FILE NO. 00032-2010-PI/TC
LIMA
5,000 CITIZENS

JUDGMENT

FROM THE FULL JURISDICTIONAL BENCH OF THE CONSTITUTIONAL COURT OF PERU

JULY 19, 2011

UNCONSTITUTIONALITY PROCEEDINGS

5,000 CITIZENS AGAINST ARTICLE 3 OF LAW NO. 28705 – GENERAL LAW FOR THE PREVENTION AND CONTROL OF TOBACCO USE RISKS---

SYNTHESIS

Claim of unconstitutionality filed by over 5,000 citizens against Article 3 of Law No. 28705 – General Law for the Prevention and Control of Tobacco Use Risks---.

Signatory Justices
MESÍA RAMÍREZ
BEAUMONT CALLIRGOS
CALLE HAYEN
ETO CRUZ
URVIOLA HANI

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In Lima on July 19, 2011, the Constitutional Court, in Plenary Jurisdictional Session, made up by Justices Mesía Ramírez, President; Álvarez Miranda, Vice President; Beaumont Callirgos, Calle Hayen, Eto Cruz and Urviola Hani, hereby issue the following judgment based on a vote on which Justices Beaumont Callirgos and Eto Cruz concur and the singular vote of Justice Álvarez Miranda, which are added.

I. ISSUE

Claim of unconstitutionality filed by over 5,000 citizens against Article 3 of Law No. 28705 – General Law for the Prevention and Control of Tobacco Use Risks---, amended by Article 2 of Law No. 29517, published in the Official Gazette "El Peruano" on April 2, 2010.

II. QUESTIONED PROVISION

Article 3 of Law No. 28705, amended by Article 2 of Law No. 29517, whose text is as follows:

> "3.1 Smoking shall be banned in establishments dedicated to health or education, in public offices, in the interiors of work places, in enclosed public spaces and on any means of public transportation, which are one hundred percent smoke-free environments.
> 3.2 Interiors and enclosed public spaces are understood as any work place or place of public access that is covered by a roof and enclosed between walls, regardless of the material used for the roof and whether the structure is permanent or temporary.
> 3.3 Regulation to the Law establishes the other specifications for interiors or enclosed public spaces."

III. BACKGROUND

§1. Arguments from the claim

Through a claim filed on November 30, 2010, the plaintiffs request that Article 3 of Law No. 28705 – General Law on the Prevention and Control of Tobacco Use Risks – amended by Article 2 of Law No. 29517, be declared unconstitutional. Specifically, they question the precept in the extreme to which it bans tobacco use in all enclosed public spaces in the country, thus prohibiting the existence of establishments exclusively for smokers, and in the extreme to which it bans tobacco use in open areas of educational establishments for adults.

They maintain that Article 8 of the Constitution is limited to establishing an order to regulate tobacco use but not to ban it. Therefore, in order to protect the right to health, the State may introduce certain tobacco use restrictions, but it may not ban it. To that

effect they relate that the World Health Organization's Framework Convention on Tobacco Control, which in their opinion holds legal rank and upon whose regulations is based, in good measure, the inclusion of the questioned regulation into the legal system, could not ban tobacco use, since the Constitution expressly allows the use of social toxins.

They state that the challenged regulation unreasonably affects the right of smokers to free personal development, because it prevents them from exercising their freedom to smoke, even when it in no way affects the rights of non-smokers. And, as they tell it, the regulation absolutely bans tobacco use in enclosed public places, regardless of whether these are designated exclusively for smokers and where smoking staff members work, in addition to absolutely forbidding tobacco use in the open areas of educational establishments for adults. They affirm that neither of these two cases affects the health right of non-smokers in any way. They maintain that the State cannot punish people who, within the framework of their autonomy, have freely decided to smoke in places exclusively equipped for it. Along that line, they say that a restriction on smokers' rights may be justified when its practice affects the rights of non-smokers. However, it is baseless when smokers freely decide to meet at a place where only other smokers go--equally willingly.

Otherwise, they stress that the questioned regulation clearly affects the right to free private enterprise and free trade so long as it establishes an absolute ban on having establishments exclusively for smokers unless there is a justified objective reason. They say that if the purpose is to protect the rights of non-smokers and workers, it would suffice to impose a measure guaranteeing their rights, such as allowing for specially equipped smoking areas, making the Regulation on Permissible Value Limits for Chemical Agents in the Workplace the benchmark, but without banning the creation of the types of places for smokers only. Quite the contrary, they say, the most restrictive smokers' rights alternative is being chosen, resulting in its being an unconstitutional option.

They stress that the hindrance on having places exclusively for smokers where only smoking staff works is not a suitable measure to guarantee non-smokers' health right, because they would not be exposed to tobacco smoke. They likewise maintain that the absolute smoking ban in open areas of education centers for adults is also unsuited to protect non-smokers' right to health, because in such a circumstance, no non-smokers would be exposed to tobacco smoke when they are outdoors. To that extent they believe that the questioned provision does not pass the subprinciple of suitability, consistent with the principle of proportionality.

They state that the steps taken before the challenged law was issued were suited to achieving the desired goals but less restrictive of smokers' rights and the right to free private initiative and free enterprise because it allowed tobacco use in open spaces. Insofar as enclosed spaces, it established the possibility of an area for smokers no larger than 10% of the place, which had to be separated from the non-smoking area within the maximum allowable values for toxic substances and have proper mechanisms for

ventilation and smoke extraction that would keep the non-smoking area from being contaminated. They maintain that while the prior legislation was in force, the State made no effort to see that the established measures were obeyed, and that restricting the regulatory framework just because municipalities have not carried out their oversight duties is to make the ones being administrated responsible for the Administration's limitations, thus affecting the free development of smokers' free personal development, free private initiative and free enterprise. They also stress that there were other, less restrictive measure that could have been chosen, like allowing the creation of establishments for smokers only, where only smoking personnel would work and who could be covered by a Supplementary Job Risk Insurance. And regarding the absolute smoking ban in open areas of educational centers, they believe that banning the use of tobacco in educational centers could have been selected as an alternative only when there were minors present or only in enclosed spaces. In short, they declare that the filed regulation does not create a superior state of protection for non-smokers and unnecessarily restricts the right of smokers, which is why it does not meet the subprinciple of need.

They maintain that if tobacco use in establishments exclusively for smokers and where smoking personnel are working causes no damage to non-smokers' health because such people would not go to such places, the ban is unreasonable. In these cases the ban would do nothing more than discriminate against smokers by showing intolerance of their choice. They also say that if the use of tobacco in open spaces inside places dedicated to adult education, like universities, institutes and postgraduate schools, causes no health damage to non-smokers, banning it is unreasonable. Due to these considerations they believe that the regulation does not pass the subprinciple of strict proportionality.

Finally, they assert that by banning tobacco use in places exclusively for smokers with restricted public access, tobacco use is being indirectly promoted in smokers' homes, affecting the children of smoking parents and prompting them to smoke in imitation of their models.

§2. Arguments in rebuttal to the claim

The attorney for the Congress of the Republic rebuts the claim, asking that it be declared baseless, as it does not breach the Constitution. First, he maintains that the World Health Organization's Framework Convention on Tobacco Control is part of our legal system and holds Constitutional rank, because it is a treaty about the right to health. He relates that according to its provisions, Peru must enact suitable measures to achieve two goals: 1) Continually and substantially reduce the prevalence of tobacco use; and 2) continually and substantially reduce the exposure to tobacco smoke, these being the objectives of the challenged provision. He believes that in the claim importance is given only to the second of the goals. He declares that it is wrong to say that the stated Convention makes only proposals, when what it does is establish general obligations for the State Parties in order to prevent and reduce tobacco use, nicotine addiction and the exposure to tobacco smoke.

He declares that the precept establishes the smoking ban only in particular places, such as establishments dedicated to health or education, public offices, the interiors of work places, enclosed public spaces and any means of transportation and that therefore it cannot be said that we confront an absolute concept of prohibition.

Concerning the plaintiff's question about why there would have to be a ban on smokers-only establishments where smoking personnel also work, he states that one must remember that the challenged article bans smoking "inside work places", even if the staff member smokes. Thus, the plaintiffs would intend the recognition of an exception to the stated ban. Moreover, in such a hypothesis the staff smoker would be far more exposed to the consequences of smoking, because he would not only have to tolerate such consequences when he himself decides to smoke, but also when he cannot smoke because he is working. To that effect, he says that in this case the smokers would not be exercising their right to free personal discovery in harmony with the right to health belonging to the location's workers, even when it has to do with staff members who smoke.

Conversely, with regard to the question posed by the plaintiffs about why to keep adults from using tobacco at a university where there are plenty of open spaces and they will not affect the rights of third parties, he believes it contradictory to allow the performance of an action (tobacco use) which carries devastating consequences to human health into a place (a university educational center) devoted to offering a public service (education) whose goal is comprehensive human development and providing knowledge on how to achieve a better quality of life, *especially* if minors also attend these centers. It stands to reason that such environments be 100% smoke free in order to contribute to the reduction of use and protection against the exposure to tobacco smoke, which prevents sickness and, as a result, guarantees full effectiveness of the right to health. In his opinion, it has to do with a reasonable limitation on the right to free personal discovery.

He emphasizes that while smoke-free spaces are a Pan American Health Organization proposal, they are a means suitable not only to reducing exposure to tobacco smoke, but also to reducing tobacco use. He maintains that the right to free personal discovery, like any right, is not absolute; it must be practiced in harmony with other people's basic rights and goods of constitutional relevance.

He relates that the exercise of free private initiative must not threaten general community interests, while the exercise of free enterprise must not put people's health at risk.

He believes that the constitutionally legitimate goal of the measures adopted by the challenged regulation is to guarantee the right to health, not just of non-smokers, as the plaintiff understands it, but also of smokers, which becomes urgent when faced with growth of the smoking epidemic that produces devastating diseases. To that effect, he says that among the steps the State should take are those indispensable to the prevention of diseases, such as the measures adopted by the inchoate provision that become suited to reaching such an objective, which is why they pass the subprinciple of suitability for the

principle for the principle of proportionality. He considers it wrong to maintain, as the plaintiffs do, that with the challenged measure minors are more exposed to tobacco smoke at home, because according to the World Health Organization, by reducing tobacco use, the effect is precisely the opposite: attacking the heart of its social acceptability prevents the onset of its use, promoting smoker cessation more effectively than efforts directed towards the smokers themselves.

He says that the regulation preceding the challenged one, which admitted the equipping of designated smoking areas in public places, unlike the one being challenged was insufficient to guarantee full effectiveness of the right to health, there is no mechanism 100% effective in preventing smoke from passing into the non-smoking area, and ventilations systems are incapable of sufficiently preventing the presence of toxic substances in the environment. He affirms that according to the ruling on Draft Bill No. 2996/2008-CR and No. 3790/2009-PE that preceded issuance of the challenged regulation, and according to plenty of reports from the World Health Association and the Pan American Health Association, the method it used (the establishment of 100% smoke-free public places) is the only effective method to guarantee full effectiveness of the right to health. To that effect he says that the earlier legislation cannot be considered an alternative method, since it was incapable of guaranteeing the right to health, which is why the regulation passes the subprinciple of need, satisfying the principle of proportionality.

He states that creating establishments exclusively for smokers where only smoking personnel work is also a measure unsuited to health protection, because the smoking personnel would be exposed to the consequences of smoking not just when they decide to smoke, but also when they cannot do so because they are working.

He relates that when the plaintiff proposes risk insurance for the workers in these establishments, he is not only recognizing that working in these places is a risky activity, but he also proposes a measure that does not lead to tobacco use reduction or to protection from tobacco smoke exposure. Therefore, it is not an alternative measure to the one adopted, either.

Finally, he believes that if we compare the degree to which the right to health is protected and the degree to which the rights to free personal discovery, free private initiative and free enterprise are affected, one can conclude that the challenged measure is proportional in the strict sense.

§3. Arguments from the *amici curiae*

3.1 The Pontificia Catholic University School of Law's Legal Clinic on Actions in the Public Interest

On June 17, 2011, the Pontificia Catholic University School of Law's Legal Clinic on Actions in the Public Interest asked to be included in the proceedings as *amicus*

curiae, filing the report "Legal Analysis on the Unconstitutionality Proceedings Against the Amendment to Law No. 28705, General Law for the Prevention and Control of Tobacco Use Risks, amended by Article 2 of Law No. 29517". Through a decision dated June 22, 2011, the Constitutional Court resolved to declare this request admissible. Below are the conclusions of its report:

- The World Health Organization's Framework Convention on Tobacco Control is recognized as a Human Rights Treaty and, therefore, an agreement having Constitutional rank in our legal system. For this reason, the Constitutional Court must consider this instrument in order to give content to the concise scope of the health right included in our Constitution by undertaking the matter of the epidemic facing humanity (smoking), defined as such by this Treaty and, based on those standards, to verify constitutional compatibility of the amendment to Law No. 28705 by Law No. 29517. The Constitutional Court must thus affirm the constitutionality of effective "legislative measures" to "protect against exposure to tobacco smoke in indoor work places, means of public transportation and enclosed public places", as shown in the Convention's Article 8.

- There is a great deal of documented information from very serious studies proving tobacco's health damages to the point that it has been officially classified by the WHO and Framework Convention on Tobacco Control as a world epidemic. On this road to protecting the right to life and health, States must design and carry out public policies coordinated with the above Treaty in order to reduce and, if possible, to eliminate the use of a product classified as a drug and which is injurious to health. So there can be no doubt about this, British American Tobacco Perú itself acknowledges that *"The use of tobacco products is a real and serious health risk. The only way to prevent these risks is to not use tobacco..."*

- It may be important for the Constitutional Court to explore scenarios where it seeks to determine whether tobacco use under addictive conditions involves exercise of the right of self-determination, for if a human being is unable to control his will for chemical substances his body requires (as happens with all drugs), under such conditions one must consider that *the freedom to smoke is not freedom*. While it is true that this is a reality and people may choose to take drugs and travel that road, what the State may not do is promote these behaviors that are detrimental to life and health.

- Smoking is an illness that primarily affects the poor. WHO estimates show that 84% of smokers live in poor countries, where the burden of smoking-related sickness and death is growing rapidly. In Peru the population in poverty allots a percentage of its meager income to the purchase of tobacco. Nine out of 10 homes with low economic resources invest over 6% of their earnings in acquiring cigarettes for their use.

- Tobacco companies keep up an aggressive policy of market expansion, and Peru is an attractive country in the region for the tobacco industry; it is a country of 30 million inhabitants with relatively low use compared to other countries (15% of adults in the

country's 15 principal cities are regular smokers, and each of them uses approximately 5 cigarettes per day). The challenge is to achieve the greatest number of users. That is the market logic they pursue, which goes against the public policies which must be constructed for Peruvians' life and health.

- The ban on smoking in public places or 100% smoke-free zones is being absolutely viewed by Convention State Parties as an effective measure, because it reduces the prevalence of tobacco use, it reduces the average number of cigarettes per day, and it promotes cessation. Studies reveal that these types of measures not only protect non-smokers from exposure to tobacco smoke, they also stimulate smokers to reduce their use, thereby achieving control of the epidemic. It is part of a sensible health policy.

- There should be no doubt about the benefits to the rights to life and health from introducing restrictions on the smoking habit in enclosed public places. Smoking control is not a paternalistic position; it is a public health policy position.

- Approximately one-third of the countries in the European Union have adopted global legislation on behalf of smoke-free environments. The effects on public health are immediate—the figure for cardiac crises has dropped between 11% and 19%.

- Latin America is advancing rapidly on smoke-free zones. . In Uruguay, Mexico, Panama, Nicaragua, Honduras, Venezuela and Colombia regulations similar to the one in these proceedings on unconstitutionality have been challenged.

- The establishment of tobacco smoke-free zones is the best solution when faced with spaces shared by smokers and non-smokers, given that it is technically proven that it is quite difficult and costly to install equipment that will effectively eliminate tobacco smoke and its contaminating particles. The consequence of this, aside from the health problems, means an exit that discriminates against small establishments that could not take it on, thus affecting the ability of businesses to compete.

- Establishing smoke-free enclosed public places also has no effect on businesses. Free enterprise is not hurt. Important studies carried out in Norway, Uruguay and the U.S. demonstrate that there are no economic losses associated with these restrictions; in none of the cases where smoke-free spaces were created did service sector income (specifically in bars, restaurants and hospitality) drop, and these companies' earnings were not reduced.

- Most of the population is non-smoking, and it is entitled to breathe clean air without tobacco smoke contaminants. This can be achieved when the law delimits where smoking may take place and where it may not. As it has been said: *"Smokers' right to smoke ends when their behavior affects the health and wellbeing of others…".*

- People may choose to smoke. That is part of their self-determination, and the law does not prohibit their doing so. What has been stipulated is the regulation of an activity detrimental to rights and one that affects people's life and health by reducing

the risks it represents. This self-determination to select a damaging activity, however, may not do harm to the rights of those who work in public places. Let us not forget that establishments need staffs who offer services to customers, and they are exposed to the pollutants in tobacco smoke against their will.

- Workers in public establishments largely prefer smoke-free environments. They are not chosen because they smoke, but because of their abilities. In Peru, due to the shortage of existing jobs, people generally cannot choose their place of employment. Instead, they need to work where they have the chance to bring in an income. So, an expansion of the current law to create centers for smokers served by "smoking" workers may mean the affecting of these people's rights by their having to assume a habit or by being forced to breathe smoke they do not want.

- Making the statutory reform flexible to the possibility of establishments for smokers would mean a step backwards regarding our legislation's advances in the matter and an enormous frustration to the country's anti-tobacco fight, in addition to harming the World Health Organization's Framework Convention on Tobacco Control, because what will happen in practice is that all evening entertainment centers will be declared as places suitable for smokers by their own owners. In other words, they will turn public places into places for smokers, which will end up affecting those who are not smokers. To prevent it, in this case one must keep in mind the principle of anticipation of consequences.

- The smoking ban in educational centers as the action intends it is improper, due to the fact that it would affect minors studying at universities and their promotional centers. One should also recall that the university should reduce the social acceptability of the act of smoking and consider that there is an instructional factor and social responsibility to be taken into account to educate and *"to promote healthy life habits".*

3.2 The Georgetown University School of Law's *O'Neill Institute for National and Global Health Law, Campaign for Tobacco Free Kids* and Framework Convention Alliance

On the other hand, on July 6, 2011, the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance asked to be included in the proceedings as *amicus curiae,* filing the report "*Amicus Curiae* in Defense of the Constitutionality of Law 28705, amended through Law 29517". Through a decision dated July 11, 2011, the Constitutional Court resolved to declare this request admissible.

They relate that pursuant to the International Law on Human Rights, the Peruvian State has the obligation to abstain from carrying out actions that threaten human rights, as well as the obligation to carry out positive activities to ensure that people are not victims of violations to those rights. Therefore, it has the obligation to discourage the production, marketing and use of tobacco, stupefactants and other noxious substances. They allege

that according to the criterion of the Committee on Economic, Social and Cultural Rights – established by virtue of Resolution 1985/17 of May 28, 1985, from the United Nations Economic and Social Council (ECOSOC) – the Peruvian government must use the WHO Framework Convention on Tobacco Control as a standard to evaluate compliance with the obligations derived from the right to health protection, recognized in the International Covenant on Civil Rights and Policies.

They maintain that both the World Health Organization and various technical studies on the matter have established that 100% smoke-free environments are the only effective strategy for reducing the exposure to tobacco smoke in enclosed spaces to levels safe for the protection of health, which is why the existence of areas for smokers in enclosed public locations cannot be allowed. They likewise relate that this method has significantly reduced the percentage of hospitalizations due to heart attacks in different countries.

They believe that the proposal in the claim to allow environments for smokers only in which smoking personnel works would create the expansion of sites where in addition to smoking, the sale of food or beverages is allowed, so that in practice they are indistinguishable from any restaurant or bar, thus losing the tenor of the rule requiring places to be 100% smoke free. They state that it would be counterintuitive to allow places for smokers only in which servers must be smokers, because smoking is an epidemic that the Peruvian State has promised internationally to combat. Furthermore, it would deal with a discriminatory step against non-smokers in the access to work, and it would contravene provisions of the International Labor Organization that demands work environments be free from atmospheric contamination. They declare that there would be no merit in considering work in places exposed to tobacco smoke as risky work, since this such when the risky nature is integral to the job activity.

It says that given the importance of educational centers to the strategies of awareness creation and public sensitization, the absolute ban on the ability to smoke there is in harmony with the WHO Framework Convention on Tobacco Control. It concerns a measure that strengthens young people's protection against tobacco.

They maintain that it is proven that a law like the one questioned by the plaintiffs reduces exposure to smoke at home, since it encourages people to make them smoke-free environments.

They argue that smoke-free environmental laws lead to a reduction in the rate of smokers and thus demonstrate its suitability. In addition, the measures are needed, because less restrictive options do not meet the goal of health protection. They believe that the degree of damage to the rights in play is minimal, since essential elements of commercial freedoms are unaffected, as are the production and sale of these products. Regarding the alleged damage to the right of free personal development, they state that the impact on this is minimal, so long as the use of tobacco is not absolutely banned, but healthier standards of life are promoted instead.

IV. GROUNDS

§1. Demarcation of the Prayer for Relief

1. The appellants have filed a claim of unconstitutionality against Article 3 of Law No. 28705 – General Law for the Prevention and Control of Tobacco Use Risks – because they believe the basic rights to free personal development, free enterprise and free private initiative have been breached. Specifically, they relate the following: "The purpose of this claim of unconstitutionality is to question the stated article **in the extreme to which it absolutely bans without exception the use of tobacco in all enclosed public spaces in the country**, thereby banning the existence of establishments exclusively for smokers. Furthermore, **in the extreme to which it absolutely bans without exception the use of tobacco in open areas of educational establishments for adults"** (Cf. claim motion, p. 2; emphasis in the original).

2. Article 3 of Law No. 28705 stipulates the following:

> "3.1 Smoking shall be banned in establishments dedicated to health or education, in public offices, in the interiors of work places, in enclosed public spaces and on any means of public transportation, which are one hundred percent smoke-free environments.
> 3.2 Interiors and enclosed public spaces are understood as any work place or place of public access that is covered by a roof and enclosed between walls, regardless of the material used for the roof and whether the structure is permanent or temporary.
> 3.3 The regulation to the Law establishes the other specifications for interiors or enclosed public spaces."

3. Consequently, one question that is noted, having thoroughly analyzed the prayer for relief, is that the claim is not raised against the entirety of Article 3 of Law No. 28705, but rather only against particular areas with bans set forth in point 3.1. Specifically, the claim is raised against the following extreme in point 3.1, Article 3 of Law No. 28705: "Smoking is banned in establishments dedicated (…) to education [and] in enclosed public spaces (…), which are one hundred percent smoke-free environments."

   One also sees that the plaintiffs do not intend expulsion of the challenged precept from the legal system, but instead that the Constitutional Court interpret that where the precept bans smoking "in enclosed public spaces", it not be understood to include establishments exclusively for smokers, and that where it bans smoking "in establishments dedicated (…) to education", it not be understood to include open areas in those establishments which are for adults.

   In short, the plaintiffs do not intend to make the challenged precept null and void, but instead for the Constitutional Court to issue an interpretative judgment through which its sphere of application is reduced. Could this be the intention of an unconstitutionality proceeding?

4. Issuing interpretative judgments that reduce, expand, replace or clearly specify the regulatory scope of a legal text with its remaining in the legal system is nothing new to what the constitutional courts of the world do. In fact, it is well known that this Court has issued this kind of judgment on more than one occasion (cf. SSTC 0010-2002-PI, 0006-2003-

PI, 0050-2004-PI –consolidated–, 0006-2006-PI, 0002-2009-PI, among others). So the point is not to determine whether the Constitutional Court can issue an interpretative judgment on the filed claim of unconstitutionality (which, as required by various constitutional principles, among which the duty to presume the constitutionality of the laws and the duty to interpret them according to the Constitution stand out, is clearly possible – cf. STC 0030-2005-PI, FF. JJ. 50 to 61–). Instead, it is to determine whether it may be the subject of the intention in proceedings of unconstitutionality.

5. Article 75 of the Constitutional Procedural Code (CPCo.) establishes that the goal of the proceedings on unconstitutionality is "defense of the Constitution against violations of its regulatory hierarchy" involving laws of legal rank and specifying that among other types, this violation may be "total or partial". From the viewpoint of the challenged provision text, it involves a partial constitutional violation when only some of its words create the flaw of unconstitutionality; after judgment is rendered, the provision remains written with the remaining words only. From the viewpoint of the challenged provision's interpretative tenors, this involves a partial constitutional violation when only some of such interpretative tenors are unconstitutional; after judgment is rendered, the provision may not be interpreted in the tenors which in the opinion of the Tribunal Court are invalid. Conversely, total breach demands that the monitored provision be expelled from the legal system, because there is no constitutional way to interpret it according to the Fundamental Norm.

6. On the other hand, it should be interpreted that when CPCo Article 81 establishes that "[j]udgments found based on the process of unconstitutionality leave null and void the regulations on which they are ruled", "regulations" should not be understood as just the text of the challenged precepts, but eventually, particular interpretative tenors attributable to them, so that what is "null and void" is not necessarily the text of the challenged provision, but instead only some of its interpretative tenors. In fact, as stated earlier, that is what usually happens when the Constitutional Court issues an interpretative judgment.

7. The analyzed precepts (CPCo. 75 and 81) would let the possibility be upheld in an issued interpretative judgment that the subject of the claim in a proceedings of unconstitutionality not be banned absolutely, *especially* if one considers that given the Constitutional Court's classification as supreme interpreter of the Constitution (Article 1 of Law No. 28301 – Organic Law on the Constitutional Court)—and pursuant to Article 82 of the CPCo., its interpretations would be linked to all public powers, which would contribute towards endowing predictability to application of the legal system.

8. However, the Constitutional Court believes that such a possibility becomes clearly exceptional. The reasoning for this basically lies in the fact that in the framework of a proceedings on unconstitutionality, the Constitutional Court holds the monopoly on competency to expel precepts with rank of law that are judged unconstitutional from the legal system, but not in order to interpret them according to the Constitution. The latter is a competency that all public branches exert *in suo ordine*. As a result, to intend for the proceedings on unconstitutionality to turn into a proceedings aimed, *par excellence*, at interpreting a provision with legal rank according to the Constitution, with final assurance that it will be expelled from the legal system, would mean to refute the ultimate outcome for which it has been conceived, requiring this Court to

exercise a competence that any State body doing its respective duties strictly may (and must) exercise. Said another way, to assume as a rule the possibility of going to the Constitutional Court to ask it to do a hermeneutic job that any public branch can do is utterly absurd.

9. Now, it is also true that at extraordinary times it may happen that the expected interpretative result reached after the work of interpreting the provision according to the Constitution is the result of a highly complex, hermeneutical job, scarcely expected in the practice of everyday competencies of public powers. That singularly happens when what is sought is for the result of the interpretation of a provision according to the Constitution to have its application exempted depending the event (individual cases) that *prima facie,* based on their literal analysis, are sharply understood in their regulatory circumstance (generic case). We should recognize that above all in a legal system with a Germanic-Roman tradition like ours, the tendency to interpret regulations definitively according to their literal tenor is broadly institutionalized, when *prima facie* we see the tenor is compatible with Fundamental Law.

10. But the effect of spreading basic rights, as well as their maximum indecisiveness, on certain occasions may generate that exceptions must be established interpretatively to apply the laws, including assumptions that enter their regulatory scope semantically.

However, as noted, it deals with extraordinary situations requiring an unorthodox, hermeneutical operation, even though constitutionally required, which is hard to predict in the confines of regular public power action and that as a result, exceptionally justifies filing a claim of unconstitutionality with the Constitutional Court.

11. This Court sees that in this case it is fulfilling this *sui generis* situation. Indeed, the plaintiffs request that the Court make an exception through interpretative method for application of Article 3.1 of Law No. 28705 in specific cases which, based on a literal analysis, admit the generic assumptions included in its prohibitive order. So, as stated above, they mean for the Constitutional Court to interpret that where the precept bans smoking “in enclosed public spaces”, it not be understood to include establishments exclusively for smokers (which are “enclosed public spaces"), and that where it bans smoking “in establishments dedicated (…) to education”, it not be understood to include open areas in such establishments for adults.

12. Consequently, based on the considerations described, this Court believes that as an exception there is merit in accepting for assessment the grounds for the question raised with the understanding that it is confined to questioning the constitutionality of two interpretative tenors derived from the text, “Smoking is banned in establishments dedicated (…) to education [and] in enclosed public spaces (…), which are one hundred percent smoke-free environments” from Article 3 of Law No. 28705. Such interpretative tenors are the following: **a) The creation of enclosed public spaces for smokers only is hereby banned; and b) Smoking in open areas of establishments dedicated to education for adults only is hereby banned.** Adhering strictly to the claim’s prayer for relief, **the object of control in these proceedings is composed of these two regulations. Consequently, the constitutionality case in these proceedings will rest on them.**

§2. Is smoking part of the contents constitutionally protected by the basic right to free personal development?

13. Both the plaintiffs and the Federal Congressional Prosecutor agree on stressing that the ban on creating enclosed public spaces for smokers only and the ban on smoking in open areas of establishments dedicated to education for adults only restrict the basic right to free personal discovery. Indeed, the claim maintains that it "**unreasonably affects the right of smokers to free personal discovery, because it prevents them from exercising their freedom to smoke, even when it in no way affects the rights of non-smokers"** (cf. claim motion, pp. 20 - 21; emphasis in the original). On the other hand, the Congressional Prosecutor maintains that "**[t]hese restrictions have been imposed with the idea that the exercise of the right to free personal development is not exempt from limits. (…). [T]he right to free personal discovery, like any right, is not absolute; it must be exercised in harmony with the basic rights of other people and constitutionally relevant goods**" (cf. motion of rebuttal to the claim, pp. 34 and 35; emphasis in the original).

Incidentally, the PUCP School of Law's Legal Clinic on Actions in the Public Interest, appearing as *amicus curiae*, also seems to share this view: " People may choose to smoke. That is part of their self-determination: (cf. report, "Legal Analysis on the Unconstitutionality Proceedings against the Amendment to Law No. 28705, General Law for the Prevention and Control of Tobacco Use Risks, amended by Article 2 of Law No. 29517, p. 50).

14. However, the Constitutional Court believes that assuming that smoking is an activity found in the constitutionally protected contents of the basic right to free personal discovery is not something that can be readily taken as implied, so it is a constitutionally correct stance to accept it for analysis.

15. The matter can be posed in these terms: Is the *basic rights* area of the Constitution that may only be limited as constitutionally justified by the lawmaker restricted to rights and freedoms from the specific mandates of the Constitution, or is there a general right to basic freedom, according to which everything not banned by the Constitution is constitutionally authorized and protected, and therefore, the lawmaker may only limit it reasonably and proportionally?

This question contains two positions in which, in turn, as Luis Prieto well says, "two different ways are lurking to conceive the relationship between the individual and the political community, meaning, two different political philosophies. The first one (…) understands that political power can do [] everything [not legally banned] without having to invoke on its behalf any special justification, so the citizens' freedom should managed in the area (…) which has not been subject to a mandate or ban (…). The second (…) maintains that man is naturally free and must continue to be so legally, so that any sacrifices imposed on that freedom must have some justification" (cf. Prieto, Luis, *Justicia constitucional y derechos fundamentales*, Trotta, Madrid, 2003, pp. 251 – 252). As will be supported below, the second position is the axiological support of

modern constitutionalism in general and of the 1993 Peruvian Constitution in particular.

16. In fact, the material basis of modern constitutionalism, presided by individual basic rights and which is, of course, the same one serving as the dogmatic basis for the 1993 Constitution, sinks its roots into the ideology that with its respective shadings identified the liberal North American and French Revolutions at the end of the eighteenth century. In fact, essential features shared by the political liberalism in both revolutions has led some to propose, and not peacefully, the existence in that context of an "Atlantic revolution" (cf. Godechot, Jacques, "Revolución Francesa o Revolución Atlántica"["French Revolution or Atlantic Revolution", in M. J. Villaverde – collector–, *Alcance y legado de la Revolución Francesa*, [*Scope and Legacy of the French Revolution*], translation by M. J. Lasaosa, Ed. Pablo Iglesias, Madrid, pp. 109 – 115).

17. First and foremost, this foundation is pinned to human freedom, on which he is entitled to build a lifetime plan while exercising his moral autonomy, whose recognition, respect and promotion must be the primary articulator of competencies and authority of government power.

18. Maybe the best way to see the axiological strength of this basis is by recalling a few statements from the 1789 *Declaration of Human Rights of Man and of the Citizen:* "Men are born and remain free and equal in rights. (…) "(Article 1); "Liberty consists of the freedom to do everything which injures no one else; hence, the exercise of each man's natural rights has no limits except those which ensure other members of society enjoyment of the same rights. These limits can only be determined by law" (Article 4); Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law" (Article 5).

It departs from the premise, then, that respect for man's natural freedom must be the principal basis of any legal system in such a way that the State must protect that broad and essential morally autonomous space unless, when exercising it, the respective area of another human being's freedom is affected.

19. In the Constitutional State the alluded natural freedom translates into a constitutionally protected legal freedom, so that any act aimed at limiting it must by necessity be found constitutionally justified. This core principle finds expression in Article 2, Subsection 24, Subclause a) of the Constitution, according to which "[n]o one is required to do what the law does not order, nor is he prevented from doing what it does not prohibit", although, as we have said, such an obligation or legal ban on the exercise of freedom cannot be just any one, but rather only what is supported in the constitutional values themselves.

20. Of course, this does not let us state that the Constitution than establishes the action of a lawmaker who turns into something akin to "an original legal egg" from which everything arises, "from the Criminal Code to the law on manufacturing thermometers", as Ernst

Forsthoff ironically maintained at the time (cf. *El Estado de la sociedad industrial*[*The Government of the Industrial Society*], Institute on Political Studies, Madrid, 1975, p. 242). What he simply maintains is that when the lawmaker keeps a broad margin of free legal configuration, he finds a *prima facie* limit in the protected contents of basic rights protected and, more broadly, in man's general basic rights freedom that requires legislative action to be expressed in reasonable and proportional constitutional terms.

21. In the judgment of the Constitutional Court, without losing sight of that guiding principle recognized in Article 2, Subsection 24, Subclause a) of the Constitution, there is a basic subjective right that covers that basic rights general freedom in its constitutionally protected contents.

This right, as the parties in these proceedings have advised, is the right to free personal development. Although this Court has upheld in earlier case law that it is an unnamed right and would therefore find its basis in Article 3 of the Constitution (cf. STC 0007-2006-PI, F. J. 47), when things are more carefully analyzed, the manifest indecisiveness of this clause counsels constitutional jurisdiction – by virtue of its lack of direct democratic legitimacy -- to not respond to it unless the basic right whose ethical essence is undisputed and is necessary to protect, is not reasonably derived from the semantics of the rights expressly enumerated by the Fundamental Norm. And if this reasonable relationship can be established, the constitutional interpretation describing the respective basic right's legal existence will also enjoy a greater margin of democratic legitimacy by finding the express mention of a right by the Constitutional Power of Government as a direct source in the Fundamental Norm.

In other words, as this Court has established earlier, "as much as reasonably possible, one should find statements in the development of expressly recognized constitutional rights that let the respect for man's dignity be consolidated, because that would prevent the tendency to constantly fall back on the constitutional clause on "unenumerated" rights and, thereby, lessen the value of the purpose for which it was created. The appeal of Constitutional Article 3 in this sense must be reserved only for those special and very novel situations that include the need to recognize a right requiring protection at the highest level and that somehow may be considered included in the contents of a constitutional right already explicitly recognized (cf. STC 0895-2001-PA, F. J. 5).

32. So, as it was established in STC 2868-2004-PA, F. J. 14, the Constitutional Court believes that the right to free personal development is recognized in Article 2, Subsection 2, of the Constitution, which says that everyone has the right "to his free development". While there is no express mention in this precept of the specific area that man is entitled to free development, it is precisely that opening that makes it reasonable to uphold that reference is made to individual personality, in other words, to the ability to explore it with full freedom to construct one's own sense of a material life through one's moral autonomy while not affecting the basic rights of other human beings.

As the cited judgment affirmed, "[t]he right to free development guarantees man's general freedom of action in relation to each sector of personal development. In other words, from segments of natural freedom in particular areas of life, whose exercise and recognition are tied to the constitutional concept of person as a spiritual being, given autonomy and dignity, and in his condition as a member of a community of free beings. (…) Such spaces of the freedom to structure personal and social life are areas of freedom minus any government intervention that is unreasonable or disproportionate to safeguard and effect the value system guarded in the Constitution itself." (F. J. 14).

23. Finally, in recognizing the fundamental right to free personal development (Article 2, Subsection 1 of the Constitution), there then underlies constitutional recognition of a general freedom clause, through which natural human freedom – around whose protection that artificial entity called State is placed – is legalized, preventing public powers from limiting a human being's moral autonomy of action and choice, including in aspects of everyday life that most society could consider ordinary, unless there is a constitutional value supporting such a limit, and whose protection is pursued through reasonable and proportional constitutional means.

This way this general freedom clause "comes to equal a balance that would otherwise be truncated in favor of authority", because what it demands "is that the conflict between freedom and duty be precisely formulated in terms of constitutional conflict, which must require the performance of ponderance between limited freedom and the good that serves as basis for the limited regulation. Undoubtedly, this does not eliminate a wide margin of discretion, but it does try to eliminate arbitrariness" (cf. Prieto, Luis, *Justicia constitucional y derechos fundamentales* [*Constitutional Justice and Fundamental Rights*], Trotta, Madrid, 259, pp.

24. Consequently, the act of smoking, while a demonstration of practiced freedom, is part of the constitutionally protected content of the basic right to free personal development, which is why any limitation on its performance will only become constitutional to the degree that it respects the principle of proportionality.

25. Thus, the ban on creating enclosed public spaces for smokers only and the ban on smoking in open areas of establishments dedicated to education for adults only, are in turn, insofar as restrictions on the freedom to smoke, restrictions on the basic right to free personal development. This being the case, such bans will become constitutional only to the degree that they are respectful of the principle of proportionality.

§3. Does the ban on enclosed public spaces for smokers only limit the basic rights to free private initiative and free enterprise?

26. The plaintiffs also state that **"[t]he QUESTIONED REGULATION clearly affects the right to a free private sector and free trade, so long as it establishes an absolute ban on having establishments exclusively for smokers unless there is a justified objective**

reason" (cf. claim motion, p. 25; the emphasis is original). On the other hand, the Congressional Prosecutor has not rejected the theory that the ban on enclosed public spaces for smokers only limits the described liberties. But he maintains that they "not be carried out unrestrictedly", since "**the exercise of free private initiative must not threaten 'general community interests', while the exercise of free enterprise must not put people's health at risk**" (cf. motion of rebuttal to the claim, pp. 42 and 43; emphasis in the original).

27. The ban on enclosed public spaces for smokers only does, in fact, constitute a limit to free enterprise and free private initiative. To the extent that this Court has upheld that "when Article 59 of the Constitution recognized the right of free enterprise, it is guaranteeing everyone freedom of choice, not just to create businesses (freedom to found a business) and, therefore, to act in the market (freedom of access to the market), but also to establish one's own business objectives (freedom of business owner organization) and to manager and plan its activity (freedom to manage the business) according to its resources and the conditions of the market itself, as well as the freedom to quit or get out of the market. Clearly, through the right to freedom of enterprise the Constitution guarantees the startup and maintenance of the business activity under free conditions (…)" (cf. STC 3116-2009-PA, F. J. 9).

28. However, that the ban in question may limit freedom of enterprise does not necessarily mean that it is unconstitutional, because as has been said in uniform and repeated case law, no right or freedom in the Constitutional State is absolute. In fact, as was upheld in STC 0008-2003-PI, "[p]rivate initiative may be freely deployed so long as general community interests, which are safeguarded by a plethora of laws attached to the legal system, do not collide; it is worth saying, through the Constitution, international treaties and laws on the matter" (F. J. 18). Similarly, this Court has upheld that "[w]hen Article 59 of the Constitution states that the exercise of freedom of enterprise 'must not be detrimental to public morality, health or safety', it is doing none other than setting limits within which this right is exercised according to law. Certainly, these limits are by way of example and not limiting, for correct protection must arise from a Constitutional principle like human dignity, as found in Articles 1 and 3 of the Constitution (…). So, the right to free enterprise exceeds its limits when it is exercised against morality and good customs or it puts the health and safety of people at risk. Consequently, the exercise of the right to free enterprise, to be aligned with the law, should be done subject to the law and thus within the basic limitations coming from security, hygiene, health, morality or preservation of the environment" (STC 3330-2004-PA, F. J. 32).

29. Having established that the ban on enclosed public places for smokers only is a restriction of free enterprise and free private initiative, such a restriction will only become constitutional to the extent that it respects the principle of proportionality.

30. Up to this point, we have established that the ban on creating enclosed public spaces for smokers only and the ban on smoking in open areas of establishments dedicated to education for adults only, derived from the text, "Smoking shall be banned in establishments dedicated (…) to education [and] in enclosed public spaces" from Article 3 of Law No. 28705, are a

limitation on the freedom to smoke and, therefore, a limitation on the basic right to free personal development. It has likewise been established that the ban on creating enclosed public spaces for smokers only limits free private initiative and free enterprise. *Ergo,* such bans are valid only when they pass the test of proportionality, meaning, to the extent that a) they pursue a constitutionally valid end, b) they are suitable to achieve it, c) they are necessary, and also, d) strictly proportional.

§4. What goals are sought by the bans on enclosed public spaces for smokers only and on smoking in open areas of educational centers for adults only?

31. Given the circumstances, first it is proper to analyze what goal the bans in question are seeking.

Concerning this, the plaintiffs state that first, their goal cannot be "the elimination of tobacco toxins, since the use of social toxins like tobacco is expressly permitted by Article 8 of our Political Constitution" (cf. claim motion, p. 28). On this the Congressional Prosecutor says the following: "In fact, the Constitution does not establish the smoking ban. On this detail it only notes that the State 'regulates the use of social toxins'. But it is essential to show that this regulation must be carried out while keeping in mind the consequences of tobacco use" (cf. motion of rebuttal to the claim, p. 27).

32. To propose the goal of banning the creation of enclosed public spaces for adults only and the ban on smoking in open areas of establishments dedicated to education for adults only is, in terms of the search for tobacco "elimination", tantamount to proposing that the act banned by such measure is simply to smoke and not, instead, to smoke under certain conditions. In fact, in certain passages of the claim, plaintiffs have proposed the matter as if it dealt with an absolute ban: **"Article 8 of the Constitution was limited to establishing an order for regulation, but in no case did it mean to introduce a hypothesis of prohibition.** (>>>) [T]he provisions of Article 8 of the current Constitution are limited to approving the authority of the State to establish restrictions on tobacco use, **without imposing absolute bans"** (cf. claim motion, p. 14; emphasis in the original). Regarding the detail, the Congressional Prosecutor says the following: **"Among the measures related to tobacco control forming part of the law in question is the challenged article, which establishes no "absolute ban" on tobacco use, as the plaintiff holds. Indeed, this article establishes only the smoking ban in particular places, like establishments dedicated (…) to education [and] enclosed public spaces**" (cf. motion for claim rebuttal, pp. 28 – 29).

33. In the opinion of the Constitutional Court, and as the Congressional Prosecutor has sustained, the challenged bans prohibit no act of smoking absolutely. To suggest from there that its goal is to "eliminate" tobacco, as the plaintiffs do, is erroneous. And if that is not the goal sought by the questioned regulation, it becomes harmless within the framework of this case for the Constitutional Court to enter into analyzing whether or not it is constitutionally valid that Article 8 of the Constitution be interpreted – where it sets forth that the State "regulates the use of social toxins" – where the lawmaker is

empowered to absolutely ban smoking. Said another way, even if that is not the goal of the adopted measures, there is even less merit in analyzing whether it is constitutional or not.

34. On the other hand, the plaintiffs maintain that "the central grounds of the QUESTIONED REGULATION is to protect non-smokers' right to health, recognized by Article 7 of the Constitution" (cf. claim motion, p. 28). The Congressional Prosecutor in turn says the following: **"the legitimate constitutional goal of the utilized measure is to guarantee full effectiveness of the right to health, but not just of non-smokers, as the plaintiffs understand it, but also of smokers**" (cf. motion for claim rebuttal, p. 45, the emphasis is original). However, the constitutionality of this hypothesis (that the goal be to safeguard the health of smokers themselves) has been expressly rejected by the plaintiffs: "a restriction on smokers' rights can be justified when its exercise affects the rights of non-smokers. But it has no basis when smokers freely decide to meet at a place where only other smokers go—also voluntarily. In this scenario, the rights of non-smokers are not affected, and therefore an intervention by the government lacks justification. Otherwise, the government would be imposing a behavior that it deems 'positive' – no smoking – denying the voluntary decision to adopt a different behavior, or similarly, the autonomy that has been recognized" (cf. claim motion, p. 22; emphasis in the original).

35. In the opinion of the Constitutional Court, it is noteworthy that the regulatory scope of Article 3 of Law No. 28705 which, according to the plaintiffs' own proposal, is judged unconstitutional -- to wit, that the creation of enclosed public spaces for smokers only and smoking in open areas of establishments dedicated to education for adults only-- does not seek to protect (much less directly and immediately) non-smokers' right to health. Moreover, in the hypothesis as it were, such bans would become inadequate to achieve such a goal, and they would thus be unconstitutional. In other words, if the regulatory scope of the questioned ban in this case were seeking such a goal, the Constitutional Court must evaluate the claim by accepting the plaintiffs' criterion to the extent that "**it unreasonably affects smokers' right to free personal discovery, since it keeps them from acting on their right to smoke, even when it in no way affects the rights of non-smokers.** In effect, (…) the QUESTIONED REGULATION absolutely bans the use of tobacco in enclosed public places, notwithstanding that these may be exclusively aimed at smokers (and where smoking personnel may work). And besides, it absolutely bans the use of tobacco even in the open areas of educational establishments exclusively for adults, even when both options in no way affect the basic rights of non-smokers" (cf. claim motion, pp. 20 - 21; emphasis in the original).

36. However, as said, it happens that that is not the goal of the questioned regulatory scope. In the first place, such an aim consists of reducing tobacco use (immediate aim) to protect the health of smokers themselves (first mediate aim). Is this (to protect the health of smokers themselves) a constitutionally valid aim? To answer this question the following section (§5) will be devoted. Before that, it must be specified that this is not the only mediate aim of the bans, but also to prevent the high institutional costs of health care due to the serious health problems caused by tobacco use.

37. About this detail, it is essential to consider that according to an analysis made by the Permanent National Commission on the Anti-Tobacco Fight (COLAT), the government annually loses 2 billion, 500 million dollars on the care of cancer cases and heart problems, among other illnesses, caused by tobacco use. The calculation was made based on the health budget and the minimum legal wage workers receive each month, part of which is spent on tobacco use. Calculation of the created loss reached the above figure, despite the fact that the expenditure on treatments for other illnesses linked to smoking that affect other organs of the body like the lungs, tongue, stomach, skin and eyes, among others, were not taken into account (cf. http://elcomercio.pe/lima/416589/noticia-duro-costo-cigarillos-estado-pierde-us-2-mil-400-millones-fumadores).

38. Along these lines, it is necessary to also consider the following data from the *National Technical Approach to Smoking Guide , Peru 2010*, prepared with technical contributions from the following institutions: the Medical School of Peru, the Peruvian Society of Pulmonology of Peru, the Peruvian Society of Cardiology, the Medical Oncology Society of Peru, the Peruvian Psychiatry Association, the Information and Education Center for the Prevention of Drug Abuse (CEDRO) and the Permanent National Commission on the Anti-Tobacco Fight (COLAT):

> "One of the world's biggest public health problems is tobacco use; its addition is called smoking. It has been estimated that one out of every 8 deaths is associated with tobacco use. It has been estimated that almost 100 million people died from smoking during the twentieth century, and it is estimated that by the year 2030, tobacco could be responsible for 10 million deaths per year in the world. Another striking bit of statistical data is that the constant use of cigarettes is associated with the death of nearly 50% of chronic smokers. In Peru tobacco is the second most used drug after alcohol. Its continuous use has been associated with being the cause of different types of cancer in men and women, such as cancer of the lung and the oral cavity, among numerous other chronic respiratory ailments. Smokers have a higher likelihood of missing more days of work due to illness and of dying in the most productive years, leaving their families without a source of income.
> It is known that tobacco smoke contains over 4,000 chemical compounds, of which 60 are carcinogenic with another 16 carcinogens being found in smokeless tobacco. The World Bank has indicated that tobacco consumes the resources of the world's economy at a rate of 200 billion dollars annually" (p. 3).

39. To this effect the ban on creating enclosed public spaces for smokers only and on smoking in the open areas of establishments dedicated to education for adults only, in seeking to reduce tobacco use, also has the ultimate aim of reducing the high costs of medical care it creates for the government for sickness the above use causes the smoker, whose sums may well become aimed at meeting the number one duty of the State to "guarantee the full effectiveness of human rights" (Article 44 of the Constitution).

40. A query could be made about the validity of this last aim, arguing that since smoking is part of free personal development, the State has the duty to become involved in said health costs, without taking measures to prevent or reduce them. But this query would be a clear mistake, since the statements about the right to free personal development the State is required to protect and promote are those necessary for the coverage of basic needs for the exercise of his moral autonomy (primary goods), but not its statements that they be reduced to cover the person's interests or pleasures which are not integral to

his life plan (secondary goods). In fact, the objective damage of many of these statements – not just for the one carrying them out. but sometimes indirectly for third parties, too – while *prima facie* they could not be absolutely banned in order not to affect the essential contents of the right to free personal development, they may indeed be openly discouraged by the State.

41. Therefore, it is one thing to recognize that by filing the claim for medical care caused by tobacco use, in application of Article 7 of the Constitution, which recognizes the basic right to health protection, the State has the duty to address it and another, quite different, to maintain that the State has no prerogative to all steps necessary to significantly reduce the costs created by a behavior that indirectly reduces the State's ability to meet its essential duty to protect and guarantee the basic rights of all people (Article 44 of the Constitution).

42. As a result, the aim of reducing health costs from the treatments resulting from tobacco-caused diseases by significantly reducing its use through bans on enclosed public spaced for smokers only and on smoking in open areas of educational centers for adults only is constitutionally valid. But, is limiting the act of smoking for the intended aim of protecting the health of the tobacco user himself a constitutionally valid goal? The answer to this question is treated in the next section.

§5. Is limiting the act of smoking for the intended aim of protecting the health of the tobacco user himself a constitutionally valid goal?

43. As stated *supra*, the plaintiffs believe that the answer to this question must be no. Such an aim, in their opinion, must be seen as simply "unacceptable, but it is a typical paternalistic measure" (cf. motion dated July 6, p. 16). Their position seems to rest on a basic principle of respect for man's moral autonomy, posed in these terms by Stuart Mill:

> "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. No one can rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right" (cf. Mill, Stuart, *On Liberty* [1859], translation by Pablo de Azcárate, with prologue by l. Berlin, Alianza Editorial, Madrid, 1988, p. 65).

44. From this focus it maintains that in the Constitutional State all forms of legal paternalism are banned; therefore, it affects moral autonomy and human freedom of choice. Perhaps the most influential definition of "paternalistic measure" continues to be that of Gerald Dworkin, who declares that it consists of "the interference in a person's freedom of action that is justified by reasons that refer exclusively to wellbeing, the good, the happiness, the needs, the interests or the values of the coerced person" (cf. Dworkin, Gerald, "Paternalism", in J. Betegón and J. R. de Páramo (Directors), *Derecho y Moral* [*Law and Morals*], Ariel, Barcelona, 1990, p. 148).

45. Indeed, in recognizing the basic right to free personal development (Article 2, Subsection 1 of the Constitution) and of the basic rights to freedom of conscience (Article 2, Subsection 3 of the Constitution), expression, opinion and the circulation of thought (Article 2, Subsection 4 of the Constitution), there underlies a prohibitive rule, by virtue of which, at least as the constitutionally protected content of third-party human rights is concerned, the State cannot

limit people's freedom of choice and actions in order to achieve their own wellbeing with the argument of supposed training and irrational execution of will. Such a limitation would seriously damage a person's moral autonomy, and the State subrogates its own criterion on rationality to the criterion that a human being should be free to create and execute the construction of his own life plan under *amparo*..

46. A human being should enjoy the highest possible degree of freedom in building and carrying out his own life plan and the satisfaction of his own interests, even when they may be irrational to a broad social majority, for even self-error (sometimes committed at the expense of high personal costs, both material and spiritual) is fundamental for the maturation of ideas and future actions whose free flow is singularly important in the area of a social democracy. Thus, it has been rightly mentioned that in the Constitutional State recognition of the right "to do wrong" is essential (cf. Waldron, Jeremy, "A right to do wrong", in *Liberal Rights. Collected Papers 1981-1991*, Cambridge University Press, 1993, pp. 63 – 87).

47. Moreover, it should not be forgotten that outside of the manifest violation of fundamental rights, the criterion of the rational or irrational is no more than a point of view, meaning that every human being has the right and the hope, through respectful and tolerant deliberation, to see his minority convictions today become a majority's convictions tomorrow. After all, as Oliver Wendell Holmes declares in one of his famous singular votes, "The best test of truth is the power of the thought to get itself accepted in the competition of the market" (cf. Singular vote in Abrams *vs.* United States, 250 U.S. 616 –1919-).

48. But not just that. Free personal development and freedoms of conscience, opinion and expression are the subjective sources through which pluralism and democratic valor are guaranteed, whose different social manifestations are constitutionally guaranteed. Thus is cultural pluralism is recognized and protected, since Article 2, Subsection 19 of the Constitution sets forth that everyone is entitled "[to] his ethnic and cultural identity. The State recognizes and protects the nation's ethic and cultural plurality". It recognizes a social pluralism, demonstrated among other aspects in the demand for an educated plurality that respects multilingualism and cultural diversity, but that at the same time fosters national inclusion (Article 17 of the Constitution), a political pluralism by promoting and guaranteeing free participation in public affairs and electoral processes (Articles 2, Subsection 17, 30, 32 and 35 of the Constitution, and an economic pluralism, as expressly shown in Article 60 of the Constitution.

49. The guarantee of pluralism is how democratic societies position themselves to properly safeguard the ghost of something like a "tyranny of values", according to which a powerful majority, under the argument of having discovered a supposed dogmatic truth, underjudges the thought and action of a minority that is apart from it and which, through peaceful and democratic paths, seeks to channel its questions toward that apparent truth, stimulating its reexamination in a dialogical relationship. So, it is fundamental in the Constitutional State to restore something like an "ethic of doubt", practiced under free personal development and thought, since in reality "doubt contains (…) an elegy to truth, but a truth that must always be re-examined and rediscovered. So, then, the ethic of doubt is not contrary to truth, but rather contrary to dogmatic truth, which is the one that wants to fix things once and for all for everyone and prevent or disqualify that

crucial question: 'Could it be *really true?*' (…). The ethic of doubt does not at all mean avoiding the call for the truth, the just, the good or the beautiful; it just means to try to respond to that call in freedom and responsibility towards oneself and others" (cf. Zagrebelsky, Gustavo, *Against the Ethic of Truth*, translation by Álvaro Núñez Vaquero, Trotta, Madrid, 2010, pp. 9 – 10).

50. So, having established that one of the rules underlying the recognition of the basic rights to free personal development and the freedoms of conscience and speech is the impossibility of the State to set up paternalistic legal measures, it is essential to note that such a rule, like all of those in a Constitutional State, is not absolute, but instead, *prima facie.* And as Francisco Laporta has said, it is possible to agree on "circumstances where paternalistic intervention is intuitively necessary" (cf. *Between the Law and Morality"*, Fontamara, México D. F., 1993, p. 54) or, as Ernesto Garzón Valdés says, where it can reach "a higher degree of plausibility" (cf. "Is Legal Paternalism Ethically Justified?, in *Doxa*, N.º 5, 1998, p. 156), or, in the words of Carlos S. Nino, in which it is found "broadly justified…" (cf. *Ethics and Human Rights. An Essay on Foundation*, 2nd Edition, 2nd printing, Astrea, Buenos Aires, 2007, p. 414). In other words, under certain exceptional circumstances the public powers may take steps to limit free personal development whose exclusive aim is the good of the very person whose freedom is limited.

It is important to recall that legal paternalism is one thing and perfectionism or legal moralism, something else entirely. As said, paternalism imposes the adoption of certain behaviors for the good of the coerced person himself, alleging that otherwise he will certainly, or with reasonable certainty, self-generate subjective harm to his own basic rights, limiting the chance to exert his own moral autonomy. On the other hand, legal moralism or perfectionism pressures the person for his own purported good to adapt to a specific ideal of life or pattern of human excellence, which the social majority believes is morally virtuous. So, as Carlos S. Nino puts it, "Perfectionism must be carefully distinguished from government paternalism, which does not consist of imposing personal ideals or plans for living that individuals have not chosen, but in imposing behaviors or courses of action on individuals that are proper to satisfy their subjective preferences and plans for living that have been adopted freely" (cf. *Ethics and Human Rights. An Essay on Grounds*, op. cit., p. 414). Of course, since the Constitutional State has liberty, self-determination and pluralism as some of its main basic values, any perfectionist measure becomes proscribed, but that does not necessarily happen with paternalistic measures, which as said, may be justified under certain exceptional circumstances. What conditions are those? To answer a question like this, the following grounds are guides, but be clear that they are not meant to be an exhaustive list; rather, they just describe the ones that most obviously justify adopting a paternalistic measure.

51. First, no human being can renounce or nullify his autonomy by practicing it. In other words, when a human being is exercising his freedom, he cannot ignore his end condition itself to be obliged to be an exclusive object or means to achieving other ends. In a sentence, human dignity cannot be denied in the exercise of freedom.

52. It is proper to recall here that a few short years before the French Revolution in his *Grounding for the Metaphysics of Morals*, Immanuel Kant had more completely expressed the latest values of enlightened rationalism that opened its way to the liberal ideals that serve as the axiological basis for current constitutionality without reducing them to just moral autonomy or liberty. These values, which together gave shape to the so-called *categorical imperative*, are formal equality-- in other words, the universal imperative that orders the human being to work as if he wanted to see the best of his behavior become universal laws. It is dignity, meaning the imperative of the ends that orders that a human being never be treated as just a simple means, but rather as an end in itself; and it is liberty, meaning the imperative of autonomy, that orders that the human will not affect the will of a human being when exercised in such a way that it does not trespass the will of another. In Kant's opinion all these values are expressive of a single moral law. In other words, it deals with "three…ways to represent the principle of morality", being "deep down, so many other formulae for one and the same law, each of which contains the others within it" (cf. *Grounding for the Metaphysics of Morals*, 4th Edition, translation by M. García Morente, Epasa-Calpe, Madrid, 1973, p. 94).

53. The dignity recognized in Article 1 of the Constitution, whose defense and respect "are the supreme goal of society and the State", is thus not reduced to protecting a human being's moral autonomy. Instead, it is the result of prior recognition of his condition as an end unto itself, so that in exercising it, it is not possible to destroy that grounding. So, for example, the signing of a "slavery contract" is not possible in the practice of freedom.

54. Second, human liberty is properly restricted on its own behalf when such a restriction is of an infinite degree and has as its purpose to prevent the creation of subjective, serious and irreparable harm to a basic right owned by the person whose autonomy is being restricted. For instance, with the obligation to use a seat belt in cars, imposing a fine on those who do not restricts the freedom of one who would not do it on his own, but it deals with a minimal area of sacrificed freedom in order to prevent objective, serious and eventually irreparable damage to his own life and physical integrity. It deals with a paternalistic measure justified in the Federal Constitution, because given the wide difference between the intensity of sacrificing liberty and the intensity of protecting life or physical integrity, the lawmaker is correct to abstractly ponder setting a general obligation for the good of the obligated person himself.

5. Now, it is true that the intensity of sacrificing liberty to safeguard rights of the very human being exercising it may vary, depending on the case. No matter how far beyond "logic" the paternalistic measure may be at first look, it is essential to carefully evaluate the circumstances based on each particular person. For example, it is not the same thing to require the use of a helmet by the motorcycle driver or civil construction worker who wants to prevent its use through a clearly aesthetic question of someone who refuses to use it because it is a basic principle of his religion that men may cover their heads only with a turban. This is a case, for example, of those who profess the *sij* Indian religion. Thus, Article 16.2 of the *Road Traffic Act* of 1988 and Article 11 of the 1989 *Employment Act* in the United Kingdom allow those who profess this religion to be exempted from the requirement to wear a helmet when riding a motorcycle and in construction activities, respectively. However, the United Nations Commission on

Human Rights has said in favor of banning this exception that compliance with the International Accord on Civil and Political Rights prevails (cf. Bhinder *vs.* Canada, Notice No. 208/1986, U.N. Doc. CCPR/C/37/D/208/1986 –1989-).

56. Third, a paternalistic legal measure becomes justified when it can be reasonably and objectively determined that by limiting someone's ability to exercise his free will and restricting his freedom for any reason, it will prevent an objective, serious and irreparable harm to his basic rights.

It concerns a person about whom it can be objectively predicted that due to any circumstance apart from the will of the government and the person himself, he is incapable of sufficiently reasonably evaluating the serious risk that a behavior represents for his own rights and interests of, or that being aware of that risk, due to some external or internal compulsion, he is not entirely capable of acting to prevent it as a result. Since in these cases it is reasonably doubtful that will itself is freely exercised on everything, some believe that it is not proper to speak of paternalistic measures here (cf. Beauchamp, Tom, "On Coercive Justifications for Coercive Genetic Control", in J. Humber and R.F. Almeder –editors–, *Biomedical Ethics and the Law*, Plenum Press, New York, 1979, p. 388).

So, children, and in general, those who are absolutely incapable in terms of Article 43 of the Civil Code are people with regards to whom certain paternalistic measures may be adopted.

57. But can paternalistic steps be taken concerning adults who, not being legally incapable, show certain traits that, in a manner of speaking, distort their statement of will, without being incapable? In certain circumstances, the answer to the question is yes. So, *informative paternalistic measures* may be taken for the good of the adults themselves to whom the information is directed if we reasonably assume that requiring them to be informed may redirect the course of a behavior that may cause serious damage to their rights. As Miguel Ramiro Avilés well puts it, "[i]nformation campaigns on the risks or benefits involved with performing certain activities must be the first type of paternalistic measure that must be taken. The least aversive measure is always preferable, because a person's autonomy or liberty must suffer the least possible, to which one adds that information appeals to reason" (cf. "A vueltas con el paternalismo jurídico"["Close to Legal Paternalism"], in *Rights and Liberties*, No. 15, June 2006, p. 234).

58. A paternalistic measure may also be taken to prevent a person from letting an act be carried out as a result of external pressures (external compulsion) that may cause grave damage. For example, Miguel Ramiro Avilés describes how "[t]he regulations that in Spain govern the activities of procurement and clinical utilization of human organs establish that the live donor must demonstrate his express, free, conscious and disinterested consent. This must be verified at a meeting with members of the Ethics Committee for Health Assistance from the hospital doing the transplant. This is meant to *isolate* the live donor from possible pressures by his family environment, thereby guaranteeing that his consent is really free. That is because the immense

majority of these kinds of donations occur between family members, which can lead to very strong outside pressure on the person who, having been subjected to compatibility tests, has been selected as a donor" (cf. "A vueltas con el paternalismo jurídico", op. cit., p. 240, note 119).

59. It is also possible to take steps meant to redirect adults' behavior for their own benefit, if such steps are aimed at preventing possible serious and irreparable harm to their basic rights and there are founded suspicions that such behavior is not the result of freely demonstrated full will, but instead, some internal element (internal compulsion) that grievously affects it. Such is the case with people who are addicted to some toxicological substance. And this addition may prevent someone from being capable enough to notice the serious risks his actions can cause in a particular area of his life or, if he is capable of noticing said risk, he is not entirely capable on his own of redirecting his behavior to prevent it. In any event, even under these circumstances, free personal development displays a certain area of its protected content, so it would be hard to justify measures designed to penalize the performance of the self-damaging behavior, with only the adoption of discouraging steps possible.

60. This is how, at least in the described circumstances, a paternalistic measure is justified in the Constitutional State. It concerns cases in which the measure's degree of impact on liberty is minimal compared with the degree of protection it creates regarding certain basic rights or in which it is objectively doubtful whether the person's will has a fully conscious, autonomous and free origin and, moreover, the creation of serious and irreversible damage to that person's basic rights is plausibly prevented. Obviously, however, it concerns exceptional measures, so the general rule continues to be respect for the highest degree of human moral autonomy possible.

61. The Colombian Constitutional Court has reached a similar conclusion by identifying two hypotheses, to wit, "on the one hand, coercive legal measures meant to require the performance or omission of an action in order to impose certain models of virtue or human excellent on citizen(s). And it has concluded that this hypothesis, belonging to the so-called "perfectionism" or "legal moralism", is in no way compatible with the principles contained in our Constitution. On the other hand are measures that seek to protect the interests of the person himself, but their goal is to secure the *wellbeing, happiness, needs, interests or values* of the one to whom the measure is directed. On the contrary, these are compatible with the Constitution, *'since they are not founded on the coercive imposition of a model of virtue, but instead mean to protect the affected person's own interests and convictions'* [C-309 of 1997, legal ground number 7] Both types of measures, of course, involve interference in people's freedom to act. The first ones have no constitutional justification whatsoever, and the second may be justified under meeting certain requirements" (cf. Judgment C-639 of 2010, F. J. 10), since for the Court such requirements consist of getting through the so-called test of proportionality (F. J. 11). To that effect, it sustains the hypothesis shared by this Court further on that "[t]he value of the autonomy may be secured by the State through the privilege of other values directly related to it. For instance, coercive measures may be established that in principle interfere with people's freedom of choice, but that pertain to the promotion of pre-established values based

on majority principle, without whose guarantee the exercise of the right to autonomy (for example, life and health) would not be possible. Despite everything, these kinds of measures require strict constitutional adaptation in order to prevent the attempted imposition through that manner of life models or plans or concepts of good. So, the measures in question must be proportional, and if their backup is a sanction, this must be the least rigid possible" (F. J. 14).

62. Given that the goal of the bans on creating enclosed public spaces for smokers only and on smoking in open areas of establishments dedicated to education for adults only is to protect the health of the smokers themselves, *per se* the measure is not unconstitutional, as the plaintiffs maintain, but instead, to the degree that it is adapted to some of the exceptional circumstances described above (which will be analyzed when the principle of proportionality in the strict sense is covered in section **§**9 *infra*--), it will be constitutionally valid.

63. In short, both the aim of protecting the health of tobacco users themselves and the aim of reducing health costs resulting from the treatment of tobacco-caused illnesses through significantly reducing its use are constitutionally valid. Furthermore, as will be supported below, reducing tobacco use to protect the health of smokers themselves is not only a constitutionally permitted aim, since Peru ratified the WHO Framework Convention on Tobacco Control, it is a constitutionally obligatory aim.

§6. Reducing tobacco use as a constitutionally obligatory aim, in light of the WHO Framework Convention on Tobacco Control.

64. Through Legislative Judgment No. 28280, published on July 17, 2004, the Federal Congress approved the WHO Framework Convention on Tobacco Control.

65. Regarding this Convention, the plaintiffs have noted the following: "pursuant to the provisions of Subsection 4) of Article 200 of our Constitution, **the WHO Framework Convention on Tobacco Control has legal rank, so it must be interpreted in harmony with the Constitution**" (cf. claim motion, p. 15, emphasis in the original). Likewise, in their July 6, 2011, motion they have emphatically held that "**[t]he Convention in question is not a human rights treaty, and therefore it lacks constitutional rank**" (p. 9, emphasis in the original).

66. Regarding the particular, the Congressional Prosecutor has noted the following: "**human rights treaties (…) have constitutional rank. (…). To that effect, the WHO Framework Convention on Tobacco Control (…) has constitutional rank, because it is a treaty on the right to health**" (cf. motion of rebuttal to the claim, pp. 3 and 4; emphasis in the original). The PUCP School of Law's Legal Clinic on Public Interest Action has adjudged similarly in its report by noting that the referenced Convention regulates "the right to health in its connection with a specific illness: smoking, and postulating the need for a common strategy to be able to eradicate it. If the right to health is a Human Right, and this Convention seeks to protect the right to health that is linked to illnesses caused by smoking, then there is no doubt that we are facing a Convention that regulates human rights matters. (…). By the Treaty on Human Rights having acquired Constitutional rank, there can be no

regulations that go against it, and the lawmaker is forbidden to deny them. It is also a protection that extends to treaties being included into the national system but with Constitutional rank, and being a limit and an interpretative and/or legislative parameter" (p. 12 and 13).

67. The Constitutional Court agrees with the Congressional Prosecutor and the PUCP School of Law's Legal Clinic on Actions in the Public Interest in believing that the WHO Framework Convention on Tobacco Control is a human rights treaty, since it seeks to clearly, expressly and directly protect the basic right to health protection recognized in Article 7 of the Constitution. Indeed, the Convention's introduction points out that it "represents a groundbreaking step in advancing national, regional and international action and global cooperation *to protect human health against the devastating impact of tobacco consumption and exposure to tobacco smoke*" (emphasis added). Similarly, the Preamble emphasizes that one of the principles inspiring its issuance is the Parties' determination "to give priority to their *right to protect public health*, [r]ecognizing 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" (emphasis added). In the same vein the Convention emphasizes that its basis is "Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and "the preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

68. But it does not escape the Court's consideration that the plaintiffs have employed specific arguments to reject the theory that the Convention is a human rights treaty. So, it has held that "in human rights treaties, unlike other conventions, the States assume obligations fundamentally toward people under their jurisdiction whose rights it recognizes before the States. (…). On the other hand, what the WHO Framework Convention does is recognize the obligations among the States signing it in order to adopt certain tobacco control measures. In other words, it does not recognize "new rights"; rather, it establishes a "framework" of measures that States ought to adopt to confront smoking. (…). While it mentions the right to health, it does so to support the measures the States should adopt and to recognize the right to health, which apart from this is already found set forth in human rights treaties" (cf. July 6 motion, pp. 9 - 10). Thus, the plaintiffs' argument could be reformulated like this: A treaty on human rights is one that recognizes human rights, basically being obliged vis-à-vis people under its jurisdiction, but not one through which, without "new rights" being recognized, and the State is obliged to take measures to optimize the protection of those rights.

69. This Court disagrees with this criterion. Treaties, by virtue of which a State is obliged to adopt measures directly aimed at most efficiently endowing human rights, are human

rights treaties, even when they do not recognize "new rights". In fact, many times it is precisely the specific measures the State internationally assumes through particular complementary treaties that allow for the contents protected on such rights to be most sharply delineated and, consequently, that ones that let protection of the Constitution's Fourth Final Provision more precisely interpret the fundamental rights it protects. Otherwise, whether there is a human rights treaty or not, it is not defined by some formal criterion that can be analyzed on whether it deals with a treaty recognizing that type of right for the first time, but instead by a material criterion that consists of analyzing whether the treaty directly concerns a human right, whether to recognize it for the first time or to assume obligations aimed at its more efficient protection.

So, for instance, the Second Discretional Protocol of the International Covenant on Civil and Political Rights, designed to abolish the death penalty, is a human rights treaty that contributes to more precisely interpreting the scope of the protected right to life content, even though it may not be recognized here for the first time. The Convention on the Elimination of All Forms of Discrimination against Women is a human rights treaty that specifies particular scopes of the right to gender equality, demanding that State Parties take specific steps to make its protection effective, even though it may not recognize the right for the first time. The Convention Against Torture and Other Treatments or Cruel, Inhuman or Degrading Penalties is a human rights treaty that specifies particular scopes of the right to personal integrity, requiring the adoption of certain steps to which it aims, even though it may not recognize that right for the first time. The International Convention on the Protection of the Rights of all Migrant Workers and their Families is a human rights treaty that contributes towards specifying the demarcation of the right to work, demanding that States take certain steps for it, and it does not carry *ex novo* recognition with it of the mentioned right. The Convention on the Inalienability of War Crimes and Crimes Against Humanity is a human rights treaty, for it contributes to the highest protection of the right to truth and establishes no new recognition of this right, etc.

Along this same line, the WHO Framework Convention on Tobacco Control is a human rights treaty, because although it does not recognize the right to health protection as a "new right" (in the plaintiffs' terms), it obliges State Parties clearly and directly to take steps that contribute to optimizing its effectiveness.

70. The plaintiffs also seek to resolve the hypothesis that the WHO Framework Convention on Tobacco Control is not a human rights treaty and submit a supporting quote saying that "human rights treaties are characterized by not being reciprocal, meaning, by creating some type of special relationship "between government obligations and the human beings whose rights they seek to protect" (cf. Novak, Fabián, "Tratados aprobados por el Congreso"[Treaties Approved by Congress], in Walter Gutiérrez –Director–, *La Constitución comentada[The Commented Constitution]*. *Análisis artículo por artículo [Analyis article by article]*, Volume I, Legal Gazette, Lima, p. 774), and a paragraph from An Advisory Opinion from the Inter American Court on Human Rights, which affirms that "modern human rights treaties (…) are traditional multilateral treaties, concluded based on a reciprocal exchange of rights for the

mutual benefit of the contracting Party States. Their objective and goal are the protection of basic human rights, regardless of their nationality, before their own State as well as the contracting Party States themselves. By approving such human rights treaties, States submit themselves to a legal system within which for the common good they assume various obligations, not in relation to other States, but towards the individuals under their jurisdiction" (cf. Advisory Opinion OC-2/82 of September 24, 1982, "The Effect of Reservations on the Entry into Force of the American Convention of Human Rights", paragraph 29).

71. The Constitutional Court shares the technical legal criterion drawn from both quotes, but it does not see how they nullify the capacity of the WHO Framework Convention on Tobacco Control as a human rights treaty. No reciprocal obligations emanate from the above Convention that are demandable only among the States that have signed it, as the plaintiff seems to erroneously suggest, but rather, and predominantly, obligations of the State Parties towards the individuals under their jurisdiction, all of them aimed at the protection of their fundamental right to health in the face of the global scourge that smoking represents.

72. This is subsequently seen in an omni-comprehensive analysis of those obligations, which have been correctly summarized by the PUCP School of Law's Legal Clinic on Actions in the Public Interest in its report:

> **"Primary Obligation or Objective:**
> To protect against the devastating health, social, environmental and economic consequences of tobacco use and the exposure to tobacco smoke (…) in order to continually and substantially reduce the prevalence of tobacco use and the exposure to tobacco smoke (Article 3).
> **General Obligations (among the most noteworthy):**
> - Adopt and apply executive, administrative and/or other effective protective measures against the exposure to tobacco smoke in interior work places, means of public transportation, enclosed public areas and, where applicable, other public places and actively promote the adoption and application of these measures at other jurisdictional levels (Article 8).
> - Total ban on tobacco advertising, promotion and sponsorship. (Article 13)
> - Devise and apply effective programs to promote tobacco use cessation in such places as teaching institutions, health units, work places and sporting areas (Article 14, No. 2, a).
> - Establish programs for diagnosis, assessment, prevention and treatment of tobacco dependency in health and rehabilitation centers (Article 14, No. 2, a);
> - Adopt and apply legislative, executive, administrative or other effective measures so that all tobacco product packages or wrappers and all outside packaging for these products bear an indicator that helps Parties determine the origin of the tobacco products and, pursuant to national legislation and the appropriate bilateral or multilateral accords, help the Parties determine the discrepancy point and to supervise, document and control the movement of tobacco products and their legal status. (Article 15, No. 2).
> **Basic Principles to Achieve the Primary Objective and Secondary Ones:**
> Take steps to:
> - Protect all people from the exposure to tobacco smoke (Article 4, No. 2, a).
> - Prevent onset, promote and support cessation and achieve a reduction in the use of tobacco products in any of its forms (Article 4, No. 2, b).
> - Promote the participation of indigenous persons and communities in preparing, putting into practice and assessment of tobacco control programs that are socially and culturally appropriate for their needs and perspectives (Article 4, No. 2, c).
> - When tobacco control strategies are prepared, specific gender-related risks are considered (Article 4, No. 2, d).

- Reduce the use of all tobacco products for prevention purposes, pursuant to the principles of public health, the impact of illnesses, premature disability and mortality resulting from tobacco use and the exposure to tobacco smoke (Article 4, No. 4).
- Adopt and apply legislative, executive, administrative and/or other effective measures and cooperate, as required, with other Parties in preparing appropriate policies to prevent and reduce the use of tobacco, nicotine addition and the exposure to tobacco smoke (Article 5, No. 3)" (pp. 15 – 17).

So, it becomes quite clear that unlike what the plaintiff suggests, these obligations do not have the Convention State Parties as reciprocally beneficial subjects, but instead, essentially, the human beings who are under their jurisdiction and who will see their fundamental right to health better protected with the adoption of these measures.

73. So, this Court agrees with the stipulations of the Constitutional Court of Colombia that "the 'WHO Framework Convention on Tobacco Control' (…) constitutes an important international instrument for preventing and counteracting the dreadful consequences of tobacco use, especially on health and the environment. (…). The aim of the Convention, shown in its Article 3, is framed in the protection of present and future generations in the face of the health, social, environmental and economic consequences of tobacco use and the exposure to tobacco smoke and therefore, it develops the principles contained in Articles 49, 78 [protection of the fundamental right to health] and 79 [right to enjoy a healthy environment] of the Charter. Thus, these regulations show the State's obligation on healthcare and a healthy environment (…), show everyone's duty to secure comprehensive care of his health and that of his community" (cf. Judgment C-665 de 2007).

74. Apart from this, apparently the obligations imposed by the Convention are merely an indispensable minimum, for nothing prevents the State from adopting stricter measures to protect the basic right to health to the highest degree possible. It has been expressly set forth in the Convention: "In order to better protect human health, Parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law" (Article 2.1).

75. Consequently, the Court's conviction that the WHO Framework Convention on Tobacco Control is a human rights treaty remains assured, because far from weakening this theory, the technical criteria upon which the plaintiffs rest to maintain the opposite, confirm it.

76. More than once the Constitutional Court has upheld that "[i]nternational human rights treaties not only confirm our system but also have Constitutional rank" (cf. SSTC 0025-2005-PI –cumulative–, F. J. 26; 0005-2007-PI, F. J. 11; among others). Of course, this statement is not intended to maintain that international human rights treaties are a direct parameter of the constitutionality of laws so that regardless of what the Constitution established, proving the incompatibility between a law and an international human rights treaty will let this Court expel the law from the legal system. Among other things, that would make this Court the guardian of such treaties and not the Constitution, assuming itself made up by that treaty and not by the

Peruvian Fundamental Norm, which by any reckoning would be constitutionally erroneous. It is proof that the ultimate parameter of validity is the Constitution and not human rights treaties and is, when all is said and done, in theory at least, protected by Article 200, Subsection 4 of the Constitution, where there is no impediment whatsoever for a human rights treaty to be subject to control in the framework of a proceedings of unconstitutionality.

77. What is meant to be upheld when an international human rights treaty is declared of constitutional rank is that once it becomes part of national law (Article 55 of the Constitution), and it has assumed its full constitutionality by will of the constitutional branches of government as stated in Final Provision Four of the Constitution, there is an obligation to interpret the rights and liberties recognized in the Fundamental Norm according to the contents of those treaties. When it is interpreted this way, the Constitution will be the ultimate parameter of constitutionality of the law, but not the treaty itself.

78. In this respect, we should recall what this Court upheld, that establishment of the national legal pyramid be subject to two guiding criteria: categories and degrees. The first "allude to a collection of regulations of similar or analogous content and value", and the second "expose an existing hierarch among the regulations of a single category." Our legal system's first category contains "constitutional regulations and constitutional rank regulations" distributed by degrees, with the Constitution the regulation of first degree, laws of constitutional amendment regulations of second degree, and international human rights treaties of third degree (cf. STC 0047-2004-PI, F. J. 61).

79. The WHO Framework Convention on Tobacco Control requires State Parties to take a series of steps "to continually and substantially reduce the prevalence of tobacco use and the exposure to tobacco smoke" (Article 3). In other words, the Convention demands that two aims be achieved, to wit: a) continually and substantially reduce the prevalence of tobacco use, and b) continually and substantially reduce the exposure to tobacco smoke. Obviously, the first aim has at the same time the goal of protecting the health of smokers themselves, because if the Convention were only aimed at protecting the health of non-smokers, it would have sufficed to mention that in the second aim. This has been correctly advised by the Congressional Prosecutor in his motion of rebuttal to the claim (p. 7). The Colombian Constitutional Court is of the same view, stating that "it is clear that from the constitutional viewpoint, measures designed to prevent and restrict tobacco use, which are not truly aimed at protecting the rights of 'passive smokers', seek to guarantee the health of the individual himself who uses tobacco. No other conclusion is possible if we take the grounds for such policies seriously, which are expressed in the WHO Framework Convention on Tobacco Control (…), all focused from the assumption that tobacco use affects health" (cf. Judgment C-639 de 2010, F. J. 9).

80. It has now been established in the above section that despite what the plaintiffs sustain, the effort to reduce tobacco use with the ultimate goal of protecting the health of smokers themselves is a constitutionally valid end. So, if since it is a constitutionally valid end and the Peruvian State has committed to achieve it after signing the WHO

Framework Convention on Tobacco Control, this means that to date it concerns not just a constitutionally valid end, but a constitutionally obligatory one, also.

81. Along this same line, in the criterion this Court shares, the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance have upheld in their report that the questioned legislative measure in this proceeding "is not just a constitutionally valid measure, but also exigible from the International Human Rights Law perspective and the obligation to protect the right to health (p. 7).

82. Finally, because the WHO Framework Convention on Tobacco Control is a human rights treaty by mandate of Final Provision Four of the Constitution, the State is obligated to interpret Article 7 of the Constitution, which recognized the basic right to health protection, and Article 9 of the Constitution, which requires designing a pluralistic, decentralized national health policy, according to all the precepts of that Convention, so that according to its Article 3, *the State has the obligation to protect the right to health through a pluralistic and decentralized national policy that continually and substantially reduces the prevalence of tobacco use and the exposure to tobacco smoke.*

§7. Do the questioned bans pass the subprinciple of suitability?

83. Up to now, in summary, it has been established that the bans on creating enclosed public spaces for smokers only and smoking in the open areas of establishments dedicated to education for adults only, a) limit the constitutionally protected contents of the basic rights to free personal development, free private initiative and free enterprise; b) have as an immediate end that of reducing tobacco use and as interim ends, protecting the health of smokers themselves and reducing the institutional costs it generates due to the serious illnesses tobacco use causes; c) such ends are not just constitutionally valid, but that the aim of continually and substantially reducing tobacco use is a State obligation, as established in Article 3 of the WHO Framework Convention on Tobacco Control.

84. Do the above normative bans suited to achieving the goal being sought? The plaintiffs have stated that these bans "**do not constitute a suitable means to guarantee the right to health of non-smokers**. **This is because what we are discussing is the possibility of the existence of places for smokers exclusively, where smoking personnel work**, so non-smokers would not be exposed to tobacco smoke. Likewise, **the absolute ban on smoking in open areas of educational centers (for adults) is unsuited to protect non-smokers' right to health, since in such a scenario non-smokers would not be exposed to tobacco smoke by being outdoors and not exposed to tobacco smoke**. Therefore their right to health is not compromised" (cf. claim motion, p. 29; emphasis in the original).

86. That the absolute bans on smoking in enclosed public spaces and educational centers contributes, in general terms, to reducing tobacco use in society is a conclusion one could reach intuitively. However, there are objective arguments from authorities and knowledgeable people on the matter that let us confirm such an assumption.

86. So, according to the emphasis in the *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments,*

> "Smoke-free environments not only protect non-smokers, they reduce tobacco use in continuing smokers by two to four cigarettes a day (…) and help smokers who want to quit, as well as former smokers who have already stopped, to quit successfully over the long term. Per capita cigarette consumption in the United States is between 5% and 20% lower in states with comprehensive smoke-free laws than in states without such laws (…).Complete workplace smoking bans implemented in several industrialized nations are estimated to have reduced smoking prevalence among workers by an average of 3.8%, reduced average tobacco consumption by 3.1 cigarettes per day among workers who continue to smoke, and reduced total tobacco consumption among workers by an average of 29%(…). People who work in environments with smoke-free policies are nearly twice as likely to quit smoking as those in worksites without such policies, and people who continue to smoke decrease their average daily consumption by nearly four cigarettes per day (…).After comprehensive smoke-free legislation was enacted in Ireland, about 46% of smokers reported that the law had made them more likely to quit; among those who did quit, 80% reported that the law had helped them to quit and 88% reported that the law helped them to maintain cessation (…). In Scotland, 44% of people who quit smoking said that smoke-free legislation had helped them to quit (…)" (p.29).

87. The Congressional Prosecutor has made similar reference, citing the respective 2008 WHO Report (cf.. motion of rebuttal to the claim, p. 48).

88. The PUCP Legal Clinic on Public Interest Action Law School, in its report quoting Valdes Salgado, Raydel, Avila Tang, Erika, Stillman, Frances A., Wipfli, Heather and Samet, Jonathan, "Laws that ban smoking", in *Revista de Salud Pública de México*, Vol. 50, Supplement 3 of 2008, p. 337, has described the following:

> "…the creation of 100% smoke-free spaces is an effective measure because it reduces the prevalence of tobacco use, the average number of cigarettes per day, and it promotes cessation. The above is achieved when observance of the law is strictly supervised; if there is only strong legislation that is loosely observed, its impact will be practically nil.
> (…)
> A meta-analysis that included 26 studies on the impact of the smoking ban in work places in the U.S., Canada, Australia and Germany concludes unequivocally that the measure not only protects non-smokers from exposure to tobacco smoke, but also stimulates smokers to reduce their use. There is a big difference in the impact achieved with total restrictions to when there is just a partial restriction. It has been estimated that where there is comprehensive legislation and particularly, that it its observance is overseen, it can reduce cigarette use. .. (This study has the following reference: Fichtenberg CM, Glantz SA: *Effect of smokefree workplace on smoking behaviour: systematic review*. BMJ 2002; 325:188]" (p. 31).

89. Complementing this criterion, the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance have maintained that in their report "[a]ccording to scientific research, laws on smoke-free environments brought about a 3 percent reduction in smoker rates and a reduction of three cigarettes smoked per day among those who continued smoking, which demonstrates [the] suitability [of the measure]" (p. 6).

90. None of these arguments has been contradicted by the plaintiffs. The questioned bans are clearly suited to the substantial reduction of tobacco use. They are thus suited to

protecting smokers' health and to reducing the costs of health care these may require. The latter, furthermore, has already been confirmed by different studies. In fact, the World Health Organization has established that:

> "…smoke-free environment laws offer improvements in respiratory health very quickly after their enactment. In Scotland, bar workers reported a 26% decrease in respiratory symptoms, and asthmatic bar workers had reduced airway inflammation within three months after comprehensive smoke-free legislation was enacted (…). In California, bar tenders reported a 59% reduction in respiratory symptoms and a 78% reduction in sensory irritation symptoms within eight weeks after implementation of the law requiring hospitality areas to be smoke-free.
> Even low-level exposure to second-hand tobacco smoke has a clinically significant effect on cardiovascular disease risk (…). Smoke-free environments reduce the incidence of heart attack among the general population almost immediately, even in the first few months after being implemented (…). Several studies have confirmed decreases in hospital admissions for heart attacks after comprehensive smoke-free legislation was enacted (…). Moreover, many of these studies, conducted in subnational areas (states/provinces and cities) in countries where smoke-free laws had not been enacted on a national level, show not only the impact of the legislative measures in question, but also the potential benefit of enacting smoke-free legislation on a local level when national bans are not in place.
> (…)
> Between 1988 and 2004, a period during which the state of California implemented comprehensive smoke-free legislation, rates of lung and bronchial cancer declined four times faster in that state than in the rest of the United States" (cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, p. 28).

91. In this same regard, the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance relate that since implementing measures like the ones questioned here, "Scotland has experience a 17 percent reduction in admissions for heart attacks in 9 important hospitals [Sally Haw. *Scotland's Smokefree Legislation: Results from a comprehensive evaluation. Presentation given at the Towards a Smokefree Society Conference. Edinburgh Scotland*, September 10-11, 2007. Available at: http://www.smokefreeconference07.com/programme.php]. Studies also carried out in the U.S. and Italy have revealed that the number of hospitalizations due to heart attacks has been reduced considerably after implementing strict smoke-free environment laws in public and work places. [Sargent RP, Shepard RM, Glantz SA (2004) *Reduced incidence of admissions for myocardial infarction associated with public smoking ban: before and after study*. *British Medical Journal*. 328(7446):977-80. Available at: http://www.bmj.com/cgi/content/short/bmj.38055.715683.55v1/ Bartecchi C, Alsever RN, Nevin-Woods C et al (2006) *Reduction in the incidence of acute myocardial infarction associated with a citywide smoking ordinance. Circulation* 114(14):1490-6. Available at:http://circ.ahajournals.org/cgi/content/short/CIRCULATIONAHA.106.615245v1] " (cf. Report, p. 4).

92. As a result, the challenged bans pass the subprinciple of suitability.

§8. Do the questioned bans pass the subprinciple of need?

93. For a restrictive measure on a basic right not to exceed the subprinciple of need, an alternate measure must be apparent, that while restricting the fundamental right in question in a lesser measure, lets the constitutionally valid end under pursuit be reached with at least equal suitability.

94. In this case, it translates as follows: The bans on creating enclosed public spaces for smokers only and on smoking in open areas of establishments dedicated to education for adults only will not pass the subprinciple of need if it is apparent that there is a measure less restrictive of the fundamental rights to free personal development, free private initiative and free enterprise that will allow substantial reduction of tobacco use be reached at least with equal suitability or satisfaction, as required in Article 3 of the WHO Framework Convention on Tobacco Control, protecting tobacco users' health to an equal degree and reducing by an equal amount the health costs of treating the illnesses that tobacco causes.

96. The plaintiffs say the following: "Provisions of original Article 3 of Law No. 28705, complemented by the provisions of Supreme Decree No. 001-2010-SA, are a suitable measure to protect the fundamental right to health of non-smokers, that restrict the right to freedom in a lesser measure of those who have chosen to use tobacco, and the rights to free private initiative and free enterprise of those who have chosen to undertake economic activities aimed at smokers. That is because it allowed the restricted use of tobacco in open spaces and in enclosed public spaces. The latter case established that 90% of the establishment had to be completely smoke free. However, it allowed an area no greater than 10% of the place to be equipped for smokers. It needed to be separated from the non-smoking area and have proper ventilation and smoke extraction mechanisms that prevented contamination of the non-smoking and adjoining areas" (cf. claim motion, p. 30).

96. The old version of Article 3 of Law No. 28705 stipulated the following: "In work centers, hotels, restaurants, cafes, bars and other entertainment centers, owners and/or employers will have the option to allow tobacco use in areas designated for smokers, which in all cases must be physically separated from the areas where smoking is banned and must have mechanisms that prevent the passage of smoke to the rest of the locale and ventilation to the outdoors or air extraction to the outdoors."

97. Furthermore, as mentioned already, the plaintiffs are wrong to state that the direct aim of the questioned bans is to protect non-smokers' health. It is essential to stress that they also err by maintaining that the permission for smoking areas in enclosed public spaces has been suited to protect the health of said non-smokers, because there is currently unanimity among those understanding the matter, who deem that there is no way to prevent the act of smoking performed in the "smoking area" from putting the health of those in the "non-smoking area" at risk. Indeed, as stated in the Accumulated Ruling on Draft Laws No. 2996/2008-CR and No. 3008/2008-CR by the Consumer Defense Commission and Regulatory Bodies for Public Services from the Federal Congress, which served as the basis giving rise to the current version of Article 3 of Law No. 28705:

> "The measure to establish smoking and non-smoking areas has been seriously questioned, because it has been deemed ineffective in protecting non-smokers from tobacco smoke exposure.

According to a June, 2005, report from the U.S. Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), the only way to eliminate toxins is by eliminating smoking in enclosed places. The report concludes that the damaging effects to health cannot be controlled by ventilation and that no other engineering, including present and advanced ventilation and air dilution [equipment] has demonstrated (…) the control of health risks from the exposure to tobacco smoke [http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf]
The explanation for it is that tobacco smoke is a mixture of gases and particles that cannot be eliminated entirely through ventilation systems. According to Dr. Rodrigo Córdova from the National Committee for Smoking Prevention in Spain: 'Leisure areas with the best and most powerful ventilation systems invariably present nicotine concentrations very much higher than 2.4 micrograms/m3'. In this regard, the Spanish Society of Smoking Specialists states that "if the system worked, the concentration should be nil and nonetheless, 2.4 can already cause lung cancer. Deionizers are fashionable, but not even their manufacturers trust their usefulness against tobacco. It even reports in its documentation that electronic deionizers for air purification do not protect from secondhand smoke, and do not help eliminate the gases found in tobacco smoke' [http://www.sedet.es/secciones/noticias/noticias.php?anyo=2007&id_categoria=1&mes=5&pagina=9].
As far as how useful the solutions for separate environments and ventilation systems are, Professor Rodrigo Córdova states the following: 'Smoking in the smokers' area causes sickness in the non-smokers' area when there is merely functional separation: curtains, folding screens, 'air-cleaning' systems, etc. (…) In some places it has been possible to see these types of devices – smoke stations – which no accredited scientific authority has certified for one very simple reason: because these systems are incapable of eliminating vapor phase substances. (…). These ventilation systems may eliminate the odor and part of the tobacco smoke found in particulate form, even bacteria, but they are not viable to eliminate the carcinogens in tobacco smoke for several reasons: a) the principal toxic components of tobacco are in the form of gas in concentrations that are noxious to health; b) in order to eliminate them, it would require an air exchange speed that would be intolerable, since it would need to have the magnitude of a small hurricane, etc; c) leisure spots with the best ventilation systems always present concentrations of toxins above healthy levels' [Ibid]" (pp. 12 – 14).

98. On this matter and regarding the Peruvian situation specifically, the arguments presented by the PUCP Legal Clinic on Public Interest Action Law School in its report, which is shown below, are singularly convincing:

"A study done early in 2010 by the *Permanent National Commission on the Anti-Tobacco Fight (COLAT), Tobacco Free Kids, Roswell Park Cancer Institute* and under the auspices of the Pan American Health Organization, where an assessment was made of the contamination from tobacco smoke particulates and air quality in restaurants, cafeterias, pubs, dance halls, bars and karaokes in Lima, showed that the contamination levels in public establishments with areas for smokers and where smoking was permitted reached environmental pollution levels eight times higher than the contamination levels in places 100% tobacco free and that those contamination levels became four times higher than the contamination levels found on Abancay Avenue at rush hour [Permanent National Commission on the Anti-Tobacco Fight, Tobacco Free Kids, Roswell Park Cancer Institute and the Pan American Health Organization. Study on Air Quality in Public Establishments in Peru. Lima, 2010]. (…).
But even more, a Pan American Health Organization study called 'Development of Legislation for Tobacco Control: Templates and Guidelines', stated *'the separation of smokers and non-smoker sin a single environment does not protect non-smokers from the damage, regardless of the ventilation system used'* [Pan American Health Organization. Development of Legislation for Tobacco Control. Templates and Guidelines, June, 2002. Cit. by RADOVIC, Flavia and Carmen BARCO, COLAT Report No.1772/PB/11, Lima, February 28, 2011. Printed document. p. 11].
The *U.S. Society of Heating, Refrigerating and Air-Conditioning Engineers,* on technical questions concerning tobacco smoke in enclosed places, such as bars, dance halls and

> restaurants, has said: *'Right now the only way to effectively eliminate the health risks associated with exposure to tobacco smoke indoors is to ban smoking'* [VALDES- SALGADO, Raydel, AVILA- TANG, Erika, STILLMAN, Frances A, WIPFLI, Heather and SAMET, Jonathan. Laws that ban smoking. In *Revista de Salud Pública de México*, Vol. 50, Supplement 3 from 2008, p. 339].
> On the other hand, a document from the WHO stresses: *"...although the increase in the ventilation rate reduces the concentration of contaminants indoors, the rates of ventilation would need to exceed over 200 times the common standard just to control the odor, which itself is no indicator of the concentration of toxic substances in the air, because the concentration of these can be elevated, even in the absence of a strong tobacco smoke smell. To eliminate the toxic substances contained in tobacco smoke, the only option with no risk to health is to have much higher ventilation rates, which are practically speaking not viable due to the high costs and physical structure that their installation involves. To eliminate the toxic substances in secondhand smoke, you would need air changes whose measure would be impractical, uncomfortable and unaffordable'* [WORLD HEALTH ORGANIZATION. Protección contra la exposición al humo de tabaco ajeno. Recomendaciones normativas [Protection against the exposure to secondhand tobacco smoke. Normative recommendations]. Cit. by: RADOVIC, Flavia and Carmen BARCO, op cit. p. 11]. (…).
> Among the conclusions by [a study from the Information and Education Center for the Prevention of Drug Abuse – CEDRO], it stresses the following: (…) '*Even when most of the establishments studied have ventilation systems and/or air conditioning, these only guarantee the extraction or elimination of smoke, but not the toxins in the environment where there was smoking, and even less so, the elimination of exposure by the people who are in them to such substances. Only the ban on smoking in enclosed spaces guarantees proper protection'* [CEDRO. Study Summary: Exposure to Secondhand Tobacco Smoke by Employees in Bars, Dance Halls and Entertainment Centers. Lima, 2008]" (pp. 46, 47, and 52).

99. Conversely, the *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, states the following:

> "Physically separating smokers from non-smokers by allowing smoking only in designated smoking rooms reduces exposure to secondhand tobacco smoke only by about half, and thus provides only partial protection (…).
> ASHRAE (American Society of Heating, Refrigerating and Air-Conditioning Engineers) concluded in 2005 that comprehensive smoke-free laws are the only effective means of eliminating the risks associated with second-hand tobacco smoke, and that ventilation techniques should not be relied upon to control health risks from second-hand tobacco smoke Ventilation and designated smoking rooms do not prevent exposure to second-hand tobacco smoke. and legislation. Placing the responsibility for enforcing smoke-free places on facility owners and managers is the most effective way to ensure that the laws are enforced. In many countries, laws have established that business owners have a legal duty to provide safe workplaces for their employees. Levying of fines and other sanctions against business owners is more likely to ensure compliance than fining individual smokers. Enforcement of legislation and its impact should be regularly monitored. Assessing and publicizing the lack of negative impact on business following enactment of smoke-free legislation will further enhance compliance with and acceptance of smoke-free laws. exposure (…). This position statement concurs with other findings that ventilation and designated smoking rooms do not prevent exposure to second-hand tobacco smoke (…)." (p. 27).

100. Likewise, the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law, Campaign for Tobacco Free Kids* and Framework Convention Alliance relate that "[a] study of more than 1,200 public places in 24 countries revealed that the air pollution level in enclosed places was 89 percent lower in smoke-free places compared to those where there was smoking [*Roswell Park Cancer Institute, Department of Health Behavior; International*

Agency for Research on Cancer; Division of Public Health Practice, Harvard School of Public Health (September 2006). *A 24-Country Comparison of Levels of Indoor Air Pollution in Different Workplaces*]. Available at: http://www.tobaccofreeair.org/downloads/GAMS%20report.v7_Sept_06.pdf]", which is why they believe that "since ventilation systems do not eliminate tobacco smoke, the only regulation possible is the ban in such areas" (cf. Report, pp. 4 and 5).

102. We should also add that according to a recent study in the British medical review, *The Lancet*, commissioned by the World Health Organization and which was made public on November 23, 2010, passive smoking causes 600,000 deaths annually around the world, the most affected of the group being children (165,000 children die every year from the effects of tobacco). Specifically, the study shows that passive smoking causes 379,000 deaths from heart attacks, 165,000 from respiratory infections (that especially affect children), 36,900 from asthma and 21,400 from lung cancer (cf. http://elcomercio.pe/mundo/674949/noticia-600-mil-fumadores-pasivos-mueren-cada-ano-165-mil-ellos-son-ninos).

102. In light of this, there is clear agreement among international organizations specializing in health protection matters, other organizations with authority in matters related to this fundamental right, and techniques on the controlling exposure to polluted air, so that tobacco smoke in the smoking areas of enclosed public places inevitably, and despite the technical measures that may be adopted, breaches the fundamental right to health of non-smokers.

103. Thus, taking into consideration that Article 7 of the Constitution recognized the everyone's fundamental right to health protection, which pursuant to Article 12, Section 1 of the International Covenant on Economic, Social and Cultural Rights, such protection must be verified at "the highest possible level" (also demanded by Article 10, Section 1 of the Added Protocol to the American Convention on Human Rights on the matter of Economic, Social and Cultural Rights), and that pursuant to Article 2, Section 22 of the Constitution, everyone is entitled "to enjoy a balanced and proper environment in the development of his life", the old text of Article 3 of Law No. 38705 that gave the owners of enclosed public establishments "the option to allow tobacco use in areas designated for smokers" became unconstitutional, which is why the lawmaker has duly acted to repeal it.

104. So, when the plaintiffs propose the creation of areas for smokers in enclosed public spaced as an alternative measures, they are not just proposing a measure that does not contribute in equal measure to achieving the aim pursued by the questioned provisions (because they do not reduce tobacco use with the intensity with which the absolute ban in enclosed public spaces and educational centers can achieve), but they also are proposing an unconstitutional measure.

105. It must furthermore remain clear that it becomes safe to establish for certain what the level is of health damage to non-smokers that "smoking areas" in enclosed public places can cause, since because there is a technical agreement among those who understand that such a danger exists, that element of opinion is enough to consider this possibility

unconstitutional. The Colombian Constitutional Court has upheld this in the criterion shared by this Court.

> "[a]ny assessment of the certainty of the high, medium or low degree of non-smoker damage in environments that have been altered by tobacco smoke is clearly excluded from the job of the judge who is in control of constitutionality. And quite the opposite, it becomes an unavoidable duty to apply the Constitution by protecting the health rights of 'passive smokers' and the right to a healthy environment, for there is no denying the health damage, but instead only its scope in the debate in to the political scenario.
> Competence of the judge controlling constitutionality is thus circumscribed only to constitutionally endorsing justification of the measures meant to prevent non-tobacco users (especially minors, but adults, too), from being in any way affected by those who use it. This equally confirms the constitutional folly of the argument aimed at sustaining the lack of real justification of anti-tobacco policies by comparing them with other behaviors that presumably would have such a harmful health burden as tobacco use. First of all, the constitutional judge's analysis of the study of the effects on one or another of citizens' usage behaviors does not belong. Second of all, as said, it is sufficient that some degree of health damage on those entering tobacco-use altered environments has been proven, and it is sufficient justification to protect the rights of some to the detriment of the interests of others" (cf. Judgment C-639 de 2010, F. J. 8).

106. Now, on the other hand, the plaintiffs' intent to allow the existence of enclosed public spaces for smokers involves only the need to address the problem for which the situation would be factual and legal for the workers in such places. On that detail the plaintiffs state the following: "there are other less restrictive measures the lawmaker could apply, <u>like allowing the creation of establishments for smokers only, where only smoking personnel work"</u> (claim motion, p. 32, emphasis in the original).

The plaintiffs' precaution that only "smoking personnel" work in such places would be designed to ensure that the measure affects no basic rights of third parties who willingly do not wish to see their rights affected, which would not mar free personal development. It would, of course, be gained not necessarily by requiring the presence of smoking personnel, but simply the presence of workers who, whether smokers or not, have willingly decided to be subjected to the health risks engendered by tobacco smoke.

107. In any event, even in the case of workers who smoke, it is clear that they could not smoke while performing their jobs, since according to one extreme of Article 3.1 of Law No. 28705 (which has not been challenged by the plaintiffs), it is also forbidden to smoke "inside work places". That has been correctly advised by the Congressional Prosecutor in the rebuttal to the claim (p. 38).

108. This way the plaintiffs suggest permission for a conduct whose effects are not limited to harming the smoker himself, but instead extend to the worker, this time as a passive smoker. They thus suggest through this permission that the worker's health damages are assumed as a kind of *social externality* coming from the supposed State obligation to assume certain costs in order to make the possibility of smoking by those who want to do so more viable. That way they even suggest the following possibility: "in the case of workers in establishments for smokers only, the State

could have a law that regulates such activity, deeming it a risky activity (...) included in supplementary job risk insurance" (cf. motion claim, p. 33). This possibility has been insisted on in the motion filed July 16, 2011 (p. 17).

110. Smoking is part of the constitutional contents of the right to free personal development; it was already established. However, it is an objectively damaging health behavior, not just for the one doing it, but for his entire surroundings. So, although it is an act the State cannot sanction, it is not an act it ought to encourage. In fact, the serious damage caused by the basic right to health obliges the State to carry out absolutely no act that facilitates or promotes its realization. Moreover, as a consequence of signing the WHO Framework Convention on Tobacco Control, as stated, the State has assumed certain obligations that seek to discourage and substantially reduce tobacco use and cigarette smoke exposure.

110. Therefore, the suggestion by the plaintiffs that the State be the one who assumes the costs of the person's free decision to smoke through supplementary risk insurance is contrary to the constitutional duty of not promoting this action which is objectively harmful and contrary to the health value. Smoking is an act of freedom, and the State has the duty to recognize it. But that is one thing, and it is another quite different one to intend that under its pretext, it has the duty to assume any cost for its execution, other than that involving health care of the insured who, by his free choice, decided to perform a behavior that was very likely to cause him harm (but to him, and only to him; any other possibility is constitutionally proscribed).

111. Aside from this, supplementary risk insurance by any other name has the purpose of paying for healthcare caused by doing jobs that, despite the health damage that doing them causes, are indispensable to achieving the common good, like logging, coal mining, mineral mining, the production of crude oil and natural gas, textile manufacturing, the leather industry, the manufacture of industrial chemicals, the manufacture of plastic products, the iron and steel industry, machinery construction, etc. In other words, in these cases the cost assumed by the State generally follows the need to promote and protect when faced with the relationship to a job activity that despite its health risks, is deemed valuable to promote the "general wellbeing based on justice and the comprehensive and balanced development of the nation", the State's topmost duty, according to Article 44 of the Constitution. Of course, smoking does not contribute to achieving that social goal. *Ergo*, the plaintiffs are wrong to suggest that it would be the State's duty to assume health costs generated by a job activity aimed at making the viability of an act (smoking) that not only exhausts all its potential in the ordinary pleasure of the one carrying it out, but also that while epidemic, is the cause of millions of deaths in the world.

112. Along these lines the Constitutional Court shares the position of the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance that "[r]isky jobs are such when the risky nature is inseparable from the job activity, which is certainly not the case for bars or restaurants or other enclosed public places" (cf. Report, p. 5).

113. Conversely, regarding the ban on being able to smoke in the open areas of educational centers, the plaintiffs hold that "it is also unnecessary. Less restrictive steps can be taken, such as, for instance, banning tobacco use in educational centers only when there are minors in attendance or only in enclosed spaces" (cf. claim motion, p. 33; emphasis in the original).

114. But the plaintiffs' proposed measures do not meet the aim to reduce tobacco use, much less with the same intensity with which the absolute ban on smoking anywhere in educational center does. The Constitutional Court, it should be added, shares the following criterion argued by the Congressional Prosecutor: "**it is contradictory to allow the performance of an act (tobacco use), which brings devastating consequences to human health, into a place (university educational center) that is dedicated to offering a public service (education), whose aim is comprehensive human development and to provide him knowledge to achieve a better quality of life. Moreover, if we take into consideration that many time minors also attend such educational centers at the same times, who must be protected, based on the provisions of the Constitution and in the Convention on the Rights of the Child**" (cf. motion of rebuttal to the claim, pp. 12 -13; emphasis in the original).

115. Indeed, if tobacco annually kills at least 5 million people whether they smoke or not around the world (cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, p. 7), and according to Article 13 of the Constitution, "[t]he goal of education is comprehensive human development", it becomes reasonable that the act of smoking is absolutely banned in all educational quarters.

116. It should be borne in mind, as proposed by the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance, "exhaustive bans on smoking in universities have been approved in countries, such as Austria, Bolivia, Cuba, Egypt, Guatemala, India, New Zealand, the United Kingdom and Uruguay, among many others [Framework Convention Alliance (2008), Smoke-Free Environments. Report on the International Situation to December 31, 2008, available at: http://tobaccofreecenter.org/files/pdfs/es/SF_environments_report_es.pdf]. Furthermore, it is a measure that strengthens the protection of young people against tobacco, since there are no guarantees that even in institutions of higher education there are no children present. Recalling that the tobacco industry verifiably targets its communication campaigns at children and young people [N. Hafez, P.M. Ling. *How Philip Morris Built Marlboro into a Global Brand for Young Adults: Implications for International Tobacco Control*, *Tobacco Control*, Vol. 14 No. 4 (2005) and G. Hastings, L. MacFadyen, *Keep Smiling:*MacFadyen, *Keep Smiling: No-Own's [sic] Going to Die*, *British Medical Association Tobacco Control Resource Centre*, London, (2000)], the extra protective measures against these strategies may be justified in international commitments, such as the Convention on the Rights of the Child" (cf. Report, p. 6).

117. Strictly speaking, then, the plaintiffs offer no alternative that show us that the questioned bans do not pass the subprinciple of need. Fundamentally, it follows that they have not considered that the goal of the lawmaker's steps is not just to protect the health of non-smokers, but also to reduce tobacco use, a goal that as said, becomes fully valid and also constitutionally obligatory.

118. Given the circumstances, the Constitutional Court believes that faced with the bans on creating enclosed public spaces for smokers only and on smoking in open areas of establishments dedicated to education for adults only, there are no less restrictive measures for the basic rights to free personal development, free private initiative and free enterprise that will allow the substantial reduction of tobacco use be reached at least with equal suitability or satisfaction as required in Article 3 of the WHO Framework Convention on Tobacco Control by protecting tobacco users' health to an equal degree and reducing by an equal dimension the health costs of treating the illnesses that tobacco causes. Therefore, it believes that these bans pass the subprinciple of need.

119. Aside from this, we should remember that when seeing whether or not there are alternative steps to those taken by the lawmaker that less restrict basic rights but meet the desired goal with equal or greater efficacy, the Constitutional Court must act under the principle of self-restraint, because to establish too demanding a threshold when evaluating compliance with the subprinciple of need may end up "suffocating" the lawmaker's competencies to choose the most proper means to achieve the constitutionally required goals, thus creating damage to the representative democratic principle (Article 93 of the Constitution) and failure to observe the principle of functional correction when interpreting the Constitution and laws pursuant to it (cf. STC 5854-2005-PA, F. J. 12 c.)

§9. Do the questioned bans pass the subprinciple of strict proportionality?

120. It remains to analyze whether the bans on creating enclosed public spaces for smokers only and smoking in open areas of establishments dedicated to education for adults only pass the subprinciple of strict proportionality. According to this subprinciple, a restrictive measure of basic rights, it will only be considered if the degree of damage it causes to the content of the restricted rights is less than the degree of satisfaction it creates in relation to the constitutional rights and/or goods it seeks to protect or optimize.

121. The plaintiffs declare the following in the claim chapter heading dedicated to this point: "**If tobacco use in establishments exclusively for smokers and where smoking personnel are working does not cause any damage to the health of non-smokers because such people would not go to such places, its ban is unreasonable**" (cf. claim motion, p. 34; emphasis in the original). They also stress,"[ ]if the use of tobacco in open spaces inside places devoted to adult education, such as universities, institutes and postgraduate schools, causes no health damage to non-smokers, banning it is unreasonable" (cf. claim motion, p. 36). However, it these actions are not banned, tobacco use would not be reduced, which is the goal being sought.

122. The Congressional Prosecutor in turn relates the following:

> "Concerning the **degree to which the protection of the right to health is achieved** (…) the challenged measure (…) is suited to guaranteeing the full effectiveness of the right to health, because it becomes indispensable to prevent the diseases caused by tobacco use and exposure to tobacco smoke. This measure also helps enable the State to achieve different actions that (…) are aimed at guaranteeing the full effectiveness of the right to health.
> Regarding the **degree of damage to the rights to free personal development, free private initiative and free enterprise,** we should stress that **the exercise of these rights may be limited by the right to health.** In this regard the Constitutional Courts holds that the right to free personal discovery, like any right, is not absolute; it must be exercised in harmony with the basic rights of other people and Constitutionally relevant goods. Conversely, according to Constitutional provisions, the exercise of free private initiative must not threaten 'general community interests', while the exercise of free enterprise must not put people's health at risk.
> **If we compare the aspects analyzed earlier (the degree to which the right to health is protected and the degree of damage to the rights to free personal discovery, free private initiative and free enterprise) we can conclude that the challenged measure is proportional" (**cf. motion of rebuttal to the claim, p. 60; emphasis in the original).

123. First of all, we should analyze what the degree of restriction of free personal development is that involves banning smoking in enclosed public spaces and open areas of establishments dedicated to education. On this particular, the thinking is that due to the effects the nicotine drug produces in the smoker's physiology, it would be hard to say that the smoker is responding to free personal development. That has been the perception of the PUCP Legal Clinic on Public Interest Action Law School, when it maintains the following:

> "These days scientists agree in believing that nicotine plays a fundamental role in producing the dependence characterized by the smoking habit. It is physiologically proven that nicotine produces a tolerance effect, meaning, after several hours of administering a large quality of this substance into the body, its effect is reduced, and in this case the smoker's solution is to increase the dose in order to re-achieve an accumulation of nicotine in the body that feels satisfactory to him. Tolerance is expressed in such a way that after hours of having administered a considerable amount of nicotine into the body, the effects of this substance drop, causing the smoker to seek to increase the respective dose to achieve a nicotine level that feels satisfying to him. [TEIXEIRA DO CARMO, Juliana, ANDRÉS-PUEYO, Andrés and Ether ÁLVAREZ LÓPEZ. LA EVOLUCIÓN DEL CONCEPTO DE TABAQUISMO [EVOLUTIONOF THE SMOKING CONCEPT] . *Cuadernos de Saúde Pública* vol.21 Nº 4 Río de Janeiro July/Aug. 2005 (online). At: http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S0102- 311X2005000400002. Inquiry date: June 1, 2011].
> The special circumstances with this product used by millions of people—tobacco—which is questioned by the scientific community, leads us to conclude that, whether it can be considered in any respect as such, ***the freedom to smoke is not freedom***" (cf. Report, p. 23; emphasis in the original).

124. Concerning this position, the plaintiffs maintain the following: "To think that under the guise of protecting smokers' health, the State may ban smoking in specific places where third parties are not affected means to assume that there is a 'weakness of will' hypothesis by the smokers meriting State intervention, because as the Amicus Curiae Report believes – incredibly – '*the freedom to smoke is not freedom'.* So we face an illegitimate paternalistic measure that damages free personal development" (cf. motion dated July 6, 2011, pp. 16 – 17).

125. Even when the plaintiffs think that "weakness of will" is "hypothetical" in the average smoker, though, it must be acknowledged that as the PUCP Legal Clinic on Public Interest Action Law School has proposed, science has shown that many smokers do not smoke because they "want to", but because they are addicted to nicotine, the main component of tobacco that affects the brain.

Indeed, as the U.S. *National Institute on Drug Abuse* warns,

> "...nicotine is addictive. Most smokers use tobacco regularly because they are addicted to nicotine. Addiction is characterized by compulsive drug seeking and abuse, even in the face of negative health consequences, and tobacco decidedly fits this description. It is well documented that most smokers identify tobacco use as harmful and express a desire to reduce or stop using it, and nearly 35 million of them want to quit each year. Unfortunately, fewer than 7 percent of those who try to quit on their own achieve more than a year of abstinence. Most relapse within a few days after quitting. (…).
>
> Recent research has shown how nicotine acts on the brain to produce a number of effects on behavior. Of primary importance to its addictive nature are findings that nicotine activates the brain circuitry that regulates feelings of pleasure, also known as reward pathways. A key brain chemical involved in the desire to consume drugs is the neurotransmitter dopamine, and research has shown that nicotine increases levels of dopamine in the reward circuits. It has been found that nicotine's pharmacokinetic properties also enhance its abuse potential. Cigarette smoking produces a rapid distribution of nicotine to the brain, with drug levels peaking within 10 seconds of inhalation. Acute effects subside within a few minutes, which cause the smoker to continue dosing himself frequently during the day to maintain the pleasurable effects of the drug and prevent withdrawal symptoms.
>
> What people often don't realize is that the cigarette is a highly efficient and very well designed system to dispense the drug. With each draw or 'drag' he inhales, the smoker can transfer the nicotine rapidly to the brain. Within a 5-minute period a typical smoker gives a lit cigarette 10 draws. So, a person who smokes around a pack and a half (30 cigarettes) a day gives his brain about 300 daily 'hits' of nicotine. These factors contribute considerably to nicotine's highly addictive nature"
>
> (cf. http://www.nida.nih.gov/researchreports/nicotina/Nicotina2.html).

126. Thus, in the case of nicotine addicts (meaning, in the case of most smokers), we are faced with an exceedingly strong internal compulsion that, while it may not be said to disappear, does considerably reduce the freedom exercised when deciding to smoke. This has been warned by the PUCP Legal Clinic on Public Interest Action Law School in its Report when it notes the *American Psychiatric Association*'s conclusions:

> "The problem is hard to confront, because it concerns a product used under dependency conditions, meaning where people can lose their own will or freedom to choose to undertake a habit they no longer control. According to the *American Psychiatric Association*, tobacco produces physical and psychological dependence, which is why it is considered an addictive substance. It also shows that it produces a tendency for continued use, even knowing the damage it can cause. [SOTO MAS, F., VILLALBÍB, J.R., BALCÁZARA, H and J. VALDERRAMA ALBEROL. La iniciación al tabaquismo: aportaciones de la epidemiología, el laboratorio y las ciencias del comportamiento. (online) At: http://www.elsevier.es/sites/default/files/elsevier/pdf/37/37v57n04a13036918pdf001.pdf. Inquiry date: June 1, 2011]" (p.22).

127. Let us also remember that human physiology is made up in such a way that it progressively creates higher nicotine tolerance level, so that over time the smoker needs higher doses of it to achieve the satisfaction he wants and thereby little by little doing more damage to his health and eventually the health of third parties. As the PUCP Legal Clinic on Public

Interest Action Law School puts it, "smoking can end up creating tolerance behaviors, withdrawal syndrome and compulsive use behavior [SOTO MAS, F., VILLALBÍB, J.R., BALCÁZARA, H y J. VALDERRAMA ALBEROL. La iniciación al tabaquismo: aportaciones de la epidemiología, el laboratorio y las ciencias del comportamiento. (online) At: http://www.elsevier.es/sites/default/files/elsevier/pdf/37/37v57n04a13036918pdf001.pdf. Inquiry date: June 1, 2011]. (…)" (cf. Report, p. 22).

128. That is why information campaigns do no good for those who are nicotine addicts; it is not because smokers are not warned of the personal and social harm their behavior causes, but instead that they are unable to overcome on their own the desire to smoke, which is chemically forged in the brain. That is why Miguel Ramiro Avilés is right when he holds that:

> "…information campaigns that try to prevent smoking will be effective and must be aimed especially towards people who have not begun use, while for people who have been smoking for some time already, mere information will not get them to change their behavior if there are no specific health means, as well. The reason for the latter is that they are subject to an internal compulsion, their dependency, which clouds understanding of the information. Public anti-tobacco use health policy must, therefore, adopt both measures if it wants to be truly effective. What it should not do is just give the habitual smoker information, because his incompetence is not from the lack of information, but from being subject to an internal compulsion" (cf. "A vueltas con el paternalismo jurídico", op. cit., p. 233, note 95).

129. This being the case, can it be said that the measures taken to reduce tobacco use in nicotine-addicted people seriously damage free personal development? Obviously not. In any case, it concerns minimal restrictions, so long as even under these circumstances the level of display of such freedom can be placed in doubt.

130. So, there is no denying that there are people who decide to smoke, whether or not they are addicted to tobacco. For them the bans on creating enclosed public spaces for smokers only and smoking in open areas of establishments dedicated to education for adults only are greater than for addicts. But despite that, can one say that the restrictions are serious ones?

131. Even when, as has been established, smoking pertains to constitutionally protected content on the basic right to free personal development, it is clear that not all exercise of freedom displays are axiologically identical. Acts of freedom that seek the satisfaction or coverage of basic needs to build a life plan (primary goods, in Rawls' terminology in his *Theory of Justice)* cannot be compared with those acts of *agere licere*, that do not define the essence of a life plan but seek only the satisfaction of non-essential interests or pleasures (secondary goods, in Rawls' terminology). In the abstract, only the first acts of freedom in a Constitutional State have a high intensity value, while the second, without denying that they deserve recognition and a degree of protection, enjoy a value of lower intensity.

And while it is true that in certain cases the separation between primary and second goods can become debatable, in the opinion of the Constitutional Court, smoking by any reckoning satisfies only secondary goods. Not just because it is clear it contributes nothing to any basic need, but because it is an intrinsically damaging act by causing, as said, the annual average deaths of over 5 million people worldwide, which is why smoking has justifiably been considered an epidemic.

132. Concerning the health problems tobacco causes in the home, the plaintiffs have stated that the regulatory bans questioned are not proportionate, for they will do nothing but aggravate such problems. Indeed, the following is stated in the claim: "by banning tobacco use in places for smokers only with public or restricted access, it is indirectly promoting increased use in smokers' homes, the only place they have left for use. In this context, who is going to protect the rest of the home's inhabitants from the exposure to tobacco smoke? The children of parents or siblings who smoke are indirect recipients of the smoke emitted when it is being used. Even worse, it is logical to presume that a child who sees his parents or siblings smoke will be more likely to become a smoker by imitating the model. In short, the opposite of the goal is achieved. The exposure of minors to tobacco smoke is increased and its use is encouraged" (cf. claim motion, p. 36).

133. There are two basic reasons why the Constitutional Court cannot share the plaintiffs' criterion. First, because there are empirical reasons proving that the conclusions they reach are false. Furthermore, according to the World Health Organization, "[l]egislation creating smoke-free public places (…) encourages families to make their homes smoke-free (…), which protects children and other family members against passive smoking (…). In Australia, the introduction of smoke-free workplace laws in the 1990s was gradually accompanied by an increase in the proportion of adults who avoided exposing children to second-hand tobacco smoke in the home (…). Even smokers are likely to voluntarily implement a "no smoking" rule in their homes after comprehensive smoke-free legislation is enacted" cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, p. 30).

Likewise, as the Georgetown University School of Law's *O'Neill Institute for National and Global Health Law*, *Campaign for Tobacco Free Kids* and Framework Convention Alliance have shown,

> "[a] survey conducted by the Action on Smoking and Health UK, Asthma UK and the British Thoracic Society asked people who were exposed to smoke before and after the smoke-free environment legislation about their levels of exposure to secondhand smoke at home. The results revealed that the exposure had dropped considerably because the law encouraged people to make their homes smoke-free environments. [ASH UK. *As the smoke clears: The Myths and Realities of Smokefree England*. October 2007. Available at: http://smokefree.ash.positive-dedicated.net/pdfs/mythsandrealitiesofsmokefreeengland.pdf]" (cf. Report, p. 6).

134. The second reason why this Court disagrees with the plaintiffs' objection is because underlying it is a lack of recognition of the duty also falling to individuals, and singularly to parents, in the proper promotion of constitutional values. Indeed, the plaintiffs' question that in the face of the questioned bans… "who is going to protect the rest of the home's inhabitants from the exposure to tobacco smoke?", it would seem to suggest that faced with the lawmaker's decision--in the spirit of protecting the basic right to health and meeting international obligations assumed in this sense—to ban tobacco use in enclosed public places would inevitably be to oblige parents to smoke in their homes, seriously damaging their children's health and encouraging

them to enter into this addictive activity. This point of view forgets that according to Article 5 of the Constitution "[i]t is the duty of all parents (…) to educate (…) their children" and that according to Article 38 of the Constitution, "[a]ll Peruvians have the duty to (…) respect, obey and defend the Constitution". This requires assuming that every parent has the constitutional duty to not carry out behaviors in the home that might violate his children's fundamental right to health. Obviously, except in absolutely exceptional circumstances, it is not incumbent upon the State to undermine parents in the protection of children, because it would become a violation of the autonomy of family decision making (Article 6 of the Constitution) and family intimacy (Article 2, Section 7, of the Constitution. Paradoxically, that in fact is what would constitute an unjustified paternalistic measure in the Federal Constitution.

Naturally, if as a result of the regulatory bans challenged in this case, a parent decides to smoke in his home in front of his children, it will plainly be a result of his indifference to constitutional values and his unfortunate lack of respect for the basic rights of his relations, and not because the lawmaker whose purpose is, of course, quite the opposite—to substantially reduce tobacco use in Peruvian society--has desired or caused it. (And unfortunately, as we have established, there are empirical reasons to maintain that the adopted measures progressively meet such an objective.)

135. The ban on creating enclosed public spaces for smokers only as it was established conversely restricts the rights to free private initiative and free enterprise, so it is no longer possible to freely decide to create spaces like these. How well does it do it?

136. The World Health Organization has revealed the following in this regard:

> "Despite tobacco and hospitality industry voices of alarm, experience shows that in every country where comprehensive smoke-free legislation has been enacted, smokefree environments enjoy great acceptance, have recorded no problems to apply or enforce the related measures, and result in either a neutral or positive impact on businesses, including the hospitality sector (…). These findings were similar in all places studied, including in Australia, Canada, the United States and the United Kingdom (…); Norway (…); New Zealand (…); the state of California (…); New York City (…); and various US states and Municipalities (…).
>
> In New York City, which implemented smoke-free legislation in two stages (a first phase, covering most workplaces including most restaurants in 1995 and a second phase, in which the ban was extended to bars and remaining restaurants in 2003), restaurant employment increased after enactment of the 1995 law (…). Combined bar and restaurant employment and receipts increased in the year after enactment of the 2003 ordinance (…), and have continued increasing since.
>
> After comprehensive smoke-free legislation was implemented, there were no statistically significant changes observed among hospitality industry economic indicators in Massachusetts (…), no economic harm to bar and restaurant businesses reported in the mid-sized US city of Lexington, Kentucky (…), and no adverse economic impact on tourism in Florida (…). When bars located in communities with smoke-free laws were sold, they commanded prices comparable to prices paid for similar bars in areas with no restrictions on smoking (…). This type of economic evidence can be used to counter false tobacco industry claims that establishing smoke-free places causes economic harm" (cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments,* p.31).

137. So, although in the abstract the ban on having public spaces for smokers only may look like it restricts the rights to free private initiative and free enterprise, objective and specific data show that such restrictions are extremely mild or even nil.

138. On the other hand, when the subprinciple of suitability was analyzed, it made clear the high level of satisfaction with how the questioned bans meet the aim of reducing tobacco use, which obviously leads to greater protection of smokers' right to health and the reduction of health costs from tobacco use. Because health is a right and fundamental value for our constitutional system, its protection is imperative so that every human being can exercise his moral autonomy and ultimately develop in dignity (Article 1 of the Constitution).

139. Smoking (said more than once in this judgment) is an epidemic: "Among the five greatest risk factors for mortality, it is the single most preventable cause of death. Eleven per cent of deaths from ischaemic heart disease, the world's leading killer, are attributable to tobacco use. More than 70% of deaths from lung, trachea and bronchus cancers are attributable to tobacco use. If current patterns continue, tobacco use will kill more than 8 million people per year by 2030. Up to half of the world's more than 1 billion smokers will die prematurely of a tobacco-related disease" (cf. http://www.who.int/tobacco/health_priority/es/index.html - World Health Organization).

140. In view of the fact that smoking is an epidemic that places the right to health at serious risk of both smokers and non-smokers and can create irreparable harm is many cases, measures issued in compliance with State obligations "in order to continually and substantially reduce the prevalence of tobacco use and the exposure to tobacco smoke" (Article 3 of the WHO Framework Convention on Tobacco Control), enjoy the highest level of legal and ethical relevance in the State Constitutional framework, especially if, as has been demonstrated in this case, they achieve this aim with a high degree of satisfaction.

141. Hence, since the bans on creating enclosed public spaces for smokers only and on smoking in open areas of educational establishments for adults only restrict only mildly the basic rights to free personal development, free private initiative and free enterprise, significantly reducing the use of a highly addictive and highly damaging substance to not just the health of the smokers but to those do not, as well, the Constitutional Court believes that such bans pass the subprinciple of proportionality in the strict sense and are, in short, constitutional. Therefore, it is fitting to dismiss the claim.

§10. Impossibility of adopting future measures that protect the fundamental right of health from the smoking epidemic to a lesser degree.

142. Before closing this case, the Constitutional Court believes it fundamental to stress that pursuant to the deliberations below, it is not possible constitutionally in the future for legislation to pull back from the currently adopted measures to reduce tobacco use in Peruvian society.

143. As mentioned earlier, Article 7 of the Constitution sets forth the following: "Everyone is entitled to the protection of their health, that of the nuclear family and of the community as the duty to contributing to its promotion and defense." In turn, Article 12, Section 1, of the International Accord on Economic, Social and Cultural

Rights establishes this: "State Parties in this Accord recognize the right of all persons to enjoy the *highest possible level* of physical and mental health" (emphasis added). Substantially analogous, Article 10, Subsection 1, of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Matters ("San Salvador Protocol"), sets forth the following: "Everyone is entitled to health, understood as the enjoyment of the *highest level* of physical, mental and social wellbeing" (emphasis added).

Therefore, according to Final and Transitional Provision Four of the Fundamental Norm, by virtue of which the fundamental rights it recognizes, "are interpreted pursuant to the Universal Declaration of Human Rights and with international treaties and accords on the same matters ratified by Peru", the State has not only the obligation to protect the right to health, but to protect it with the objective that a human being enjoy this basic right *at the maximum possible level.*

144. Otherwise, as a result of signing the stated International Accord on Economic, Social and Cultural Rights, the Peruvian State has committed to "[t]he prevention and treatment of epidemic diseases" (Article 12, Section 2, Subsection c). Smoking has been considered by both the World Health Organization (cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments)* and by the Pan American Health Organization (cf. *The Smoking Epidemic. Governments and the Economics of Tobacco Control. Science Publication No. 577, 2000)* as an epidemic, meaning, as the source of a number of sicknesses that simultaneously attack a great number of people and tend to spread. This is basically due to the following: "Tobacco use is the leading cause of preventable death, and is estimated to kill more than 5 million people each year worldwide. Most of these deaths are in low- and middle-income countries. The gap in deaths between low- and middle-income countries and high-income countries is expected to widen further over the next several decades if we do nothing. If current trends persist, tobacco will kill more than 8 million people worldwide each year by the year 2030, with 80% of these premature deaths in low- and middle-income countries. By the end of this century, tobacco may kill a billion people or more unless urgent action is taken." (cf. *WHO Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, p. 1).

All of this has been confirmed in the latest *WHO Report on the Global Tobacco Epidemic, 2011: Warning About the Dangers of Tobacco,* presented on July 7, 2011, in the city of Montevideo, Uruguay. Indeed, in the executive summary of this Report, the following is stressed: "Tobacco continues to be the number one cause worldwide of preventable deaths. Every year it kills around 6 million people and causes hundreds of billions of dollars of economic losses around the world. occur in low- and middle-income countries, and this disparity is expected to widen further over the next several decades" p. 1). Incidentally, the complete Report version highlights Peru as one of the countries that has most recently legally banned tobacco use in enclosed public spaces and work places, together with Burkina Faso, Spain, Nauru, Pakistan and Thailand (cf. *WHO Report on the global tobacco epidemic, 2011. Warning about the dangers of tobacco,* pp 43, 51, and 53).

145. That smoking has been recognized as an epidemic has been recognized by the Peruvian government when it signed the WHO Framework Convention on Tobacco Control. Furthermore, through ratifying this Convention, the Peruvian government expressly recognizes, among other things, "that propagation of the smoking epidemic is a worldwide problem with serious consequences for public health requiring the broadest international cooperation possible and the participation of all countries in an effective, appropriate and comprehensive international response" and "that science has unequivocally demonstrated that tobacco use and the exposure to tobacco smoke are the causes of death, disease and disability and that tobacco-related diseases do not appear immediately after the onset of smoking or being exposed to tobacco smoke or using tobacco products in any other way."

146. Conversely, pursuant to Article 2, Subsection 1, of the International Accord on Economic, Social and Cultural Rights, the Peruvian government "promises to adopt measures, (…) up to the maximum available resources, to progressively achieve through all appropriate means, including the adoption of legislative measures in particular, the full effectiveness of the fundamental right to health]" It is a commitment essentially identical to the one from Articles 1 and 2 of the San Salvador Protocol and Article 26 of the American Convention on Human Rights. According to the Committee on Economic, Social and Cultural Rights' General Comment No. 9 –established by virtue of Resolution 1985/17 of May 28, 1985, by the United Nationals Economic and Social Council (ECOSOC), "[w]hile each State Party is responsible for deciding on the particular method to put the rights of the pact into effect in domestic legislation, the means used must be proper to produce coherent results for full compliance with State Party obligations" (cf. General Comment No. 9, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights", 19th Sessions Period, December 3, 1998). In turn, according to General Comment No. 3 of the stated Committee, "The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized (in the Covenant)", stressing that "the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Nevertheless, (…) it should not be misinterpreted as depriving the obligation of all meaningful content. (...). [t]he phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (cf. *General Comment No. 3. "The Nature of States Parties' Obligations", 5th* Sessions Period, December 14, 1990).

147. It should likewise be remembered that as established according to Article 3 of the WHO Framework Convention on Tobacco Control, the aim of reducing use and exposure to tobacco smoke must be achieved "continually", which in the judgment of this Court, means the impossibility of reversing the steps taken that are aimed at achieving them.

148. Taking into consideration the criteria explained in the preceding legal grounds, meaning, that the State has the duty to protect the right to health at the maximum level possible, that smoking is an epidemic, that rights must be protected through progressive steps, which means that except in highly exceptional circumstances, the legal steps taken to protect health mark a point of no return and that according to Article 3 of the WHO Framework Convention on Tobacco Control, the aim of reducing use and the exposure to tobacco smoke must be achieved "continually", it is found constitutionally prohibited that in the future legislative steps or those of any other nature be taken that protect in a lesser degree the fundamental right to health in face of the smoking epidemic in comparison with the way current legislation does so.

V. RULING

By these grounds, the Constitutional Court, with the authority conferred upon it by the Political Constitution of Peru

HAS HEREBY RESOLVED

1. To declare the claim **BASELESS**.

2. Pursuant to grounds 142 to 148 *supra*, in view of the provisions of Article 3 of the WHO Framework Convention on Tobacco Control and the duty of the State to progressively protect the fundamental right to health, recognized in Article 7 of the Constitution, at the highest level possible, it is found constitutionally prohibited that in the future legislative steps or those of any other nature be taken that protect in a lesser degree the fundamental right to health in face of the smoking epidemic in comparison with the way current legislation does so.

It is hereby ordered that this be published and notice be given.

Signed

MESÍA RAMÍREZ
BEAUMONT CALLIRGOS
CALLE HAYEN
ETO CRUZ
URVIOLA HANI

FILE NO. 00032-2010-PI/TC
LIMA
5,000 CITIZENS

GROUNDS FOR THE VOTE BY MAGISTRATES BEAUMONT, CALLIRGOS AND ETO CRUZ

Being in agreement with the operative portion of this ruling, we nevertheless wish to add the following considerations as grounds for the vote.

§1. Defining of the controversy

1. The purpose of this claim is to have Article 3 of Law No. 28705 – General Law for the Prevention and Control of Risks from Tobacco Use – amended by Article 2 of Law No. 29517, declared unconstitutional, and which establishes:

> "Smoking shall be banned in establishments dedicated to health or education, in public offices, in the interiors of work places, in enclosed public spaces and on any means of public transportation, which are one hundred percent smoke-free environments."

2. However, as well specified in grounds 12 of the judgment, the claim is circumscribed to questioning the constitutionality of two interpretative tenors of this provision, to wit: a) Smoking shall be banned in enclosed public spaces for smokers only; and) Smoking shall be banned in open areas of establishments dedicated to education for adults only.

§2. Concerning paternalism and perfectionism as State interventional methods in personal autonomy.

3. In order to evaluate the constitutionality of the challenged regulations banning smoking in certain establishments and public environments, it is important to address the study of the legal nature displayed by these government measures, while regulations aimed at preserving particular legal good are held as relevant.

5. It should be stressed, therefore, that similar to what happens with penalizing drug use or the requirement to wear a seatbelt, the government regulation on tobacco use is usually identified as a government interventional method into matters whose propriety encumbers *prima facie* evaluating the individuals themselves. To that effect, it is confirmed that the State may only decide what life style people should follow at the cost of denying their accompanying autonomy.

5. Nonetheless, to understand this statement in its correct terms, one must hearken back to the classic distinction, coined by the moral philosophy between *paternalism* and *perfectionism*, insofar as measures aimed at imposing a certain pattern of behavior on citizens. Indeed, as Nino well stresses,

> "Perfectionism must be carefully distinguished from government paternalism, which does not consist of imposing personal ideals or plans for living that individuals have not chosen, but in imposing on individuals behaviors or courses of action that are appropriate to satisfy their objective preferences and plans for living that have been freely adopted" [1].

6. From this perspective it becomes obvious that unlike the model challenged by political perfectionists (by definition, vertical and totalitarian, and in that sense, having no place in the constitutional State), government paternalism quite to the contrary promotes freedom of choice of lifestyles, thus providing the information that may be relevant (like that referring to the damages from tobacco use), making certain steps more difficult and thus requiring that they be thought about more carefully (like in the case of the paperwork for marriage and divorce), eliminating certain pressures that might determine that self-damaging decisions be made (such as when the challenge to a duel is made punishable), etc.[2].

7. It must be remembered that the paternalistic model differs dramatically in its postulates, depending on the interest or right one seeks to protect. So, when dealing with the defense of *civil and political rights* (like to life or religious freedom), government action assumes a basically restrictive appearance, since the expansion of these kinds of freedoms require precisely the least State interference. On the other hand, when protective measures are aimed at maximizing *rights of a provisional nature* (such as health or education), more State intervention finds justification in the need for certain barriers to be overcome in order to achieve a substantially equal context among people. State action in this hypothesis finds its *raison d'être* in the principle of solidarity and the notion of reciprocity.

8. All in all, the imperious need for government action to not represent unmeasured intervention in the life of citizens (regardless of the fundamental right one seeks to optimize) follows not only that ideology of liberal stamp that has let the human being be placed at the center and justification from the State and society, but also responds to the demand that personal autonomy insofar as inherent value to the constitutional State, is preserved in the context of the standards of life in society. Even more so if, as it is fair to recognize, a State that understands its foremost task is to intervene in its citizens lifetime ambitions, it runs the risk of becoming a totalitarian state, which ends up subordinating the exercise of rights to a pretended "general interest" that in practice is no more than the personal interest of the government in power.

9. So, when our Constitution shows that "[d]efense of the human being and respect for his dignity are the supreme goal of society and the State" (Article 1), immediately adding that "[n]o one is obliged to do what the law does not order, nor is he prevented from doing what it does not ban" (Article 24, Subsection a), it presupposes that dignity requires a context favorable to maximizing people's general freedom to act, meaning, their ability to be self-determined, giving themselves their own standards and choosing the path of personal realization that best pleases them, so long as that life plan does not affect third parties [3].

10. Personal autonomy, understood as an inherent value to the Constitutional State, in its interaction with remaining principles and values has been immeasurably defined, as shown in ground 18 of the judgment, through the Declaration of the 1789 Rights of Man and the Citizen, whose Article 4 establishes that "[f]reedom consists of being able to do whatever

does not harm to another: therefore, the exercise of each man's natural rights has no limits other than those that guarantee other members of society that they will enjoy those same rights. Such limits may only be determined by law". In the same vein is the Universal Declaration of Human Rights, which says in Article 29, Subsection 2, "[I]n the exercise of their rights and in the enjoyment of their liberties, all people will be subject only to the limitations established by law with the sole goal of ensuring the recognition and respect of others' rights and liberties and of satisfying just demands of morality, public order and the general wellbeing of a democratic society."

11. However, the principle of not affecting third parties as the *sole* limit to the autonomy of will and, by extension, to the exercise of the rights and liberties recognized in our Magna Carta, cannot be understood as subordination to the general interest or the convenience of majorities. Indeed, it is apparent that fundamental rights, rather than being absolute, are relative, with the understanding that their enjoyment and exercise are limited by other rights and constitutional goods which hold equal value and thus deserve equal constitutional protection. Hence, the principle according to which anyone can freely choose his lifetime ambitions can be limited or restricted in certain circumstances, but always on the condition that such restrictions satisfy the criteria of reasonableness and proportionality.

12. However, when a particular government policy restricts people's general freedom of action with support in the need to address the general interest of the majorities with no risk of affecting third parties, it does nothing more than arbitrarily sacrifice the exercise of rights based on a utilitarian criterion based on the cost-benefit logic, failing to recognize equally the value that such rights hold in the constitutional State. Quite the contrary, the understanding of fundamental rights as conquests in the face of majorities presupposes that the bundle of legal positions they protect ought to prevail over the *abstract notion* of social interest for the simple reason that "a right against the government must be a right to do something, even when the majority thinks that doing it would be bad and even when the majority might be worse off because that "something" is done."[4]

13. Hence, for a particular limitation in the area of personal autonomy to look like a reasonable and proportional measure, it must find its basis in the protection of concurrent rights of specific people, considered individually (with respect to which it may be possible to show a *causal relationship* in the strict sense), albeit in unreal "rights" or "preferences" of the majorities. This way, as Nino well shows, today as before, fundamental right are found aimed at safeguarding certain interests that may be minority ones "against the possibility of their being subjugated every time it is shown that the majority of society would be benefitted if those interests were frustrated."[5]

14. In the *sub litis* case, for instance, a justification alluding to the so-called "majority interest" would consist of declaring that tobacco use would have to be restricted because the loss of lives or productive ability of regular smokers diminishes their contribution to general wellbeing. Naturally, to restrict (or even worse, to ban) tobacco use based on this kind of reason would be equivalent to trying to impose the lawmaker's subjective morality through law, turning it into a manifestly irrational and disproportionate measure and certainly perfectionistic, especially if we keep in mind that in more than a few cases

the smoking habit is freely chosen by people as a lifestyle. This would be the case, to cite just one example, of our writer, Julio Ramón Ribeyro, who in an interesting passage in his tale “For Smokers Only”, gives a glimpse of this possibility by describing the following:

> “”[t]he cigarette, aside from a drug, was for me a habit and a rite. Like any habit, it had been added to my nature until it formed a part of it, so that to take it away was the same as mutilation, and like every rite was subject to following a rigorous protocol, sanctioned by the performance of specific actions and the use of irreplaceable cult objects. You could conclude that smoking was a vice that I took on in the absence of sensory pleasure, a feeling of calm and diffuse wellbeing, the fruits of the nicotine contained in the tobacco and that was manifested in my social behavior through ritualistic acts"[6].

15. So, the judgment states in grounds 34 that the aim of the questioned regulatory area above all consists of “reducing tobacco use (immediate aim) in order to protect the health of smokers themselves (first mediate aim)”. On this point, the Court recognizes that many smokers do not smoke because “they want to”, but because they are addicted to nicotine, the main component of tobacco that affects the brain, which is why it leads to stating, regarding such people, that the questioned bans appear as *minimal restrictions*. In spite of it, it does not deny that there are people who decide to smoke, whether or not they are addicted to tobacco. However, concerning them, the Court believes that the challenged bans constitute mild restrictions, since the act of smoking “by any reckoning satisfies only secondary goods”, because it does not contribute to the coverage of any basic need.

16. We fully agree with the qualification of bans questioned here as paternalistic measured justified in the State Constitution, since as recognized in grounds 56 of the judgment, an exceptional circumstance for limiting free personal development is when there are suspicions that the person’s behavior is not a consequence of a freely adopted will, but of some internal element that clearly affects it. In other words, without being a perfectionist measure (since it imposes no particular model of life), it does qualify as a paternalistic measure (since it seeks to protect the addict from the weakness of his will). But it should be asked: Does the same thing happen regarding the generality of regular smokers who are not addicted to nicotine?

17. In our opinion, the characterization of the act of smoking as a “secondary need” for those not addicted does not come to justify the measure consistent with its total ban, since that would as much as state that all "banal activities" in society should be banned. Now, it is true that as shown in grounds 38, the statements about the right to free personal development that the State is obliged to protect and promote are those necessary for the coverage of basic needs, and not ones reduced to covering interests or pleasures not integral to peoples' life plan. But it seems fair to us to recognize that constitutional justice could not be defined in a single moment and forever, as such preferences should be qualified, meaning, if the restrictions to them can be categorized as *mild, moderate or serious* for the person. Objective determination of the severity of a limitation to free personal development is a matter that should be analyzed specifically with greater reasoning, if we agree that while the State may discourage certain behaviors aimed at satisfying ‘non-essential" goods, it could not absolutely ban them.

18. Free enterprise, free private initiative and the right to property (which among other contents involves the right to the enjoyment of goods), are fundamental rights that also become compromised in this case, so long as beyond the restrictions that operate on the right to free personal development (to the degree that one cannot smoke in any enclosed public place and in open areas of educational establishments for adults), particular enclosed public places (restaurants, shopping centers, dance halls, etc) will see their incomes and business expectations drop due to the reduction in the number of smoking consumers who go there, as well as the drop in income from tobacco advertising, among other aspects. Therefore, beyond the constitutionality of the questioned provisions, I believe that municipalities and the Parliament should be urged to establish in their respective areas *compensation measures* (reduction of some taxes, benefits, for example) that may in some measure compensate for an earnings expectation that when these businesses began, the State legitimately authorized.

For these considerations, we are of the opinion that the claim of unconstitutionality of proceedings must be declared **BASELESS.**

Justices

BEAUMONT CALLIRGOS
ETO CRUZ

FILE NO. 00032-2010-PI/TC
LIMA
5,000 CITIZENS

SOLE VOTE OF JUSTICE ÁLVAREZ MIRANDA

With all due respect for the opinion offered by the rest of my justice colleagues, I hereby issue the following sole vote, due to the following considerations.

Demarcation of the Prayer for Relief

1. According to the tenor of the claim, the plaintiffs question the constitutionality of Law No. 28705, General Law for the Prevention and Control of Risks from Tobacco Use in the extremes that they absolutely proscribe (i) in enclosed public environments, and (ii) in open spaces of educational institutions for adults.

Preliminary Considerations: Smoking as a demonstration of the right to free personal development

2. According to the Political Constitution of Peru, human dignity not only represents the supreme value that justifies the existence of the State and of the objectives it fulfills, but is constituted as an essential basis for all fundamental rights. Therefore, I share what was stressed by the Spanish Constitutional Court in the sense that *"dignity is a spiritual and moral value inherent to a person that is singularly manifested in conscious and responsible self-determination of life itself and carries with it the affirmation of respect for others".* [7]

3. To that effect, "*an indisputable driving principle role without which the State would lack legitimacy and the rights of proper directional support*" becomes inherent to dignity. *It is this same logic that otherwise comes from international instruments related to Human Rights that make the principle the direct source from which each and every human right emanates."* [8] Indeed, while the Preamble to the Universal Declaration of Human Rights believes that "*(...)freedom, justice and peace in the world are based on the recognition of intrinsic dignity (...)."* The Preamble to the International Covenant on Civil and Political Rights recognized not only that*"(...) freedom, justice and peace in the world are based on the recognition of the inherent dignity of all members of the human family and their equal and inalienable rights"* but that*"(...) these rights derive from the inherent dignity of the human being".*

4. Now, it should be mentioned that the Constitutional Court has stressed that dignity has a double nature, meaning, as a principle and as a fundamental right, *"as a principle it acts through the process of application and performance of the*

regulations by constitutional operators, such as: a) interpretative criterion; b) criterion for the determination of essential protected constitutional content of particular rights in order to resolve suppositions in which the exercise of rights evolves into a conflicting question; and c) criterion involving limits to legislative, administrative and judicial intentions, and even extending to the particulars."[9] While *"fundamental right is constituted in an area of guardianship and autonomous protection. That is where its exigibility and feasibility in the legal order reside, meaning, the possibility that individuals are legitimized to demand the participation of jurisdictional bodies for their protection in the resolution of conflicts that arise in the same intersubjective praxis of contemporary societies where different ways of affecting the essence of human dignity are concerned, before which we cannot remain impassive."*[10]

5. Therefore, *the recognition of human dignity as a basis of the constituted order is followed by his recognition as a free being capable of self-determination and with legitimacy to demand protection of that capability, as a being subject to setting his own expectations, able to make his own decisions, legitimized to choose his life options and able to act or to omit according to his needs and aspirations. In short, he is a being who knows himself sheltered by a general clause of freedom and ready to employ it to carry out his existence."* [11] Along this line, each person is responsible for setting his own, *"life options according to his choices and desires, without in so doing ignoring the rights of others and the existing legal system. It is what we call the right to freely explore one's own individuality."*[12] Of course, *"the right to explore one's own individuality presupposes, insofar as its effectiveness, that its owner has the willful capacity and enough autonomy to carry out value judgments that will let him establish life options according to which he will direct his existential path."*[13]

6. So, in my opinion, the autonomy of private will *"becomes a right intimately tied and linked to personal dignity, because it is built on the principle, suitable instrument for satisfaction of the basic needs through the power conferred upon it by the positive system in order to regulate his own interests in the legal traffic"*[14] or in different aspects of his life, assuming, of course, the consequences of his actions.

7. As it could be no other way, in a Social and Democratic State of Law, *"personal autonomy always begins with the recognition of his individuality so that the one owning it is so by virtue of the directions he freely sets for his existence. It is, then, the note of living as one thinks; it is the thinking of the self-determining man. In summary, it is the dimension of the unique existence, important in every experience, and that given its essential quality, must be recognized as an inalienable right by the State."* [15] Thus, it is clearly, that *"democracy is based, then, on the acceptance that a human being and his dignity are the beginning and the end for the State (Article 1 of the Constitution)."* [16]

8. Thus, *"the freedom to explore one's own individuality has a positive connotation and another negative one. The positive aspect of this right consists of man's ability in principle to do whatever he wants in his life and with his life. The negative aspect consists of civil society and the State's inability to make undue interference into the life of the holder of this right beyond a reasonable limit that in any case preserves its essential core"*[17]

9. One cannot avoid that *"the essence of the freedom to explore one's own individuality as a right is the recognition that the State makes the power natural for everyone to be how he individually wants to be, without coercion or unjustified controls or obstacles by others."* [18] Hence, the State may intervene by imposing restriction on that fundamental right so long as it has its support in the rights of third parties (such as in this case, the right to the health of non-smokers) and that it deals with reasonable and proportional restrictions. No matter how liberal the role of the State may have been, in no case did such abstentionism mean a total disregard for the fortune of its people.

10. Along this line, and as the Spanish Constitutional Court has underscored, it must be warned that *"the right to life has a content of positive protection that prevents configuring it like a right to freedom that includes the right to one's own death."*[19] And so, according to what has been set forth uniformly and repeatedly in case law by this Court, no fundamental right is of an absolute nature. One interpretation of this type becomes contrary to the constitutional postulates contained in our Constitution.

11. Therefore, with exception, the State finds itself obligated to intervene in safeguarding people's lives, provided there is a real danger where comprehensive integrity and people's health are compromised, and this is easily diminished. In such a scenario, it becomes legitimate for the State to prevent someone from committing suicide, so the person expressly states his desire to end his existence, and despite being prevented from keeping his commitment, he will not be subject to any sanction. The safeguard of life furthermore imposes a series of government steps, to the extent possible and reasonable, to reduce risks inherent to all human activities, not just linked to the relationship between *use and work* (for example, by banning bus traffic and establishing the required use of helmets at construction sites, respectively) where both the user and worker are subject to special State guardianship, for in all *everyday life situations* that government duty also exists as exemplified, for instance, in the requirement to use a seatbelt in cars and a helmet on motorcycles.

12. As Ulrich Beck so correctly stresses, the threats currently overhanging mankind no longer have their origin in indominatable nature but rather in human behavior that seeks to dominate it and take advantage of it to improve its quality of life through knowledge. Thus, we currently live in a *"risky society"* in which State cooperation becomes indispensable for risk management and to reduce risk to its minimum expression. By way of example, we should point out that with general

automobile use, while it saves time and money, one cannot deny that there has been no shortage of traffic accidents in which at least one automobile has been involved. To reduce the risks from driving motor vehicles, the State requires drivers to get a driver's license beforehand and for their owners to take out Obligatory Traffic Accident Insurance (SOAT) and to pass periodic technical inspections, among other measures.

13. However, what doubt can there be that the decision to use tobacco is one of the many manifestations of the right to free personal development which, while it can wind up in an addiction that when all is said and done is noxious and pernicious to health, is fruit of the human being's free choice, so it must be respected notwithstanding that through other means the State tries to discourage its use to reduce future medical expenses for this product's users and who, in spite of not smoking, end up breathing tobacco smoke.

14. Denying the people the chance to smoke under the pretext of reducing the costs of enforced health services in the future will have to assume by being scientifically proven that smoking is harmful to health. This is, by any measure, unreasonable and disproportionate. Under this logic the voluntary use of *"junk food"* should be banned, since it has been irrefutably proven that its regular use is damaging to health, or proscribing certain types of extreme sports where there is a latent risk of becoming injured, handicapped or even killed (like the practice of hang gliding), and where any accident can occur. This in principle should be undertaken by the State or the affected individual himself, because generally private insurance does not cover accidental events resulting from such activities.

15. However, *"living in community and experiencing the sensation of being equal and constitutionally free before others also includes the possibility of acting and feeling differently with regards to aspirations and personal self-determination. The power of each individual to set those life options according to his own choices and desires, without ignoring at the same time the rights of others and the existing legal system, is what we call the right to free personal development."*[20]

16. People cannot be compelled to lead a healthy life. Such an aspiration, belonging to a totalitarian State, is not in accordance with the values and specific and inherent principles that inspire our Magna Carta. As shown in preceding considerations, it may encourage or discourage certain types of behaviors through fostering measures. In that line, "*the lawmaker may prescribe (...) the way in which (a person) must behave with others, but not the way in which (one) must behave with (himself), to the extent that his behavior does not interfere with anyone's sphere of action"* [21]. Therefore, I do not share the paternalistic and tuitive thesis that begins with the premise that the State always and in all cases knows what is best for everyone, even in areas where the rights of third parities are not affected or peaceful and civilized coexistence based on mutual respect.

17. And, *"thinking of the person like a robot has its evitable and inexorable consequences, and the first and most important one of all is that in matters pertaining solely to the person, only for him should they be decided"* [22]. However, even the mistake itself is fundamental to the maturation of ideas and future actions, because one learns from mistakes. Indeed, the right to free personal development *"does not establish that there are certain personality models admissible and others excluded by the system. Instead, that system says that it is up to the person himself to choose his life plan and develop his personality according to his interests, desires and convictions, so long as it does not affect the rights of third parties or breach the constitutional order"* [23]

18. Unquestionably, smoking creates a series of costs that go beyond what is subject to being monetarily evaluated for both the "active" smoker, such as, for instance, the act itself of purchasing cigarettes or the undeniable deterioration of his health that tobacco use causes in the end, and for "passive" smokers, who by having to breathe smoke from those who smoke despite not performing that action and in many cases perceive it as something disagreeable, internalize the cost of the stated *negative externality.* Thus, and in order to correct such a situation, the State finds itself with the unavoidable obligation to regulate the use of these types of products.

19. I understand by *externalidad (externality / spillover / neighborhood effects)* the impacts that an economic agent creates on third parties and that the market does not return to the one who created it. Such impacts may be *negative (negative externality / external cost),* in case the agent does not assume all the costs of his activity and they end up being assumed by other agents or by society as a whole *(social cost),* or positive *(positive externality / external benefit)* in case they benefit third parties who assume no cost whatsoever *(free riders).*

20. In a relationship of use, in principle each user assumes the benefits and the risks that the product he acquires causes (for which he is even civilly responsible against third parties). However, the existence of the *externalities* warned of in the above considerations and the elevated transaction costs make it impossible for the particulars to privately resolve the damages caused by this negative externality (it would be a fantasy that we would all contractually agree that everyone would smoke at home and not in the street, as well as how eventual breaches of this agreement would be punished) and legitimize the State's intervention in regulation of this product's use, but this must be reasonable and proportional.

21. A situation of complete deregulation would wind up harming those who do not share the smoking habit; despite not being dedicated to such an activity, they would end up suffering from all the discomforts of tobacco smoke as well as the harmful consequences such an activity causes on their health.

22. While the State tolerates its use, it must in no way encourage it, because in the end, the harm it causes on the health of the non-smoking population is an

externality not ordinarily assumed by the smoker and that quite likely will be assumed by the governmental health systems, since most of the population is poor and does not have the resources necessary to be cared for in private medical centers. Under this logic, it becomes valid for the State to discourage this type of use, such as, for example, imposing higher tax burdens, imposing warnings on the product signage, but especially by providing the most information possible so that citizens will learn about the risks entailed by the use of such a product. Although some do not believe it, in general, consumers act rationally.

23. To that end, educational campaigns play a leading role in reducing tobacco use. Use is not reduced with bans, but by building habits, which are generally built from early age. Otherwise, plain and simply, informality will be created, because people will continue disobeying the stated bans on tobacco use and business owners will end up allowing their customers to disobey, especially if one considers that it becomes materially impossible for the State to entirely supervise places all the time. Regulation cannot be made on the backs of reality.

24. More than an expense, such campaigns should be understood as an investment that will not only allow the reduction of pathologies that in the future will afflict the users of such a product, but as an investment in current improvement to the public's quality of life by preventing non-smoker third-party troubles.

Inconsistencies in Tobacco Use Regulation

25. First of all, and despite not having been alleged by the parties, I believe it is appropriate to advise that the current regulatory framework is openly inconsistent, because despite proscribing smoking in open places in educational institutions, it tolerates it in open public places like for instance, in a stadium (while the public is watching a show) or in the ticket offices adjacent to them (while the person is waiting in line to buy a ticket), despite the fact that there may even be minors among the attendees of that place. Given the concentration of people and their proximity, the discomfort and pernicious effects from tobacco smoke compared to those of an enclosed public place, the ban on smoking in such locations should also be extended to them.

26. Similarly, it becomes unacceptable for smoking to be allowed in parks where next to them are games designed for children, or while one waits at the street corner for the traffic light to change to cross street intersection, etc.

27. Therefore, despite *"in exercising constitutional control, the judge's role is not to assess whether the thinking done by the lawmaker when defining the regulating and subsequently limiting rights, are the best one, (because) his constitutional job is simply to control the virtual excesses of constituted power or, in other words, the arbitrary, unnecessary, useless or disproportionate limitations of fundamental rights"* [24], in my opinion, he cannot fail to stress that not even in the public street should smoking be

allowed so as not to harm people with the healthy habit of not smoking, particularly when cigarette butts will end up in the public street because smokers do not ordinarily carry around an ashtray while moving.

Analysis of the Specific Case

28. Given that the purpose of the questioned legislative measures in this litigation is to safeguard non-smokers' right to health by disproportionately (in the plaintiffs' opinion) restricting the right to smokers' free personal development and free private initiative, it becomes necessary to look to the *disproportionality test* so that the decreed solution can consider all the compromised legal goods.

29. According to Constitutional Court created case law, this test is constructed based on 3 tests to be applied successively: suitability, need and proportionality. Such tests can clearly be defined as follows:

- In light of the *suitability test*, the decreed legislative measure must have a goal and be appropriate to achieve that goal. That goal in turn must not be constitutionally banned and must be socially relevant.

- The *needs test* examines whether within the world of legislative measures the State could apply to achieve such an objective, the adopted one is the least restrictive of rights.

- The *strict or prudent proportionality test* seeks to establish whether the legislative measure keeps a reasonable relationship with the goal designed to be achieved through a balance between its costs and benefits.

Hence, my position will be expounded by taking this methodology into account.

30. Regarding this particular, I should stress that "*the principle of proportionality already carries the assumption of the requirement of reasonability and, furthermore, also includes the principle of strict or prudent proportionality.*"[25]

Concerning the Tobacco Smoking Restriction in Enclosed Public Places Meant Exclusively for Smokers

31. Concerning the extremity of the claim referring to the existence of enclosed places solely and exclusively for smokers or that in making a correct differentiation between the public tobacco user and those who do not use it, and where it establishes proper places meant exclusively for the former, I believe that while the regulation pursues a constitutionally legitimate goal—reducing tobacco use--and the imposed measure is suitable and proper to achieve such an objective, it cannot be denied that there are less serious mechanisms to safeguard non-smokers' right to health.

32. In my opinion it is possible to harmonize the basic rights of those involved (smokers, non-smokers and business owners offering leisure services to smokers), because there are alternative measures that would make such harmonization possible.

33. To the extent that it does not harm the neighbor who does not smoke (that is, cause *negative externalities)*, I see no constitutionally valid justification to restrict either the right to smokers' free personal development or the rights to free private initiative and free enterprise of those who invest in satisfying that public consumer who demands leisure places where he can smoke, even more so if one way or another the latter provide growth to the country by paying taxes and generating employment.

34. Therefore, and so long as there are places with the implements necessary to distinguish and isolate smoking areas from non-smoking ones, I find no reason to proscribe the existence of the first of the stated areas. So, if a non-smoker voluntarily decides to go to a place for smokers, he must assume the nuisances that tobacco smoke causes to others, since there is a wide offering of alternative places where it is not allowed.

35. Notwithstanding the aforementioned, it should be specified that in addressing the above considerations, government regulation on enclosed public places where smoking is allowed must be extremely strict and have the ventilation and smoke absorption measures needed to protect the health of not only the non-smokers but also the workers in such a business, because regardless of whether they share the smoking habit, while they are working (they may have willingly decided to work in such establishments and receive remuneration in exchange for their work), they are also passive smokers. Therefore, the State cannot remain indifferent to them (in spite of the fact that technically they are not internalizing a *negative externality*).

36. For this reason, including in the hypothetical scenario that there are places aimed only for smokers (like Tobacco Bars and Cigar Bars in the United States), such a regulation must be scrupulously obeyed to safeguard the health of the staff working in such an establishment. Therefore, this extreme of the claim must be declared **GROUNDED** by not passing the proportionality test.

About the Restriction on Smoking Tobacco in Open Spaces of Educational Institutions Designed for an Adult Public

37. With respect to this extreme of the demand, it should first be indicated that while it becomes legally impossible to prevent minors from being students of such institutions, this restriction finds constitutional justification in addition to the ones mentioned in the above paragraphs of this vote concerning the higher interest of such minors. Since they are still in the formative state (not just physically, but

mostly mentally), they must be free not only from suffering the noxious health effect produced by tobacco produces but on behaviors that they might imitate.

38. So, in open public spaces of such educational institutions, it cannot be denied that the *negative externality* caused by those who do smoke ends up harming those who do not and that there will probably be minors among those injured. Therefore, it becomes valid that such a situation be regulated. In my opinion, there is no doubt that the challenged regulation pursues a constitutionally valid aim and there is no way to prevent non-smokers from being harmed by tobacco smoke, as has been developed in the above sections. For this reason, I deem that the challenged regulation passes the tests of *suitability and need.*

39. Insofar as the *test of strict or prudent proportionality*, I believe that the measure adopted by the State brings an *intervention of mild intensity* in the right to free personal development of the smoking education community whose corollary prevents non-smokers from having to bear the discomforts caused by tobacco smoke. Thus, the *degree of performance* of smokers' right to health is *elevated* by preventing it from being damaged absolutely. For such consideration, I am of the opinion that this extreme of the claim must be declared **BASELESS.**

S. ÁLVAREZ MIRANDA

NOTES

[1] NINO, Carlos Santiago: *Ética y derechos humanos. Un ensayo de fundamentación*, 2nd Edition expanded and revised, 2nd reprinting, Astrea, Buenos Aires, 2007, p. 414.
[2] NINO, Carlos Santiago: *Ética y derechos humanos.*
[3] Understanding this power as an integral part of the contents of the right to *free exploration of one's individuality* as an unnamed or implicit right derived from the principle of human dignity, the Constitutional Court has interpreted that "the valuation of the person as center of the State and society, as a moral being with the capacity of self-determination, means that he must also be guaranteed the free display of such capacity through his free general action in society (STC N.º 0007-2006-AI/TC, FJ. 47).
[4] DWORKIN, Ronald: *Taking Rights Seriously*, Ariel, Barcelona, 1989, p. 289.
[5] NINO, Carlos Santiago: *Ética y derechos humanos.* 437-438.
[6] RIBEYRO, Julio Ramón: *La palabra del mudo*, Planeta, Lima, 2009.
[7] Judgment of the Spanish Constitutional Court No. 53/1985.
[8] Judgment of the Peruvian Constitutional Court No. 2273-2005-PHC/TC.
[9] Judgment of the Constitutional Court No. 2273-2005-PHC/TC.
[10] Judgment of the Constitutional Court No. 2273-2005-PHC/TC.
[11] Judgment of the Colombian Constitutional Court No. C-373-02.
[12] Judgment of the Colombian Constitutional Court No. T-124/98.
[13] Judgment of the Colombian Constitutional Court No. SU-642/98.
[14] Judgment of the Colombian Constitutional Court No. T-468/03.
[15] Judgment of the Colombian Constitutional Court No. T-594/93.
[16] Judgment of the Peruvian Constitutional Court No. 00030-2005-PI/TC.
[17] Judgment of the Colombian Constitutional Court No. T-542/92.
[18] Judgment of the Colombian Constitutional Court No. T-594/93.
[19] Judgment of the Spanish Constitutional Court No. 120/1990.
[20] Judgment of the Colombian Constitutional Court No. T-124/98.
[21] Judgment of the Colombian Constitutional Court No. C-221/94.
[22] Judgment of the Colombian Constitutional Court No. C-221-94.
[23] Judgment of the Colombian Constitutional Court No. C-481/98.
[24] Judgment of the Colombian Constitutional Court No. C-475/97.
[25] Judgment of the Peruvian Constitutional Court No. 000045-2004-PI/TC.