

Review Article

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Smokeless tobacco control: Litigation & judicial measures from Southeast Asia

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Recourse to litigation and positive judicial interventions is one of the most effective tools to meet public health objectives. The present review envisions compiling litigation and judicial measures in Southeast Asia Region (SEAR) while assessing their role in advancing smokeless tobacco (SLT) control, and equally highlighting, how tobacco industry has used litigation to undermine tobacco control efforts in the Region. The litigation, especially from the SEAR, up to 2017, that have facilitated SLT control or have been used by the tobacco industry to challenge an SLT control policy decision were reviewed. Most of the litigation related to SLT control from the Region are on pictorial health warnings. Bhutan has imposed a complete prohibition on sale, manufacture and import of all kinds of tobacco products and the litigation there relates to the prosecution of offenders for violating the ban. Judiciary in the Region is well informed about the ill-effects of tobacco use and remains positive to tobacco control initiatives in the interest of public health. In India, several SLT-specific litigation helped in better regulation of SLT products in the country. Litigation has compelled governments for effective enforcement of the domestic tobacco control laws and the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC). Parties to the WHO FCTC must now use Treaty Article 19 to strengthen their legal procedures and make the tobacco industry liable, for both criminal and civil wrongs.

Key words Framework convention on tobacco control - litigation - public health law - public interest litigation - smokeless tobacco - Southeast Asia - tobacco industry

Introduction

Tobacco is the only product, legally sold, which if used as intended by its manufacturers kills half of its users¹. According to the World Health Organization (WHO), globally, tobacco use kills more than seven

million people every year². Considering the colossal threat of diseases and deaths caused by tobacco use, countries adopted the Framework Convention on Tobacco Control (FCTC), the first global public health treaty under the aegis of the WHO. The Treaty asserts both demand and supply reduction measures to curb

tobacco use in any form and of any type³. However, global efforts in tobacco control have been more focused on dealing with the hazards of smoking and preventing public exposure to the second-hand smoke (SHS). Smokeless tobacco (SLT) was considered a harm reduction alternative by several Parties or a specific problem of the Southeast Asia due to its high prevalence in the region⁴. Recent surveillance data suggest that SLT use is becoming a global concern with more than 350 million SLT users in 140 countries⁵. Moreover, 36 Parties to the Treaty have more than one million SLT users or more than 10 per cent prevalence at population level among men or women or both⁶.

Litigation and judicial interpretations have served a useful purpose of institutionalizing tobacco control laws in several jurisdictions globally as one of the most effective tools for advancing tobacco control. However, it also remains one of the greatest challenges for the governments to protect tobacco control efforts from the litigation by the tobacco industry⁷. Although most of the litigation and judicial pronouncements have primarily addressed smoking or SHS as a public health problem, there are some key litigation, especially in the Southeast Asia region and particularly in India, which have also focused on SLT. In this review an attempt has been made to document some of the important litigation and judicial pronouncements which have impacted SLT prevention and control in India and the Region. The available literature from India, Bangladesh, Thailand, Sri Lanka and Nepal, related to judicial interventions in the field of SLT has been reviewed. Database of litigation available online^{8,9} was used to review judicial pronouncements related to tobacco in general having an impact on SLT regulation in the selected countries from the Region. This review is also aimed to understand how judicial interpretations have influenced, either positively or negatively, SLT prevention and control in the region.

Bangladesh

In a country that is planning to eradicate tobacco use by 2040, as per the Global Adult Tobacco Survey (GATS) 2009, there is a high prevalence of tobacco use, wherein, over one-fourth of the population uses SLT. The SLT use is very high among women in Bangladesh. Three main SLT products used in the country are - *Zarda*, *Gul* and *Sada Patta*¹⁰.

The earlier tobacco control law of Bangladesh did not include SLT under its ambit, however, in

May 2013, the National Assembly of Bangladesh passed the Smoking and Tobacco Products Usage (Control) (Amendment) Act, 2013 which brought SLT within the definition of 'Tobacco' under the new law¹¹. While applying provisions of the law on all SLT products, it particularly requires two, out of the nine, graphic health warnings (GHW) to cover at least 50 per cent of the principal display area (upper side) of all SLT products.

Realizing that the pictorial warnings are not going to be rolled back, the tobacco industry started pushing for displaying the health warnings in the lower part of the pack rather than in the upper part so that they would draw lesser attention. The industry led by the Bangladesh Cigarette Manufacturers' Association succeeded in perusing the law ministry to issue a temporary permission on printing the health warnings on the lower half of the packs¹². Tobacco control and public health organization in the country approached the High Court against this decision of the law ministry. However, with a tobacco industry front group posing as a tobacco control organization, the Court adjourned all the previous orders and ordered to continue the health warnings based on the 'Public Notice' in the below 50 per cent of tobacco packs¹³. After a long battle, finally the National Tobacco Control Cell issued an order on July 4, 2017, for tobacco companies in Bangladesh to print the notified warnings on all tobacco products including *zarda*, *gul* and all types of tobacco on the upper half of tobacco packs from September 19, 2017 altering the earlier order¹⁴.

Earlier in 2000, the High Court of Bangladesh, while hearing a matter related to failure of the government to implement statutory warnings to disclose adverse effect of tobacco use on health and advertisement of cigarettes through a touring luxury yacht of a tobacco company held that use of any advertisement for cigarettes without appropriate health warnings offended the constitutional right to life¹⁵. The Court directed the Government to take necessary steps to restrict tobacco production; provide subsidy for rehabilitation of tobacco growers and farmers to switch to alternative crops; restrict smoking in public places and prohibit advertising and promotion of tobacco products¹⁵.

Given that the SLT products now come under the ambit of the new tobacco control law of 2013, the decision of the Apex Court of Bangladesh should apply to all SLT products and the growers and manufacturers as well.

Bhutan

Bhutan is the only country to impose a complete ban on cultivation, manufacture, distribution and sale of tobacco products since 2004; the law was further strengthened by enacting the Tobacco Control Act of 2010¹⁶. Although the country prohibits the sale of tobacco products, its use is not prohibited. Specified amount of tobacco products can be imported for personal use. All kinds of tobacco advertisements, promotions and sponsorships are prohibited, including on all the national media channels. Any imported tobacco product for personal use is taxed at an import duty of 100 per cent and sales tax of 100 per cent. However, in spite of the ban and a strong law, the National Health Survey from the country reports smoking at the rate of four per cent in the population while about 48 per cent use SLT¹⁷. The Global Youth Tobacco Survey of Bhutan, 2013, reveals that 30.3 per cent youth of the country use tobacco in some form. This is more than 11 per cent increase compared to the 18.8 per cent in 2006¹⁸.

This highlights that enforcement of the prohibition on access to tobacco remains a challenge for the country. The validity of the law and the related punishment has been upheld by the courts in Bhutan. In one of the cases, an individual was charged with smuggling tobacco products from India and selling it in Bhutan. The person was convicted of the offence under the 2010 tobacco control law and punished to three years of imprisonment¹⁹. This decision of the Thimpu District Court was upheld by the High Court of Bhutan which said, '*Parliament unequivocally established that tobacco smuggling is a felony of the fourth degree, leaving no room for judicial leniency in the charges*²⁰.' The court also acknowledged the fact that the domestic law was enacted by the Parliament to give effect to and comply with WHO FCTC.

Nepal

In Nepal, the prevalence of both smoking and SLT use is almost equal with 18.5 per cent smokers and 17.8 per cent SLT users in the year 2013²¹. The Government of Nepal has taken strong tobacco control efforts under the Tobacco Product (Control and Regulation) Act, 2011 which is the primary tobacco control law that provides for regulation of smoking in public places including workplaces and public transports; tobacco advertising, promotion and sponsorship; sale of tobacco products and packaging and labelling of tobacco products²². The law required

GHW covering 75 per cent of both smoking and SLT products pack. However, this provision was challenged by the tobacco industries, at the same time, a civil society filed another petition to counter and call on the government to enforce the law. The Supreme Court of Nepal heard the five petitions on pictorial health warnings (PHW) on the smoking and SLT product packet including others²³⁻²⁷.

All the industry petitioners challenged the constitutionality of the directive requiring the 75 per cent PHWs on all tobacco packs issued under the Tobacco Product Control and Regulatory Act of 2011²⁸. The Supreme Court of Nepal rejected the contentions of the industries and held that the regulations cannot be termed as unconstitutional and cannot be cancelled while rejecting all petitions. During the final hearing of all the petitions, the Court decided in favour of Lokendra Shrestha, the Civil Society petitioner and directed implementation of the pictorial warnings Rules and Directives under Tobacco Products (Control and Regulation) Act - 2011²⁹. The Directives and its requirements have been implemented since December 2013. These directives were amended and increased PHW size from 75 per cent to 90 per cent from October 2014. The tobacco industry once again challenged the directives against 90 per cent PHWs and the civil society registered a counter to this industry petition. These petitions have been heard by the Supreme Court collectively and the Court has not issued any stay against the Government's Directive. Therefore, 90 per cent PHW in tobacco product packets is in implementation in Nepal³⁰, which now has the world's largest PHWs and messages on all forms of tobacco products.

Sri Lanka

According to the WHO STEPS surveillance data of 2015, 26 per cent of males and five per cent of females used SLT in Sri Lanka³¹. This meant one per cent increase in male users and two per cent decrease in female users when compared to the prevalence in 2007³². To deal with the rising burden of tobacco use, the country adopted and implemented the National Authority on Tobacco and Alcohol (NATA) Act No. 27 of 2006 as a comprehensive law for tobacco and alcohol control³³. The law covers both smoking as well as smokeless forms of tobacco and is in line with the mandates of the FCTC. A 2016 regulation under NATA bans sale of SLT³⁴. It provides that '*no person shall manufacture, import, sell or offer for*

*sale any smokeless tobacco product or mixture that contain tobacco*³⁴. The total ban is also imposed on e-cigarette and any flavoured, coloured or sweetened cigarette along with this regulation. No litigation is reported so far for this regulation but association of tobacco product manufactures has written to the Prime Minister of Sri Lanka to withhold the regulation till 2020 to find alternative job opportunities for sellers and manufacturers. The law itself and the regulations framed under the law have been subject to intimidating judicial challenges constantly by the tobacco industry. The PHWs on tobacco pack being the most recent one which included warnings on SLT products as well.

The Tobacco Products (Labelling and Packaging) Regulations, No. 1 of 2012 issued in August 2012 required all tobacco products to carry PHWs covering not <80 per cent of the total area of the packs³⁵. The constitutionality of the Regulation was challenged by the industry, wherein the Court upheld the rule as it was in the interest of promoting public health and in line with the Government's obligations under the FCTC. The Court also held that the time provided for implementing the regulation was sufficient and the balance of convenience was in favour of the Ministry of Health³⁶. However, the Court recommended the Government to consider reducing the warnings to 50-60 per cent of the pack³⁷. Given the significant impact of larger and effective PHW, the Sri Lankan Parliament adopted another law [*i.e.*, National Authority on Tobacco and Alcohol (Amendment) Act, No. 3 of 2015] with explicit reference to the 80 per cent size of the PHWs. The Bill came into effect on June 1, 2015.

Finally, the matter was referred by the President of Sri Lanka to the Supreme Court of Sri Lanka for its advice³⁸. The President sought a judicial review on the constitutionality of the law requiring the 80 per cent PHWs, besides increasing the fine for non-compliance. The tobacco industry intervened on the pretext that the larger PHWs will raise illicit trade in tobacco products. However, the Apex Court was of the opinion that the amendments were well within the legislative powers of the Parliament and did not violate any Constitutional provisions. Rejecting the contention of the industry, the Chief Justice also stated that the court can interfere only if the policy decision is patently arbitrary, discriminatory or malafide. The court further observed: '*...A policy once formulated is not good forever. The government has power to change the policy. The executive power is not limited frame a*

particular policy. It has untrammelled power to change, re-change, adjust and readjust the policy taking into account the relevant and germane considerations. It is entirely in the discretion of government how a policy should be shaped. It should not however be arbitrary and capricious. Thus, the covering the area of 80% of both front and back sides of every packet, package or carton containing cigarettes and other tobacco products cannot be considered arbitrary and capricious'.

The court while delivering the judgment also cited the observation made by Supreme Court of India in the case of *Vincent V. Union of India, 1987*³⁹:

'...maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to the public health, in our opinion, therefore, is of high priority - perhaps the one at the top'.

Thailand

In Thailand, SLT use is the lowest in the region *i.e.*, 1.1 per cent; however, SLT use varies widely within the country, ranging from 0.8 per cent in Bangkok region to 4.7 per cent in the northeastern region of the country⁴⁰. To curb the menace, the government of Thailand implemented strong tobacco control measures including larger PHWs on all tobacco products covering 85 per cent of the pack. The tobacco industry, as expected, challenged these regulations and got interim relief from the lower Court⁴¹. On appeal, the Supreme Administrative Court reversed the decision of the Administrative Court of First Instance and declined the petition to suspend enforcement of the regulation. The Court held that the requirements of the regulations were well within the intended scope of the parent law and the larger PHWs can thus be implemented⁴².

India

According to the latest Global Adult Tobacco Survey India Report 2016-2017, India is home to 199 million SLT users *i.e.*, almost 65 per cent of the world SLT users live in India⁴³. The government of India has taken considerable measures to deal with the high burden of SLT use in the country. Besides key regulations under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA)⁴⁴, the prohibition

on use of tobacco and nicotine as ingredient in any food under the Food Safety and Standards Regulation 2011 has been the key to preventing SLT use in India⁴⁵. However, not only this but also many such efforts have been challenged by the tobacco industry before various courts and the judicial verdicts from these cases have had a major impact on the governmental policies and the behaviour of the tobacco industry in relation to SLT control.

Pictorial health warnings

The PHWs on tobacco products were notified first as a result of a PIL filed by *Ms. Ruma Kaushik* in Himachal Pradesh High Court⁴⁶. The PHWs were finally implemented, after years of delay and dilution, as a result of the direction in the matter of *Health for Millions Trust vs. Union of India and Others*⁴⁷ by the Supreme Court of India in May 2009. More than 50 court cases were filed in various High Courts in India by the tobacco industry to challenge implementation of PHWs on the pretext that it breaches right to equality under the Constitution of India. All these matters were transferred by the Apex Court unto itself⁴⁸. The Court mandated all tobacco products to display the specified PHWs in the country from 31 May 2009⁴⁷. This resulted in confiscation of the *Gutka* pouches that were not in conformity with the provisions of Packaging and Labelling Rules, 2008, notified for implementation of Section 7 of COTPA, 2003⁴⁹.

In 2014, when the PHWs were increased from 40 per cent to 85 per cent of the principal display area, the tobacco industry again went to all possible forums to get the larger warnings stayed. However, the Apex Court declined to stay the implementation of the Rules and transferred all related cases to the Karnataka High Court for adjudication on merits⁵⁰. The Karnataka High Court vide order dated December 15, 2017, has quashed the 85 per cent PHWs as unconstitutional⁵¹. It was again for the Supreme Court, on appeal, to stay the High Court's decision for continued implementation of the larger health warnings in the country⁵².

Regulation of contents

Responding to a petition demanding information on the nicotine and tar content of tobacco products, the government gave an undertaking before the Delhi High Court to create requisite institutional capacity to test the nicotine and tar contents of tobacco products by setting up tobacco testing laboratories to enforce the mandates of Section 7 (Clause 5) of COTPA⁵³. In line with the WHO FCTC mandates and the global best practices, the Ministry of Health and Family Welfare,

Government of India, has also proposed to amend this provision to prevent display of quantitative statements on tobacco product packaging and provide for testing of contents and emissions of all chemicals and not only of tar and nicotine⁵³.

Ban on minors' access to tobacco products

Several High Courts in the country have issued directions for protection of minors as envisaged under Section 6 of COTPA *i.e.*, ensuring no sale of tobacco products to and by minors and within 100 yards of educational institutions^{54,55}. The very provision was put into implementation as a result of the direction from the Bombay High Court⁵⁶. Karnataka High Court further directed the monitoring of implementation of the provision on a monthly basis⁵⁷, while the Kerala High Court gave a detailed order for comprehensive protection of minors from exposure to tobacco⁵⁸. The Delhi High Court dismissed petitions of wholesalers seeking exemption from application of Section 6(b) and ordered cost against the petitioners⁵⁹, on appeal the Apex Court allowed the exemption with the condition that the petitioners shall transact their wholesale business only after 1600 h (*i.e.*, when the schools are closed for the day) and that they will not indulge in any retail business⁶⁰. The Jammu and Kashmir High Court issued direction to various State Departments/Municipal Corporations for ensuring prohibition on sale to minors and within 100 yards of any educational institutions in accordance with Section 6 of COTPA. Further the Apex Court, directed the Government of India and State governments '*to rigorously implement the provisions of COTPA, 2003 and the 2004 Rules as amended from time to time*⁶¹.'

Ban on advertising, promotion and sponsorship

Courts in India have issued several directions to take action against advertisements, promotion and sponsorships by the tobacco industry. The Gujarat State Road Transport Corporation and Ahmedabad Municipal Transport Services were asked to remove the advertisements of *gutka* and/or *pan masala* displayed on the public transport vehicles⁶². Karnataka High Court directed the Government of India to withdraw sponsorship extended by the Tobacco Board of India to a tobacco industry sponsored event in October 2010 to comply with Section 5 of COTPA⁶³.

Ban on smokeless tobacco in toothpaste

Specific to SLT use, the Rajasthan High Court upheld the Central Government's Notification that

prohibited the use of tobacco in toothpastes/tooth powders under the Drugs and Cosmetics Act, 1940⁶⁴. On appeal, this was also upheld by the Supreme Court⁶⁵.

Ban on sale of smokeless tobacco in plastic sachets

The Rajasthan High Court applied 'polluter pays' principle on the *gutka* manufacturer being responsible for creating plastic waste and imposed exemplary damages while restrained the manufacturers of *gutka* and *pan masala* from selling their products in plastic sachets⁶⁶. This was appealed before the Apex Court which upheld the decision sans the exemplary damages imposed by the High Court on the manufacturers. The direction from the Apex Court in this matter resulted in changing of the plastic waste management and handling regulation which banned the storing, packing or selling of *gutka*, tobacco and *pan masala* in plastic sachets⁶⁷. This resulted in a restriction on the use of plastics for packaging of *gutka*, tobacco and *pan masala*⁶⁸.

Ban on gutka

The Food Safety Authority of India prohibited the use of tobacco and nicotine as ingredients in any food products⁴⁵. Since *gutka* is prepared after mixing sweeteners and condiments with tobacco, majority of the State governments issued orders/notifications under Regulation 2.3.4 and/or section 30(2)(a) of the Food Safety and Standards Act, 2006, prohibiting the sale of *gutka* and *pan masala* (containing tobacco or nicotine) within their States⁶⁹. However, some of the States exempted *gutka* meant for export from these ban orders.

The *gutka* industry challenged the regulation 2.3.4 and the resulting ban on manufacture and sale of *gutka* in several States⁷⁰. Again, to avoid multitude of litigation and inconsistent orders from High Courts the Apex Court transferred all *gutka* ban cases unto itself and held that the ban was lawful. It directed States imposing the ban to file compliance report and others to file an affidavit stating as to why they have not implemented the ban⁷¹.

In litigations initiated by the SLT Industry, the said ban was upheld by the High Courts of Bombay, Patna, Karnataka and Kerala. The Bombay High Court ruled that the ban was in the interest of public health and the Food Safety and Standards Act, 2006, has adequate provisions to support such a ban. It also ruled that the said ban would also extend to food articles manufactured for exports⁷².

To circumvent the ban on the sale of *gutka*, the manufacturers of *gutka* started producing and selling

pan masala (without tobacco) and flavoured chewing tobacco in separate sachets but often conjoint and sold together. Hence, instead of the earlier 'ready to consume mixes', chewing tobacco companies started selling *gutka* in twin packs to be mixed as one. This flouting of the regulations was brought to the notice of the Apex Court which directed all the enforcement authorities to ensure compliance with the law and further directed the State governments and their respective Health Departments to file response on the action taken to ensure such compliance with the regulation 2.3.4⁷³.

Significance of litigation in smokeless tobacco control

Judicial pronouncements have played an important role in deciding the tide of tobacco control in the Southeast Asia Region. As a tool for social and policy change, litigation has been effectively used in the region to attain the public health objectives of tobacco control. The tobacco industry, on the other hand, lives to its reputation of challenging every tobacco control initiative at every possible adjudication forum. Initially, these challenges and litigation pertained to smoke-free laws since smoking remained the major focus of tobacco control regulations. However, with the adoption and enforcement of the WHO FCTC, more countries have begun to include SLT in their tobacco control policies, and therefore, various tobacco control policy initiatives on SLT are being subject of litigation.

Other than India and Bhutan, most of the litigation, that have bearing or impact on SLT control in the Region, have been related to implementation of the PHWs. The judiciary in the Region has played a positive role in strengthening SLT control within their respective jurisdictions.

Bhutan has a complete ban on SLT products and thus the litigation there relates to the enforcement of the law. The Apex Court upheld the law that bans the sale of tobacco products and found the prosecution and punishments consistent with the law of the land. Sri Lanka had implemented all tobacco control measures equally on SLT products and faced industry litigation against PHWs on all tobacco products. It has also imposed a complete ban on sale, manufacture and import of SLT products in the country.

The Indian judiciary has been a pioneer in tobacco control and directed the governments to curb smoking in public places to prevent violation of non-smokers right to breathe air, free from tobacco smoke^{74,75}. Several subsequent litigation have also strengthened SLT prevention and control in the country. The

decision of Rajasthan High Court, banning the use of plastic sachets to pack *gutka* and *pan masala*; direction from several High Courts to prevent sale of any kind of tobacco products around educational institutions; direction of courts in respect of ban on *gutka*; and finally the Apex Court taking a positive stand in these matters have been the hallmark of the Indian judiciary. However, some of the concerns with respect to SLT litigation or tobacco control litigation, in general, have been those that are initiated by the tobacco industry and particularly those where they get *ex parte* decision in their favour including stay of key tobacco control measures. It takes considerable time to get such decisions rectified, decided on merit or revoked on appeal; while in the meantime, public health and population at large suffers.

Conclusion

Comprehensive efforts are needed from all stakeholders to deal with the high burden of SLT use in the Southeast Asia Region. The judiciary in the Region has remained positive in fulfilling public health objectives and has played an important role in strengthening tobacco control initiatives. Court decisions have helped in countering the aggressive nature of the tobacco industry in promoting SLT in the region by upholding evidence-based measures, especially PHWs on all tobacco products. These litigation and the resulting judicial measures have demonstrated the effectiveness of judicial interventions in thwarting the tobacco industry tactics and advancing the public health objectives.

To fulfill the mandates of the WHO FCTC, Parties to the Convention must now focus on full implementation of the Treaty provisions and guidelines. This to happen, however, will require a progressive judicial system, wherein public health outweighs the tobacco industry interference.

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