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17. Conclusions

Brigit Toebes

The aim of this book has been to critically analyse the interface between human rights and tobacco control. As evidenced by a vast amount of scientific research, tobacco has a devastating impact on the lives, health and well-being of many individuals in society. The production, sale and consumption of tobacco therefore raise important questions from the perspective of human rights.

The approach in this book aligns with a burgeoning discourse on the interface between human rights and health. Over the past decennia, human rights have been linked increasingly to health protection and to healthcare settings, addressing concerns such as equal access to healthcare services, the protection of vulnerable persons in healthcare settings, environmental health protection, and reproductive and sexual health.¹

This book's approach is also in sync with an increasing 'mainstreaming' of human rights, which entails integrating human rights into various domains of law and policy at both international and domestic levels.² One such policy domain is tobacco control, and hence the question arises: what are the implications of introducing human rights into this field?

Our analysis of the role of human rights in tobacco control aligns with 'human rights-based approaches' to various policy areas. Human rights-based approaches are a way to clarify obligations of States and other responsible actors and to identify how these obligations can be operationalized in practice. Human rights-based approaches have been developed in particular in relation to development,³ but they are also increasingly mentioned in the context of

¹ Inter alia, Thérèse Murphey, *Health and Human Rights* (Hart 2013); Brigit Toebes, Mette Hartlev, Aart Hendriks and Janne Rothmar Herrmann (eds), *Health and Human Rights in Europe* (Intersentia 2012); and Lawrence Gostin and Benjamin Mason Meier, *Global Health and Human Rights* (forthcoming Edward Elgar Publishing 2020).

² For example, Christopher McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2004) particularly the reference to mainstreaming the WHO.

³ 'The human rights-based approach to development cooperation' (UN Sustainable Development Group, 2003), at: <https://unsdg.un.org/resources/human-rights-based>

non-communicable diseases (NCDs).⁴ A human rights-based approach to tobacco means framing tobacco as a human rights concern and identifying the legal obligations of responsible actors, as well as actions that can be taken by various actors to address this concern. We hope that this book provides a useful and workable basis for identifying such human rights-based approaches to tobacco control.

As mentioned, tobacco poses tremendous challenges to public health and human rights and is therefore an important human rights concern. Tobacco control has, however, not yet been connected to human rights law as thoroughly and systematically as it could be.⁵ As indicated by Gispén in the Introduction to this volume (Chapter 1), the precise interface between human rights and tobacco control still remains somewhat under-researched. With this publication, we attempt to contribute to this developing field by analysing a range of dimensions to human rights in tobacco control.

Without repeating what has already been addressed throughout this book, this chapter will draw some overall conclusions and identify an agenda for developing future research and policy. It will do so by addressing the following questions: what is the basis for addressing tobacco as a human rights concern? How has tobacco thus far been addressed by international and regional human rights bodies, and at the domestic level? Based on this experience, which human rights come into play? And what are the synergies and tensions that arise when taking a human rights approach to tobacco control? Subsequently: whose interests are at stake and which actors are responsible for realizing their rights? What does this responsibility entail and how can responsible actors be held to account?

What is the basis for addressing tobacco as a human rights concern? Beylveveld (Chapter 2) draws on the work of legal theorist Alan Gewirth and his Principle of Generic Consistency to argue that tobacco is a human rights concern, especially because it does harm to children as well as children yet to be born. Children are vulnerable in this context as they may be unable to express their will, they may face peer pressure, and addiction may influence their choices. Schmidt, in his chapter 'Is there a human right to tobacco control' (Chapter 3), takes a pluralist approach, according to which several

-approach-development-cooperation-towards-common-understanding-among-un, accessed 19 May 2020.

⁴ David Patterson, Kent Buse, Roger Magnusson and Brigit Toebes, 'Identifying a Human Rights-based Approach to Obesity for States and Civil Society' (2019) 20 *Obesity Reviews* 1.

⁵ Carolyn Dresler and Steven Marks, 'The Emerging Human Right to Tobacco Control' (2006) 28 *Human Rights Quarterly* 599 made an important contribution to this approach.

aims and rights can justify a human right to tobacco control. He argues that the central objections to a human right to tobacco control fail, for example because a concern with personal freedom and consent does not speak against strong tobacco control. Schmidt also advances that a concern with power relations might speak *for* a human right to tobacco control as it could lessen the power asymmetries between tobacco control and vulnerable populations.

How has tobacco thus far been addressed by international and regional human rights bodies, and at the domestic level? As Cabrera and Constantin point out in Chapter 4, international human rights law mechanisms provide promising avenues for monitoring the implementation of human rights obligations related to tobacco control. Yet we must also conclude that in practice, the international and regional human rights mechanisms have only paid limited attention to the human rights dimensions of tobacco. Most emboldening seems the practice of the Convention on the Rights of the Child (CRC) Committee, which has engaged with the topic by addressing various children's rights dimensions of tobacco.⁶ While a systematic analysis is lacking, it seems accurate to conclude that the other treaty bodies, including those of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), and the Committee on Economic, Social and Cultural Rights (CESCR), Human Rights Council (HRC) and the UN Special Procedures have engaged to a lesser extent with tobacco. We are therefore pleased that the UN Special Rapporteur on the Right to Health, Dainius Puras, has endorsed our topic and approach in his Foreword to this volume. In addition to action taken through the UN Special Procedures, the human rights treaty bodies could organize a Day of General Discussion on the rights of children in tobacco control and adopt a General Comment on NCDs and/or NCD risk factors.⁷ From an academic perspective, more systematic research documenting and analysing the practice of treaty bodies in relation to tobacco would contribute to identifying existing gaps as well as emerging human rights approaches to tobacco control.⁸

The book has also explored the existing regional human rights mechanisms in Europe, Asia, Africa and the Americas, thus providing a comprehensive overview of the practice of these mechanisms in the context of tobacco. When it comes to this practice, we see both potential and disappointment. Potential, because as on the international level, the existing regional human rights frameworks and mechanisms offer ample opportunity for addressing tobacco

⁶ For an elaborate discussion of this practice see Marie Elske Gispen and Brigit Toebes, 'The Human Rights of Children in Tobacco Control' (2019) 41 *Human Rights Quarterly* 340.

⁷ See also Dresler and Marks (n 5) 638, 651.

⁸ Data collection by Gispen and Rusli, Gispen and Toebes (n 6) CRPD tobacco.

as a human rights concern. In practice, however, the attention paid to tobacco control within the framework of such mechanisms is often quite limited.

To start with Europe: as discussed by Garde and this author in Chapter 6, while certain legal practices are emerging, we cannot speak of a coherent European human rights framework for assessing tobacco legislation and policy. It is promising that the European Committee of Social Rights of the Council of Europe has addressed the problems surrounding tobacco on several occasions in its State reporting procedure. In addition, the EU has adopted several authoritative tobacco control laws, in particular the Tobacco Advertising Directive and the Tobacco Products Directive. Although this EU legislation is not grounded in human rights law, the regulation marks important steps in tobacco control across Europe. It is also encouraging that the Council of Europe and EU monitoring bodies have all systematically rejected human rights claims from the industry. On the basis of this fragmented practice and attitude, a European human rights approach to tobacco control could gradually emerge.

On the American continent a similar, or perhaps somewhat bleaker, picture emerges. As explained by Cabrera and Constantin (Chapter 9), the Inter-American Human Rights System offers a wide range of avenues and opportunities for promoting tobacco control in the region. Yet when it comes to implementing the human rights standards in relation to tobacco, using the available mechanisms, the outcome is disappointing.

Nnamuchi, in his chapter on the African continent (Chapter 8), warns that because smoking rates continue to rise in Africa, tobacco use and exposure to second-hand smoke (SHS) are increasingly becoming a pressing public health concern. He illustrates how the mandate of the African Commission on Human and Peoples' Rights offers interesting opportunities for addressing tobacco concerns. For example, a State obligation to protect the right to health has clearly been recognized in its case law, thus offering potential for future tobacco-related cases.

Furthermore, as Zhang illustrates in Chapter 7 on ASEAN, the ASEAN Charter (2008) and the Intergovernmental Commission on Human Rights (2009) offer potential for advancing human rights in the region, which may ultimately also create possibilities for addressing human rights specifically in the context of tobacco. While these opportunities are a long shot, it is worthwhile to explore the options, and to insist on their importance. Zhang also explains that all ASEAN countries are signatories to the UN human rights treaties, which offers potential for addressing human rights in tobacco control. This also provides an important complementary opportunity for a country like Indonesia, which has not ratified the Framework Convention on Tobacco Control (FCTC).

Altogether, we must conclude that regional human rights treaty bodies could engage much more actively with tobacco and its related problems, including tobacco farming, tobacco use, and exposure to SHS. It is up to these organizations, Member States, NGOs and individuals to bring these matters up in the context of State reporting procedures, individual complaint mechanisms and other monitoring mechanisms.

For identifying the role of human rights in tobacco control, much can be learnt from the domestic level, where some countries have adopted innovative tobacco control policies. Sormunen and Karjalainen, in their chapter on the Tobacco Endgame in Finland (Chapter 14), explain how the country was the first to introduce an endgame, which aims to make Finland smoke free by the year 2030. While there was little consideration of human rights with the adoption of the endgame, the authors assert that such endgames are very much in line with protecting the rights of children in the context of tobacco.

Similarly, Australia has set an important example to the world by introducing plain packaging and by showing how these standards are consistent with international norms regulating investment and trade. The authors of Chapter 16 on plain packaging, Mitchell and Roberts, assert that the Australian government implicitly advanced the right to health by promoting public health in this context.

Negri, in her chapter on smoke-free environments (Chapter 13), explains that Italy has had extensive outdoor smoking bans for many years and has recently introduced a smoking ban for private cars in the presence of children and pregnant women, thus going beyond international legal requirements. What is particularly informative is how the Italian Constitutional Court has engaged with the introduction of smoking bans in the light of the right to health in the Italian Constitution. This shows how constitutional rights (and human rights) can provide an important anchor for the introduction of smoke-free laws. It is also important that the Court has stated that protection from SHS must be regulated in a uniform manner across the country so as to avoid differentiated protections. This provides a strong rationale for introducing smoke-free zones at a governmental rather than a local level. At the same time, the author shows how local initiatives for smoke-free zones can act as a catalyst for domestic laws.

Lastly, Lierman and van Westendorp's chapter on e-cigarettes in Belgium (Chapter 15) is illustrative of the complexities that arise when implementing international or regional (in this case, EU) tobacco regulation. They explain how Belgian legislation generally treats e-cigarettes equally to tobacco products, thus adopting a precautionary approach (as opposed to, for example, the

UK).⁹ All in all, it seems that countries can learn from each other's successes and failures. Sharing and comparing these domestic practices and experiences are thus crucial for advancing best practices at the national, regional and international level.¹⁰

The third question was: which specific human rights are relevant in the context of tobacco and what are the synergies and tensions that arise? As mentioned above, Schmidt, in Chapter 3, makes a strong philosophical case for a human right to tobacco control. In current existing international human rights law, an explicit human right to tobacco control does not exist and it is not feasible to expect that such a right will be recognized in the future. However, translating the idea of a right to tobacco control to the legal discipline, we can construe a right to tobacco control in relying on various human rights, including, in particular, the right to health, rights to information and education, and rights to a healthy environment and an adequate standard of living.¹¹ A similar approach has been taken in relation to the right to water, which is grounded in several rights in, inter alia, the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right to an adequate standard of living, the right to health and the right to life.¹²

Yet, while a right to tobacco control for reasons of public health protection is important, there are other human rights dimensions to tobacco as well. Barrett and Hannah, in their chapter on the parallels between tobacco control and illicit drugs (Chapter 11), are wary of the potential negative human rights outcomes associated with tobacco control strategies. 'Should buyers of illicit tobacco be criminalised' and 'should tobacco crops be forcibly eradicated?' they ask. Based on these concerns, they argue in favour of recognition of the more complex linkages between tobacco and human rights.

All in all, it seems important to align with existing approaches on health and human rights. Taking a 'health and human rights' approach to tobacco control implies taking as a starting point that human rights are interrelated, as also stated in the Vienna Declaration and Programme of Action.¹³ This means that economic, social and cultural rights as well as civil and political rights are important in the context of smoking and exposure to SHS. As Cabrera and

⁹ Lukasz Gruszczynski, *The Regulation of E-Cigarettes* (Edward Elgar Publishing 2019).

¹⁰ We aim to foster this interaction with the European Scientific Network on Law and Tobacco.

¹¹ Dresler and Marks (n 5).

¹² CESCR, 'General Comment No. 15: The right to water (Arts 11 and 12 of the Covenant)' (2002) UN Doc E/C.12/2002/11.

¹³ Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights in Vienna on 25 June 1993) A/CONF/157/23 [5].

Constantin point out in Chapter 4, tobacco control is a ‘cross-cutting issue that relates to economic, social and cultural rights, and civil and political rights’.

The implications of economic, social and cultural rights, particularly the right to health, have been explored to some extent and are fairly straightforward. While the right to health does not explicitly mention tobacco, its scope as set forth in the treaties and accompanying documents contains many implicit bases for protection against tobacco. Take, for example, the right to health (Article 12 ICESCR), which contains State obligations to reduce infant mortality, improve environmental hygiene, prevent all types of diseases and secure access to medical services. All these components are directly relevant for the protection against the harmful effects of smoking and SHS.

However, when it comes to civil and political rights, the picture is less clear. The precise implications of civil and political rights in the context of tobacco control are much less crystallized. As evidenced above, the human rights claims from the tobacco industry, often based on civil and political rights to property and freedom of expression, have been rejected systematically by regional and domestic courts. Still, what remains to be considered is that tobacco control measures, varying from the introduction of smoke-free zones, to tobacco taxes, the introduction of display bans and the eradication of tobacco crops, may infringe on the human rights of the individuals involved. This concern was also implicitly voiced by Barrett and Hannah in Chapter 11, especially when it comes to criminalizing certain behaviour such as buying illicit tobacco and growing tobacco leaves. This means that a careful balance needs to be drawn between taking tobacco control measures, which presumably protect the right to health, and the protection of the civil and political rights of those involved. For example, how do civil and political rights come into play with the introduction of smoke-free zones? How does the prohibition on smoking in a car when a child is on board align with the right to privacy, for example? And how can we protect individuals who depend on growing tobacco for their livelihood? Given that tobacco control measures create potential infringements of personal freedom of smokers, they may touch in particular on their rights to privacy and physical integrity and freedom of movement, but also on their right to an adequate standard of living. It is important in this context to be cognizant of the vulnerability of smokers, tobacco farmers and others, and to consider their needs and respect their rights.¹⁴ In this regard, lessons may also be learnt from related domains where human rights have been applied, including the regulation of drugs.

¹⁴ For a vulnerability approach in relation to children see Marie Elske Gispén, ‘Vulnerability and the Best Interests of the Child in Tobacco Control’ (accepted for publication) *International Journal of Children’s Rights*.

This brings us automatically to the question of whether and to what extent civil and political rights of individuals may be limited for the sake of tobacco control. According to international and regional human rights law, restrictions (limitations) to civil and political rights are only allowed if ‘necessary’, which means based on one of the limitation grounds (including public health), responding to a pressing public or social need, pursuing a legitimate aim and being proportionate to that aim.¹⁵ Hence, in introducing a smoking ban in the private sphere the question arises: does it respond to a pressing public health goal and is such a prohibition proportionate to that aim? There is still little experience with the implementation of such principles in relation to tobacco control laws and policies. The outcome of this balancing may vary from one regional or domestic setting to another. Here, society’s level playing field for tobacco control measures may also have to be considered.

The above addressed the complexities surrounding the limitation of mainly civil and political rights. As suggested above, introducing tobacco control measures may also be framed as an explicit balancing between the right to health and a range of civil and political rights. This balancing between the right to health and civil and political rights is a difficult matter that still raises many questions. It suggests that the right to health – as an individual right – can reflect public health claims.¹⁶ This suggests that the right to health is a claim from a group of individuals (‘the public’) rather than exercised by an individual right holder. More research could be directed towards exploring this balancing act, and to addressing the question whether this balancing leads to meaningful outcomes.

Other tensions and synergies arise between human rights standards and other standards in international law. First, the question arises if and to what extent human rights are embedded in the FCTC. While human rights are mentioned in the preamble to this treaty, Taylor and McCarthy explain in their chapter on the FCTC (Chapter 10) that human rights considerations were largely absent from the negotiation and design of this Convention. According to the authors, this reflects the tobacco industry’s historical success in co-opting the language of human rights in support of its own agenda. This does not mean, however, that there are no promising synergies between the FCTC and human rights law, which could be used in policy settings and in tobacco litigation.

A remaining source of tension concerns the rules under International Economic Law (IEL). Public health experts tend to see IEL as an obstacle to

¹⁵ See, *inter alia*, Principles 10 and 25 of the ‘Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (28 September 1984) UN Doc E/CV.4/1985/4.

¹⁶ See also Brigit Toebes, ‘Human Rights and Public Health: Towards a Balanced Relationship’ (2015) 9 *International Journal of Human Rights* 488.

comprehensive tobacco control policies. Gruszczynski (Chapter 12) explains that while IEL Decision-Making Bodies (DMBs) have been reluctant to use the FCTC and human rights standards explicitly in their decision-making, they have attached considerable weight to the protection of public health, particularly when it comes to the risks posed by tobacco. While this is a promising outcome, it is still worth exploring how the implementation of the FCTC and human rights by DMBs could be further advanced.

Subsequently, whose interests are at stake? Interestingly, as Taylor and McCarthy explain, the language of human rights was first brought into the realm of tobacco by the industry itself, which claimed freedom of expression and rights to property. Hence the industry claimed that their interests and rights were violated by tobacco control measures. Again, as illustrated in this book, such claims have been rejected systematically by international bodies including the European Court of Human Rights and the European Court of Justice. It seems that the tide is turning and the tobacco control side of the field is increasingly using human rights, thus reflecting the rights of individual right holders rather than those of the industry.

So who are the right holders that we are talking about in the context of tobacco? It is about the rights of all individuals in society, varying from non-smokers to smokers, people of all ages and from all socio-economic backgrounds. They have a right to health, information and a healthy living environment, with due respect to their rights to privacy, their physical integrity and their freedom of movement.

Emerging from many chapters in the book is the pressing need to protect children and future generations as vulnerable populations with less decision-making authority. It is paramount that their rights are advanced in the context of tobacco, and the CRC offers a strong basis to do so.¹⁷ But it is not only about the rights of children. There is a need to explore the needs and rights of others, including but not limited to persons with low socio-economic status, women and disabled persons. Their rights are more complex to identify and it will require a careful balancing of the various interests. As also suggested by Gispén in the Introduction, a vulnerability approach, giving recognition of the complex vulnerabilities of individuals in this context, may add to this analysis.¹⁸

Who are the duty holders in this context and how can they be held to account? Based on human rights and the FCTC, States have the primary obligation to regulate tobacco and to protect everyone in society against its harmful effects. Should States fail in this effort, they can be held to account before domestic

¹⁷ Gispén and Toebes (n 6).

¹⁸ See also Gispén (n 14).

courts, quasi-judicial domestic bodies, and regional and international human rights monitoring bodies. Research suggests that the FCTC is increasingly cited in court decisions.¹⁹ In such cases, human rights claims could strengthen the claims based on the FCTC. Applicants could argue that the provisions in the FCTC form an operationalization of a range of constitutional and human rights provisions, including the rights to life and health, to underline the critical involvement of governments in the protection of health.²⁰

Finally, how should we frame the responsibility of the tobacco industry? As Lane explains in her chapter (Chapter 5), accountability of the tobacco industry is difficult to pin down, both in theory and in practice. A complication is that only States can be held accountable before international and regional human rights monitoring bodies. Lane explains how the Organisation for Economic Co-operation and Development National Contact Points may offer a promising avenue, as well as domestic litigation. When it comes to domestic litigation, the proof is in the pudding. NGOs, victims and legal practitioners must not relax their vigilance and must continue their efforts to hold the tobacco industry accountable for their flagrant disregard of human rights. In doing so they can create important precedents for litigation all over the world.

¹⁹ Suzanne Y Zhou, Jonathan D Liberman and Evita Ricafort, 'The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures' (2019) 28 *Tobacco Control* s113.

²⁰ Gohar Karapetian and Brigit Toebes, 'The Legal Enforceability of Articles 5(3) and 8(2) of the WHO Framework Convention on Tobacco Control: The Case of the Netherlands' (2018) *Brill Open Law*, doi.org/10.1163/23527072-00101001, with reference to Complaint submitted by the Youth Smoking Prevention Foundation against the Dutch State, 8 September 2014.