

CASHING IN ON 240 DAILY DEATHS: LAWYERING FOR BIG TOBACCO IN THE PHILIPPINES

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Obviously, a product that kills two of three of its users¹ should not be sold on the market. A product that not only kills two of three of its users but also those who are simply exposed to it should also be illegal.

If it happens that the same product not only kills two of three of its users, including those exposed to it, but its use also costs the government billions of pesos every year, by common sense, this product should be banned altogether. But this is not the case—cigarettes are on the market, are not illegal, and are not banned.

Cigarettes are on the market despite the fact that tobacco use kills more than six million people every year worldwide; in the country, smoking kills ten Filipinos every hour.² Cigarettes are not illegal despite causing more than 600,000 deaths each year from secondhand smoke alone.³ Cigarettes are not banned despite the fact that its economic cost for the Philippine government amounts to hundreds of billions of pesos every year,⁴ on top of the untold disabilities and human suffering that mostly affect the poor and marginalized sectors of society. This is all despite the fact that “smoking kills” is one of the most established, consistent, and incontrovertible scientific conclusions of the modern world.

This freedom to destroy lives is unparalleled in any form of trade in history. This is because this product is sold and marketed by a 1.435 trillion-peso global industry,⁵ which has done all it can to water down its regulation through interference in political decision-making and through media and public relations tactics that attempt to misinform the public of the real risks of tobacco use.⁶

This is because the tobacco industry has systematically reframed tobacco use as a “right” and dying from nicotine addiction as a valid “decision” that supposedly informed, adult users can opt to make. This is because the tobacco industry felt that tobacco farmers’ interest should be protected, never mind the deplorable labor standards in their tobacco plantations.⁷ And most of all, this is because the tobacco industry found the law and the courts to be on their side.

Throughout its fight against governments in shoring more profits,⁸ the tobacco industry has been at the able assistance of among the best lawyers that money can hire. The same is particularly true in the Philippines, which holds world-renown as having the “strongest tobacco lobby in Asia.”⁹

That is why when the late Health Secretary Juan Flavio Velasco required tobacco corporations to put “Warning: Cigarette Smoking is Dangerous To Your Health” on cigarette packages in 1993, the Philippine Tobacco Institute,¹⁰ through its lawyers, quickly sought injunction and they won.¹¹

Lawyers of Philip Morris also won their case against the Food and Drug Administration before the Supreme Court last year, when they successfully challenged the agency’s regulation of tobacco products.¹² The Metro Manila Development Authority similarly lost before the Court of Appeals when it sought to restrict smoking in public places¹³ in a case instituted by self-claimed private individuals, who later on intimated to having been financially supported by tobacco companies.¹⁴

So when President Rodrigo Duterte signs his executive order this year to enforce a “smoke-free Philippines” and a nationwide ban on smoking in public,¹⁵ it is to be expected that the tobacco industry and their teams of lawyers will again be up in arms to quickly nullify it.

The courts will probably see the Philippine Tobacco Institute invoking arguments such as the supremacy of the Inter-Agency Committee on Tobacco, to which they are member of, on the regulation of tobacco product in the same manner as in *Department of Health v. Philip Morris Philippines Manufacturing, Inc.*,¹⁶ or the inapplicability of the Framework Convention on Tobacco Control, or the limited extent of the President’s residual powers.

All this spate of litigation is, of course, justifiable should the assumption that the trade of this deadly product is a protected proprietary right be true. These long series of controversies—past, present, and future—only means the upholding of the rule of law where it not true that smoking is a nuisance that “[i]njures or endangers the health or safety of others.”¹⁷ After all, that is what lawyers do: protect life, liberty, and property.

But this is an oversimplification of the legal problem on tobacco control and cause lawyering against these “merchants of death.”

As it stands, the laws themselves are written in such a way that smoking is not *per se* prohibited. When the tobacco industry itself has vigorously lobbied to weaken¹⁸ what now are the Graphic Health Warnings Law and the Sin Tax Reform Law—and more importantly, the Tobacco Regulation Act of 1993—it becomes obvious that *dura lex sed lex* becomes an invocation to justify the unjust. In the local government levels, the tobacco industry has been insistent in influencing cities and municipalities to dilute ordinances that further restrict smoking in their localities.¹⁹

In the same manner, the fact that the country’s public health financing scheme finds its lifeline from excise taxation on tobacco products and state subsidy for

tobacco farmers continues in many tobacco-growing regions means that this trade is recognized by the State as a legal endeavor in its equivocation to fully effect police power that it may be truly so that *salus populi est suprema lex*.

This is unfortunate; but for many lawyers, it pays the bill.

After all, this nation's history has shown that, at the expense of public welfare and human lives, it appears that lawyering for the wrong side of history is a most profitable endeavor.

¹ Michelle Roberts, *Tobacco 'kills two in three smokers'*, BBC NEWS (Feb. 24, 2015), at <http://www.bbc.com/news/health-31600118>; 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 MEDICINE

² B. Bellew et al., *Addressing the tobacco epidemic in the Philippines: progress since ratification of the WHO FCTC*, 3 PUBLIC HEALTH ACTION 103 (2013).

³ See generally JUDITH MACKAY & MICHAEL ERIKSEN, THE TOBACCO ATLAS (World Health Organization 2002).

⁴ "Annual productivity losses from premature deaths for four smoking-related diseases (lung cancer, cardiovascular, coronary artery disease, and chronic obstructive pulmonary diseases) investigated in "Tobacco and Poverty Study in the Philippines" ranged from US\$ 65.4 million to US\$ 1.08 billion using the conservative Peto-Lopez estimates. It could be as high as US\$ 2.93 billion using the Smoking Attributable Morbidity and Mortality and Economic Costs (SAMMEC) estimates." (Citation omitted.) DEPARTMENT OF HEALTH, 2009 PHILIPPINES' GLOBAL ADULT TOBACCO SURVEY, COUNTRY REPORT 11 (2010).

⁵ Simon Bowers, *Global profits for tobacco trade total \$35bn as smoking deaths top 6 million*, THE GUARDIAN (Mar. 22, 2012), at <https://www.theguardian.com/business/2012/mar/22/tobacco-profits-deaths-6-million>. (Exchange rate at 1 USD to 41 PHP.)

⁶ See Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUBLIC HEALTH 63 (2012); WORLD HEALTH ORGANIZATION, TOBACCO INDUSTRY INTERFERENCE, A GLOBAL BRIEF (2012).

⁷ See, e.g., SOUTHEAST ASIA TOBACCO CONTROL ALLIANCE, CHILD LABOUR IN TOBACCO CULTIVATION IN THE ASEAN REGION (2013).

⁸ See, e.g., *Philip Morris Brands Sarl v. Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, at <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>; *Philip Morris Asia Ltd. (Hong Kong) v. Australia*, Permanent Court of Arbitration Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015), at http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf.

⁹ K. Alechnowicz & S. Chapman, *The Philippine tobacco industry: "the strongest tobacco lobby in Asia"*, 13 TOBACCO CONTROL ii71 (2004).

¹⁰ See Letter of the Philippine Tobacco Institute, Inc. to Trade and Industry Secretary Peter Favila dated May 2, 2016, available at <http://www.takingontobacco.org/letter/philwarn/PTIletter060502.pdf> (denominating as its members the British American Tobacco, Associated Anglo-American Tobacco Corporation, Japan Tobacco, Inc., Fortune Tobacco Corporation, Mighty Corporation, Philip Morris Philippines Manufacturing, Inc., La Suerte Cigar and Cigarette Factory, and Altasia).

¹¹ *Philippine Tobacco Institute, Inc. v. Secretary of Health*, Civil Case No. 94-905, Regional Trial Court of Makati Branch 66, Sept. 22, 1994, available at <http://www.tobaccocontrollaws.org/litigation/decisions/ph-19940901-philippine-tobacco-institute,->.

¹² Department of Health v. Philip Morris Philippine Manufacturing, Inc., G.R. No. 202943, 754 SCRA 452, Mar. 25, 2015.

¹³ Maricar B. Brizuela, *MMDA to appeal CA ruling on power to catch smoking ban violaters*, PHIL. DAILY INQUIRER (Aug. 9, 2015), at <http://newsinfo.inquirer.net/711519/mmda-to-appeal-ca-ruling-on-power-to-catch-smoking-ban-violaters>; *CA ruling: MMDA not authorized to arrest smokers*, MANILA TIMES (Aug. 5, 2015), at <http://www.manilatimes.net/ca-ruling-mmda-not-authorized-to-arrest-smokers/206852>.

¹⁴ Clemente v. MMDA, Civil Case No. MC-11-5585, Regional Trial Court of Mandaluyong City, Branch 213, Oct. 24, 2001. See James Cordova, *Tobacco companies in Philippines play dirty legal game*, ASIAN CORRESPONDENT (Aug. 19, 2011), <https://asiancorrespondent.com/2011/08/tobacco-companies-in-philippines-play-dirty-legal-game>; *Tobacco industry hit for blocking MMDA's anti-smoking drive*, INTERAKSYON.COM (Aug. 18, 2011), at <http://interaksyon.com/article/11229/ex-doh-chief-groups-hit-tobacco-industry-for-blocking-mmdas-anti-smoking-drive>.

¹⁵ Mayen Jaymalin, *Smoke-free Philippines awaits Duterte signature*, PHIL. STAR (Oct. 10, 2016), at <http://www.philstar.com/headlines/2016/10/10/1632126/smoke-free-philippines-awaits-duterte-signature>; *Duterte wants to ban public smoking in Philippines*, AL JAZEERA (Oct. 12, 2016), at <http://www.aljazeera.com/news/2016/10/duterte-ban-public-smoking-philippines-161012053010958.html>.

¹⁶ G.R. No. 202943, 754 SCRA 452, 467, Mar. 25, 2015.

¹⁷ CIVIL CODE, art. 694. See Rana v. Wong, G.R. No. 192861, 727 SCRA 539, 552, June 30, 2014.

¹⁸ *Tobacco lobby hit for meddling in gov't policies*, PHIL. DAILY INQUIRER (Aug. 9, 2014), at <http://business.inquirer.net/176270/tobacco-lobby-hit-for-meddling-in-govt-policies>.

¹⁹ HEALTHJUSTICE PHILIPPINES, COUNTERING TOBACCO INDUSTRY INTERFERENCE AT THE LOCAL LEVEL: A SURVEY OF BEST PRACTICES AND LESSONS LEARNED FROM LOCAL GOVERNMENT INTERVENTIONS IN THE PHILIPPINES (2015); The Framework Convention on Tobacco Alliance, Philippines, *On PTI's letter to LGUs requesting for participation in public hearings on proposed ordinances and pushing for a model ordinance* (Feb. 6, 2014), at <http://tobaccocontrol.ph/article2.html>.