine addiction, since it is common to listen smokers saying how hard it is to quit the consumption.

It is crystal clear that there is no way to defend the public health concerns as an adequate information of what the tobacco consumption can cause. This danger must not be interpreted as a smoking prohibition, however, it is important to focus that, for instance, bans with regard to misleading, forbidden or false advertising is one of the best approaches concerning tobacco consumption.

Sadly, with the analysis of the tobacco companies, it is more than necessary a regulation concerning tobacco control, since tobacco companies have so far bad illustrations with regard to how the business sector can be aggressive with the public health policy for increasing profits. And this is the resolute extent which we may perfect see how both the subjects human rights and consumer rights need to be approached in balance, giving more consideration to fundamental rights such as the right to health, right to adequate information and the other human rights in correlation.

The surplus of legislation regarding tobacco control is the only alternative to combat efficiently the dangerous of a tobacco consumption and the possible way to give alternatives to the consumer for choosing. There is a difference between a choice and a prohibition that need to be expressed, and this is this dissertation has showed that a paternalistic approach should be considered only concerning, mainly, the respect to the right to an adequate information which so strong is the best measure for not invade the freedom of expression.

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