

Killing Smoking: Abrogating Tobacco Use Privileges and Trade Interests in Local Government Jurisdictions¹

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1. This Article presents counter-arguments to the legal positions usually taken by the tobacco industry in challenging ordinances which protect the local population and communities from the dangers brought about by tobacco use. It was written separately but concurrently with *The Public Welfare Dimension of the Competition Clauses: An Exposition and Application of the Proper Constitutional Treatment for Industries with Adverse Public Health Impacts*, 90 PHIL. L.J. 797 (2017) by the Authors, together with Dr. Lee Edson P. Yarcia and April Joy B. Guiang.

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I. INTRODUCTION

Tobacco products are unique in that they are the only consumer goods that kill half of their users when used as intended.² The most recent epidemiological studies suggest the figure to be two out of three.³ Today, there is no more room for contention or doubt regarding the fact that smoking kills.⁴ But despite the fact that a stick of cigarette contains more than 4,000 chemicals, of which at least 250 are known to be harmful and more than 50 are known to cause cancer,⁵ and despite the fact, too, that

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2. World Health Organization, Tobacco, *available at* <http://www.who.int/mediacentre/factsheets/fs339/en> (last accessed Oct. 31, 2017) [hereinafter Tobacco Fact Sheet]. According to the World Health Organization Report on the Global Tobacco Epidemic, “[t]obacco kills a third to half of all people who use it, on average 15 years prematurely. Today, tobacco use causes [one] in [ten] deaths among adults worldwide [—] more than five million people a year.” World Health Organization, WHO Report on the Global Tobacco Epidemic, 2008 (Report on the Status of the Tobacco Epidemic and the Impact of Interventions Implemented to Stop It) at 14, *available at* http://apps.who.int/iris/bitstream/10665/43818/1/9789241596282_eng.pdf (last accessed Oct. 31, 2017). *See also* United States Department of Health and Human Services: Centers for Disease Control and Prevention, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General (A Report Published Online by the Surgeon General) at 3, *available at* <https://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf> (last accessed Oct. 31, 2017).
 3. Emily Banks, et al., *Tobacco smoking and all-cause mortality in a large Australian cohort study: findings from a mature epidemic with current low smoking prevalence*, 13 BMC MED. 1, 6 (2015).
 4. WHO Framework Convention on Tobacco Control pmbl., para. 6, *entered into force* Feb. 27, 2005, 2302 U.N.T.S. 166 [hereinafter WHO FCTC]. According to the WHO Framework Convention on Tobacco Control (WHO FCTC), “scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease[,] and disability, and that there is a time lag between the exposure to smoking and the other uses of tobacco products and the onset of tobacco-related diseases[.]” *Id.*
 5. Tobacco Fact Sheet, *supra* note 2.

nicotine — the active component in tobacco — is one of the most addictive substance to man,⁶ tobacco products remain widely available in the global market.

It is, therefore, not surprising that, every year, more than seven million people die from tobacco smoke all over the world.⁷ More than six million of those deaths are the result of direct tobacco use while around 890,000 are the result of non-smokers being exposed to second-hand smoke.⁸

The tobacco epidemic in the Philippines is no different, and the public health impact of tobacco use in the country is astounding.⁹ The results of the nationally representative and government-commissioned 2015 Global Adult Tobacco Survey show that 16.5 million Filipino adults are current tobacco users, including almost half of the male population.¹⁰ To make matters

6. Samuel Osbourne, The 5 Most Addictive Drugs in the World, *available at* <http://www.independent.co.uk/life-style/health-and-families/health-news/the-5-most-addictive-drugs-in-the-world-a6924746.html> (last accessed Oct. 31, 2017). The WHO FCTC provides that

cigarettes and some other products containing tobacco are highly engineered so as to create and maintain dependence, and that many of the compounds they contain and the smoke they produce are pharmacologically active, toxic, mutagenic[,] and carcinogenic, and that tobacco dependence is separately classified as a disorder in major international classifications of diseases[.]

WHO FCTC, *supra* note 4, pmb., para. 7.

7. Tobacco Fact Sheet, *supra* note 2.

8. *Id.*

9. See Department of Health, Rules and Regulations Promoting a 100% Smoke Free Environment, Department of Health Administrative Order No. 2009-0010 [DOH A.O. No. 2009-0010] (May 11, 2009); Department of Health, National Tobacco and Control Program, Department of Health Administrative Order No. 2007-0004 [DOH A.O. No. 2007-0004] (Jan. 15, 2007); & Department of Health, A Smoking Cessation Program to Support the National Tobacco Control and Healthy Lifestyle Program, Department of Health Administrative Order No. 122, Series of 2003 [DOH A.O. No. 122, s. 2003] (Dec. 10, 2003).

10. World Health Organization, et al., Global Adult Tobacco Survey Fact Sheet: Philippines 2015 (A survey conducted by the Philippine Statistics Authority, in coordination with the Department of Health) at 1, *available at* <http://www.who.int/tobacco/surveillance/survey/gats/fact-sheet-2015.pdf?ua=1> (last accessed Oct. 31, 2017) [hereinafter GATS 2015 Fact Sheet]. The Global Adult Tobacco Survey (GATS) is “a global standard for systematically monitoring adult tobacco use (smoking and smokeless) and tracking key tobacco control indicators. [The] GATS is a nationally

worse, “16.0% of students, 22.2% of boys, and 10.4% of girls [aged 13 to 15 years old] currently use[] any tobacco products,”¹¹ an increase of 4.7% in prevalence rate since 2011.¹²

In terms of economic burden to the health system and to communities, families, and individuals, the analysis of the Department of Health’s 2010 Country Report is particularly damning. The Department cites that the “[t]otal costs of illness for the four smoking-related diseases [lung cancer, cardiovascular disease, coronary artery disease, and chronic obstructive pulmonary diseases] studied were estimated at [₱308.55 billion] using Smoking-Attributable Mortality, Morbidity, and Economic Costs figures while Peto-Lopez estimates yield a *more conservative* but still substantial loss of [₱145.86 billion].”¹³ In contrast, the total budget of the Department of Health in 2017 is only ₱98 billion.¹⁴

representative survey, using a consistent and standard protocol across countries including the Philippines.” *Id.*

11. World Health Organization, Global Adult Tobacco Survey: Country Report 2015 at 22 (citing World Health Organization, Global Youth Tobacco Survey Fact Sheet Philippines 2015 (on file with Authors)), *available at* http://www.who.int/tobacco/surveillance/survey/gats/phl_country_report.pdf?ua=1 (last accessed Oct. 31, 2017) [hereinafter GATS 2015 Report]. The Global Adult Tobacco Survey: Country Report 2015 describes the different surveys. The Global Youth Tobacco Survey (GYTS), a component of the Global Tobacco Surveillance System, is a global standard for systematically monitoring youth tobacco use (smoking and smokeless) and tracking key tobacco control indicators. The GYTS is a nationally representative school-based survey of students in grades associated with 13 to 15 years of age and is designed to produce cross-sectional estimates for each country. The GYTS uses a standard core questionnaire, sample design, and data collection protocol. GATS 2015 Report, *supra* note 11, at 22 & 29.

12. *Id.*

13. World Health Organization, et al., 2009 Philippines’ Global Adult Tobacco Survey Country Report (2010) at 11, *available at* http://www.who.int/tobacco/surveillance/2009_gats_report_philippines.pdf (last accessed Oct. 31, 2017) (emphasis supplied) [hereinafter 2009 Phil. GATS Country Report]. The conversion rate in 2009 was at \$1 to ₱47.64. Bangko Sentral ng Pilipinas, Annual Report Volume 1 (2009) at 11, *available at* <http://www.bsp.gov.ph/downloads/publications/2009/annrep2009.pdf> (last accessed Oct. 31, 2017).

14. Department of Health, Department of Health F.Y. 2018 Budget Proposal, *available at* http://www.doh.gov.ph/DOH_budget (last accessed Oct. 31, 2017).

These estimates come from four diseases alone. Cigarette smoking, however, “harms nearly every organ of the body”¹⁵ and causes more deaths each year than human immunodeficiency virus or HIV, illegal drug use, alcohol use, motor vehicle injuries, and firearms-related incidents combined.¹⁶ Moreover, in the last four decades, there has been a steadily rising number of deaths from non-communicable diseases — in particular, heart diseases, cerebrovascular diseases, and malignant neoplasms or cancers — to which smoking or tobacco use is a major causative factor.¹⁷ Not only does this global tobacco epidemic cost households and governments over ₱70 trillion in healthcare expenditure and lost productivity annually¹⁸ —

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15. United States Centers for Disease Control and Prevention, Health Effects of Cigarette Smoking, *available at* https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm (last accessed Oct. 31, 2017) (citing United States Department of Health and Human Services, United States Public Health Service, *The Health Consequences of Smoking — 50 Years of Progress* (Executive Summary of the Report of the Surgeon General) at 4, *available at* <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf> (last accessed Oct. 31, 2017)).
16. United States Centers for Disease Control & Prevention, *supra* note 15.
17. See Mario Villaverde, et al., *Health Promotion and Non-Communicable Diseases in the Philippines: Current Status and Priority Policy Interventions and Actions* (A Health Promotion Study by Ateneo de Manila School of Government and HealthJustice) at 2, *available at* http://www.ateneo.edu/sites/default/files/ASoG-HJ%20Health%20Promotion%20Study%202012_0.pdf (last accessed Oct. 31, 2017).
18. See World Health Organization, *World No Tobacco Day 2017: Beating tobacco for health, prosperity, the environment and national development*, *available at* <http://www.who.int/mediacentre/news/releases/2017/no-tobacco-day/en/> (last accessed Oct. 31, 2017) [hereinafter WHO World No Tobacco Day 2017]. According to the World Health Organization, “[t]obacco use kills more than [seven] million people every year and costs households and governments over US\$1.4 trillion through healthcare expenditure and lost productivity.” *Id.* See also Mark Goodchild, et. al., *Global economic cost of smoking-attributable diseases*, *BMJ TOBACCO CONTROL*, May 5, 2017, *available at* <http://tobaccocontrol.bmj.com/content/early/2017/05/04/tobaccocontrol-2016-053305.info> (last accessed Oct. 31, 2017). “The total economic cost of smoking (from health expenditures and productivity losses together) totalled PPP [(purchasing power parity)] \$1,852 billion (US\$1,436 billion) in 2012, equivalent in magnitude to 1.8% of the world’s annual gross domestic product []. Almost 40% of this cost occurred in developing countries, highlighting the substantial burden these countries suffer.” *Id.* at 1.

with losses in the Philippines costing more than ₱380 billion¹⁹ — its sizable impact translates to a lost generation.

Each premature death from tobacco products is an incompensable and inestimable loss of human potential. Viewed this way and together with the fact that the epidemic causes, aggravates, perpetuates, and contributes to inequity and intergenerational poverty, tobacco consumption must, therefore, be properly recognized not only as a public health or legal issue, but also as a social justice and human development issue. Thus, the Sustainable Development Goals,²⁰ to which the Philippines has aligned its Philippine Health Agenda 2016–2022²¹ and its national economic agenda, the AmBisyon Natin 2040,²² established in no small measure that tobacco control remains a principal State policy.²³

II. RIGHT TO HEALTH VIS-À-VIS RIGHT TO PROPERTY

Amid the worsening tobacco epidemic and the growing governmental response to smoking-caused deaths and suffering, aggressive efforts have been made by the tobacco industry to undermine restrictions and regulatory instruments with the end-goal of ensuring that their commercial and proprietary interests are preserved.²⁴ For instance, the lobbying group, Philippine Tobacco Institute, has several times fronted for the interests of the local tobacco industry,²⁵ whose main products collectively kill 10 Filipinos

19. 2009 Phil. GATS Country Report, *supra* note 13, at 11.

20. Transforming our world: the 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Sep. 25, 2015). “[The Sustainable Development Goals] are integrated and indivisible[,] and balance the three dimensions of sustainable development: the economic, social[,] and environmental.” *Id.* pmb1.

21. Department of Health, The Philippine Health Agenda 2016–2022, Administrative Order No. 2016-0038 [DOH A.O. No. 2016-0038] (Oct. 26, 2016).

22. National Economic Development Authority, AmBisyon Natin 2040, *available at* <http://2040.neda.gov.ph> (last accessed Oct. 31, 2017).

23. G.A. Res. 70/1, *supra* note 20, at 16. Goal 3.a states, “Strengthen the implementation of the World Health Organization Framework Convention on Tobacco Control in all countries, as appropriate[.]” *Id.*

24. See Aditya Kalra, et al., Inside Philip Morris’ campaign to subvert the global anti-tobacco treaty, *available at* <https://www.reuters.com/investigates/special-report/pmi-who-ctc> (last accessed Oct. 31, 2017).

25. See, e.g., Philippine Tobacco Institute, Inc. v. Department of Health, CA-G.R. CV. No. 49376 (CA 2000) (unreported). The Regional Trial Court denied the

every hour.²⁶ It goes without saying, therefore, that where the fundamentality of the right to health were to be recognized, tobacco products need to be controlled and regulated. This is because “[h]ealth is a fundamental human right indispensable for the exercise of other human rights[,]”²⁷ and “[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”²⁸

Philippine Tobacco Institute Inc.’s prayer for the issuance of a writ of preliminary injunction. See *Philippine Tobacco Institute*, CA-G.R. CV. No. 49376, at 4-5 (unreported).

26. See Philip C. Tubeza, *Smoking kills 10 Filipinos every hour*, PHIL. DAILY INQ., Sep. 19, 2011, available at <http://newsinfo.inquirer.net/61111/smoking-kills-10-filipinos-every-hour> (last accessed Oct. 31, 2017); Matikas Santos, *10 Filipinos die hourly due to smoking-related illnesses — Drilon*, PHIL. DAILY INQ., Mar. 3, 2014, available at <http://newsinfo.inquirer.net/581985/drilon-co-sponsors-bill-on-graphic-based-warning-on-cigarette-packets> (last accessed Oct. 31, 2017); Sol Aragones, *10 Filipinos die every hour due to smoking*, available at <http://news.abs-cbn.com/lifestyle/05/13/11/10-filipinos-die-every-hour-due-smoking> (last accessed Oct. 31, 2017); & Sol Aragones, *10 Pinoy smokers die every hour: DOH*, available at <http://news.abs-cbn.com/lifestyle/06/26/12/10-pinoy-smokers-die-every-hour-doh> (last accessed Oct. 31, 2017).
27. Office of the High Commissioner on Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 1, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).
28. *Id.* Paragraph 2 of the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14 also states that

[t]he human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms — ‘Everyone has the right to a standard of living adequate for the health of himself and of his [or her] family, including food, clothing, housing[,] and medical care and necessary social services.’ The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with [A]rticle 12.1 of the Covenant, States[-P]arties recognize ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,’ while [A]rticle 12.2 enumerates, by way of illustration, a number of ‘steps to be taken by the States[-P]arties ... to achieve the full realization of this right.’

Id. ¶ 2 (citing Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 25, ¶ 1, U.N. Doc. A/RES/3/217 A (Dec. 10, 1948) & International Covenant on Economic, Social and Cultural Rights, art. 12, ¶ 1, entered into force Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]).

This fundamental and cardinal nature of the right to health is recognized by no less than the Philippine Constitution,²⁹ which puts a great and clear onus upon the State to protect, promote, and respect this right towards its fullest realization.³⁰ Thus, when the fundamental and paramount law of the nation,³¹ to which all laws must conform,³² declared and dictated that the State “shall *protect and promote the right to health* of the people and instill health consciousness among them[.]”³³ it entrusted the State — from the level of Congress to the local governments — with the mandate to institutionalize a “unifying”³⁴ policy and structure that would direct “all the instrumentalities of the government to address themselves to developing the health consciousness among the people[.]”³⁵ And this consciousness, according to Commissioner Minda Luz M. Quesada during the debates of the 1986 Constitutional Commission, must be “a consciousness that makes people really behave and put into practice what they know about their health; so *that they stop smoking*, ... because they now have this consciousness.”³⁶

In this wise, far from the callous disregard of the tobacco industry of this primordial right,³⁷ the Constitution’s edict in protecting the right to health

29. PHIL. CONST. art. II, § 15 & art. XIII, §§ 11-13.

30. See PHIL. CONST. art. II, § 15 & art. XIII, §§ 11-13.

31. See *Manila Prince Hotel v. Government Service Insurance System*, 267 SCRA 408, 430 (1997). In the case, it was held that, “[The Constitution] is supreme, imperious, absolute[,] and unalterable except by the authority from which it emanates. It has been defined as *the fundamental and paramount law of the nation.*” *Id.*

32. *Tawang Multi-Purpose Coop. v. La Trinidad Water District*, 646 SCRA 21, 35 (2001). The Court noted that the Constitution is the basic and paramount law “to which all other laws must conform to.” *Id.* It went on to say that “[i]n case of conflict between the Constitution and a statute, the Constitution always prevails[.]” *Id.* See also *Sabio v. Gordon*, 504 SCRA 704, 731 (2006); *Social Justice Society (SJS) v. Dangerous Drugs Board*, 570 SCRA 410, 422-23 (2008); & *Macalintal v. Commission on Elections*, 405 SCRA 614, 631-32 (2003).

33. PHIL. CONST. art. II, § 15 (emphasis supplied).

34. 2 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 47, at 643 (1986).

35. 4 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 89, at 904 (1986).

36. *Id.* at 906 (emphasis supplied).

37. See *Oposa v. Factoran, Jr.*, 224 SCRA 792, 804-05 (1993). “Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation []—[] aptly and fittingly stressed by

has been described by the Framers themselves as a “very strong declaration of principles”³⁸ and a “vigorous mandate”³⁹ because they are one in categorically highlighting that its protection and promotion is “vital to the total development of the citizenry.”⁴⁰ While many smoke-free ordinances attempt to do just this as “[n]o legislature can bargain away the public health,”⁴¹ and as local governments are primarily entrusted with the welfare of their constituents,⁴² the tobacco industry invariably argues that its proprietary interests — the thousands or millions of pesos its members, or so-called “stakeholders,” stand to lose — are more valuable, more indispensable, more cardinal, more basic, and more fundamental than the human right to health.

Their arguments boil down to the assertion of the commercial interests of tobacco manufacturers, companies, and retailers, though these interests are mere privileges they falsely denominate as rights that they can assert everywhere in the Philippines. Much like the concluding words in the landmark case of *Social Justice Society (SJS) v. Atienza, Jr.*,⁴³

[e]ssentially, [they] are fighting for their right to property. ... However, based on the hierarchy of constitutionally[-]protected rights, the right to life enjoys precedence over the right to property. The reason is obvious [—] *life is irreplaceable, property is not*. When the [S]tate or [l]ocal government unit’s] exercise of police power clashes with a few individuals’ right to property, *the former should prevail*.⁴⁴

The tobacco industry, therefore, would have much to learn from the Supreme Court, which enunciated early on that

the petitioners[]—[]the advancement of which may even be said to *predate all governments and constitutions*.” *Id.* at 805 (emphasis supplied).

38. 4 RECORD, 1987 PHIL. CONST., NO. 89, at 906.

39. *Id.* at 905.

40. *Id.* at 906.

41. *United States v. Gomez Jesus*, 31 Phil. 218, 225 (1915). *See also* *Del Mar v. Philippine Amusement & Gaming Corporation*, 346 SCRA 485, 527 & 553 (2000).

42. *See* Office of the President, *Redirecting the Functions and Operations of the Department of Health*, Executive Order No. 102, Series of 1999 [E.O. No. 102, s. 1999], whereas cls. 1-2 (May 24, 1999).

43. *Social Justice Society (SJS) v. Atienza, Jr.*, 545 SCRA 92 (2008).

44. *Id.* at 157 (citing *Secretary of Justice v. Lantion*, 322 SCRA 160, 185 (2000) & *Vda. de Genuino v. Court of Agrarian Relations*, 22 SCRA 792, 797 (1968)) (emphasis supplied).

[w]hile the Bill of Rights also protects property rights, *the primacy of human rights over property rights is recognized*. Because these freedoms are ‘delicate and vulnerable, as well as supremely precious in our society,’ ... they ‘need breathing space to survive,’ permitting government regulation only ‘with narrow specificity.’

Property and property rights can be lost thru prescription; but human rights are imprescriptible. If human rights are extinguished by the passage of time, then the Bill of Rights is a useless attempt to limit the power of government and ceases to be an efficacious shield against the tyranny of officials, of majorities, of the influential and powerful, and of oligarchs — political, economic[,] or otherwise.⁴⁵

Since it goes without saying that the human right to health is so extremely intertwined with the very right to life,⁴⁶ the industry’s invocation of its members’ license to peddle tobacco products to the detriment of the Filipino people and of generations to come cannot be countenanced.

III. THE STATE’S POWER TO REMOVE HAZARDOUS PRODUCTS

The Philippine Constitution, in the competition clauses under Article XII, Section 19,⁴⁷ in fact, militates against common industry arguments. This is obvious from the exchange of Commissioners Napoleon G. Rama and

45. *Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., Inc.*, 51 SCRA 189, 202 (1973) (emphases supplied).

46. PHIL. CONST. art. III, § 1. Article III of Section 1 of the 1987 Philippine Constitution states that “[n]o person shall be deprived of *life*, liberty, or property without due process of law[.]” PHIL. CONST. art. III, § 1 (emphasis supplied). *See also* International Covenant on Civil and Political Rights art. 6, ¶ 1, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. The International Covenant on Civil and Political Rights states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.” *Id.* & Office of the High Commissioner for Human Rights, *CCPR General Comment No. 6: Article 6 (Right to Life)*, U.N. Doc. HRI\GEN\1\Rev.1 (Apr. 30, 1982). Committee on Civil and Political Rights (CCPR) General Comment No. 6 maintains that “[i]t is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation[.] ... It is a right which should not be interpreted narrowly.” *Id.* ¶ 1.

47. PHIL. CONST. art. XII, § 19. Article XII, Section 19 provides, “The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.” PHIL. CONST. art. XII, § 19.

Bernardo M. Villegas during the debates of the 1986 Constitutional Commission⁴⁸ as regards the said provision.

MR. RAMA. Section 14 states[—] ‘The State shall regulate or prohibit monopolies when the public interest so requires.’ I have heard the Chairman say that this would not prohibit the State to set up monopolies for the common good.

MR. VILLEGAS. That is right.

MR. RAMA. I was thinking, for instance, of the procedure or the system in Japan where tobacco is the monopoly of the State and serves substantially the *common good* and its revenues form a substantial part of the budget of the Japanese government.

Therefore, the monopoly on tobacco is a desirable monopoly; *first, it is hazardous to health*; and second, the State converts this kind of industry into something that benefits the country. On the other hand, although the statement has been made by the Chairman that this would not prohibit the State from setting up monopolies, the second sentence in Section 14 seems to contradict that statement because it states[—] ‘No combinations in restraint of trade or unfair competition shall be allowed.’ It is addressed to both the State and the private sector. So, does the Commissioner think that there should be some kind of a phrase here that would allow the government or the State to set up monopolies that would serve the common good?

MR. VILLEGAS. The second sentence is interpreted in the context of the antitrust legislation or the jurisprudence on antitrust legislation, for example, in the United States, to the extent that combinations in restraint of trade or unfair competition actually prejudice the consumers and the people. Then that is where the law comes in. But precisely, there are certain monopolies which actually favor the consumers because of the economies of scale since we do not have unnecessary duplication of resources. However, these types of monopolies have to be regulated.

MR. RAMA. But this will not prohibit the State from setting up monopolies for the common good?⁴⁹

What the above exchange shows is that the public monopolization by the State may be done for industries that are “hazardous to health.”⁵⁰ The obvious implication of this position is that private players may be *totally*

48. 3 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 55 (1986).

49. *Id.* at 258 (emphasis supplied).

50. *Id.* at 258.

eliminated in relation to industries that must be regulated for the purposes of the common good. This thought was not rejected by both committee and plenary deliberations, but was in fact affirmed as shown in the exchanges among Commissioners Hilario G. Davide, Jr., Jose E. Suarez, and Bernardo M. Villegas.⁵¹ This has also been supported by jurisprudence when the Supreme Court recognized that the “overriding”⁵² interest of the public welfare may actually subvert the privilege to the exercise of trade.⁵³

All these imply that there is not even a question about the State’s legitimate power to remove tobacco products from the market, because as the overriding intent of the competition clauses has always been public welfare, tobacco trade may be dispensed with altogether.⁵⁴ No less than the Constitution allows this.

This position is also supported by the general principles of international law, which “are binding on all [S]tates”⁵⁵ and form part of the law of the land.⁵⁶ This international law principle is articulated in this manner — “as a

51. *Id.* at 258-63.

52. See *Philippine Ports Authority v. Mendoza*, 138 SCRA 496, 510 (1985) & *Anglo-Fil Trading Corp. v. Lazaro*, 124 SCRA 494, 514-18 (1983).

53. See *Pernito Arrastre Services, Inc. v. Mendoza*, 146 SCRA 430, 444 (1986). The Court held, “[I]n industries affected with public interest, a regulated monopoly is not necessarily proscribed, if such is deemed necessary in order to protect and promote public interest.” *Id.*

54. See generally Allan Chester B. Nadate, et al., *The Public Welfare Dimension of the Competition Clauses: An Exposition and Application of the Proper Constitutional Treatment for Industries with Adverse Public Health Impacts*, 90 PHIL. L.J. 797 (2017).

55. *Pharmaceutical & Health Care Association of the Philippines v. Duque III*, 535 SCRA 265, 291 (2007). In describing the generally accepted principles of international law, the Court held,

‘Generally accepted principles of international law’ refers to norms of general or customary international law which are binding on all [S]tates, [i.e.], renunciation of war as an instrument of national policy, the principle of sovereign immunity, a person’s right to life, liberty[,] and due process, and *pacta sunt servanda*, among others.

Id.

56. PHIL. CONST. art. II, § 2. The said provision provides that “[t]he Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land*[,] and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.” PHIL. CONST. art. II, § 2 (emphasis supplied). See also *Mijares v. Ranada*, 455 SCRA 397, 421 (2005). “[G]enerally accepted principles of

matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, [*inter alios*], ... [an] investment not deemed expropriatory[.]”⁵⁷

In other words, where the measure is promulgated regularly and applied equally to all tobacco manufacturers or retailers — as the case of an ordinance is — the loss is deemed *damnum absque injuria*,⁵⁸ and must be borne by the tobacco industry. This principle hinges on the inherent police power of States, which has been applied in international law as “to reject claims challenging regulatory measures designed specifically to protect public health[.]” as ruled in *Philip Morris Brands SARL v. Uruguay*.⁵⁹

Thus, where the “contractual deprivation” is “motivated by the increasing awareness of the dangers presented [by the product to] human health,” the abrogation of the privilege to manufacture, distribute, and sell such product is permitted as a “valid exercise of the State’s police powers and, as a result, does not constitute [a compensable] expropriation.”⁶⁰ Recently, this position was affirmed against Philip Morris in its dispute against the State of Uruguay, where the international tribunal referred to States’ innate power to enact *bona fide*, non-discriminatory measures for the

international law, by virtue of the incorporation clause of the Constitution. ... form part of the laws of the land even if they do not derive from treaty obligations.” *Mijares*, 455 SCRA at 421.

57. *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, 44 ILM 1345, part IV, ch. D (3), ¶ 7 (NAFTA Chapter Eleven Arbitral Tribunal, 2005).
58. *See Amonoy v. Gutierrez*, 351 SCRA 731 (2001) & *Custodio v. Court of Appeals*, 253 SCRA 483 (1996). In *Amonoy v. Gutierrez*, the Court stated that “[u]nder th[e] principle [of *damnum absque injuria*], the legitimate exercise of a person’s rights, even if it causes loss to another, does not automatically result in an actionable injury. The law does not prescribe a remedy for the loss.” *Amonoy*, 253 SCRA at 732. In *Custodio v. Court of Appeals*, the Court further held that “one may use any lawful means to accomplish a lawful purpose and though the means adopted may cause damage to another, no cause of action arises in the latter’s favor. An injury or damage occasioned thereby is *damnum absque injuria*.” *Custodio*, 253 SCRA at 493.
59. *Philip Morris Brands SARL v. Uruguay*, Award, ICSID Case No. ARB/10/7, ¶ 198 (2016). *See also Bischoff Case (Germany v. Venezuela)*, 10 R.I.A.A. 420, 420 (1903).
60. *Chemtura Corp. v. Government of Canada*, PCA Case No. 2008-01, ¶ 266 (Feb. 8, 2010).

protection of public welfare, including public health.⁶¹ According to the Award in *Philip Morris Brands SARL*, “[p]rotecting public health has since long been recognized as an essential manifestation of the State’s police power,”⁶² which would permit the de-normalization of tobacco trade. This is, likewise, the position taken by Australia⁶³ in its dispute against Philip Morris Asia Limited, which it won before the Permanent Court of Arbitration this year.⁶⁴

IV. POLICE POWER OF THE STATE

In this jurisdiction, the exercise of police power, delegable to local governments, is “the most essential, insistent[,] and illimitable of powers”⁶⁵ of the State.⁶⁶ It is the “law of overwhelming necessity”⁶⁷ that allows the

61. *Philip Morris Brands SARL*, ICSID Case No. ARB/10/7, ¶ 295.

62. *Id.* ¶ 291.

63. United Nations Commission on International Trade Law, Australia’s Response to the Notice of Arbitration at 1, ¶ 3, available at <https://www.italaw.com/sites/default/files/case-documents/ita0666.pdf> (last accessed Oct. 31, 2017).

64. *Philip Morris Asia Ltd. (Hong Kong) v. Commonwealth of Australia*, PCA Case No. 2012-02, Final Award Regarding Costs, ¶ 93 (July 8, 2017).

65. *Binay v. Domingo*, 201 SCRA 508, 514 (1991); *Basco v. Phil. Amusements & Gaming Corporation*, 197 SCRA 52, 61 (1991); *Lozano v. Martinez*, 146 SCRA 323, 338 (1986); & *Smith, Bell & Co. v. Natividad*, 40 Phil. 136, 147 (1919).

66. *See Ynot v. Intermediate Appellate Court*, 148 SCRA 659 (1987). The Court held that

[t]he protection of the general welfare is the particular function of the police power which both restraints and is restrained by due process. The police power is simply defined as the power inherent in the State to regulate liberty and property for the promotion of the general welfare. By reason of its function, it extends to all the great public needs and is described as the most pervasive, the least limitable[,] and the most demanding of the three inherent powers of the State, far outpacing taxation and eminent domain. The individual, as a member of society, is hemmed in by the police power, which affects him [or her] even before he [or she] is born and follows him [or her] still after he [or she] is dead[]—[]from the womb to beyond the tomb[]—[]in practically everything he [or she] does or owns. Its reach is virtually limitless. It is a ubiquitous and often unwelcome intrusion. Even so, as long as the activity or the property has some relevance to the public welfare, its regulation under the police power is not only proper but necessary. And the justification is found in the venerable Latin maxims,

interference with personal liberty or property to promote the general welfare.⁶⁸ As early as 1910, the Philippine Supreme Court has made clear that this meant the power to curtail even the exercise of vested rights and privileges — especially those pertaining to the use of property.

[I]t is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his [or her] title, holds it under the implied liability that *his [or her] use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.* ... Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the [C]onstitution, may think necessary and expedient.⁶⁹

In the State's exercise of police power, public health has always had paramount consideration. The Court noted early on that “public health [is a] [matter] of legislative concern of which the legislature cannot divest itself[,]”⁷⁰ and “[i]t is as much for the interest of the [S]tate that public health should be preserved as that life should be made secure.”⁷¹ These principles are related to doctrine of *sic utere tuo ut alienum non leadas*,⁷² “which call for

Salus populi est suprema lex and *Sic utere tuo ut alienum non laedas*, which call for the subordination of individual interests to the benefit of the greater number.

Id. at 669-70.

67. *Basco v. Phil. Amusements & Gaming Corporation*, 197 SCRA 52, 61 (1991); *Philippine Association of Service Exporters, Inc. v. Drilon*, 163 SCRA 386, 391 (1988); & *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660, 713 (1919).
68. *See Edu v. Erieta*, 35 SCRA 481 (1970). The Court described police power as the “[S]tate authority to enact legislation that may interfere with personal liberty or property in order to promote the general welfare. Persons and property could thus ‘be subjected to all kinds of restraints and burdens in order to secure the general comfort, health[,] and prosperity of the [S]tate.’”
- Id.* at 487 (citing *Calalang v. Williams, et al.*, 70 Phil. 726, 733 (1940)).
69. *United States v. Toribio*, 15 Phil. 85, 93 (1910) (emphasis supplied).
70. *Churchill and Tait v. Rafferty*, 32 Phil. 580, 603 (1915).
71. *See United States v. Gomez Jesus*, 31 Phil. 218, 228 (1915) & *Case v. Board of Health*, 24 Phil. 250, 281 (1913) (citing *Holden v. Hardy*, 169 U.S. 366, 395)).
72. *Andamo v. Intermediate Appellate Court*, 191 SCRA 195, 202 (1990). The Court held, “It must be stressed that the use of one’s property is not without

the subordination of individual interests to the benefit of the greater number.”⁷³

The validity of this exercise of police power “*does not depend upon the absolute assurance* that the purpose desired can in fact be probably fully accomplished, or upon the certainty that it will best serve the purpose intended.”⁷⁴ Rather, it is important that the measure is reasonable.⁷⁵ The control and regulation of tobacco products within the ambit of the smoke-free ordinances — access restrictions, regulation of tobacco advertisement, promotion, and sponsorship, and measures for the protection from exposure to tobacco smoke — are all evidence-based approaches demonstrated to have consistently achieved the desired positive public health outcomes.⁷⁶ The fact,

limitations. Article 431 of the Civil Code provides that ‘the owner of a thing cannot make use thereof in such a manner as to injure the rights of a third person.’” *Id.* See also *JMM Promotion & Management, Inc. v. Court of Appeals*, 260 SCRA 319, 330 (1996). The Court defined the maxim as follows

According to the maxim, *sic utere tuo ut alienum non laedas*, it must of course be within the legitimate range of legislative action to define the mode and manner in which every one may so use of his [or her] own property so as not to pose injury to himself [or herself] or others.

Id.

73. *Ynot*, 148 SCRA at 670.

74. *Mirasol v. Department of Public Works & Highways*, 490 SCRA 318, 350 (2006) (emphasis supplied).

75. *Id.* at 348. In *Mirasol v. Department of Public Works & Highways*, the Court held that “[t]he sole standard in measuring its exercise is reasonableness. What is ‘reasonable’ is not subject to exact definition or scientific formulation. No all-embracing test of reasonableness exists, for its determination rests upon human judgment applied to the facts and circumstances of each particular case.” *Id.* (citing *Department of Education, Culture and Sports v. San Diego*, 180 SCRA 533, 537 (1989); *City of Raleigh v. Norfolk Southern Railway Co.*, 165 S.E.2d 745, 749 (1969); & *Board of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah’s Witnesses*, 117 N.E.2d 115, 119 (1954) (U.S.)).

76. See WHO FCTC *supra* note 4, pmbl. & arts. 13 & 16. See also Conference of the Parties to the WHO Framework Convention on Tobacco Control, Bangkok, Thailand, June 30–July 6, 2007, *Elaboration of guidelines for implementation of the Convention (decision FCTC/COP1(15))*, princ. 1, ¶ 6, U.N. Doc. A/FCTC/COP/2/7 (Apr. 26, 2007) [hereinafter *Guidelines on Protection from Exposure to Tobacco Smoke*]. The *Guidelines on Protection from Exposure to Tobacco Smoke* explains that

too, that smokers constitute only a minority of the population;⁷⁷ that there is no unsafe level of exposure to secondhand smoke;⁷⁸ that cancer-causing, injurious, and pathologic chemicals in smoke are imperceptible, odorless, or colorless;⁷⁹ that the costs of health care, diminished productivity, lost work hours, and premature death from tobacco smoke are staggering;⁸⁰ and that children are passive, silent victims of tobacco⁸¹ would inevitably and ultimately show that the ordinance is *both reasonable and critical* to addressing the overwhelming necessity of saving and protecting the lives of Filipinos across individual local government jurisdictions from the tobacco epidemic.

This exercise of police power is made more meaningful in light of the social justice ends that such public health measures seek to accomplish.⁸² The Constitution is, after all, a charter, whose broad strokes and fine lines “[bend]

[a]pproaches other than 100% smoke free [environments], including ventilation, air filtration[,] and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective[.] [T]here is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke.

Id.

77. See GATS 2015 Fact Sheet *supra* note 10, at 11.
78. Guidelines on Protection from Exposure to Tobacco Smoke, *supra* note 76. The Guidelines on Protection from Exposure to Tobacco Smoke provide that “[t]here is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence.” *Id.*
79. See United States Environmental Protection Agency, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders at 2-5, *available at* https://www.epa.gov/sites/production/files/2014-09/documents/passive_smoke.pdf (last accessed Oct. 31, 2017) & Tobacco Free Initiative, International Consultation on Environmental Tobacco Smoke (ETS) and Child Health (Consultation Report) at 5, *available at* http://www.who.int/tobacco/research/en/ets_report.pdf (last accessed Oct. 31, 2017).
80. 2009 Phil. GATS Country Report *supra* note 13, at 11.
81. See Tobacco Free Initiative, *supra* note 79, at 5. The Consultation Reports provide, “[T]here is more than sufficient evidence of harm to demand action to reduce children’s involuntary exposure to tobacco smoke.” *Id.* See also Brigit Toebes, et. al., *A missing voice: the human rights of children to a tobacco-free environment*, BMJ TOBACCO CONTROL, July 12, 2017, *available at* <http://tobaccocontrol.bmj.com/content/early/2017/09/21/tobaccocontrol-2017-053657> (last accessed Oct. 31, 2017).
82. See, e.g., Nadate, *supra* note 54, at 839-42.

over backward to accommodate”⁸³ not the multi-billion peso Philippine tobacco industry or the multi-trillion peso global tobacco industry, but rather, the down-trodden and the underprivileged in life.⁸⁴ The social justice implication becomes obvious when viewed in consonance with the demography of the tobacco epidemic — it is the poor, marginalized, and underprivileged sectors of society that bear the greatest burdens of tobacco addiction.

The World Health Organization notes, for instance, that “in the poorest households, spending on tobacco products often represents more than 10% of total household expenditure — meaning less money for food, education, and healthcare.”⁸⁵

This is important considering that the average monthly expenditure for manufactured cigarettes is ₱678.40,⁸⁶ according to the 2015 Global Adult Tobacco Survey, and the poor has been constantly targeted by tobacco industries worldwide for their vulnerability.⁸⁷ In addition, it is the poor who have the most to lose from the expensive treatment and therapies needed to cure or manage tobacco-related diseases.⁸⁸

Time and again, the Supreme Court has emphasized that the less privileged must be protected, and their rights safeguarded, by reading the Constitution as an expression of the supremacy of public welfare⁸⁹ and the

83. *St. Mary’s Academy of Dipolog City v. Palacio*, 630 SCRA 263, 280 (2010); *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*, 446 SCRA 299, 388 (2004); *Uy v. Commission on Audit*, 328 SCRA 607 (2000); & *Ditan v. POEA Administrator*, 191 SCRA 823, 829 (1990).

84. See 5 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 106, at 909 (1986).

85. WHO World No Tobacco Day 2017, *supra* note 18.

86. GATS 2015 Fact Sheet, *supra* note 10, at 1.

87. See Anna Gilmore, *Big tobacco targets the young in poor countries — with deadly consequences*, GUARDIAN, Dec. 1, 2015, available at <https://www.theguardian.com/global-development/2015/dec/01/big-tobacco-industry-targets-young-people-poor-countries-smoking> (last accessed Oct. 31, 2017) & Truth Initiative, tobacco is a social justice issue: smoking and low-income communities, available at <https://truthinitiative.org/news/smoking-and-low-income-communities> (last accessed Oct. 31, 2017).

88. *Id.*

89. See *Ynot*, 148 SCRA at 670; *Tatad v. Secretary of the Department of Energy*, 281 SCRA 330, 375 (1997); *People v. Reyes*, 67 Phil. 187, 190 (1939); *Ermita-Malate Hotel and Motel Operators Association v. City Mayor of Manila*, 20

State's obligation to ensure that *salus populi est suprema lex*.⁹⁰ This notion of the ascendancy of the public welfare as to modify economic policies was put forward as early as the deliberations of the Constitutional Convention of the 1935 Philippine Constitution.⁹¹ In his analysis of the 1973 Constitution, leading constitutionalist Justice Enrique M. Fernando held the same view, concluding further that the then-charter's social justice provisions constituted an "active and militant policy."⁹²

Finally, the words of Cecilia Muñoz-Palma, the President of the 1986 Constitutional Commission and later Justice of the Supreme Court, also lend clarity to the abstraction that the ideas of social welfare and social justice in

SCRA 849, 865 (1967); *Primicias v. Fugoso*, 80 Phil. 71 (1948); *The United States v. Ling Su Fan*, 10 Phil. 114 (1908); & *Collins v. Wolfe*, 5 Phil. 297 (1905).

90. *Cruz v. Pandacan Hiker's Club, Inc.*, 778 SCRA 385, 399 (2016) & *Fabie v. City of Manila*, 21 Phil. 486, 492 (1912). The cases provide that "[t]he welfare of the people is the supreme [or highest] law." *Id.*
91. 3 JOURNAL OF THE CONSTITUTIONAL CONVENTION at 177-78 (1966). The Journal provides —

[T]his [C]onstitution has [a] definite and well defined philosophy not only political but social and economic. ... If in this Constitution the gentlemen will find declarations of *economic policy they are there because they are necessary to safeguard the interests and welfare of the Filipino people* because we believe that the days have come when in self-defense, a nation may provide in its [C]onstitution those safeguards, the patrimony, the freedom to grow, the freedom to develop national aspirations and national interests, not to be hampered by the artificial boundaries which a constitutional provision automatically imposes.

Id. (emphasis supplied).

92. *Philippine Apparel Workers Union v. National Labor Relations Commission*, 106 SCRA 444, 461 (citing ENRIQUE M. FERNANDO, REFLECTIONS ON THE REVISED CONSTITUTION 80 (1974)). Justice Enrique M. Fernando, in his book, provided that —

What is thus stressed is that a fundamental principle as social justice, identified as it is with the broad scope of the police power, has an even basic role to play in aiding those whose lives are spent in toil, with destitution an ever-present threat, to attain a certain degree of economic well-being. Precisely, through the social justice ... provisions, the government is enabled to pursue an active and militant policy to give reality and substance to the proclaimed aspiration of a better life[.]

Id.

the 1987 Philippine Constitution typify. According to her, the Constitution “is a document which in clear and in unmistakable terms reaches out to the underprivileged, the paupers, the sick, the elderly, disabled, veterans[,] and other sectors of society.”⁹³ “[The] less in life[,]” after all, as the late President Ramon Magsaysay said, “should have more in law.”⁹⁴

Put in this light, the famous expression in *Calalang v. Williams, et al.*⁹⁵ by the eminent Justice Jose P. Laurel rings as an apt repudiation of the tobacco industry’s contentions — that more than “the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated,”⁹⁶ social justice means that since the “[p]ublic welfare, then, lies at the bottom”⁹⁷ of the State’s continued existence, it may “interfere with personal liberty, with property, and with business and occupations”⁹⁸ for the purpose of “[promoting] the general welfare.”⁹⁹

The Court’s exhortation in *Carlos Superdrug Corp. v. Department of Social Welfare and Development (DSWD)*¹⁰⁰ is also, therefore, proper —

[W]hen the conditions so demand[,] as determined by the legislature, *property rights must bow to the primacy of police power* because property rights, though sheltered by due process, must yield to general welfare.

Police power as an attribute to promote the common good would be diluted considerably if on the mere plea of petitioners that they will suffer loss of earnings and capital, the questioned provision is invalidated. Moreover, in the absence of evidence demonstrating the alleged confiscatory effect of the provision in

93. *Atong Paglaum, Inc. v. Commission on Elections*, 694 SCRA 477, 577 (2013) (C.J. Sereno, concurring and dissenting opinion) (citing 5 RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES, NO. 105, 945 (1986)).

94. Cesar Bacani, *In Praise of Asian Virtues*, ASIaweek, Nov. 30, 2000, available at edition.cnn.com/ASIANOW/asiaweek/99/0806/sr1.html (last accessed Oct. 31, 2017).

95. *Calalang v. Williams, et al.*, 70 Phil. 726 (1940).

96. *Id.* at 734.

97. *Id.* at 733.

98. *Id.*

99. *Id.*

100. *Carlos Superdrug Corp. v. Department of Social Welfare and Development (DSWD)*, 526 SCRA 130 (2007).

question, there is no basis for its nullification in view of the presumption of validity which every law has in its favor.¹⁰¹

For all the money that its members stand to lose, this is a view strongly opposed by the tobacco industry. It needs recalling, however, that they must be the one to adjust; not the Constitution.

V. CURRENT STATUTORY EVIDENCE

In challenging smoke-free ordinances, it is often the tobacco industry's argument that an ordinance unduly or invalidly expands the restrictions of Republic Act No. 9211 or the Tobacco Regulation Act of 2003.¹⁰² A cursory reading of this position shows that it proceeds from the wrong premise that the said law exists as the sole regulatory regime for tobacco control in the country.

In the same manner, the industry misconstrues the law with its inference that it stands as the exclusive, unbendable rule governing the manufacturing, sale, and distribution of tobacco products. This construction is not only false — it has the dangerous implication of unduly limiting, if not, emasculating, the power of local governments to enact measures meant to protect and promote the right to health of its constituents, as well as ensure public welfare based on laws and policies that require, permit, or direct them to do so.

Contrary to this argument, the Tobacco Regulation Act of 2003 is only one of the many laws covering tobacco control and regulation. The Philippines is a State-Party to the WHO Framework Convention on Tobacco Control (WHO FCTC),¹⁰³ and the legislature passed Republic Act No. 8749 or the Philippine Clean Air Act of 1999.¹⁰⁴

In addition, the country has a well-defined executive policy against smoking, which was underlined by President Rodrigo Roa Duterte when he

101. *Id.* at 144 (emphases supplied).

102. An Act Regulating the Packaging, Use, Sale, Distribution and Advertisements of Tobacco Products and for Other Purposes [Tobacco Regulation Act of 2003], Republic Act No. 9211 (2003).

103. WHO Framework Convention on Tobacco Control Details, *available at* https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280055410&clang=_en (last accessed Oct. 31, 2017).

104. An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes [Philippine Clean Air Act of 1999], Republic Act No. 8749 (1999).

signed Executive Order No. 26.¹⁰⁵ This Order seeks to establish national consciousness on the hazards of smoking,¹⁰⁶ to halt the increase in the number of Filipinos afflicted by largely preventable tobacco-related diseases,¹⁰⁷ and to protect the non-smoking public from the deadly effects of secondhand smoke.¹⁰⁸ It was also made under the express recognition that “public health takes precedence over any commercial or business interests.”¹⁰⁹

More specifically, the Philippine Clean Air Act of 1999 unreservedly declared that every Filipino has “[t]he right to breathe clean air[.]”¹¹⁰ It prohibits “[s]moking inside a public building or an enclosed public place[,] including public vehicles and other means of transport[,] or *in any enclosed area outside of one’s private residence, private place of work[,] or any duly*

105. Office of the President, Providing for the Establishment of Smoke-Free Environments in Public and Enclosed Places, Executive Order No. 26, Series of 2017 [E.O. No. 26, s. 2017] (May 16, 2017).

106. *Id.* §§ 5, 8, & 9.

107. *Id.* whereas cl. 5. “[S]cientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease[,] and disability, lead to devastating health, social, economic[,] and environmental consequences, and places burdens on families, on the poor, and on national and local health systems[.]” *Id.*

108. *Id.* “[A]n increasing number of Filipinos become afflicted with and die each year of tobacco-related diseases such as stroke, heart disease, emphysema, various cancers[,] and nicotine addition, and both the public and workers in facilities where smoking is allowed are most at risk from these and other tobacco-related diseases[.]” *Id.* whereas cl. 7.

109. E.O. No. 26, s. 2017, whereas cl. 6.

110. Philippine Clean Air Act of 1999, § 4 (a).

designated smoking area[.]”¹¹¹ It prescribed, too, that this provision shall be implemented by local government units.¹¹²

Similarly, there is a clear State duty to protect communities, families, and individuals from tobacco smoke, as embodied in the text of Article 8 of the WHO FCTC which, having been ratified and concurred into by the Senate, stands in equal and full application as acts of Congress.¹¹³ The WHO FCTC was developed as a strong, comprehensive, and evidence-based response¹¹⁴ to the spread of the worldwide tobacco epidemic.¹¹⁵ Article 8 was designed to protect individuals, families, homes, and communities involuntarily affected by secondhand smoke.¹¹⁶ It aims to realize the right to breathe clean

111. *Id.* § 24 (emphasis supplied). *Cf.* Department of Environment & Natural Resources, Rules and Regulations Implementing Republic Act No. 8749, part VIII, rule XXIX, § 1. Section 1 of the Implementing Rules and Regulations to Republic Act No. 8749 provides,

Local Government Units (LGUs) shall ... implement or enforce a ban on smoking inside a public building or an enclosed public place[,] including public vehicles and other means of transport[,] or in any enclosed area outside of one’s private residence, private place of work[,] or any duly designated smoking area.

Id.

112. Philippine Clean Air Act of 1999, § 24.

113. *See* *Marubeni Corporation v. Commission of Internal Revenue*, 177 SCRA 500 (1989); *La Chemise Lacoste, S.A. v. Fernandez*, 129 SCRA 373 (1984); *KLM Royal Dutch Airlines v. Court of Appeals*, 65 SCRA 237 (1975); & *World Health Organization v. Aquino*, 48 SCRA 242 (1972).

114. *See* WHO FCTC *supra* note 4, pmb1, para. 3. The WHO FCTC provides, “Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate[,] and comprehensive international response[.]” *Id.*

115. *Id.* pmb1, para. 4. The WHO FCTC provides further, “Reflecting the concern of the international community about the devastating worldwide health, social, economic[,] and environmental consequences of tobacco consumption and exposure to tobacco smoke[.]” *Id.*

116. *Id.* art. 8. Article 8 of the WHO FCTC provides that:

- (1) Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease[,] and disability.
- (2) Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative[,] and/or other measures,

air, implicit in every person's fundamental human right to life and right to the highest attainable standard of health.¹¹⁷

The country became a State-Party to the WHO FCTC, upon Senate concurrence and executive ratification in 2005, in a conscious joint executive and legislative decision to protect the present and future generations of Filipinos from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to tobacco smoke.¹¹⁸

The industry's myopic understanding of ordinances vis-à-vis national law is, therefore, incorrect. Instead, the two must be read *in pari materia* and "should be construed together"¹¹⁹ — as they cover the same subjects of

providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places[,] and, as appropriate, other public places.

Id.

117. Guidelines on Protection from Exposure to Tobacco Smoke, *supra* note 76, ¶ 4 (a). Said provision states,

The duty to protect from tobacco smoke, embodied in the text of Article 8, is grounded in fundamental human rights and freedoms. Given the dangers of breathing second-hand tobacco smoke, the duty to protect from tobacco smoke is implicit in, *inter alia*, the right to life and the right to the highest attainable standard of health, as recognized in many international legal instruments.

Id. See also ICESCR, *supra* note 28, art. 12, ¶ 1. It provides, "The States [-]Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." ICESCR, *supra* note 28, art. 12, ¶ 1.

118. S. Res. No. 195, 12th Cong., 1st Reg. Sess. (2005). Paragraph 3 thereof provides —

The Convention, consisting of [38] articles, aims to protect the present and future generations from the devastating health, social, environmental[,] and economic consequences of tobacco consumption and exposure to tobacco smoke by providing measures to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke[.]

Id. whereas cl. 3.

119. *Lledo v. Lledo*, 612 SCRA 54, 63 (2010); *Gayo v. Verceles*, 452 SCRA 504, 520 (2005); *Co v. Civil Register of Manila*, 423 SCRA 420, 427 (2004); *Vda. de Urbano v. Government Service Insurance System*, 367 SCRA 672, 691 (2001); & *Philippine Global Communications, Inc. v. Relova*, 145 SCRA 385, 394 (1986).

tobacco control and tobacco regulation. In *People v. Bustinera*,¹²⁰ the Supreme Court elucidated that

[w]hen statutes ... relate to the same person or thing, or to the same class of persons or things, or cover the same specific or particular subject matter, or have the same purpose or object, the rule dictates that they should be construed together [—] *interpretare et concordare leges legibus, est optimus interpretandi modus*.¹²¹

The rationale behind this rule is the fact that

enactments of the same legislature on the same subject matter are supposed to form part of one uniform system; that later statutes are supplementary or complimentary to the earlier enactments and[,] in the passage of its acts[,] the legislature is supposed to have in mind the existing legislation on the same subject and to have enacted its new act with reference thereto.¹²²

Thus, “the old statutes relating to the same subject matter should be compared with the new provisions and[,] if possible[,] by reasonable construction, *both should be so construed that effect may be given to every provision of each*.”¹²³

In resolving an “irreconcilable conflict[,]”¹²⁴ “irreconcilable inconsistency[,]”¹²⁵ or “irreconcilable repugnancy”¹²⁶ between the

120. *People v. Bustinera*, 431 SCRA 284 (2004).

121. *Id.* at 290.

122. *City of Naga v. Agna*, 71 SCRA 176, 184 (1976).

123. *Id.* (emphasis supplied).

124. *Magno v. Commission on Elections*, 390 SCRA 495, 500 (2002). With the use of principles in statutory construction, the Court held —

It is basic in statutory construction that in case of irreconcilable conflict between two laws, the later enactment must prevail, being the more recent expression of legislative will. *Legis posteriores priores contrarias abrogant*. In enacting the later law, the legislature is presumed to have knowledge of the older law and intended to change it.

Id. (citing *Philippine National Bank v. Cruz*, 180 SCRA 206, 213 (1989)).

125. *Mecano v. Commission on Audit*, 216 SCRA 500, 505 (1992). The Court held that “[t]he failure to add a specific repealing clause indicates that the intent was not to repeal any existing law, unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and old laws.” *Id.*

126. *Garcia Valdez v. Soteraña Tuason*, 40 Phil. 943, 946 (1920). The Court said that “when there is a plain, unavoidable, and irreconcilable repugnancy between two laws[,] the later expression of the [l]egislative will must be given effect. It is

provisions of a ratified treaty and those of domestic law, the Philippines applies the rule that treaties and statutes are equal in rank, and that the one passed or approved later in time should prevail, in accordance with the principle of *lex posterior derogat priori*.¹²⁷ In any such finding between and among the Clean Air Act of 1999, the Tobacco Regulation Act of 2003, and the WHO FCTC, therefore, the WHO FCTC's specific and special provisions would govern, having been the latest law in force. The well-respected constitutional and public international law expert and member of the 1986 Constitutional Convention, Fr. Joaquin G. Bernas, Jr., opined that this legal effect stems from the fact that a statute "is *on a full parity* with a treaty."¹²⁸

Under the WHO FCTC, the creation and implementation of 100% smoke-free environments are explicitly recognized as the only effective science-based measures to protect the population from the harmful effects of exposure to secondhand tobacco smoke.¹²⁹ This is in collective recognition by States of the overwhelming scientific evidence establishing that exposure to tobacco smoke causes death, disease, and disability.¹³⁰

"Smoke[-]free air[.]" as used in the WHO FCTC, means "air that is 100% smoke[-]free[.]" which "includes, but is not limited to, air in which

axiomatic in the science of jurisprudence that two inconsistent statutes cannot co-exist in one jurisdiction with reference to the same subject[]matter." *Id.*

127. *Secretary of Justice*, 322 SCRA at 197. Applying the doctrine of incorporation, the Court said —

The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle *lex posterior derogat priori* takes effect[—] a treaty may repeal a statute and a statute may repeal a treaty.

Id.

128. JOAQUIN G. BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 64 (2002) (citing *Tañada v. Angara*, 272 SCRA 18 (1987)) (emphasis supplied).

129. See WHO FCTC, *supra* note 4, art. 8. See also Guidelines on Protection from Exposure to Tobacco Smoke, *supra* note 76, princ. 7, ¶ 29. Under the Guidelines on Protection from Exposure to Tobacco Smoke, "[the] elimination of smoke indoors is the only science-based solution to ensure complete protection from exposure[.]" *Id.*

130. WHO FCTC, *supra* note 4, pmb., para. 6.

tobacco smoke cannot be seen, smelled, sensed[,] or measured.”¹³¹ Article 8 of the WHO FCTC and the Conference of Parties’ (the official and sole international body that interprets the WHO FCTC) Guidelines on Protection from Exposure to Tobacco Smoke¹³² provide a clear legal obligation on all States-Parties to protect their populace from tobacco smoke by adopting effective legislative, executive, administrative, and other measures to reduce secondhand smoke exposure.¹³³ These effective measures require “the *total elimination* of smoking and tobacco smoke in [] particular space[s].”¹³⁴

Under the Conference of Parties’ Guidelines on Protection from Exposure to Tobacco Smoke, States-Parties are required to adopt and implement effective measures against tobacco smoke exposure in four key areas: (a) indoor workplaces; (b) public transport; (c) indoor public places; and, as appropriate, (d) other public places.¹³⁵ As an obligation of States-Parties, these measures need not be legislated by the national legislature, and can be implemented through executive orders, administrative issuances, and local ordinances. In addition, Article 16 of the WHO FCTC provides a clear legal obligation on all Parties to “adopt and implement effective legislative, executive, administrative[,] or other measures at the appropriate government level to prohibit the sales of tobacco products” to minors.¹³⁶

The WHO FCTC, too, provides binding rules and obligations as regards tobacco advertising, sales, and promotions. Article 13 of the same requires the country to “undertake a *comprehensive ban of all* tobacco advertising,

131. Guidelines on Protection from Exposure to Tobacco Smoke, *supra* note 76, princ. 7, ¶ 16.

132. In interpreting a treaty, the Vienna Convention on the Law of Treaties provides that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions[,]” such as the Conference of Parties’ article-specific guidelines to the Framework Convention on Tobacco Control, “shall be taken into account.” See Sam Foster Halabi, *The World Health Organization’s Framework Convention on Tobacco Control: An Analysis of the Guidelines Adopted by the Conference of Parties*, 39 GA. J. INT’L & COMP. L. 133-35 (2010) (citing Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

133. WHO FCTC, *supra* note 4, art. 8, ¶ 2.

134. Guidelines on Protection from Exposure to Tobacco Smoke, *supra* note 76, princ. 1, ¶ 6 (emphasis supplied).

135. *Id.* princ. 7, ¶ 23. See also WHO FCTC, *supra* note 4, art. 8, ¶ 2.

136. WHO FCTC, *supra* note 4, art. 16, ¶ 1.

promotion[,] and sponsorship”¹³⁷ because “[a] ban on tobacco advertising, promotion[,] and sponsorship is effective only if it has a broad scope.”¹³⁸ At a minimum, the WHO FCTC obliges all States-Parties to “prohibit all forms of tobacco advertising, promotion[,] and sponsorship¹³⁹ 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;”¹⁴⁰ “restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public;”¹⁴¹ “undertake a comprehensive ban or ... restrict tobacco

137. *Id.* art. 13, ¶ 2 (emphasis supplied).

138. Conference of the Parties to the WHO Framework Convention on Tobacco Control, Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control (Tobacco advertising, promotion and sponsorship) ¶ 5, available at http://www.who.int/fctc/guidelines/article_13.pdf (last accessed Oct. 31, 2017). The cited provisions are as follows:

- (5) A ban on tobacco advertising, promotion[,] and sponsorship is effective only if it has a broad scope. Contemporary marketing communication involves an integrated approach to advertising and promoting the purchase and sale of goods, including direct marketing, public relations, sales promotion, personal selling[,] and online interactive marketing methods. If only certain forms of direct tobacco advertising are prohibited, the tobacco industry inevitably shifts its expenditure to other advertising, promotion[,] and sponsorship strategies, using creative, indirect ways to promote tobacco products and tobacco use, especially among young people.
- (6) Therefore, the effect of a partial advertising ban on tobacco consumption is limited.

Id. ¶¶ 5-6.

139. WHO FCTC, *supra* note 4, art. 13, ¶ 4 (a). Paragraph 8 of the Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control explains as follows —

It is important to note that both ‘tobacco advertising and promotion’ and ‘tobacco sponsorship’ cover promotion not only of particular tobacco products[,] but also of tobacco use generally; not only acts with a promotional aim[,] but also acts that have a promotional effect or are likely to have a promotional effect; and not only direct promotion[,] but also indirect promotion.

Conference of the Parties to the WHO Framework Convention on Tobacco Control, *supra* note 138, ¶ 8.

140. WHO FCTC, *supra* note 4, art. 13, ¶ 4 (a).

141. *Id.* art. 13, ¶ 4 (c).

advertising, promotion[,] and sponsorship on radio, television, print media[,] and, as appropriate, other media, such as the [I]nternet[;]”¹⁴² and “prohibit or ... [restrict] tobacco sponsorship of international events, activities[,] and/or participants therein.”¹⁴³

These broad proscriptions were designed based on the “[recognition] that a comprehensive ban on advertising, promotion[,] and sponsorship would reduce the consumption of tobacco products[,]”¹⁴⁴ and, ultimately, protect and save lives.

VI. THE TOBACCO REGULATION ACT

The Tobacco Regulation Act of 2003 also does not create a right to smoke, to access designated smoking areas, or to advertise and promote tobacco products. It does not in itself establish a clear and concrete right to create designated smoking areas or to advertise or promote in any premise, perimeter, or vicinity.¹⁴⁵ This is so because the Tobacco Regulation Act of 2003 was designed to control and limit the tobacco industry — not the State’s enforcing agents or instrumentalities and, more so, not the local governments.¹⁴⁶ This is clear from the *travaux préparatoires* of the said law and from the deliberations in the House of Representatives and Congress.¹⁴⁷ Thus, in his sponsorship speech of the law,¹⁴⁸ the late Senator and former Secretary of Health Juan M. Flavio intimated that

¹⁴² *Id.* art. 13, ¶ 4 (e).

¹⁴³ *Id.* art. 13, ¶ 4 (f).

¹⁴⁴ *Id.* art. 13, ¶ 1.

¹⁴⁵ *See* Tobacco Regulation Act of 2003, § 2.

¹⁴⁶ *Id.*

¹⁴⁷ The Court has previously held that only where the interpretation of statutory provisions is equivocal should extraneous aids of construction and interpretation be resorted to. *See* Ang Bagong Bayani-OFW Labor Party v. Commission on Elections, 359 SCRA 698, 724 (2001) & J.M. Tuason & Co., Inc. v. Land Tenure Administration, 31 SCRA 413, 422-23 (1970).

¹⁴⁸ The Supreme Court has widely utilized sponsorship speeches to elucidate the intent behind particular provisions of statutes. *See* James Ient v. Tullett Prebor (Philippines), Inc., G.R. No. 189158, Jan. 11, 2017, at 22, *available at* <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/january2017/189158.pdf> (last accessed Oct. 31, 2017); *Duncan v. Sandiganbayan* (2nd Division), 762 SCRA 663, 673-74 (2015); *Goldenway Merchandising Corporation v. Equitable PCI Bank*, 693 SCRA 439, 453 (2013); & *Inding v. Sandiganbayan*, 434 SCRA 388, 399-400 (2004).

[u]ntil Senate Bill No. 1859 is enacted into law, the Philippines will remain impotent in terms of protecting the Filipino people against the hazards of tobacco. Until we enact a strong anti-tobacco legislation, our country will continue to be *the dumping ground of tobacco manufacturers which exploit markets where its deadly products are not regulated*.¹⁴⁹

A careful scrutiny of the Tobacco Regulation Act of 2003, too, shows that what it leaves expressly unrestricted, it does not require; that is, where smoking is not prohibited, it does not mean that it would be illegal for smoking to be disallowed; where designated smoking areas are not disallowed, it does not mean that it would be a crime to not put up designated smoking areas; where tobacco promotions are not disallowed, it does not mean that it would be an offense to forego tobacco advertisements or promotions. What is expressed, after all, puts an end to what is implied.¹⁵⁰

For example, Section 6 of the law states that for areas where smoking is not completely banned, “[s]uch areas *may include* a designated smoking area within the building, which may be in an open space or separate area with proper ventilation, but shall not be located within the same room that has been designated as a non-smoking area.”¹⁵¹ Additionally, Section 23, which provides for restrictions on “all tobacco promotions”¹⁵² is formulated as a narrowly-tailored exception to the general rule — “All stalls, booths[,] and other displays concerning tobacco promotions *must be* limited to point-of-sale adult only facilities.”¹⁵³ The general rule remains that tobacco advertising, promotions, and sponsorships are not allowed under Republic Act No. 9211.¹⁵⁴ As it is only elementary that *ubi lex non distinguit nec nos*

149. Juan M. Flavier, Sponsorship Speech for S.B. No. 1859 at the 12th Congress (Oct. 23, 2001) (emphasis supplied).

150. De La Salle Araneta University v. Juanito C. Bernardo, G.R. No. 190809, Feb. 13, 2017, at 13, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/february2017/190809.pdf> (last accessed Oct. 31, 2017); Canet v. Decena, 420 SCRA 388, 393-94 (2004); Malinias v. Commission on Elections, 390 SCRA 480, 491 (2002); & Espiritu v. Cipriano, 55 SCRA 533, 538 (1974).

151. Tobacco Regulation Act of 2003, § 6 (emphasis supplied).

152. *Id.* § 23.

153. *Id.* § 23 (c) (emphasis supplied).

154. *Id.* §§ 15-26.

distinguere debemos,¹⁵⁵ one must refuse reading into a statute what it is not there.

To drive the analysis further, for the designation of smoking areas in permissible places, Republic Act No. 9211 does not use the word “shall[,]” which in its ordinary signification is imperative.¹⁵⁶ This is because the objective of the law was not to be a grant of license for establishments to allow smoking by mandating the establishment of designated smoking areas; the statutory provision on designated smoking areas were all meant to protect *those who do not smoke* from those who chose to willingly imperil their lives and those around them. This is clear from the exchange of Senator Flavier and Senator Aquilino E. Pimentel, Sr.¹⁵⁷ —

Senator Pimentel. ... What do we expect the restaurant owner to do especially if it is an air-conditioned restaurant?

Senator Flavier. Yes, Mr. President. This was an issue that was very, very heatedly discussed especially represented by the Restaurant Association of the Philippines. They maintain that it will be expensive to put a barrier that will enclose those that would be smoking. But I have to insist on that because the problem is, these tables are for nonsmoking and across the aisle are tables that are for smoking. The smoke permeates immediately.

Therefore, in this Act, if it is not clear, we have to make it clear. The intention is to have the smoking section completely enclosed, separate from those who are not smoking.

Senator Pimentel. And I suggest with no ventilation out, Mr. President.

Senator Flavier. Does the gentleman mean no ventilation from those who smoke?

Senator Pimentel. That is correct.

Senator Flavier. Well, that will be consistent with my view[.]¹⁵⁸

There being no qualification in the law, the same interpretation applies to tobacco advertisements, promotions, and sponsorships. This, too, is the

155. See, e.g., *Director of Lands v. Gonzales*, 120 SCRA 375, 378 (1983) & *La Tondeña, Inc. v. Collector of Internal Revenue*, 10 SCRA 709, 711 (1964). The cases provide, “Where the law does not distinguish, we should not also distinguish. *Ubi lex non distinguit, nec nos distinguere debemus.*” *Director of Lands*, 120 SCRA at 378.

156. *Diokno v. Rehabilitation Finance Corp.*, 91 Phil. 608, 610 (1952).

157. CONG. REC., 12th Cong., 1st Reg. Sess. (Oct. 23, 2001) (Second Reading of S.B. No. 1859,)

158. *Id.*

reading of the President when he signed Executive Order No. 26, upon a careful study of the Tobacco Regulation Act of 2003, in relation to the WHO FCTC and the Clean Air Act of 1999.¹⁵⁹ He clearly and categorically indicated that “[n]othing in [the] Order shall compel persons-in-charge to establish [designated smoking areas] nor prevent them from instituting *more stringent* measures in their buildings and establishments to better ensure a smoke-free environment in their premises.”¹⁶⁰ Great respect must be accorded to the interpretation of the Chief Executive,¹⁶¹ whose duty is to faithfully execute¹⁶² the laws of the land, in implementing and operationalizing statutes.

This same treatment is apparent in the advertisement, promotion, and sponsorship of tobacco products. The law’s provisions are intended to be a restriction to these activities — *not a grant or license* to do the same where it is not expressly prohibited.¹⁶³ According to Senator Flavier, in clarifying the intent of these provisions —

An advertising ban is particularly important in light of the fact that *smoking is a communicated disease especially among minors*. It is communicated *through advertisements*. It is equally important to note that numerous evidences gathered from the tobacco industry reveal that the youth are the special targets of tobacco advertisers.¹⁶⁴

159. E.O. No. 26, s. 2017, whereas cl. 2-4.

160. *Id.* § 4 (emphasis supplied).

161. *See* Hipolito v. Cinco, 661 SCRA 312, 312 (2011); Philippine Health Care Providers, Inc. v. Commissioner of Internal Revenue, 554 SCRA 411, 433 (2008); Pest Management Association of the Philippines (PMAP) v. Fertilizer and Pesticide Authority (FPA), 516 SCRA 360, 367-68 (2001); Energy Regulatory Board v. Court of Appeals, 357 SCRA 30, 40; & Republic v. Sandiganbayan, 293 SCRA 440, 453 (1998).

162. PHIL. CONST. art. VII, § 17. Section 17 of Article VII provides, “The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.” PHIL. CONST. art. VII, § 17. *See also* PHIL. CONST. art. VII, § 1. Section 1 of the same Article provides, “The executive power shall be vested in the President of the Philippines.” PHIL. CONST. art. VII, § 1.

163. *See* Republic Act No. 9211, §§ 13-28.

164. *Flavier, supra* note 149 (emphasis supplied).

In addition, he noted that “[t]he most recent evidence shows that a limited set of bans has little or no effect, whereas a comprehensive set of advertising bans can reduce tobacco consumption.”¹⁶⁵

As discussed, nowhere in the Tobacco Regulation Act of 2003 does it say that establishment of designated smoking areas and some forms of advertisement, promotion, and sponsorship cannot be disallowed. For questions of validity of ordinances, this silence is particularly important. A case in point is *Lina, Jr. v. Paño*,¹⁶⁶ which held that only where the “national legislature expressly allows by law” a particular act may “a provincial board [be prohibited from disallowing]” the same.¹⁶⁷ And, even then, the Tobacco Regulation Act of 2003 was passed with local anti-smoking ordinances in mind — ordinances which seek to create stronger tobacco control measures. The intent was not to undo, repudiate, or destroy these ordinances, but to preserve them, reinvigorate them, and give them proper legislative backing and legal support. In his sponsorship speech, Senator Flavier declared —

It is true that many local government units have already passed ordinances banning smoking ... in public places within their territorial bounds in response to a Clean Air Act provision [that] prohibits smoking in enclosed public places. Unfortunately, these are not enough [because] they only address one aspect of the problem. We need to transform these initiatives into a comprehensive national legislation. This way, anti-tobacco policies will gain not only strength and effectivity but also permanence.¹⁶⁸

Finally, what the Tobacco Regulation Act of 2003 meant as a “balanced policy[.]” goes into provisions that are expressly and specifically aimed at ameliorating the conditions of tobacco farmers and other marginalized stakeholders in tobacco agriculture like peasant families, in consonance, again, with the Constitution’s social justice principles. The tobacco industry oft misrepresents this, rephrasing the law as if to mean that health can ever be balanced with money.

Thus, to pursue this “balanced policy[.]”¹⁶⁹ the Tobacco Regulation Act of 2003, in Section 33, instituted a Tobacco Grower’s Assistance Program, a

165. *Id.*

166. *Lina, Jr. v. Paño*, 364 SCRA 76 (2001).

167. *Id.* at 84.

168. *Flavier, supra* note 149.

169. The Tobacco Regulation Act of 2003 provides that

the government shall institute a balanced policy whereby the use, sale, and advertisements of tobacco products shall be regulated in order to promote a healthful environment and protect the citizens from the hazards of tobacco

Tobacco Growers Cooperative, a National Tobacco-Free Public Education Program, and a Displaced Cigarette Factory Workers' Assistance Program.¹⁷⁰ This is how the law sought to protect the “interest of tobacco farmers, growers, workers[,] and stakeholders”¹⁷¹ because while “[i]t is true that cigarettes and tobacco leaf exports play a role in our economy by generating jobs and revenue,” according to Senator Flavier, “economic calculations on many countries now show that the overall costs of smoking and tobacco use *far outweigh* whatever perceived gains we derive from it.”¹⁷²

VII. PRESUMPTION OF CONSTITUTIONALITY

All smoke-free ordinances are *prima facie* a valid and legitimate exercise of the supreme and potent power of local autonomy. They must be, then, accorded with greatest presumption of validity and constitutionality,¹⁷³ such that “there must be a clear and unequivocal, *not a doubtful*, breach” that would justify its nullification.¹⁷⁴ This presumption of constitutionality may be overcome “only by *the clearest showing* that there was indeed an infraction”¹⁷⁵ of the Constitution and the laws, because “to invalidate [a law] [or ordinance] based on ... baseless supposition is an affront to the wisdom not only of the legislature that passed it but also of the executive which approved it.”¹⁷⁶ Thus, in the recent case of *Ferrer, Jr. v. Bautista*,¹⁷⁷ the Court categorically pronounced that “[a]n ordinance carries with it the presumption of validity. ... [and] [m]uch should be left thus to the discretion

smoke, and at the same time ensure that the interest of tobacco farmers, growers, workers[,] and stakeholders are not adversely compromised.

Republic Act No. 9211, § 2.

170. *Id.* § 33 (b), (e), & (f).

171. *Id.* § 2.

172. *Flavier, supra* note 149 (emphasis supplied).

173. *See Ferrer, Jr. v. Bautista*, 760 SCRA 652, 629 (2015); *Gancayco v. City Government of Quezon City*, 658 SCRA 853, 865 (2011); *Figuerres v. Court of Appeals*, 305 SCRA 206, 215, 217 (1999); & *Drilon v. Lim*, 235 SCRA 135, 140 (1994).

174. *Smart Communications, Inc. v. Municipality of Malvar, Batangas*, 716 SCRA 677, 696 (2014) (citing *Lawyers Against Monopoly and Poverty (LAMP) v. Secretary of Budget and Management*, 670 SCRA 373, 386 (2012)) (emphasis supplied).

175. *Id.* (emphasis supplied).

176. *Lawyers Against Monopoly and Poverty (LAMP)*, 670 SCRA at 386-87.

177. *Ferrer, Jr. v. Bautista*, 760 SCRA 652, 692 (2015).

of municipal authorities. Courts will go slow in writing off an ordinance as unreasonable[.]”¹⁷⁸

After all, when the Philippine Constitution said that “[t]he territorial and political subdivisions shall enjoy local autonomy[.]”¹⁷⁹ it meant this autonomy to be “genuine and meaningful[.]”¹⁸⁰ one that “develop[s] them into self-reliant communities and effective partners in the attainment of national goals[.]”¹⁸¹ It is a basic aim of the State to provide for a more responsive and accountable local government structure instituted through a system of decentralization whereby local government units shall be given more powers, authority, responsibilities, and resources.¹⁸² Smoke-free ordinances are designed, drafted, and developed with only in mind public welfare, public health, and social justice — aims the achievement of which can be bolstered by the passing of evidence-based measures that cater to, and are tailor-fitted to, the health needs of the people and of communities of the local jurisdiction.

Concededly, no one has more unique knowledge, insight, and wisdom as to the geographic, sociocultural, and demographic characteristics of a city or municipality and its inhabitants than the democratically elected representatives of that jurisdiction — the same body that has access to all important formative information and normative considerations as to holistically create such measure.¹⁸³

178. *Id.* See also *Smart Communications, Inc.*, 716 SCRA at 695; *Victorias Milling Co., Inc. v. Mun. of Victorias, Negros Occidental*, 25 SCRA 192, 205 (1968); & *Progressive Development Corporation v. Quezon City*, 172 SCRA 629, 638 (1989).

179. PHIL. CONST. art. X, § 2. “The territorial and political subdivisions shall enjoy local autonomy.” PHIL. CONST. art. X, § 2.

180. *Pimentel, Jr. v. Ochoa*, 676 SCRA 551, 558 (2012).

181. *Id.* at 558–59 (citing An Act Providing for a Local Government Code of 1991 [LOCAL GOV’T. CODE], Republic Act No. 7160, § 2 (1991)).

182. *Land Transportation Office v. City of Butuan*, 322 SCRA 805, 808 (2000).

183. *Cf. Lagman v. Medialdea*, G.R. No. 231658, July 4, 2017, at 68, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/july/2017/231658.pdf> (last accessed Oct. 31, 2017). “The Court has no machinery or tool equal to that of the [Chief Executive] to ably and properly assess the ground conditions.” *Id.* See *David v. Macapagal-Arroyo*, 489 SCRA 160, 228 (2006). “[The] Court cannot undertake an independent investigation beyond the pleadings.” *David*, 489 SCRA at 228 (emphasis omitted).