

COMPREHENSIVE BAN ON TOBACCO ADVERTISING IN THE RECENTLY PASSED TOBACCO CONTROL BILL IS WITHIN PUBLIC INTEREST AND DOES NOT INFRINGE TOBACCO COMPANIES' INTELLECTUAL PROPERTY RIGHTS

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Background

Globally, tobacco consumption is one of the leading causes of preventable deaths. In 2011 a World Health Organization report documented a further increase in its consumption and fatality rate.² It is estimated that tobacco use kills about 6 million people per year, and is expected to kill 8 million people worldwide by 2030.³ According to the Global Adult Tobacco Survey (GATS) 2013, 1.3 million people in Uganda aged 15 years and above use tobacco products.⁴ Tobacco use is also the leading preventable risk factor for all Non Communicable Diseases (NCDs)—with 73% of cancer-related cases at the Uganda Cancer Institute being directly linked to tobacco smoking and inhaling.⁵ The negative effects of smoking affect both the actual smokers and the passive smokers.

In that effect, Uganda has taken a step towards enacting legislation to control the use of tobacco. A Private Member's Bill (*The Tobacco Control Bill, 2014*) was tabled by Hon. Dr. Chris Baryomunsi, Member of Parliament Kinkizi County East Constituency. Some of the key objectives of the bill are to protect the present and future generations of Uganda from the devastating health, social, economic and environmental consequences of tobacco, promote health and other human rights as a State Party to the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) and other related treaties, and to regulate the manufacture, sale, labelling, promotion, advertising, distribution, public use and

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² WHO Report on the Global Tobacco Epidemic, 2011: Warning about the dangers of Tobacco

³ Centers for Disease Control and Prevention: Smoking and Tobacco Use

⁴ Preliminary results of the GATS 2013 conducted by Uganda Bureau of Statistics under coordination of Ministry of Health supported by WHO and US Centers for Disease Control and Prevention

⁵ Research conducted by Makerere University College of Health Sciences available at <http://www.chs.mak.ac.ug> and also cited in 17th Annual Uganda Human Rights Commission Annual Report (2014), pg. 185.

sponsorship of tobacco products. The Bill also proposes to repeal the outdated Tobacco (Control and Marketing) Act and the National Tobacco Corporation Act.

Ban on Tobacco Advertisement, Promotion and Sponsorship.

One of the most contentious provisions of this proposed law is Clause 13 which imposes a comprehensive ban on tobacco advertising, promotion and sponsorship. Whereas the author strongly supports the clause, he found it important to critically analyse its application and legal challenges as has been witnessed in other jurisdictions. Clause 13 (1) provides that;

All forms, methods and means of tobacco advertising, promotion or sponsorship, including cross-border tobacco advertising, promotion or sponsorship as provided for in the third schedule to this Act are prohibited.

This clause is in line with Article 13 of the WHO FCT and according to a 1999 World Bank Report

Policy makers who are interested in controlling tobacco, need to know whether cigarette advertising and promotion affect consumption. The answer is that they almost certainly do. The key conclusion is that bans on advertising and promotion prove effective, but only if they are comprehensive, covering all media and all uses of brand names and logos.⁶

However, to ensure effective prohibition, the Uganda Human Rights Commission notes “tobacco-advertising ban must cover all media and all forms of promotion. If it is only partial, then promotions will merely shift from the banned to the unbanned media and methods of promotion.”⁷

That notwithstanding, Clause 13 (5) lays down some exceptions, including acceptance of plain black and white price lists, name of the manufacturer, product and brand on tobacco product packages and depiction of tobacco products or tobacco use in the media where such depiction is for educational purposes of tobacco control.

⁶ World Bank Report, ‘Curbing the Epidemic Governments and the Economics of Tobacco Control’ 1999, p. 49.

⁷ <http://www.uhrc.ug/uganda-human-rights-commission%E2%80%99s-position-tobacco-control-bill-2014-presented-committee-health>.

Nevertheless, over the years, the above provisions have informed a lot of legal battle in several jurisdictions including Canada and South Africa. In Canada when the issue came up in the case of **Canada v. JTI-Macdonald Corp**, the Court struck down provisions of the *Tobacco Products Control Act* that broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required that unattributed warning labels be affixed on tobacco product packaging. In response to the Court's decision, Parliament enacted the **Tobacco Act and the Tobacco Products Information Regulations**. This involved permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. This triggered a petition by the tobacco manufacturers challenging the new legislation, on grounds that it limited their right to freedom of expression. The trial judge determined that the impugned provisions were constitutional and dismissed the manufacturers' actions. On final appeal, the Supreme Court held *inter alia* that;

Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes.⁸

This decision is objective in the sense that it introduces a proportionality test. The freedom to impart ideas through marketing, advertisement and product promotion is not an absolute right. The Constitution of Uganda establishes a guiding test to the effect that "in the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest."⁹

Therefore, in the case of Uganda's proposed Tobacco Control legislation, protection of public health considerations by a total ban on advertising falls

⁸ See judgment of McLachlin C.J

⁹ Article 43(1) of the Constitution and the limitations discussed extensively by Mulenga JSC in Charles Onyango- Obbo & Andrew Mujuni Mwenda vs. Attorney General, Supreme Court Constitutional Appeal No. 2/2002

squarely within the limitation test. As the Supreme Court of Canada observed, the challenge of dealing with today's sophisticated advertising of tobacco products is not insignificant. The distinction between information and brand-preference advertising directed to market share, on the one hand, and advertising directed to increased consumption and new smokers, on the other, is difficult to capture in legal terms.

The other limb of the ban relates to sponsorship. Tobacco manufacturers have a long tradition of sponsoring sporting and cultural events and facilities as a means of promoting their product and, they would argue, acting as good corporate citizens. Canada, just like Uganda proposes, in the *Tobacco Act*¹⁰, chose to ban the promotion of these sponsorships. The question before the Supreme Court was whether this ban was Constitutional. The Court held that

The trial judge, Denis J., correctly held that sponsorship promotion is essentially lifestyle advertising in disguise. If lifestyle advertising is prohibited, sponsorship provides an alternative means for tobacco companies to associate their products with glamour, recreation, etc.¹¹

The Court went ahead to note that the evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes. Parliament's objective is clearly pressing, substantial and makes a rational aim to the greater objective of promotion of public health standards by curbing the devastating effects of smoking.

The import of this decision is that the restrictions imposed by Parliament to curb the supply and consumption of tobacco products by banning advertisement and promotion of such products, their brands, trademarks and get ups does not amount to expropriation of intellectual property rights contained in the such designs, trademarks, get ups, logos *et cetera*. The Court weighs the greater public interest, the legislative objects and places them above commercial interests of tobacco

¹⁰ Tobacco Act of Canada

¹¹ See paragraphs 120 and 121 of the judgment

companies. Therefore, the proposed Tobacco Control Bill provisions above fall within this category of legal protection of public health rights of the wider society of Uganda.

Similarly, the South African Supreme Court of Appeal had a chance to pronounce itself on the matter of advertisement and promotion of tobacco products in **BATSA v Minister of Health**.¹² In that case, British American Tobacco, appealed in a matter that related to the proper interpretation of s 3(1) (a) of South Africa's *Tobacco Products Control Act 83 of 1993* (the Act) as amended by the *Tobacco Products Amendment Act 63 of 2008*, which provided that

No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.

BAT felt that the amendment would impact its ability to communicate directly with consenting adult consumers of tobacco products. It considered the definition of 'advertisement' to be unconstitutional to the extent that it limited its right to freedom of commercial expression, as set out in the Constitution of the republic of South Africa. The essence of the appellant's (BAT) complaint was that the impugned prohibition limits not only the appellant's right to engage in commercial expression, but also the right to freedom of expression of tobacco consumers who are denied the right to receive information concerning tobacco products.

Before the Supreme Court of Appeal, the issues for consideration were *inter alia*, whether the impugned prohibition as it stands was unconstitutional. As a preliminary observation, the Court noted that South Africa is a signatory to the Framework Convention on Tobacco Control.¹³ In relation to advertising, promotion and sponsorship of tobacco products, the Framework Convention imposes clear obligations on State parties. It provides that 'Each Party shall, in

¹² (463/2011) [2012] ZASCA 107 (20 June 2012)

¹³ This Convention came into force on 27th February 2005 and Uganda is a signatory

accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship.¹⁴

The South African Court was alive to the fact that in determining whether or not to impose a ban on advertising and promotion of tobacco products, the Minister would have been obliged to have regard to the Framework Convention. The Court was therefore obliged, under the Constitution, to give weight to the Framework Convention in determining the question of justification or the limitation of the right to freedom of speech.

It is noteworthy that Uganda signed the WHO FCTC Treaty on 5th March 2004, and also ratified it on 20th June, 2007 and subsequently; the treaty came into force on 18th July, 2007 and created obligations for Uganda as a State party to introduce legislative measures to ensure tobacco control.¹⁵ Uganda's foreign policy is also based on respect for international law and treaty obligations.¹⁶ Furthermore, compliance with obligations under the WHO FCTC was listed as one of core objects of the Tobacco Control Bill.¹⁷

Of fundamental legal importance, the South African Court observed that as to the public health considerations that appeared to have informed the ban on advertising, it was necessary to have regard to how the problem has been dealt with in other jurisdictions.¹⁸ The decision of the Canadian Court, *Canada (Attorney General), v JTI-MacDonald Corp* was adopted with approval. In that case, the Chief Justice of Canada observed that;

Tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.¹⁹

¹⁴ Article 13 of the Framework Convention on Tobacco Control

¹⁵ World Health Organization Framework Convention on Tobacco Control, p. (v).

¹⁶ National Objective and Directive Principle of State Policy XXVIII (i) (b)

¹⁷ Clauses 1 (c), d(i) and 2

¹⁸ Paragraph 24 of the judgment

¹⁹ 2007 SCC 30 para 9.

In Uganda, the major player in the tobacco industry is the British American Tobacco Company. In 2011, the World Health Organization estimated that BAT controls about 85% of the cigarette market in Uganda.²⁰ The Centre for Tobacco Control in Africa estimates that about 13,500 Ugandans die every year from smoking-related causes.²¹ The first ever Global Adult Tobacco Survey in Uganda revealed that 1.3 million adults currently use tobacco products.²²Worryingly, it is also estimated that 19.3% of male minors and 15.8% of female minors (ages 13-15) currently use tobacco products.²³These devastating public health findings offer strong justification for the legislative measures being adopted by Uganda. Similarly, it is important to note that smokers are not a homogenous group. Amongst them there are those that are trapped in the habit and wish to get out of it. There are also those who have given the habit up and would not like to relapse into the old habit of smoking again. The legislative object being pursued by Uganda, therefore, is aimed at discouraging all tobacco users, without exception, in the interest of public health.

On July 28th 2015, the Parliament of Uganda overwhelmingly passed the Bill. In brief, the bill among others, bans smoking in all public places, work places and public transport, bans use of smokeless tobacco such as Shisha, bans all forms of advertisement, sponsorship and promotion by the tobacco industry, bans sale of cigarettes to persons below 21 years, requires pictorial health warning on all cigarette packs covering 65% of the principal display area of the cigarette packs and prohibits sale of tobacco products within 50 metres of educational and health institutions.²⁴

²⁰ World Health Organization, Tobacco Control Economics, Tobacco Free Initiative, Country Profile: Uganda, 2012

²¹ Uganda National Tobacco Control Association, Shadow Report on the Status of Implementation of the World Health Organization Framework Convention on Tobacco Control (WHO-FCTC) Articles 8 and 13 in Uganda 2012, May 2013

²² Global Adult Tobacco Survey, Global Adult Tobacco Survey: Executive Summary 2013, Uganda, 4 July 2014

²³ Global Youth Tobacco Survey, 2011

²⁴ Lucy Abulo, 'Parliament Passes a Strong Bill to Regulate Tobacco Production, Sale and use in Uganda,' accessed at <http://unhco.or.ug/2015/07/parliament-passes-a-strong-bill-to-regulate-tobacco-production-sale-and-use-in-uganda/>.

Conclusion

Clause 13 of the Tobacco Control Bill is in line with Uganda's obligations under Article 13 of the WHO FCTC. The World Bank Report on Curbing the Epidemic Governments and the Economics of Tobacco Control. The counter-argument to this has been that such a ban would infringe on commercial speech and intellectual property rights of tobacco companies. However, through a comparative jurisprudential and jurisdictional analysis, this argument is untenable in light of the public health consideration and public interest doctrine.

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