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The framework convention on tobacco control measures: does South Africa measure up?

Summary

It is a trite fact that tobacco smoking is a hazardous habit with often fatal consequences. The global scale of this problem has prompted the United Nations, through WHO, to assist states in their fight against the tobacco pandemic. The Framework Convention on Tobacco Control has been drafted with the specific intent of serving as a guide to states, to enable them to formulate both national and international responses to this global problem. This article examines the standards suggested by the Framework Convention against which the South African legislative measures are analysed.

Die raamwerkkonvensie oor tabaksbeheermaatreëls: hoe vaar Suid-Afrika?

Dit is 'n afgesaagde feit dat die rook van tabak 'n gevaarlike gewoonte met dikwels dodelike gevolge is. Die globale afmetings van hierdie probleem het die Verenigde Nasies, deur middel van die WGO, aangespoor om nasies in hulle stryd teen die tabakspandemie te help. Die Raamwerkkonvensie oor Tabakbeheermaatreëls is met die spesifieke doelstelling om as 'n gids vir nasies te dien, wat hulle in staat sal stel om sowel nasionale as internasionale reaksies op hierdie globale probleem te formuleer, opgestel. In hierdie artikel word die Suid Afrikanse legislatiewe maatreëls teen die standaard, wat deur die Raamwerkkonvensie voorgestel is, ontleed.

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1. Introduction

Recent statistics released by the World Health Organisation (WHO) estimate that annually, four million deaths world-wide are due to tobacco-related diseases such as respiratory ailments and cancers.¹ This figure is expected to rise to ten million by the year 2030.² Remarkably, seven million of these deaths are expected to occur in developing countries.³ The reasons for this trend vary. They include, *inter alia*, the increase in developing populations, poor knowledge of health hazards, the increased prevalence of smoking, intensive and ruthless advertising, inadequate funding for tobacco control, and the lack of political will due to the tobacco companies' lobbying of the public sector.

During January 2000, WHO organised a convention in India, the main objective of which was the formulation of a tobacco framework that would serve as a guide to states in their fight against the tobacco pandemic.⁴ The convention recommended a number of steps to help member states of the United Nations, especially developing states, to curb the widespread use of tobacco. The Framework Convention on Tobacco Control is a major endeavour of WHO in an attempt to limit and control the global use of tobacco. This stems from the realisation by WHO that tobacco control cannot succeed solely through the efforts of individual states, national NGOs and media advocates and that an international response is required to an international problem. This international response, WHO believed, would be well encapsulated in the development of a Framework Convention.⁵

Tobacco control cannot succeed solely through the existence of a Framework Convention on tobacco control. The success of the tobacco control measures suggested will depend largely on the implementation of such a Framework Convention at the national level. If the treaty is to be implemented successfully, each stakeholder has a crucial role to play in this process. This applies to stakeholders at all levels, especially at the international, national, and regional levels. Co-operation between the various levels is vital since national missions cannot be used to challenge public health regulations in other countries. The international community therefore has a pivotal role to play in facilitating such regional co-operation.

This article will explore the steps that South Africa has undertaken in an attempt to measure up to the international standards set out in the Framework Convention. However, before examining the South African legislative initiatives, it is necessary to outline the recommendations of the Framework Convention.

1 Chaudhry 2000:1.

2 Chaudhry 2000:1.

3 Srivasta 2000:1.

4 A/FCTC/INB6/5. The Convention is not yet in force. Currently 47 countries are signatories to the Convention. Only Norway has since approved the Convention. Notwithstanding this, a number of countries, South Africa included, have been most revolutionary in their attempts to curtail the use of tobacco products, particularly as a response to the recommendations of the Framework Convention.

5 Dr Brundtland, Former Director-General of WHO.

2. International initiatives at tobacco control

A concerted international effort towards tobacco control became apparent in 1996 when member states of WHO adopted the World Health Assembly Resolution, WHA 49.17, in which the development of a binding international Instrument on tobacco control was initiated.⁶ This was followed in May 1997 by the environmental leaders of the so-called 'G-eight' signing the 1997 Declaration on Children's Environmental Health.⁷ Thereafter, in 1998, WHO, recognizing the enormous premature mortality rate caused by tobacco use, decided to reinvigorate its work on tobacco control by creating a new cabinet-level project entitled "Tobacco Free Initiative", which proposed the "Framework Convention" as its cornerstone.⁸

Following the 1997 Declaration, WHO convened an International Consultation on Environmental Tobacco Smoke (ETS) and Child Care in Geneva, Switzerland.⁹ The consultation brought together experts from both developed and developing countries to examine the effect of ETS on children's health and to propose recommendations on interventions in an effort to reduce and eliminate children's exposure to the harmful effects of ETS. WHO has acknowledged that tobacco control is a human rights issue, and that its Constitution specifically provides that health is a fundamental human right. The UN and regional conventions, such as the Universal Declaration of Human Rights;¹⁰ the Convention on Economic, Social and Cultural Rights¹¹ and the African Charter on Human and Peoples Rights¹² all contain provisions on the right to health. Other conventions such as the Convention on the Elimination of Discrimination Against Women (CEDAW),¹³ and the UN Convention on the Rights of the Child also provide for the right to health.¹⁴ The UN Convention on the Rights of the Child expressly cites tobacco as a serious problem.¹⁵ Articles 6 and 24 of this Convention oblige signatory governments to guarantee children's right to life by creating an environment that maximizes the survival and development of the child. In addition, states are obliged to implement measures to ensure and recognize the right of all children to the highest attainable standard of health.¹⁶

6 WHO Technical Briefing Series for the Framework Convention on Tobacco Control (1999):15.

7 WHO Technical Briefing Series at 15.

8 WHO Technical Briefing Series at 13.

9 WHO/NCD/FTK/99.10, WHO International Consultation on Environmental Smoke and Child care, seminar held in Geneva, Switzerland, January 1998.

10 GA Res. 217, UNDOC. A/810 (1948), Article 25(1).

11 GA Res. 2200A (xxi), 21UN GAOR supp (No 16) at 49.

12 OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1981) Article 16.

13 GA Res. 34/180.34 UN GAOR Supp (No 46) Articles 12 and 14.

14 UN Convention on the Rights of the Child, GA res. 44/25, annex. 44UN GAOR supp (N49) at 167, UN Doc A/44149 (1989).

15 UN Convention on the Rights of the Child.

16 WHO Discussion Paper for the WHO International Conference on Global Tobacco Control Law at 5.

Work on the Framework Convention began in earnest with the conference hosted by WHO at the beginning of 2000. The conference entitled "The WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control", was held in New Delhi, India. The main objectives of the conference were highlighted as being:¹⁷

- to consider the issues that developing countries may encounter in formulating the proposed WHO framework convention on tobacco control;
- to consider particular difficulties that developing countries may encounter in enacting tobacco control measures;
- to propose measures for ensuring that developing countries are able to implement the convention, and build the capacity to participate in global and national activities for tobacco control;
- to mobilize technical and political support for tobacco control in the developing world; and
- to consider mechanisms for stimulating the widest possible collaboration between ministries of health, foreign affairs, trade, finance, environment, justice and education for the development and future implementation of the Convention.

A number of important issues are by implication raised by the main objectives of the conference. One such issue is that tobacco control is a global issue. No one country, on its own, will be able to control the pandemic of tobacco use. What is needed is international co-operation in the development of strong control measures. The successful implementation of such measures requires co-ordination at the international level.

Another issue impliedly raised by the main objectives is acknowledgment that developing countries are the most vulnerable when it comes to being targeted by tobacco companies. These countries, therefore, must enact their own tobacco control measures to combat the epidemic of tobacco products and their effects on the health of their populations. Local measures must be directed at protecting the most susceptible groups, that is, children, the youth and women. In addition, there is a greater need for the widest possible collaboration between the various ministries within the governments in order to develop and implement the Convention on tobacco control. Tobacco control will not succeed without such inter-ministerial collaboration.

Moreover, there is a need for technical and political support for tobacco control. The successful implementation of the Convention depends largely on the political will within each country especially in the face of the powerful lobbying by the tobacco companies. Finally, there is recognition that developing countries will encounter numerous difficulties, both in developing and implementing the proposed WHO Framework Convention on Tobacco Control.¹⁸

17 WHO Discussion Paper for the WHO International Conference on Global Tobacco Control Law at 1.

18 WHO Discussion Paper for the WHO International Conference on Global Tobacco Control at 16.

In view of these envisaged difficulties, the conference committed the international communities to support the developing world. In order to successfully achieve the above objectives, the Convention proposed a number of recommendations. The recommendations which are discussed below, are directed at the international, national, and regional levels.

3. Recommendations of the Framework Convention at the International Level

At the international level, it was recommended, *inter alia*, that there should be increased collaboration between various multilateral and regional organizations. The Framework Convention also highlighted the need for developing countries and the international community to work with the World Trade Organization (WTO) and its member states in establishing a Committee on Trade and Health. The main duty of the Committee will be to examine any specific matters which have a bearing on trade policy measures. This examination may only be performed upon request by a member state.¹⁹

In addition, the Framework Convention identified the need for WHO to enhance its collaboration with larger international and regional human rights communities and recommended a joint study by WHO and the United Nations Children's Education Fund (UNICEF) on tobacco and children's rights and the WHO study on CEDAW. It was also recommended that all countries that grow tobacco need to adopt complete crop shifting within two decades in order to reduce tobacco cultivation. Any development aid given should not be used to support increased tobacco productivity.²⁰

According to the Framework Convention, the international community needs to develop a protocol on tobacco advertising and promotion. Such a protocol must include a comprehensive ban on all forms of advertising and on the promotion of tobacco products and brand names through the media. Moreover, the international organization should encourage sports organizations such as the International Olympic Association and the Federation of International Football Associations (FIFA), and the media to ensure that sports and telecasts become tobacco free.²¹

The Framework Convention recommended further that there be co-operation between stakeholders such as NGOs, governments, the judiciary and consumers in an effort to reduce tobacco consumption. Legislation intended to reduce the exposure of women and children to environmental tobacco smoke in key environments such as homes and workplaces needs to be put in place.²²

19 WHO Discussion Paper for the WHO International Conference on Global Tobacco Control at 17.

20 WHO Discussion Paper at 17.

21 WHO Discussion Paper at 18.

22 WHO Discussion Paper at 18.

4. The national level

The Framework Convention recommended the creation of efficient multisectoral interdisciplinary national institutions for tobacco control, to serve as a critical mass to influence governments to prioritise tobacco control.²³ At the same time, these institutions are expected to undertake awareness campaigns and to promote the treaty making process which will pave the way for a country's ratification and implementation of the Framework Convention.

Moreover, it was recommended that states develop specific tobacco control laws to give effect to their obligation in the Framework Convention. In so doing states are expected to ensure that the provisions of the Framework Convention and related protocols are reflected in their national health policies. Additionally, developing countries especially, need to issue regulations that will limit the access of their youth to cigarettes. To ensure compliance with the legislation, it was recommended that states include enforcement penalties within their legislation. In addition, states would be required to withdraw all subsidies for tobacco farming, and to control tobacco farming and manufacturing activities. Furthermore, the Framework Convention recommended increased government control over tobacco products, and that any state investment in tobacco be phased out.

It was also recommended that each country should develop a national policy on tobacco that will include the establishment of an office for tobacco control, the formation of a multisectoral advisory committee for tobacco control, and the establishment of health and non-health NGO networks interested in tobacco control. Each government should recognize its responsibility to ensure that media events, sports sponsorships, films and music do not promote tobacco use. At the same time, statutory warning labels and signs need to be displayed more prominently on cigarette packs and advertisements. This recommendation takes into account the uniqueness of each country's needs.

The recommendations also advocated that states increase their attention towards assisting materially in child health programmes, and to plan, manage, and evaluate smoking cessation programmes for pregnant smokers. A very important recommendation was that which required tobacco companies to disclose all information they have about the harms and addictiveness of tobacco. In addition, they would have to declare all contributions made to political parties and politicians, and disclose all payments made to lobbyists, consultants and other groups. Tobacco companies would also be required to dissolve all trade associations of the industry. The aims of these recommendations are: (i) to ensure that the tobacco industry will not be able to hide behind the claim that information pertaining to tobacco is a trade secret; and (ii) to restrict the lobbying of politicians by tobacco companies.

Finally, the recommendations advise governments to strictly enforce anti-corruption and anti-trust laws. However, government missions may not be used to challenge public health regulations on tobacco in other countries.

²³ WHO Discussion Paper at 16.

The intention behind the qualification of this recommendation may have been to encourage voluntary co-operation by the different states. However, this qualification may lead to the collapse of the tobacco policy of some countries due to smuggling and a lack of co-operation.

5. The regional level

The conference advanced three recommendations pertaining to the regional level, viz. (i) that neighbouring states should establish effective policy co-ordination to ensure efficacy in tobacco control, while at the same time preventing potential revenue losses; (ii) that developing countries harmonize their tobacco control strategies; and (iii) that regional organizations should co-operate in tobacco control activities.²⁴

The Framework Convention has set the ball rolling in the fight against the tobacco pandemic. It has created a framework that any individual state may follow when enacting national legislation on tobacco control. It has also set the scene for a co-ordinated effort at the different levels. Each level has to play its role if tobacco control is to succeed. Of the three levels, the national level carries the most responsibility in the fight against the spread of tobacco use. It is at this level that the unique needs of each country can be taken care of. It is also at this level that policies and legislation are enforced. An examination of the measures adopted by the South African government in response to the Framework Convention will be conducted below.

6. The South African tobacco products control legislation

The advertising and promotion of tobacco products in South Africa, was until fairly recently largely unregulated. In response to the global outcry on the dangers of tobacco use, during 1993, the South African government passed the Tobacco Products Control Act.²⁵ This was followed in 1994 by the legislature enacting regulations that made it compulsory to label cigarette packages with warning signs.²⁶ However, it was not until 1999 that the government undertook serious measures to control the use and abuse of tobacco products. In that year, the legislature passed the Amendment Act.²⁷

The purpose of the 1993 Act was threefold: (i) to prohibit or restrict smoking in public places; (ii) to regulate the sale and advertising of tobacco products in certain respects and to prescribe what is to be reflected on cigarette packages; and (iii) to provide for all matters connected therewith. The Amendment Act expands on the purpose of the Principal Act. It provides more details about the advertising and the promotion of tobacco products and prohibits any promotion of tobacco products through the sponsoring of

24 WHO Discussion Paper at 16.

25 The Tobacco Products Control Act 83 of 1993 (hereafter the Principal Act).

26 GNR 2063 GGE 16111 of 2 December 1994 (hereafter the 1994 Regulations).

27 The Tobacco Products Amendment Act 12 of 1999 (hereafter the Amendment Act).

certain events, such as sports, beauty contests and music events. Furthermore, it prescribes the maximum yields of tar, nicotine and other constituents in tobacco products. Finally, it seeks to increase the fines which can be imposed upon offenders.

What is evident from the contents of both Acts is that the South African Government aims to control tobacco products and smoking through a number of measures. These measures include the labeling of tobacco packages with warnings and the provision of information; a ban on tobacco advertising; the reduction of tar and nicotine levels of cigarettes; the taxation of tobacco products; and the ban or the reduction of the use of tobacco products. In examining each one of these measures, the following may be noted:

The Amendment Act²⁸ prohibits any person from selling or importing, for subsequent sale, any prescribed tobacco product, unless such product complies with the following conditions:

- it should be in a package;
- the package in which such tobacco product is sold should bear the prescribed 'warning' concerning the health hazards incidental to the smoking of tobacco products; and
- the quantities of the constituents present in the tobacco product concerned should be stated on the package.

These requirements seek to ensure that the public is given appropriate information regarding the dangers of the use of tobacco. Where advertisements are concerned (whether written, pictorial, visual, film, video or cinema), the provisions require a warning and the tar and nicotine contents of the cigarettes to be displayed across the advertisement.²⁹

In terms of the 1994 Regulations, sub-regulation 3(1)(a) provides for the warning and information to be in the same language as the one used on the package or as that contained in the advertisements. It goes further to state that the language used should be any one of the official languages.

In the preamble to the Amendment Act, the legislature appears to recognise that advertising, which associates smoking with social success, business advancement and sporting prowess, may have the harmful effect of encouraging children and young people to take up smoking. In an attempt to protect the vulnerable, section 3 of the Amended Act prohibits advertising. It simply states that 'No person shall advertise, including the use of tobacco trade marks, logos, brand names or company names used on tobacco products; or use tobacco trade marks, logos, brand names or company names used on tobacco products for the purposes of advertising any organization, service activity or event...'³⁰ The prohibition covers both direct and indirect advertising such as the use of brand names and trademarks by tobacco companies. In addition, the indirect promotion of tobacco products,

28 Section 4 of the Amendment Act.

29 Annexure 1, Column B of the 1994 Regulations.

30 Section 3(1)(a) and (b) of the Amendment Act.

for example, by giving awards for the return of a certain number of tobacco packages, is also prohibited. This is a valuable provision as it ensures that people are not attracted to smoking simply as a means of receiving free gifts.

Section 3(2) on the other hand, prohibits any manufacturer, importer, distributor or retailer of a tobacco product from promoting their products or brand names through the sponsoring of sporting events. Archetypal examples of such events included the Rothmans Cup, a soccer event; the Gunston Surfing Competition; and the Rothmans July, a horse racing event, all of which have been phased out. This section also declares illegal any sponsorship of sporting teams or individuals participating in sport events. Moreover, the sponsoring of such events which are attended by the public to promote any tobacco product is also prohibited.

It is necessary to consider the definition of both 'tar' and 'nicotine', before discussing what the Act's position is about their reduction. The Principal Act defines 'tar' as 'the anhydrous and nicotine-free condensate of the smoke of a tobacco product'.³¹ 'Nicotine' is defined as referring to 'nicotine alkaloids'.³² In order to reduce the 'hazardous constituents' of cigarettes, section 6 of the Principal Act, which deals with the Regulations, empowers the Minister of Health to make regulations regarding "... the manner and method of getting the quantities of hazardous constituents in tobacco products reduced".³³ The Minister may also regulate on "the properties of a tobacco product, the claims in respect of such product and representations in respect of the use thereof that may not appear in any advertisement".³⁴

Nicotine is absorbed through the lungs of smokers, and reaches the brain, through the bloodstream, within seconds. The amount of nicotine in the bloodstream is dependent upon the quantity of nicotine in the smoke and the speed of transfer of that nicotine from the smoke to the bloodstream.³⁵ Nicotine is a potent drug with a variety of physiological effects.³⁶ Its addictive nature is the main reason why many smokers maintain their tobacco use, and why large numbers of former smokers resume smoking.

However, when reducing nicotine it is also necessary to reduce tar. According to available evidence if habitual smokers choose a lower delivery brand with a higher tar to nicotine ratio than a high delivery brand, they increase the amounts of tar and gas constituents that they take in, in order to take in the threshold dose of nicotine.³⁷ Thus, both tar and nicotine need to be decreased in order to reduce the intake of nicotine into the bloodstream. It is in view of the hazardous nature of tar and nicotine that both Acts regulate the amount of these constituents.

31 Section 1 of the Principal Act.

32 Section 1 of the Principal Act.

33 Section 6(1)(b) of the Principal Act.

34 Section 6(1)(c) of the Principal Act.

35 Hurt and Robertson 1998:1174.

36 Hurt and Robertson 1998:1175.

37 Hurt and Robertson 1998:1177.

Section 4 of the Principal Act deals with the prohibition of the sale of tobacco products to persons under the age of sixteen years.³⁸ The legislation makes it an offence to sell cigarettes to persons under the age of sixteen.

The Amendment Act permits a retailer of tobacco products to post signs at the point of sale indicating the availability of tobacco products and their price, but only in accordance with the regulations passed in relation to this Act.³⁹ The relevant regulations⁴⁰ stipulate the size and the exact placement of the signs.⁴¹ These provisions ensure that tobacco advertisements are kept indoors. They also aim to do away with billboards. At the same time, they aim to protect young children from being encouraged to take-up smoking.

The Act provides that the sale of tobacco products from vending machines must be restricted to places not easily accessible to persons under the age of sixteen years.⁴² The owner and the person on whose premises the machine is situated are required to take reasonable precautions and exercise diligence to ensure that young children do not buy cigarettes from the vending machine. Even if the owner of the machine was not present when the offence took place, they would still be liable for a contravention of this provision.⁴³

Section 3(a) of the Amendment Act expressly prohibits the smoking of tobacco products in any public place. The Amendment Act defines a 'public place' as 'any indoor or enclosed area, which is open to the public or any part of the public and includes a workplace and a public conveyance'.⁴⁴ Smoking in 'private dwellings' however is permitted subject to two conditions: first, such smoking should be in an area of that private dwelling which is specially designated by the employer, owner, tenant or possessor, as a smoking area.⁴⁵ Secondly, the smoking area should comply with the prescribed requirements.⁴⁶

The Minister of Health has issued a notice declaring certain public places smoking areas.⁴⁷ Regulation 2 permits the smoking of tobacco products in certain areas provided that various conditions are complied with. The public areas where smoking may be permitted include the following: smoking establishments (tobacconist's store and cigar clubs); bars; pubs; taverns or any other place where the primary business is the sale of alcoholic beverages. These smoking areas must comply with the following

38 Section 4(1) of the Act provides that 'no person shall sell or supply any tobacco product to any person under the age of sixteen years even if this is not for personal use'.

39 Section 3(3) of the Amendment Act.

40 GNR 976 GGE 21610 of 29 September 2000.

41 GNR 976 GGE 21610 of 29 September 2000 regulation 2.

42 Section 5(1) of the Amendment Act.

43 Section 5 of the Amendment Act.

44 Section 2(i) of the Amendment Act.

45 Section 2(h) of the Amendment Act.

46 Section 2(h) of the Amendment Act.

47 GNR 975 GGE 21610 of 29 September 2000.

conditions: a portion of such a public place must be designated as a smoking area, and such area must not exceed 25% of the total floor area of such public place.⁴⁸ The smoking area must be separated from the rest of the public place by a solid partition⁴⁹ and it must have an entrance door on which the sign "SMOKING AREA" is displayed.⁵⁰ The purpose of this requirement is two-fold, namely, to make the area visible to all smokers, and to warn non-smokers to avoid the area. Additionally, the designated smoking area must have a ventilation system that allows for the air from the smoking area to be exhausted directly to the outside and not be re-circulated to any other area within the public place.⁵¹ Finally, the regulations require that permanent notices and signs indicating smoking and non-smoking zones be displayed.⁵²

The regulations also permit the smoking of tobacco products in places such as nightclubs, casinos or any other public place which primarily deals with the provision of entertainment to the public.⁵³ However, this too, is subject to conditions specified above. The smoking of tobacco products is permitted in restaurants, but this is also subject to the above-mentioned conditions.

Regulation 4⁵⁴ permits the operator of any passenger ship to allocate not more than 25% of the total accommodation as designated smoking areas. The passenger ship must be registered in the Republic of South Africa.⁵⁵ Other than the registration requirement, no other condition is imposed by the regulation.

Smoking in a passenger train operating in the Republic of South Africa is permitted.⁵⁶ However, the operator may allocate not more than 25% of the entire train as a designated smoking area, if its total number of carriages exceeds ten.⁵⁷ In the case of a train with less than ten carriages, only one carriage may be designated as a smoking area.⁵⁸

Acting on authority vested by section 2(1)(b) of the Amendment Act, the Minister of Health has included the workplace under the category of places where smoking may be permitted.⁵⁹ Certain conditions have to be complied with. In brief, these are: an employer must designate smoking areas that will, by necessary implication, comply with the conditions set out in Clause 3 of the regulations; and employers are required to have a written policy on smoking which in turn has to be implemented within three months from the

48 Regulation 1, clause 3(a).

49 Regulation 1, clause 3(b).

50 Regulation 1, clause 3(b).

51 Regulation 1, clause 3(c).

52 Regulation 1, clause 3(e).

53 Regulation 2(b).

54 Regulation 4, clause 4.

55 Regulation 4, clause 4.

56 Clause 5.

57 Clause 5.

58 Clause 5.

59 Regulation 2(h).

date of the coming into operation of the Amendment Act.⁶⁰ Regulation 7 is of fundamental importance as it imposes upon any employer who is in charge of a workplace a duty to ensure the protection of employees who are non-smokers. Regulation 9 empowers the employer to prohibit smoking totally in the workplace. This means that any employer may decide that his or her workplace is a non-smoking area, notwithstanding the fact that the Minister has permitted smoking in workplaces.

Additionally, regulation 11 gives anyone the right to apply for exemption for periods of up to six months. Such an application has to be lodged with the Director-General of Health. The application should set out clear details of the nature and extent of the proposed structural changes. What this regulation means is that smoking in any public place will remain prohibited until such time that smoking areas have been designated.

One means of controlling the use of tobacco products is through imposing higher taxes on the products. The aim of this method is two-fold: first, to reduce smoking and related illnesses and resultant deaths, and secondly, to provide tax revenue to the government coffers. In turn, this tax revenue may be used to pay for health care services. Though the Tobacco Products Control Act is silent on the matter of taxation, the Customs and Excise Act deals with this issue.⁶¹ This Act regulates the importation of cigarettes and the imposition of excise duty. The current tax rate imposed on the retail price stands at 50 percent of the retail price. This has been the position since 1998.

The retail price tax is an effective means of reducing the use of tobacco products. However, it is surprising that the tax rate in South African still stands at 50%. More needs to be done if this is to be used to optimal benefit, in particular, the tax rate should be raised to rank with that of various developed countries. In developed countries such as Canada, New Zealand, Australia and Sweden, the tax rate is 80% per retail price.⁶²

It is impossible to ban smoking totally. This seems to have been the perception of the drafters of the Act. The preamble to the Act acknowledges that tobacco use is a widely accepted practice among adults, which 'makes it inappropriate to ban tobacco use completely'.⁶³ In view of this, there is no doubt that the legislature only intends to restrict the use of tobacco products and not to phase it out completely. The whole purpose of the Act, therefore, appears to be to deter persons from taking up smoking and to encourage existing smokers to stop smoking.

60 Regulation 7. The Act came into operation on 1 January 2001.

61 Act 91 of 1964, as amended by Act 112 of 1977.

62 Van der Merwe 1998:259.

63 The preamble to the Amendment Act.

7. The impact of tobacco control on certain human rights

As might be expected, it is impossible that any restrictions on the use tobacco products will not, in one way or another, impact on certain fundamental human rights. This is evidenced by the conflict between the advocates of the right to life,⁶⁴ and the advocates of free enterprise.⁶⁵ The latter will always view any restrictions as a threat to their right to freedom of trade.

Furthermore, the advocates of free trade often raise the claim that any restriction to their right to ply their trade as they desire violates their freedom of expression.⁶⁶ In support of their argument they often advocate the right of a person to access to information.⁶⁷ Restrictions, they argue, impact on peoples' right to freedom of belief and opinion.⁶⁸ However, environmentalists and human rights activists argue that everyone has a right to a clean environment.⁶⁹ On the opposite side of the spectrum, retailers, licence holders and owners of premises argue that they have a right to property and that the restrictions imposed by the legislation infringe on this right.⁷⁰ These conflicting rights will be discussed below.

8. The right to life versus freedom of trade

Section 11 of the 1996 Constitution guarantees everyone the right to life. This is an unqualified right and is the source of all the other personal rights. Section 11 draws its inspiration from Article 3 of the Universal Declaration of Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Article 6(1) of the ICCPR refers to this right as 'the inherent right to life'. The right to life, like any other right enshrined in the South African Bill of Rights, may only be limited in terms of the general limitation clause.⁷¹ In essence, this means that any interference with the right to life will only be constitutional if such interference is reasonable and justifiable in an open and democratic society.

It is interesting to note the remarks of the then Judge President of the South African Constitutional Court, Mr Justice Chaskalson, in the first case to be heard in South Africa concerning the right to life — *S v Makwanyane*:⁷² An individual's right to life has been referred to as "the most fundamental of all human rights" and was dealt with in the judgments of the Constitutional Court declaring capital punishment to be unconstitutional.⁷³ Ms Justice O'Reagan, concurring with the judge president's comments, stated the following:

64 Section 11 of the Constitution of the Republic Of South Africa Act 108 of 1996 (the Constitution).

65 Section 11 of the Constitution.

66 Section 16 of the Constitution.

67 Section 32 of the Constitution.

68 Section 15 of the Constitution.

69 Section 24 of the Constitution.

70 Section 25 of the Constitution.

71 Section 36 of the Constitution.

72 1995 (3) SA 391 (CC).

73 1995 (3) SA 391 at 429H-30A.

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise other rights or to be the bearer of them. But the right to life was included in the Constitution simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to life as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is the centre of the constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such society. The right to life, thus understood, incorporates the right to human dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is the right to be treated as a human being with dignity: without human dignity, life is substantially diminished. ...⁷⁴

The value placed on human life is quite apparent from the above judgment which not only emphasizes the value of life, but also human dignity. It is submitted that exposing one's life to the harmful and deadly hazards of tobacco smoke is an infringement of not only the right to life, but to human dignity also. Exposure to the harmful and potentially fatal consequences of tobacco smoke can, therefore, be said to be neither reasonable nor justifiable.

It is of paramount importance to note that Article 6(1) of the ICCPR, further provides that the right to life shall be protected by law. However, section 22 of the Constitution guarantees every citizen the right to 'choose their trade ... freely'. The outcry from tobacco companies is that their rights are being curtailed by restrictions imposed by the legislature. This raises the issue of how does one reconcile these conflicting rights? The starting point in this regard, is to recognise that no right is absolute. Section 36(1) of the Constitution imposes automatic restrictions on all rights in the Bill of Rights, through the law of general application. It states that the extent of the limitation should be reasonable and justifiable in a open and democratic society, based on human dignity, equality and freedom. In addition, all the relevant factors ought to be taken into consideration when assessing the validity of any restriction. These factors include: 'the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose, and the least restrictive means to achieve the purpose.'⁷⁵

In view of the foregoing, one may ask: why curtail the right to freedom of trade? Are the restrictions imposed by the Act justifiable? It is submitted that tobacco products are one of those products that may kill the consumer when they are used in accordance the manufacturer's instructions. Consumers become addicted to tobacco and through their habit, threaten the lives of those around them as well their own. Both smokers and non-smokers die because of tobacco-related diseases such as cancers and heart diseases. Thus, the right to life is severely affected by the use of tobacco products.

74 1995 (3) SA 391 at 506C-F.

75 Section 36(1)(a)-(c) of the Constitution.

There can be no doubt, therefore, that the right to trade has the potential to adversely affect a person's right to dignity.⁷⁶ With so much emphasis placed on the value of human life with dignity, it is submitted that this limitation imposed by the legislation is justifiable. It is further submitted that the use of tobacco products undermines the human right to life, not only of its users, but also of passive smokers. These restrictions are necessary for the protection of smokers, and more importantly, of non-smokers. Section 36 of the Constitution will therefore play a pivotal role in resolving the dilemma between these conflicting rights. Furthermore, the value of dignity placed on human life should be the legitimate interest that warrants protection through imposition of restrictions on the freedom of trade. Without life, none would be able to exercise all the other rights, especially the right to a clean environment and the right to health. However it might be argued in favour of tobacco companies that alcohol is also dangerous to human life, perhaps more dangerous than tobacco. It contributes to liver and other diseases and annually, it results in the loss of thousands of lives on our roads. Alcohol is also a factor that contributes to family violence. It could also be argued that alcohol is addictive, contributes to poverty, has the potential to deprive a person of his dignity, and that its consumption should be banned or at least restricted. These arguments do have validity when considering that the alcohol industry appears to have a large number of customers among low-income earners and teenagers. Whilst there is no denying the merits of the argument that alcohol consumption may be injurious to one's health, that argument does not detract from the fact that tobacco smoking is equally, if not more injurious, to the health of the smoker and others around him or her.

9. Freedom of expression, the right of access to information, and the right to freedom of belief and opinion

Section 16 of the Constitution guarantees everyone the right to freedom of expression. This right includes freedom of the press and other media, and freedom to receive and impart information and ideas.⁷⁷ On the basis of this right, tobacco companies may view the ban on the advertisement of tobacco products as a major infringement.

Section 32 ensures that everyone has the right to access to information held by another person for the exercise of any right. Accordingly, tobacco companies, may advocate this right for their own benefit. They may assert that the public needs to see hear their advertisements in order to exercise their right to freedom of belief and opinion, as guaranteed by section 15 of the Constitution. Despite these arguments, it is submitted that the restrictions on these rights are justified because many people who choose to smoke become a burden to the state, especially in respect of its health care system which is already overburdened.

⁷⁶ Section 10 of the Constitution.

⁷⁷ Section 16(1)(a) and (b).

10. The right to a clean environment

The duty to ensure that everyone enjoys a clean environment is imposed upon the state.⁷⁸ Section 24(1) of the Constitution states in part that '[e]veryone has the right to an environment that is not harmful to their health or well-being. ...'⁷⁹ The environment is 'the surroundings within which humans exist and are made up of ...the physical, chemical, aesthetic and cultural conditions ... that influence human health and well-being'.⁸⁰ This will include the atmosphere of the earth. Section 24 (b) obliges the state to protect the environment through reasonable legislative and other measures. 'Other measures', it is submitted, may include health education.

The smoking of tobacco products violates the fundamental human right to a clean environment in that it exposes, not only smokers, but also non-smokers, to harmful tar and nicotine constituents. This is even worse in private homes where young persons are the most vulnerable to the toxic substances in cigarette smoke. In addition, this infringes on the right of choice between being in a smoking or non-smoking environment. Young people, especially children, who live in an environment with adult smokers, do not have the opportunity of exercising this choice.

In considering the conflict between any of these rights it of interest to note that in other countries such as the United States, any restriction imposed on a company's right to advertise its product is regarded as requiring special justification as it involves the *prima facie* infringement of a fundamental right.⁸¹ However, according to Kline, freedom of commercial speech can be constitutionally restricted, provided certain criteria are complied with.⁸² First, any restriction imposed must advance a substantial government interest. Moreover, the restriction must directly and materially advance that government interest. Finally, there must be a reasonable balance between the interest and the chosen method of restriction.⁸³ Such limitations are comparable to section 36 of the South African Constitution which allows for fundamental rights to be limited by law of general application.

In Britain, the Consumer Protection Committee is tasked with the duty of ensuring that advertisements are not fraudulent or misleading to the public. Limitations to freedom of trade are permitted as long as the restrictions aim to protect the public and public health and safety. Furthermore, the local authority is entrusted with a duty to conduct a programme of enforcement action at least every twelve months to ensure that the statutory provisions relating to tobacco control are complied with.⁸⁴ Canada, like the US and the UK, has adopted a tough stance on tobacco advertisements with the aim of

78 Section 24 (b) of the Constitution.

79 Section 24(1).

80 Section 1 of the National Environment Management Act 107 of 1998.

81 Daynard 1998.

82 Kline 1998:1.

83 Kline 1998:1.

84 Section 7 of the Young Persons Act of 1993.

eliminating children's exposure to tobacco advertising and have restricted smoking in public places and in the workplace.⁸⁵

New Zealand was one of the first countries to concern itself with the dangers of smoking. This country's first anti-smoking legislation dates back to 1882 with the banning of juvenile smoking.⁸⁶ The legislation prohibited the supply of tobacco products to persons under the age of fifteen and smoking in public places. Currently, the age of restriction stands at eighteen years. In the 1980s other prohibitions were imposed.⁸⁷ These include prohibitions on advertising, sponsorship, display, and compulsory labelling including health warnings. Over and above these prohibitions smoke-free environments have been created and extended.

In 1992, the UK adopted a policy package aimed at achieving UK smoking targets by the year 2000.⁸⁸ This package is a combination of health education, cessation support, restriction of cigarette advertising, restriction of smoking in the workplace and in public places, and the increase in cigarette tax.

Since 1987, Taiwan has required warning messages to be printed in all cigarette advertisements and on every cigarette pack.⁸⁹ The Taiwanese anti-smoking legislation also regulates the levels of tar and nicotine in each cigarette, requires each school and institute to provide educational programmes to prevent smoking, prohibits the sale of cigarettes through vending machines, mail order and electronic purchasing, and prohibits the sale of cigarettes to persons below the age of eighteen years.⁹⁰ It is noteworthy that Taiwan has not resorted to the imposition of cigarette taxes as a means of curbing smoking.⁹¹

Other countries such as Australia, Finland, Sweden and Thailand have replaced voluntary agreements relating to advertisements with legal bans on tobacco advertisement and promotion.⁹²

10. Legal challenges to the tobacco legislation

Although the tobacco legislation dates back to 1993, this area of law is still new and evolving in South Africa. Disputes based on the infringement of human rights arising from non-compliance are yet to come before the South African courts. The only matter that has come before the High Court is the case of *Tobacco Institute of Southern Africa v Minister of Health*.⁹³ In this case, the applicants launched an urgent application for an order compelling the Minister of Health to provide them with access to certain information.

85 WHO (2001)[<http://www.who.int/inf-pr-2001/en/pr2001-47.html>].

86 The Juvenile Smoking Suppression Act of 1882

87 Easton 1998:300-301.

88 Townsend 1998:188-189.

89 Hsieh and Lin 1998:319.

90 Hsieh and Lin 1998:320.

91 Heish and Lin 1998:321.

92 WHO (2001) [<http://www.who.int/inf-pr-2001/en/pr2001-47.html>].

93 1998 (1) BCLR 83 (C).

The information related to the proposed Tobacco Products Control Bill. Mr Desai J noted that the Bill, *inter alia*: '[c]ontains a severe and extensive set of restrictions on the advertising or promotion of any tobacco product, empowers the (Minister of Health) by notice in the Gazette to prohibit the smoking of tobacco products in any indoor or enclosed public place and vests the (Minister of Health) with the power to declare the permissible levels of tar, nicotine and other constituents which tobacco products or tobacco smoke may contain.'⁹⁴ The application was dismissed on the ground that the mere introduction of the Bill does not affect any rights until it becomes law.

Commenting on this case, Nadasen and Reddy⁹⁵ submit that '... The Bill must also not be viewed as an isolated attempt but rather as part of a global movement not only to affirm the dignity of each individual but also to make real the ideal of health for all. It is true that balancing competing rights is not easy and if the tobacco industry asserts the importance of specific rights to support their contentions, it is worth remembering that their contentions must be mediated by and tempered with the view that freedom to pike is death for the minnows....' The authors do not see the Act as a deliberate attempt by the legislature to restrict any rights. Rather they view it as a mechanism to realise the constitutional intent to 'improve the quality of life of all citizens and to free the potential of each person.' They suggest that the main issue is how a Court of law will balance 'the right to health with the sectoral interests of the tobacco industry'. It is submitted that the learned authors have correctly identified the primary purpose of the legislation which is not to curtail the rights of the industry but to protect the health of all South Africans and, thus, fulfill the international obligations of the South African state.

This case of *Tobacco Institute of Southern Africa v The Minister of Health* illustrates that tobacco companies will not bow down easily to any attempt by the government to restrict their operations. These companies are likely to resort to other tactful ways to protect their interests. However, it remains to be seen whether there will be an influx of litigation, not only from tobacco companies, but also from private individuals, and the government, directed against tobacco companies and retailers.

11. An analysis of the new legislation

Attaining the objectives of the legislature is dependent upon the successful implementation of the measures created for the control of the use of tobacco products. The introduction of the new Act has achieved enormous success. Tobacco products advertisements on all the national broadcasting corporations, on television and on radio stations, have ceased. The exposure of the young to tobacco products by manufacturers and retailers through their advertisements has been curtailed. Compared to the Amendment Act,

94 1998 (1) BCLR 83 at 85B-C.

95 Nadasen and Reddy 1999:464-466.

the Principal Act was somewhat generous in its tobacco control measures. It merely imposed restrictive conditions to be complied with when advertising tobacco products. The Amendment Act, however, is more radical in its approach. It has banned all forms of tobacco advertising through all public mediums.⁹⁶

As a result of this radical approach, all advertisements of tobacco products through television and the radio have been replaced by health warning messages (sponsored by the provincial departments of health). Most of these messages are directed towards encouraging existing smokers to stop smoking. Furthermore, the sponsorship of major sporting events by cigarette companies has also ceased.

The other area in which there has been success, is in respect of the compulsory labelling of cigarette packages with health warning messages and information relating to nicotine and tar contents. By making it compulsory to furnish consumers with nicotine and tar information the legislature has been able to secure the consumer's constitutional right of access to information, as guaranteed in the Bill of Rights.⁹⁷ Consumers have a right to know the risks they are exposed to when using any product. The compulsory labelling of cigarette packages enables current smokers to make an informed choice on whether to continue smoking or not. It also enables those who still want to embrace smoking to make an informed decision before they commence smoking.

Nevertheless, the language of the warnings is a matter of concern. The legislature simply provides that 'the warning and information ... should be in the same language as [the one] used on the package or in the advertisement'. Although this provision states that the warning and information should be 'in one of the official languages of South Africa',⁹⁸ it does not promote the spread of warning messages across the wide spectrum of South African society. Most tobacco brands bear health warning messages in English or Afrikaans. This inherently discriminates against the other official languages. There is yet to be a package in any of the African languages. This may, in a way, be viewed as discriminatory against the disadvantaged communities who consume tobacco products. This is a matter of concern since most low-income earners who tend to be the loyal customers of tobacco manufacturers come from among these communities and are largely of African origin.⁹⁹

Regarding the reduction of the quantity of tar and nicotine, it appears that its enforcement is more technical since it requires laboratory testing. Nevertheless, it seems that the government has the process under control. This part of the statutory provisions does not only prescribe the permissible levels of tar and nicotine, but also provides that all the expenses incurred in testing tar and nicotine levels should be borne by the manufacturer or

96 Section 3(1).

97 Section 32(1) of the Constitution.

98 Regulation 3(1)(a).

99 Van der Merwe 1998: 259.

retailer.¹⁰⁰ All the government has to do is ensure that human resources and laboratories are available for the testing of cigarette constituents.

Notwithstanding the ban on advertising of any sort, including the sponsorship of any organised activity, section 3(3) of the Amendment Act permits manufacturers and retailers to post, as they please, signs indicating the availability of tobacco products and the price provided that certain requirements are met.¹⁰¹ This provision appears to be more of a consolation to tobacco manufacturers and retailers for the loss of their right to advertise their products than a control measure. This is a welcome move by the legislature as it appears to have balanced two conflicting interests, that of the manufacturers and retailers on one hand, and of the public on the other. By allowing the manufacturers and retailers to advertise their product on a very limited scale, the legislature has achieved its aim of warning the public of the dangers posed by the use of tobacco products without compromising its intention to restrict the use of tobacco products.

Although the sale of tobacco products through the use of vending machines is not widespread in the Republic, this does not render the applicable statutory provision irrelevant. Tobacco retailers may in the future resort to the use of vending machines to market their products. This provision therefore serves an important purpose in anticipation of what may occur in the future and effectively closes any loopholes that tobacco retailers may want to exploit.

The prohibition of the sale of tobacco products to persons under the age of sixteen is another measure designed by the legislature to combat the tobacco pandemic. This prohibition is also mentioned under the prerequisites to be complied with when placing signs indicating the availability of tobacco products and their price. This is a highly appropriate tobacco control measure in view of the fact that children, whether they are active or passive smokers, are most vulnerable to the health hazards posed by the smoking of tobacco. However, the success of this provision depends on the existence of a strict surveillance system and more manpower will be needed to enforce this provision.

The taxation of tobacco products is probably one of the more effective means of reducing the use of tobacco products. Taxation is effective since it increases the excise duty and the retail price to such an extent that the purchase of cigarettes becomes burdensome, especially to low-income earning groups and younger persons. In South Africa, the Tobacco Products Control Act does not regulate the taxation of tobacco products; this is instead regulated by the Customs and Excise Duty Act.¹⁰² In recent years, there has been an annual increase in the taxes imposed on tobacco products. Whilst in South Africa the duty imposed on tobacco products

¹⁰⁰ Regulation 3 of Annexure 3.

¹⁰¹ Regulations 2(a) and (b), and 3(a) and (b).

¹⁰² Act 91 of 1964 as amended by Act 112 of 1977.

remains at 50%¹⁰³ it is noteworthy that many developed countries impose a duty of up to 80%.¹⁰⁴

One of the most far-reaching provisions of the legislation is the ban that has been imposed on smoking in public places. Notwithstanding the fact that the Act has tried to narrow down the scope of a public place by drawing a whole list of public places, this remains very wide. The regulations cover a number of public places wherein smoking is permitted, but only if they comply with the requirements laid down.¹⁰⁵ Of utmost importance is the requirement that they must have a designated smoking area, as required by the regulations. Public places that are not included in the list include buses, taxis, and all other vehicles that are used to convey the public. Unless any public place complies with the stipulated conditions, it is regarded as a non-smoking public place. These statutory restrictions apply even if private individuals or companies own the vehicle. Any public place not expressly mentioned in the list of public places wherein smoking is allowed, remains a non-smoking area. Whilst it is necessary to control the use of tobacco products in public vehicles, it is very challenging for the State to ensure compliance with the anti-smoking laws in public transport.

Another deficiency of the legislation is that it relies primarily on complaints to enforce compliance. Without complaints, there is little initiative that is being taken to enforce the law in public places. It may be speculated that this is because neither the Principal and Amendment Acts, nor the regulations designate any specific individual as being responsible for administering the Act. It appears that the National Council Against Smoking is the responsible body at the national level, while the environmental health officers are the responsible individuals at the provincial or local level. The Acts make no mention of the enforcement of the rules. All that they deal with in detail are the powers of the Minister of Health.

The legislation may also be criticised for assuming that the supply of tobacco products will be reduced through decreasing the demand for cigarettes. To reduce the supply of cigarettes through the decreasing of its demand will take many years. Instead, the better approach would be to decrease the supply of cigarettes, and to make access to cigarettes much more difficult. This will have the impact of increasing the retail price and further decreasing the demand.

The Amendment Act has acknowledged that it is inappropriate to ban smoking completely as tobacco use is a widely accepted practice among adults. Although the evidence indicates that children and women are the most vulnerable, the legislation has done very little to protect them from the harmful effects of tobacco. All that it has done is warn against smoking near children and smoking while pregnant or breast-feeding. This places the health of infants and children at the hands of addictive parents. Since monitoring compliance with these warnings in private homes is hardly possible,

103 Regulation 3 of Annexure 3.

104 Regulation 3 of Annexure 3.

the only means that will provide total protection to children and babies would be to ban the use of tobacco products completely.

Finally, the legislation does not contain any contingency measures in anticipation of the smuggling of cigarettes, that might be sparked by these statutory control measures. It should, for example, have catered for inter-departmental co-operation between the health department and other departments. However, there is nothing in the legislation nor in the regulations that deals with collaboration between the departments of health and other departments such as the South African National Defence Force and the South African Police Service.

11. Recommendations

In order to improve the legislation and to meet the challenges that are facing the tobacco control measures in South Africa, more needs to be done. The Act must designate an officer responsible for the implementation of its objectives and must outline in detail the powers and the duties of such an officer. The legislature must also consider establishing co-ordinating centres at the local level. These centres should be tasked with receiving complaints directly from the public and with instructing the police to make follow-up investigations. In turn, they must be required to report to the National Council Against Smoking. Furthermore, the legislature should consider establishing a National Fund to be administered by the Health department to be called National Fund Against Smoking (the Fund). This Fund must be financed by the levies imposed on tobacco products and by fines paid by offenders. The funds could be used to enforce the legislation and to aid in the fight against tobacco-related diseases. The establishment of a toll-free number that is accessible to all communities for lodging complaints against offenders would be complementary to the legislative intent. This toll-free number must be funded by the National Fund Against Smoking. Moreover, provision should be made for increasing the number of health inspectors who would be remunerated from the National Fund Against Smoking.

Most importantly, there should be extensive education programmes to educate and mobilise communities against the dangers of smoking, and to encourage them to report offenders directly to the local co-ordinating centres through the toll-free number. At the same time, the legislature should make it difficult to obtain tobacco products by introducing compulsory licensing for tobacco retailers and by revoking the licences of those who flout the law. Such a move will eliminate the vending of cigarettes on the streets. This will also make it easier to enforce the legislation because law enforcers will require the vendor to produce a licence. In addition, the regulations should require warning information to be provided on every cigarette. This will help convey the warning information to those who buy even a single cigarette. Furthermore, graphic photographs illustrating the consequences of smoking should be made compulsory on cigarette packages.

The Act should also make it compulsory for warning messages on cigarette packages to be in the other official languages. Where this is not practicable, tobacco manufacturers should be compelled to sponsor health messages to be broadcast on national radio and television stations, and other public media in these languages. The legislature should also deal specifically with smuggling by imposing heavy penalties on companies whose cigarettes are found to have been smuggled, and on those who are found in possession of smuggled cigarettes. This provision should be counter-balanced with the requirement that all imported cigarettes must be furnished with the details of the country of origin and marked that they are intended for use in South Africa. The legislature should also progressively increase all tax levies imposed on tobacco products from the current region of 50 % to the region of 80%.

It is also necessary to take special measures to protect babies and young children against smoking adults who continue to undermine their right to a clean environment. This requires more than merely warning against smoking near children or while breastfeeding. Instead, the use of tobacco products should be restricted with the intent of eventually banning their use completely. This goal can be achieved through increasing the retail price and imposing higher rates of taxation on cigarettes. Restricting tobacco use without any intention to uproot it may render the legislation ineffective in the long run. Finally, the Act should encourage collaboration between the National Council Against Smoking, and various other human rights organisations, such as the National Commission for Human Rights. This will ensure a holistic approach towards tobacco control since tobacco control and human rights cannot be separated.

12. Conclusion

The South African legislature must be commended for its attempts at complying with the measures suggested by the Framework Convention on Tobacco Control by addressing the harmful effects of the use of tobacco products on both smokers and non-smokers. However, if the enforcement of the anti-smoking legislation is to be successfully implemented, the time to act decisively is now. Any implementation delays might render the tobacco legislation unenforceable. Various challenges that face the implementation of the tobacco control legislation have been outlined in the preceding discussion. However, as the recommendations indicate, these challenges are not insurmountable and may be successfully overcome.

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