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Right to health and tobacco harmfulness: discrepancies between the jurisprudence of the Supreme Court and the Superior Court of Justice[1]

Direito à saúde e nocividade do tabaco: discrepâncias entre a jurisprudência do STF e do STJ

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Abstract:

The Superior Court of Justice - STJ - has a long-standing case law denying the right to compensation to smokers and their families when they seek compensation for damage to health caused by tobacco products. For the STJ, the free will of the smoker prevails when deciding to smoke, even if he/she knows the health risks inherent in tobacco consumption. The court also considers that, under the Consumer Protection Code, cigarettes are not defective products, as they do not offer legitimate expectations of safety to the consumer. Apparently, the STJ's orientation contrasts with decisions of the Federal Supreme Court - STF - which give primacy to the protection of goods such as health and the environment when put at risk by economic interests. The present article seeks to emphasize the contrast between the two orientations, especially after the STF decision that considered constitutional the prohibition of tobacco advertising.

Keywords: compensation for smokers; right to health;ban on tobacco advertising;consumer protection.

Resumo:

O Superior Tribunal de Justiça – STJ – tem remansosa jurisprudência negando direito de indenização aos fumantes e às suas famílias quando buscam reparação dos danos à saúde causados pelos produtos derivados do tabaco. Para o STJ, prevalece o livre arbítrio do fumante ao decidir fumar, ainda que conhecendo os riscos à saúde inerentes ao consumo de tabaco. O tribunal também considera que, à luz do Código de Defesa do Consumidor, o cigarro não é um produto defeituoso, por não oferecer legítima expectativa de segurança ao consumidor. Aparentemente, a orientação do STJ contrasta com decisões do Supremo Tribunal Federal – STF – que dão primazia à proteção de bens como a saúde e o meio ambiente quando colocados em risco por interesses econômicos. O presente artigo procura enfatizar o contraste entre as duas orientações, especialmente após a decisão do STF que considerou constitucional a proibição da publicidade de tabaco.

***Palavras-chave**: indenização para fumantes; direito à saúde; proibição da publicidade de tabaco; defesa do consumidor.*

[1] Texto traduzido a partir de Inteligência Artificial.

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1 Introduction

This article addresses an apparent paradox in the comparative observation between the constitutional jurisprudence of the Federal Supreme Court (STF) on the right to health in a situation of conflict with free enterprise and the decisions of the Superior Court of Justice (STJ) that reject claims for compensation in favor of victims of diseases caused by tobacco. Although the STF has proclaimed the primacy of the right to health over the interests of the private sector, the STJ does not attribute a preferential value to the protection of the health of smokers, despite the scientific recognition of the high harmfulness of tobacco, giving greater relevance to the individual decision to smoke.

Perhaps the STJ is still experiencing what has already been designated as the "digestive process" of fundamental rights, in the same way that happened with the doctrine and with the STF itself[2]. The prevailing doctrine, at the beginning of the constitutional text of 1988, spoke of the merely programmatic nature of certain norms of fundamental rights, having undergone a process of adaptation until the full recognition of the new constitutional order. A similar process occurred with our constitutional jurisprudence. Only eleven years after the promulgation of the Constitution, in 1999, the STF adopted a first decision to recognize the effectiveness of the right to health[3]. From this ruling, the jurisprudence of the STF went through a phase of maturation until it became emphatic in the sense that "[t]he right to health represents a constitutional consequence inseparable from the right to life" and the public power that denies it will fall "into serious unconstitutional conduct".[4]

Although the decisions of the STF refer to the right to health related to public policies, they serve as a parameter for the purposes of this study, and perhaps more than enough, since

[2]On the slow assimilation of the new constitutional paradigm of 1988: PEDRON, Flávio Quinaud; DUARTE NETO, João Carneiro. Transformations of the STF's understanding of the right to health. **Revista de Información Legislativa**: RIL, [*s. l.*], v. 55, n. 218, p. 99-112, April/June 2018. Available at: http://www12.senado.leg.br/ril/ editions/55/218/ril_v55_n218_p99.

[3] "JURISDICTION – INTERLOCUTORY APPEAL – TRANSIT OF THE EXTRAORDINARY. [...] HEALTH – PROMOTION – MEDICINES. The precept of Article 196 of the Federal Constitution guarantees that the State provides the needy with the essential medicines for the restoration of health, especially when a contagious disease such as acquired immunodeficiency syndrome is at stake." Federal Supreme Court. Interlocutory appeal in interlocutory appeal No. 238.328-0/RS. Aggravating circumstance: Municipality of Porto Alegre. Aggravated: Carlos Fernando Becker. Rapporteur: Judge Marco Aurélio. **Diário da Justiça**, Feb 18. 2000. The script of the first judgments of the Supreme Court in health matters was recorded by Pedron and Duarte Neto in the cited article.

[4]Federal Supreme Court. Interlocutory appeal in extraordinary appeal no. 271.286-8/RS. Aggravating circumstance: Municipality of Porto Alegre. Aggravated: Diná Rosa Vieira. Rapporteur: Judge Celso de Mello. **Diário da Justiça**, 24 Nov. 2000.

while in the cases judged by the Constitutional Court the cost of helping those affected is distributed jointly throughout society, the decisions of the STJ, On the contrary, they overwhelm the whole of society, insofar as diseases caused by tobacco overload the public system, causing direct and indirect losses reaching R$57 billion, while the collection of taxes paid by the tobacco industry is limited to R$13 billion[5]. This burden could be considerably alleviated if individual claims for compensation by sick smokers or their family members were upheld.

Using the deductive method and based on the bibliographic research carried out in the jurisprudence of the STF and the STJ, in legal and health doctrine published in national and foreign journals and in documents and websites of national and international organizations related to the subject, this article proposes to highlight the divergence of the STJ's orientation in compensation claims related to diseases caused by smoking when faced with the values that emanate from the decisions of the Supreme Court in relation to the right to health.

2 Harmful products: risk and alert levels

Special Appeal No. 1,113,804-RS, judged on 4/27/2010, became the *main case* of the STJ, exempting the tobacco industry from liability for health damage caused by smoking. One of the reasons for the decision is to consider cigarettes as *a potentially harmful product* (Article 9 of the Consumer Protection Code [CDC]), rejecting the classification of the product as *highly* harmful or dangerous to health (under the terms of Article 10). The decision argues:

[5] Data reported through 2017, according to the National Cancer Institute. Available in: https://www.inca.gov.br/observatorio-da-politica-nacional-de-controle-do-tabaco/custos-atribuiveis-ao-tabagismo. Retrieved 31 Jul. 2022. In order to correct the aforementioned distortion, the Attorney General's Office filed a lawsuit for reparations in favor of the two largest cigarette manufacturers installed in Brazil, due to the expenses assumed by the Unified Health System – SUS – in the treatment of tobacco-related diseases. News about it on the AGU website. Available at: https://www.gov.br/agu/pt-br/comunicacao/noticias/fabricantes-de-cigarros-tem-30-dias-para-responder-acao-da-agu--877836. Retrieved 31 Jul. 2022. The nexus between the tobacco industry's taxes and the cost of expenses with the treatment of smokers' diseases was highlighted in the judgment of the Precautionary Measure in Precautionary Action No. 1,657 of Judge Joaquim Barbosa: "[...] There are the vicissitudes and idiosyncrasies of the tobacco industry market, which are alleged to justify differentiated and stricter tax treatment, both for reasons of public health (financing of prophylaxis services and treatment of diseases caused by tobacco industry products) [...]" (STF. Precautionary Measure in Precautionary Action No. 1.657-MC, rapporteur of the judgment Min. Cezar Peluso, j. 27/06/2007). A similar allusion was made in the judgment on the merits, of the Federal Regional Court of the 2nd Region, which ruled in favor of the legality of the cancellation of the special registration of a company in the sector for tax non-compliance: "The State accepts the development of the activity [of cigarette manufacturing] in particular because of the tax collection resulting from it, as compensation for the damage caused by the marketed product". The TRF-2 decision was subsequently upheld by the STF (RE 550.769-RJ, discussed below), whose decision cites the decision referenced here.

a) the Constitution, in its article 220, § 4, explicitly "seals the marketing of cigarettes in the national territory, imposing restrictions only on the advertising of the product";

b) to think otherwise would be to "interpret the Constitution in the light of the Consumer Protection Code, which is, of course, impracticable";

c) in addition, it would resurrect the vetoed article 11 of the CDC;[6]

d) history demonstrates "the disastrous effects of banning the sale of products closely linked to the daily life of a country, as happened in the United States of America with the so-called 'Prohibition'".

While it is plausible that Section 220, § 4, in imposing restrictions on the advertising of the goods and services it mentions, implicitly admits their production and marketing (and thus argument a is true), the assertions made in *b*, *c,* and *d* are not correct, as it is intended to demonstrate below.

2.1 Highly harmful or dangerous products are not, ipso facto, prohibited

All the goods and services mentioned in article 220, paragraph 4, of the Constitution are admitted to the market, even if they offer "damage arising from their use".[7] Hazardousness is not a determining cause for the prohibition of the product. The solution is proper regulation and inspection. There is a didactic example in the case of pesticides, products that are rigorously inspected because they pose a threat to the environment. Law 7.802/1989 requires that they be previously registered with a federal agency, in this case, the Ministry of Agriculture, Livestock and Supply (MAPA).

In February 2020, a ministerial ordinance – Ordinance MAPA No. 43, of 02/21/2020 – established the "tacit approval" of the release of pesticides and other chemicals of high danger to human and animal health due to the simple expiration of the deadline for manifestation by the Ministry of Agricultural Defense.

In an Action for Failure to Comply with a Fundamental Precept – ADPF No. 656 – the plenary of the Federal Supreme Court suspended the validity of the ordinance[8], not admitting the relaxation of surveillance measures. Therefore, arguments *b* and *c are not correct*, i.e.:

[6] The vetoed article established the following: "Art. 11 – The product or service that, even if properly used or enjoyed, presents a high degree of harmfulness or danger must be immediately withdrawn from the market by the supplier, always at its own expense, without prejudice to the responsibility to repair the damages."

[7] In a STF ruling, Judge Dias Toffoli said that the rule of article 220, § 4, CF, "is not intended to limit the restriction of advertising only to the products described therein" (ADI No. 4.613-DF, Rel. Dias Toffoli, j. 20/09/2018. More comments below).

[8] BRAZIL. STF. ADPF 656-DF. Virtual plenary. Rel. Min. Ricardo Lewandowski, j. 22/6/2020.

highly dangerous products can be allowed, as long as they are properly controlled. In fact, the veto of Article 11 makes it clear that the mandatory withdrawal of highly harmful or dangerous products from the market is not necessarily the policy to pursue. If a product represents a serious risk to life and safety, it is essential that the State acts in regulation and inspection for the correct compliance with control standards. In this regard, the CDC and other laws and regulations apply only the provisions of the Constitution itself.

2.2 The tobacco control policy does not contemplate prohibiting the production and marketing of the product

As for argument *d* (history demonstrates the disaster of the prohibition of the "marketing of products closely linked to the daily life of a country", as happened with Prohibition in the United States), the parallel with tobacco is inappropriate. The prohibition of the production and trade of alcoholic beverages in the United States in 1920 occurred in an entirely different historical, geographical, and social context. Here and now it is not a question of banning tobacco[9]. The current policy aims to "continuously and substantially reduce the prevalence of consumption of and exposure to tobacco smoke", as expressed in Article 3 of the Framework Convention on Tobacco Control – FCTC[10] – a policy to which Brazil has adhered and has been vigorously implementing, especially since the enactment of Law 9.294/1996.

The tolerance of tobacco, despite its harmfulness, is precisely to avoid the disastrous collateral results of an interventionist and radical policy, as happened with Prohibition in the United States. Banning the product would undoubtedly lead to an increase in smuggling, raising crime rates. Therefore, the most advisable state policy is to accept the presence of the product in the market, in parallel with policies aimed at reducing consumption, as decided by the Constitutional Court of Colombia in 2010. The court proclaimed that the State must discourage certain economic activities that, even if lawful, cause harm to society and third parties, and it is

[9]It is true that this is already being considered in Australia, the so-called end of the *tobacco game* , but as the culmination of a long-term public policy. In this sense: https://tobacco-endgame.centre.uq.edu.au/. Retrieved 15 Mar. 2023. In Brazil, there are authors who defend the prohibition of tobacco products, because harmfulness does not come "from the form of consumption, but from the consumption itself." See: MARINONI, Luiz Guilherme. Consumer protection against notions of defective product and service: the issue of tobacco. **Revista Jurídica**, nº 370, August 2008, p. 29 to 41.

[10] WHO. FCTC. Article 3. Goal. The purpose of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco smoke consumption and exposure by providing a reference point for tobacco control measures to be implemented by Parties at the national, regional and international levels in order to continuously and substantially reduce the prevalence of tobacco smoke use and exposure tobacco.

up to the legislator to dictate rules that configure a *passive market* for the harmful product, allowing, on the one hand, its production and marketing and, on the other, establishing policies to discourage consumption, since a total ban could generate a [11]illicit market. In a similar reasoning, Judge Cezar Peluso, in *obtaining an opinion*, stated that the manufacture of cigarettes "is simply tolerated by the Government, which has no reasonable policy and regulatory alternative in this regard".[12]

In the national doctrine, Amanda Flávio de Oliveira proposes the development of an economic policy to discourage the consumption and production of tobacco based on the weighting between values or advantages and disadvantages of competitive and free production and consumption. Its theoretical foundation is the "right not to smoke", the result of the combination of the rights to life and liberty, which require the defense and provision by the State. The policy of discouraging tobacco would be a form of access to a dignified life[13].

Another example of tolerance to a highly harmful product, with a tendency to eliminate its use, is asbestos, a mineral widely used industrially. One of its best-known applications is in the construction of roof tiles and water tanks. It was estimated that in Brazil about 50% of homes were covered by corrugated asbestos tiles and 80% of water tanks were made of the same material[14]. In Direct Action of Unconstitutionality No. 4,066, the plenary of the STF, taking into account the medical consensus on the contraction of serious diseases as a direct effect of exposure to asbestos and the impossibility of its safe economic exploitation, decided that the tolerance to the use of the product, established in Law 9,055/1995, "does not adequately and sufficiently protect the fundamental rights to health and a balanced environment" and "is not in line with the with international commitments of a balanced nature". assumed by Brazil."[15] The majority ruled for the unconstitutionality of the law in question, although without a sufficient quorum to attribute binding force to the judgment.

Tobacco, like asbestos, does not offer the possibility of safe consumption. Due to the effects of nicotine, a psychoactive drug that causes dependence, smoking is classified as a disease and included by the International Classification of Diseases (ICD-10) in the group of mental and behavioral disorders. Those affected are not only smokers, but also those who inhale

[11] COLOMBIA. Constitutional court. Full room. Judgment C-830/10. J. 20/10/2010. Available at: https://www.corteconstitucional.gov.co/RELATORIA/2010/C-830-10.htm. Access date: 25 out. 2021.

[12] STF. Precautionary Action in Precautionary Measure No. 1.657-6-RJ, rel. of the judgment Min. Cezar Peluso, j. 22/7/2007. Further comments on this judgment are presented below.

[13] OLIVEIRA, Amanda Flávio. **Right to (not) smoke**: a humanistic approach. Rio de Janeiro: Renovar, 2008, especially p. 123 et seq.

[14] As indicated in ADI 4.066-DF.

[15] BRAZIL. STF. ADI 4.066-DF. Rel. Min. Rosa Weber, j. 24/08/2017.

smoke involuntarily because they are in the same physical environment where tobacco products are consumed, the so-called passive [16]smokers.

Brazilian legislation contemplates public policies to prevent the harmful effects of tobacco on health. An example is the Youth Statute (Law No. 12,852/2013). The policy of health care for young people must include topics and educational campaigns related to the consumption of alcohol, tobacco and other drugs "as causes of dependence" (art. 20, paragraphs IV and X). The direct causality established by law between tobacco and addiction is relevant, which only reflects the scientific consensus on the matter.

2.3 Utility and risk of dangerous goods

Although the use of a product carries a certain degree of risk, what is desired is its social utility. Drugs, for example, can produce undesirable side effects, but the benefit they produce is much greater. Therefore, care is not taken to avoid the circulation of products solely because of the existence of adverse effects implicit in their use, but to control the occurrence of possible adversities. The right means to achieve maximization of profits with the minimization of negative incidents (in addition, of course, to adequate production technology) is information. The consumer must be informed about the correct way to use a product and how to avoid problems inherent in use. To this end, the CDC is concerned not only with repairing, but also with preventing damage, imputing to the manufacturer or producer the duty to warn, because it is this economic agent that can "foresee the reasonable use or uses that can be made of it [product] and foresee the associated risks, an element to be weighed in the analysis of its usefulness or costs and benefits".[17]

Articles 8, 9 and 10 impute to the supplier the duty to inform about the risks of products and services. Taking into account that the levels of danger are different, these articles constitute a progressive scale of risk. Each level of the scale includes measures and warnings capable of providing safe use of products corresponding to the respective risk category.

Article 8 refers to products that pose risks "considered normal and foreseeable by their nature and fruiting". It is exactly what is called *inherent risk*, as with kitchen knives, which

[16] According to INCA. Available at: https://www.inca.gov.br/tabagismo/tabagismo-passivo. Retrieved October 26. 2021.

[17] SILVA, João Calvão da. **Producer liability**. Coimbra: Almedina, 1990, p. 529. Producer liability (the dominant nomenclature in Portuguese law) is paradigmatic of a special civil liability regime relating to the distribution of risks (FRADA, Manuel A. Carneiro da. **Contract and duties of protection**. Coimbra: Almedina, 1994, p.128).

must be sharpened to properly fulfill their purpose, demanding from the consumer only the appropriate care to use the product consistent with its purpose.

Article 9 covers products with *harmful potential.* Therefore, it is the supplier's responsibility to prevent damage through ostensive and adequate information on the harmfulness or danger of the product. This is the case of medicines; The package leaflet should provide information about the indications for use and therapeutic properties, as well as contraindications, side effects and drug interactions.

Antônio Herman Benjamin, author of the theory of quality, states that products can present an *inherent or latent* danger (normal and predictable due to the nature and enjoyment of the product) or *acquired* danger (granted to products that become dangerous due to a defect). As Bruno Miragem reminds us, "the fault that characterizes the defect is in the abnormality of the risk"; High-risk products should be evaluated "in comparison with the utility obtained from them."[18]

The defect may be due to insufficient or inadequate design, manufacture, or information about the use and risks of the product. Useful products may pose risks due to improper use, such as medications, if administered in disagreement with correct therapeutic indications. Therefore, information is the proper means of preventing harm to the consumer.

Article 10, on the other hand, refers to products with *a high degree of harmfulness or* dangerousness, called, by Antônio Herman Benjamin, products with *exaggerated dangerousness*, because *the information provided to consumers about them does not produce greater results in mitigating risks*. In these cases, according to Benjamin, there is "an immense disproportion between the costs and social benefits of their production and marketing." Inspired by U.S. law, Benjamin indicates some criteria for identifying products of exaggerated hazard: if the damage hypothetically caused by the product is of great gravity; if the risk of the product cannot be eliminated by the exercise of reasonable care; and what value the activity (or product) has for the community[19].

Following a similar path, João Marcello de Araújo Júnior used the *theory of norms* to express that there will be *a high degree of harmfulness* "whenever the product or service is

[18] MIRAGEM, Bruno. **Consumer Law Course**. 8th ed. São Paulo: Revista dos Tribunais, 2019, p.701.

[19] BENJAMIN, Antônio Herman. Comments on articles 12 to 27. *In:* OLIVEIRA, Juárez (Coord.). **Comments on the Consumer Protection Code**. São Paulo: Saraiva, 1991, especially p.49a 53. It can also be found in: BENJAMIN, Antônio Herman V.; MARQUES, Claudia Lima; BESSA, Leonardo Roscoe. **Manual de Direito do Consumidor**. 3rd ed. São Paulo: Revista dos Tribunais, 2010, p. 142 to 145.

contained among those that international or national experience has listed among those that necessarily cause harm to the life and health of consumers."[20]

Consequently, the classification of a product in a particular risk category cannot be arbitrary. The degree of harmfulness or danger must be objectively assessed, in accordance with empirical studies on the potential and magnitude of the damage that the product may cause.

The risk of a product is considered *objective* when it is recognized as something external to individual or societal perception or interpretation; the effects associated with the product are independent of any purely subjective assessment; and the magnitude of the damage is based on a statistical notion, universal and absolute - universal - because it is present in all the countries where the product or the technique inherent to it is practiced and absolute because it has the same incidence and probability of harm occurring anywhere[21].

One of the modes of objective assessment of the risk of a product is expressed by the formula *Rie [t = (Ai ,Ve)]t*, in which *Ai* represents the probability of an event of a certain intensity – *i* – occurring during a time of exposure – *t* –, of something or someone vulnerable – *Ve* – and exposed to risk. The risk *is* expressed as the probability that the element *e* will suffer a loss during the time of exposure as a result of an event *t* with an intensity greater than *i*. Thus, risk is understood as the probability of loss during a certain period of time *t*, as a result of the materialization of the threat and the condition of vulnerability. Risk assessments are commonly applied to the development of industrial projects, but they serve as a parameter to consider the social impact of damages. A 2019 study conducted an integrative review of the literature on risk assessment systems for new product development and highlighted that "risk criticality" stems from the "intersection between the severity or impact of risk and the likelihood of occurrence."[22]

Similar concepts are in place in a normative environment. The European Union – EU – designates four steps to be followed in risk assessment, namely: a) the identification of the hazard (which agents can produce a certain harmful effect); (b) the characterization of the

[20] ARAÚJO JÚNIOR, João Marcello de. Comments on articles 8 to 17. *In*: CRETELLA JÚNIOR, José; DOTTI, René Ariel (coord.); ALVES, Geraldo Magela (ed.). **Comments on the Consumer Code**. Rio de Janeiro: Forensics, 1992. It should be noted that neither Araújo Júnior nor Benjamín, mentioned above, expressly refer to tobacco or any other specific product. Both speak only in theory.

[21] RAMIREZ, Omar Javier. Risks of technological origin: conceptual points for a definition, characterization and recognition of the perspectives of the study of technological risk. **Revista Luna Azul**, [*s.l.*], n.29, jul.-dez. 2009. Available in: http://lunazul.ucaldas.edu.co/downloads/Lunazul29_9.pdf. Retrieved 2021/10/23.

[22] SOUZA, Sara Marque O. A.; BEAL, Valter Estevão. Risk Management Assessment for New Product and Technology Development: An Integrative Review of the Literature. *In*: INTERNATIONAL SYMPOSIUM ON INNOVATION AND TECHNOLOGY, 5., 2019, São Paulo. **Electronic Annals** [...]. São Paulo: Blucher, 2019. Available at: https://pdf.blucher.com.br/engineeringproceedings/siintec2019/13.pdf. Retrieved 31 Jul. 2022.

hazard (estimating, in quantitative and qualitative terms, the nature and severity of the adverse effects); (c) exposure assessment (quantitative or qualitative estimation of the probability of exposure to the harmful agent, with the provision of data related to the probability of contamination or exposure of the population to the hazard); (d) risk characterisation (qualitative or quantitative estimation of the likelihood, frequency or severity of the adverse effect).[23]

Data provided by several international institutions, such as the UN and the World Health Organization (WHO), and in Brazil by the National Cancer Institute, allow the risk of tobacco to be measured. According to a 2021 report by the World Health Organization, there are 1,000 million smokers in the world, and tobacco is responsible for 8 million deaths per year. Therefore, smoking is considered an epidemic[24]. Tobacco is linked to more than 50 diseases, including several types of cancer, respiratory and cardiovascular diseases[25]. Applying these data to the four risk assessment criteria of the European Union, we have to:

a) *Identification of the danger*: tobacco is a global epidemic, as declared by the WHO, which publishes an annual report on the world situation[26];
b) *Characterization of the hazard*: the harmfulness of tobacco to human health is manifested as the cause of more than 50 diseases, including several types of cancer, diseases of the respiratory system and cardiovascular diseases[27];
c) *Exposure assessment* : according to data from the United Nations, there are 1.1 billion smokers in the world[28], people who are potentially exposed to the risk of tobacco-related diseases; in addition to smokers, tobacco can also affect the health of non-smokers; in

[23]These criteria are set out in the European Communities' Communication on the Precautionary Principle. Available at: https:/publications.europa.eu/en/ publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en. Retrieved 3 Aug. 2022.

[24] According to PAHO. Available at: https://www.paho.org/pt/noticias/27-7-2021-oms-relata-progresso-na-luta-contra-epidemia-tabaco-e-destaca-ameaca. Retrieved October 27. 2021. Full report available at: https://www.who.int/teams/health-promotion/tobacco-control/global-tobacco-report-2021. Retrieved 27. Oct.2021.

[25] According to the National Cancer Institute. Available at: https://www.inca.gov.br/perguntas-frequentes/quais-sao-doencas-causadas-pelo-uso-cigarro-e-outros-produtos-derivados-tabaco. Retrieved 27. Oct.2021.

[26] WHO Global Tobacco Epidemic Report 2021: Addressing new and emerging products. WHO, [*s. l.*], 17. 2021. Available in: https://www.who.int/teams/health-promotion/tobacco-control/global-tobacco-report-2021. Retrieved 31 Jul. 2022.

[27] According to the National Cancer Institute. **What are the diseases caused by the use of cigarettes and other tobacco products?** Brasilia: INCA, Jun. 2022. Available in: https://www.gov.br/inca/pt-br/acesso-a-informacao/perguntas-frequentes/tabagismo. Retrieved 27. Oct. 2021.

[28] 1,100 million people smoke in the world. **United Nations News**, [*s. l.*], 26 Jul. 2019. Available at: https://news.un.org/pt/story/2019/07/1681511. Retrieved 31 Jul. 2022.

Brazil, according to 8.4% of the population over 18 years of age, is exposed to secondhand smoke at home or at work[29];

d) *Risk characterization*: Tobacco causes more than 8 million deaths a year due to the diseases it causes, according to the WHO.[30]

The aforementioned Framework Convention on Tobacco Control, unanimously approved by the UN General Assembly in 2005 and signed by 168 countries, including Brazil, was precisely the reason for the scientific evidence that attests to the harmfulness of tobacco for human health. The first two considered from the FCTC refer to the tobacco epidemic and its "devastating health consequences":

> Recognizing that the spread of the tobacco epidemic is a global problem with serious public health implications, which requires the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response; *Taking into account* the concern of the international community about the devastating health, social, economic and environmental consequences generated by the consumption of and exposure to tobacco smoke throughout the world [...]" (INCA, 2015, p.28).

- In this situation, there is no way not to consider tobacco as a *potentially harmful* product (art. 9, CDC), and it is imperative to include it in the highest risk level, i.e. a product with a *high degree of harmfulness or danger* (art. 10).

2.4 Cigarettes are a product with a design flaw

Defects can be caused by the design of the product (called *design* in U.S. law and *design*, in the CDC), in the manufacturing process, or in inadequate or insufficient information about its use and the risks it [31]presents. There is a substantial difference between these three types of defects. While manufacturing and information defects are failures in the production and marketing processes – defects that, once corrected, exempt the product – design defects are

[29] According to data published by the National Cancer Institute in the document Monitoring the Tobacco Epidemic in Brazil, based on data from the National School Health Survey (PeNSE 2019). Brasilia: INCA, set. 2021. Available in: https://www.inca.gov.br/sites/ufu.sti.inca.local/files//media/document//parceirostabaco_setembro_pense2019_new_1.pdf. Retrieved 31 Jul. 2022.

[30] World Health Organization. Tobacco. **WHO,** [*s. l.*], 31 Jul. 2022. Available in: https://www.who.int/news-room/fact-sheets/detail/tobacco. Retrieved 31 Jul. 2022.

[31] This classification originates from Section 402A of the *Restatement (Second) of Torts*, which provides guidance on product liability in the United States (maintained in the 1998 reform – *Restatement [Third] of Torts*)*:P product liability*), and was accepted in Article 12 of the CDC. In this sense, the national doctrine is unanimous, since the main work on this subject, published at the dawn of the CDC: BENJAMIN, Antonio Herman. Comments on articles 12 to 27. *In*: Juárez de Oliveira (Coord.). **Comments on the Consumer Protection Code**. São Paulo: Saraiva, 1991, p. 51.

original, they are *in the* product. Therefore, they cannot be corrected through technical procedures or active conduct, such as manufacturing or information defects.

Tobacco products are flawedly designed, [32]as tobacco contains nicotine, a psychoactive substance that produces dependence. In the most recent revision of the International Statistical Classification of Diseases (ICD 11), published in 2022, and repeating what has been recorded since 1992, smoking is part of the group of "mental, behavioural or neurodevelopmental disorders", due to the presence of nicotine[33]. According to José Rosemberg, professor of Tuberculosis and Pneumology at PUC-SP, "the nicotine contained in tobacco is responsible for triggering the chemical-physical dependence of smokers. If tobacco did not contain nicotine, its consumption would not be addictive and smoking would be nothing more than a habit that can be easily stopped."[34]

When inhaled, nicotine quickly reaches the brain, causing changes in the central nervous system that influence the smoker's emotional state and behavior. Due to the effect of nicotine, the brain releases neurotransmitters that stimulate a fleeting sensation of pleasure. With continuous nicotine inhalation, the brain demands increasing doses to maintain the same level of satisfaction. This effect is called drug tolerance. Over time, the smoker begins to need to consume more and more cigarettes[35]. Informing about the danger, as is done through mandatory health warnings, while positive for public awareness[36], does not in any way mitigate the defect of the product[37], which is inherent in its nature, and therefore insurmountable.

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[32] "Cigarettes are inherently dangerous products," said Gro Harlem Brundtland, speaking as director-general of the WHO, in 1999.

[33] According to the National Cancer Institute. Available at: https://www.inca.gov.br/es/node/1797. Retrieved 22 Jul. 2022. Full standings available at: https://icd.who.int/browse11/l-m/en#/http%3a%2f%2fid.who.int%2ficd%2fentity%2f590211325. Retrieved 22 Jul. 2022.

[34] ROSEMBERG, José. **Nicotine**: universal drug. Brasilia: INCA, 2004. *E-book*. Available at: https://www.inca.gov.br/sites/ufu.sti.inca.local/files//media/document//nicotina-droga-universal.pdf. Retrieved 22 Jul. 2022.

[35] According to the National Cancer Institute. Available at: https://www.gov.br/anvisa/pt-br/assuntos/tabaco/advertencias-sanitarias. Retrieved 28 Oct. 2021.

[36] According to the Pan American Health Organization, studies conducted in Brazil, Canada, Singapore, and Thailand have shown that image alerts significantly increase people's awareness of the harms of tobacco use. Available at: https://www.paho.org/pt/node/4968. Retrieved 12 Mar. 2022.

[37] In this regard, a decision of the Court of the Province of Quebec, Canada, in a ruling on the merits of the class action lawsuits against Imperial Tobacco and JTI-MacDonald, two of the largest cigarette manufacturers in that country: *"[...] Voici un bien qui, lorsqu'on en fait précisément l'usage auquel il est destiné, de la manière qui convient, présente néanmoins un danger pour la santé. Un tel danger doit être dénoncé à l'acheteur avant même l'acquisition du bien, s'agissant d'une information essentielle à la décision de se le procurer »*. Here is a product [cigarettes] which, although used precisely according to its purpose, represents a danger to health. This danger must be pointed out to the buyer, it is essential information for the purchase decision (p. 78). CANADA. Province of Québec. Cour d'Appel. Greffe de Montreal. Nos. 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150 (500-06-000070-983 and 500-06-000076-980). 3/1/2019. Available at: https://www.tobaccocontrollaws.org/files/live/litigation/2633/CA_Quebec%20Class%20Action%20Appeal.pdf. Retrieved 14 Mar. 2022.

2.5 What is meant by "legitimate expectation of security"?

For the Consumer Protection Code, a product or service is considered defective when it does not offer the security that is legitimately expected of it. This concept, as is well known, was imported from North American law, one of the sources of inspiration for the Brazilian codifier. However, a new standard for assessing the safety of a product was subsequently introduced into US law. This is a relationship between risk and utility, which began to appear in 1998 in the *Restatment (Third) of Torts* as a reference in the evaluation of design defects. In 2008, two authors who ten years earlier had worked in favour of the introduction of the criterion in the *Restatement*, published a review article of the jurisprudence celebrating the triumph. They stated in that article that "the criterion used by virtually all courts to judge products with a design defect" is whether "the manufacturer could have opted for a safer alternative design and whether, by failing to do so, the product became reasonably safe".[38]

According to the risk-utility criterion, a product has a design defect when it offers a risk disproportionate to its utility.

To balance risk and utility, U.S. courts typically consider circumstances such as: the usefulness and convenience of the product; the likelihood that the product will cause harm to the consumer and the likely severity of the injury; the manufacturer's ability to remove the unsafe nature of the product; the consumer's knowledge of the risks of the product; and the ability to avoid the danger inherent in use by Be careful[39].

In some courts, the risk-utility test ended up replacing the legitimate expectation of the consumer. Such was the case with the New Jersey Supreme Court, because that test provides "the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the general public." According to that court, if a product is unavoidably unsafe, the manufacturer cannot be exempted from liability simply because it warns of the risks of the

[38] In the original: "[...] the standard that virtually all U.S. courts use to judge product designs is the one we include in section 2(b) of the Restatement: whether the defendant manufacturer could have adopted a safer alternative design and whether failure to do so "renders the product reasonably unsafe." TWERSKI, Aarón D.; HENDERSON JR., James A. Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility. **Brooklyn Law Review**, Brooklyn, NY, v. 74, n. 3, p. 1061-1108, 2009. Available in: https://brooklynworks.brooklaw.edu/blr/vol74/iss3/16. Access date: 30 out. 2021.

[39] PERKINS, Cami. The Growing Acceptance of Resistance Risk Utility Analysis in Design Defect Claims. **Nevada Law Journal**, Nevada, v. 4, no. 3, p. 609-625, 2004.

product[40]. The case decided on that occasion by the New Jersey court concerned the risks of smoking and fraudulent cigarette advertising.

The risk-utility criterion leads to the following question: what is a cigarette for?

This response was given by the Court of Appeal of the Province of Quebec, Canada, in 2019, when it upheld two class action lawsuits against three cigarette manufacturers in that country. The court said:

> If cigarettes are dangerous, and this is what emerges from the evidence and the judgment, it is not because they are defective (or because they have been poorly preserved, another case provided for in article 1.469 of the Civil Code of Quebec and, implicitly, in articles 1.522 and 1.726), nor because they do not correspond to what is expected of them. What is a cigarette used for? Essentially, smoking, replied one of the appellant's lawyers, and this simple but accurate answer shows that we are not in the domain of the deficit of use associated with addiction to a product, a notion that, as we have seen, has a precise meaning. A perfect cigarette is no less harmful: the problem, as in the present case, lies in the information relating to that harmfulness.[41]

Returning to the American doctrine, in the article cited by Twerski and Henderson Jr. it is stated that, under the risk-utility test, a product can be considered dangerous in two circumstances: a) if the product should have been designed in a safer way; (b) whether that type of product simply should not be placed on the market[42]. This second hypothesis would correspond to Article 10 of the CDC.

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[40] UNITED STATES OF AMERICA. Supreme Court of New Jersey. **Dewey v. R. J. Reynolds Tobacco Co., 121 N.J.69 (1990).** Date of judgment: January 18, 1989. Available in: https://law.justia.com/cases/new-jersey/supreme-court/1990/121-n-j-69-1.html. Access date: 30 out. 2021.

[41] In the original: «Car si les cigarettes sont dangereuses, et c'est bien ce qui ressort de la preuve et du jugement, ce n'est en effet pas parce qu'elles sont défectueuses (ou qu'elles ont été mal conservées, autre cas de figure envisagé par l'article 1469 *C.c.Q.* et, implicitly, articles 1522 *C.c.B.C.* o 1726 *C.C.Q.*), ni parce qu'elles ne répondent pas à l'usage qu'on en attend. À quoi sert une cigarette? À fumer, essentiellement, a répondu l'un des avocats des appelantes, et cette réponse sobre, mais juste, montre bien que l'on n'est pas ici dans le domaine du deficit d'usage associé au vice d'un bien, notion qui, on l'a vu, a un sens précis. Une cigarette parfaite n'en est pas moins nocive : le problème, tel qu'en l'espèce, tient à l'information relative à cette nocivité ». CANADA. Province of Québec. Cour d'Appel. Greffe de Montreal. Nos. 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150 (500-06-000070-983 and 500-06-000076-980). 3/1/2019. Available at: https://www.tobaccocontrollaws.org/files/live/litigation/2633/CA_Quebec%20Class%20Action%20Appeal.pdf . Access date: 14 Mar. 2022.

[42] Under the risk-utility balance in product litigation, a product can be determined to be unreasonably dangerous in only two ways: (1) the product should have been designed more safely; or (2) the product category should not have been marketed at all. TWERSKI, Aarón D.; HENDERSON JR., James A. Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility. **Brooklyn Law Review**, Brooklyn, NY, v. 74, n. 3, p. 1061-1108, 2009. Available at: https://brooklynworks.brooklaw.edu/blr/vol74/iss3/16. Retrieved 30. Oct. 2021. The authors analyze the jurisprudence of several American states and conclude that in most courts it is required to demonstrate the technical feasibility of another, safer project, which only applies when there is the possibility of alternative projects or in cases of competition. This is not the case with tobacco, which would fall into the second case mentioned above, of product categories, a type of liability that the authors reject, even in another article written earlier: HENDERSON, James A. Jr.; TWERSKI, Aaron D. **Closing the American Frontier of** Product Liability: The Rejection of Faultless Liability." Cornell Law School Publications, 1991. Available at: http://scholarship.law.cornell.edu/facpub/874. Access date: Aug 3 2022. However, the New Jersey court applied the risk-utility standard to the tobacco case mentioned above, although the focus of the ruling, as we have seen, was the preference of state actions over the federal law regulating cigarette advertising and health warnings.

Anvisa itself – the National Health Surveillance Agency – proclaims: "There is no safe consumption of cigarettes or any tobacco product", [43]repeating the international consensus. No amount of information is sufficient to avoid exposure to the risk of the product, tobacco being a unique case of a risk-free company, because the manufacturer is immunized against any damage caused by the products it markets.

Despite the abundant evidence of the harmfulness of tobacco, the jurisprudence of the STJ understands that the free will of the smoker exempts the cigarette manufacturer from responsibility. However, the smoker's decision to smoke – which, by the way, is not always gratuitous, considering that most people start smoking in adolescence – can be taken into account as the victim's concurrent fault. Despite the fact that the CDC only provides for the *exclusive fault* of the consumer as a cause for exclusion of the supplier's civil liability, authors such as Flávio Tartuce accept contributory fault to mitigate the obligation of compensation on the part of cigarette manufacturers, but not to exclude it[44]. Thus, and from a point of view that has already been accepted in the courts, the concurrence of guilt of the smoker was admitted in a judgment of the Court of Justice of Rio Grande do Sul, which ordered the manufacturer to compensate the death of a smoker[45]. The lawsuit, however, was dismissed in the STJ, in acceptance of the manufacturer's special appeal. The judgment in the STJ took place in a monocratic decision that invoked the dominant jurisprudence in the court[46], without examining the argument of concurrent guilt.

From both perspectives, the New Jersey decision defied prevailing jurisprudence, leading Donna Dever to predict that it would hardly prevail when it reached the Supreme Court. Compliant: DUTY, Donna M. Dewey v. R. J. Re. R. J. Reynolds T ynolds Tobacco Company: A Change in the Obacco Cigar Company: A Change in Cigarette Labels in New Jersey. **Villanova Law Review**, [*s. l.*], v. 36, n.2, p.689-711, 1991. Available at: https://digitalcommons.law.villanova.edu/vlr/vol36/iss2/6. Retrieved 30 Oct. 2021.

[43] "There is no safe consumption of cigarettes or any tobacco product," according to the statement from the National Health Surveillance Agency - Anvisa, on a page related to the damage to health caused by various forms of tobacco consumption. Available at: https://www.gov.br/anvisa/pt-br/assuntos/tabaco/danos-a-saude. Access date: 12 Mar. 2022. The same warning is made by the World Health Organization. Available at: https://apps.who.int/iris/bitstream/handle/10665/324846/WHO-NMH-PND-19.1-por.pdf. Access date: 12 Mar. 2022.

[44] "It cannot be admitted that the burden of blame is concentrated only on the consumer, especially if tobacco companies assume a highly profitable risk-benefit" (...), "the cigarette problem must be solved with the theory of concurrent risk" (...) "Compensation must be set in accordance with the risks assumed by the parties, applying equity and seeking the highest criterion of justice." TARTUCE, Flávio. *Objective civil liability and risk: the theory of concurrent risk.* São Paulo: Método, 2011, p. 367-368.

[45] "Even if the defendant's civil liability is defended for the damages described in the initial one, and must repair them, the causal contribution of the victim must be considered, since smoking is not a destination." Court of Justice of Rio Grande do Sul. 9th Civil Chamber. Civil Appeal No. 70059502898. Rel. Des. Eugênio Facchini Neto, j. 18/12/2018.

[46] Special Appeal No. 1,843,850-RS, Judge Marco Aurélio Bellizze, 4/2/2020.

3 Systematic interpretation and evaluative ordering as vectors for the analysis of the civil liability of cigarette manufacturers

Questions concerning the civil liability of cigarette manufacturers should be debated beyond the usual argumentative limits, which are: the absence of a direct and immediate causal link (because tobacco-related diseases can also be caused by other factors); the cigarette would not be a defective product (because there is no legitimate expectation of its safety); the free will of the smoker (which would eliminate the risk of smoking); manufacturer). These arguments must be analyzed from the perspective of constitutional values. The correct interpretation of the law, according to Cannaris, requires an understanding of the meaning of the system. The systematic argument is a "special form of teleological foundation," which awakens "a capacity for teleological or evaluative derivation of the system," and such *a derivation* is not understood "in the sense of logical deduction, but in that of [47]evaluative ordering. It is therefore recommended to examine the jurisprudence of the Federal Supreme Court. It is not a question of looking to the STF for a direct response to the civil liability of cigarette manufacturers, but of finding the hermeneutical north of the constitutional system.

The research, at this point, will be aimed at identifying the *evaluative order* that emanates from some decisions of the STF regarding the limits of action of free enterprise, freedom of expression, the social function of property and the protection of the right to health and will culminate with the analysis of the STF decision in the action that directly questioned the constitutionality of the prohibition of tobacco advertising.

3.1 Role and limits of free enterprise and freedom of expression

In the Direct Action of Unconstitutionality No. 4,613-DF[48], free enterprise and freedom of expression were put in check in the face of the legal imposition of educational messages on trafficking, inserted in commercial advertising. The National Confederation of Industry argued the unconstitutionality of a law of the Federal District, which determined the dissemination of educational messages about traffic in advertising campaigns for motor vehicles. Unanimously, on 20/09/2018, the Plenary rejected the request. Judge Dias Toffoli, rapporteur, stated that:

[47] CANNARIS, Claus-Wilhem. **Systematic Thinking and the Concept of System in the Science of Law**. Trans. A. Menezes Cordeiro. Lisbon: Fundación Calouste Gulbenkian, 1989, p. 153; italics in the original.

[48] Freedom of expression, while not directly related to civil liability, is often discussed due to the prohibition of commercial advertising of smoking products, derived or not from tobacco (including e-cigarettes).

> (...) the advertisements also contain a commercial pretension that distances them, on this point, from the mere dissemination of information, being more properly, in this facet, a manifestation of free enterprise, for which the observance of constitutional principles such as the social function of property and consumer protection is required[49].

He added that the consumer has the right to "be informed about the product, its characteristics and qualities" and that "in the way of advertising, the population can be alerted about the possible risks of excessive use of products, or even about inappropriate behavior in their handling." The ruling made it possible to analyze Article 220, numeral 4, of the Constitution, which lists the products and services that can be restricted in their advertising, because they represent a risk to health. Judge Toffoli said that:

> [...] the constitutional provision *is not intended to limit the restriction to the advertising of the products described therein*, but rather to establish, with regard to them, a priori and in view of their undeniable potential for risk, immediate limitations on their propagation, without prejudice to the establishment of restrictions on the advertising of other products whose use is also potentially dangerous [emphasis added].

He reinforced this argument by recalling that Article 220, § 3, II, FC, determines that the law establishes means of protection of the person and the family against the advertising of products that may be harmful to health and the environment.

It also stressed that the instrumental dimension of freedom of expression, that is, the way in which the expression of thought is expressed, cannot be opposed to the consumer's right to be duly informed of the risks that products may entail. Therefore, in its view, the content of the contested provision did not prohibit or limit freedom of expression, but only incorporated the effective nature of the constitutional precepts related to consumer protection.

Dias Toffoli also faced the argument that the insertion of tax messages would not be admissible in advertising - of motor vehicles - paid for by manufacturers. The minister said that this insertion is justified by the constitutional principle of the social function of property[50], in addition to the fact that it does not mean any type of restriction on the sale of automobiles.

ADI 1.950-SP discussed the validity of the law of the State of São Paulo on the granting of half-price tickets for students in sports, cultural and leisure events[51]. On the occasion of the ruling, Judge Eros Grau, author of one of the most referenced works on the economic order in

[49]STF. ADI No. 4.613-DF, Rel. Dias Toffoli, j. 20/09/2018.

[50] The argument of infringement of property rights has already been used unsuccessfully by the tobacco industry to oppose the disclosure of health warnings on cigarette packets.

[51] STF. Direct Action of Unconstitutionality No. 1.950-3-SP, rel. Min. Eros Grau j. 3/11/2005. Only later was the matter regulated at the federal level by Law No. 12,933/2013.

the current Constitution[52], carried out an extensive analysis of the place and function of free enterprise at the constitutional level. He affirmed that the purpose of the economic order is to transform the world of being, through a global plan of action, with a view to achieving the foundations and purposes defined in Articles 1 and 3 of the Constitution. He said, thus, as a rapporteur:

> The economic order or economic constitution can be defined, as part of the legal system, as a world of duties, as the system of norms that institutionally defines a certain mode of economic production. The managerial economic order contemplated in the 1988 Constitution proposes the transformation of the world of being. Article 170 establishes that the economic order (world of being) must be based on the valorization of work and free enterprise and must aim to ensure a dignified existence for all, in accordance with the dictates of social justice, observing certain principles. It is a directive constitution. More than a simple instrument of government, our Constitution enunciates guidelines, programs and purposes to be carried out by the State and society. It postulates a global normative action plan for the State and for society, informed by the precepts expressed in articles 1, 3 and 170. The foundations and purposes defined in Articles 1 and 3 are the foundations and purposes of Brazilian society.

Citing doctrine, Judge Eros Grau also stated that "the intervention of the State in economic life constitutes a risk reducer for both individuals and companies, identifying, in economic terms, with a principle of security", also recalling, according to Natalino Irti, that the market is not a spontaneous institution, but a legal one, which operates in accordance with regulatory norms. that limit and shape it. For this reason, he finally said:

> [...] on the one hand, Article 1, IV, of the constitutional text, establishes as the foundation of the Federative Republic of Brazil the social value and not the individual potentialities of free enterprise; on the other hand, Article 170, *caput*, places human labor and free enterprise side by side, correcting, however, in the sense that the former is valued.

The lawsuit, filed by the National Confederation of Commerce, was dismissed by a majority, and it was stated in the summary that, in the composition between the principles and norms that, on the one hand, ensure free enterprise and, on the other, guarantee the effective exercise of the right to education, culture and sport, "the interest of the community, primary public interest".

3.2 The STF and the protection of the right to health

[52] GRAU, Eros Roberto. *The Economic Order in the 1988 Constitution: Interpretation and Critique.* First edition published in 1990 by the Editora Revista dos Tribunais. In the book, Eros Grau states that "free enterprise is not taken, as the foundation of the Federative Republic of Brazil, as an individualistic expression, but in what is socially valuable" (p. 200) and cannot be reduced "simply to the aspect it assumes as *economic freedom* or *freedom of* economic initiative" or to "a simple affirmation of capitalism" (p. 202). From this perspective, it is worth asking what effects a private company produces in society through the consumption of the products it launches on the market.

"Health is a right of all and a duty of the State," proclaims Article 196 of the Constitution, and must be "guaranteed through social and economic policies aimed at reducing the risk of diseases and other problems." Public policies aimed at protecting health generally challenge the limits of free enterprise, because they can restrict the freedom of companies in the marketplace, and freedom of expression, because they can affect the advertising of products and services. Correlatively, the social function of companies becomes the object of questioning, since products that represent a risk to health not only cause harm to affected consumers, but also social problems, because they impose the cost of treatments and early retirement on the Unified Health System (SUS) and social security[53].

The right to health was at stake in the trial in which the duty of the SUS to provide high-cost medicines for the individual treatment of a patient was discussed[54]. Judge Gilmar Mendes, rapporteur, stated in his vote:

> Fundamental rights not only contain a prohibition of intervention (*Eingriffsverbote*), but also express a postulate of protection (*Schutzgebote*). Thus, to use an expression of Canaris, there would not only be a prohibition of excess (*Übermassverbot*), but also a prohibition of insufficient protection (*Untermassverbot*) (Brasil, 2012, p.1)

The ruling added that Article 196 contains an individual and collective right to health, guaranteed through social and economic policies. Therefore, it is not a right to each and every procedure, but "a subjective public right to public policies that promote, protect and recover health". And that "[t]he problems of social effectiveness of the fundamental right to health are much more due to issues related to the implementation and maintenance of existing public health policies (...) than to the lack of specific legislation".

The case of tobacco offers disparate examples: while the health of smokers at an individual level is a problem of free will -according to the jurisprudence of the STJ-, Law 9.294/1996 and its subsequent amendments made a strict application of public policies of

[53] The tobacco industry is an example of this disastrous social outcome. The cost of treating diseases caused by smoking is R$39.4 billion, while taxes paid by cigarette manufacturers total only R$13 billion, equivalent to 23% of the losses generated by smoking in the country. If the indirect costs of premature death (R$9.9 billion) and the reduction or loss of the work capacity of smokers (R$7.5 billion) are calculated, the losses amount to R$56.8 billion per year. In other words: the taxes paid by the industry (R$13 billion per year) finance only about 23% of the damage caused by tobacco. Data extracted from the study "Burden of disease attributable to tobacco consumption in Brazil and potential impact on price increases through taxes", carried out by the National Cancer Institute. Available at: https://www.inca.gov.br/publicacoes/livros/carga-de-doenca-atribuivel-ao-uso-do-tabaco-no-brasil-e-potencial-impacto-do (26/6/2019).

[54] STF. Regimental Appeal in the Suspension of Preliminary Measures No. 175-CE, rel. Min. Gilmar Mendes, j. 17/3/2010.

proven effectiveness in the fight against smoking, such as the prohibition of smoking in closed places and the prohibition of the advertising of smoking products. derived or not from tobacco.

An important judgment on harmful products was that of ADI 4.066-DF, in which the STF focused on the case of chrysotile asbestos, considering that the control measures instituted in Law 9.055/1999 were insufficient, given the accumulated scientific knowledge on the harmful effects of this product on human health and the environment[55]. The curriculum establishes that "[t]he fundamental right to freedom of initiative (arts. 1, IV, and 170, *caput*, of the FC) must be compatible with the protection of health and the preservation of the environment".

The decision most directly related to the issues at issue here is the one related to ADI 4.874-DF, which examined the constitutionality of Resolution 14/2012, of the National Health Surveillance Agency – Anvisa – which prohibited the addition of flavoring and aromatic additives to cigarettes[56]. The National Confederation of Industry, plaintiff in the lawsuit, argued that Anvisa lacked the legal competence to prohibit the manufacture and sale of products and inputs subject to sanitary inspection. The contested legislation was intended to prevent cigarettes from becoming more attractive and palatable to young people who were new to tobacco use by inducing them to nicotine dependence. Once again, freedom of initiative was placed as a leading factor in the search for the promotion of a certain product.

The STF's decision understood that the prohibition in question was in line with "the limits established in the law and in the Constitution of the Republic for the legitimate exercise of regulatory competence by Anvisa," noting in the summary:

> Freedom of initiative (articles 1, IV, and 170, *caput*, of the Greater Law) does not prevent the State from imposing conditions and limits on the exploitation of private activities with a view to their compatibility with other principles, guarantees, fundamental rights and constitutional, individual or social protections, emphasizing, in the case of tobacco control, the protection of health and the right to information. The risk associated with tobacco consumption justifies the subjection of its market to intense health regulation, in view of the public interest in the protection and promotion of health[57].

[55] STF. Direct Action and Unconstitutionality No. 4.066-DF, rel. Min. Rosa Weber, j. 24/08/2017. A sufficient quorum was not reached for the declaration of unconstitutionality of the law.

[56] ADI 4.874-DF, Rel. Min. Rosa Webber, j. 1/2/2018.

[57] By nine votes in favor and one against (the quorum was reduced to ten, due to the impediment of a minister), the main request was rejected, which sought to give a restrictive interpretation to Anvisa's legal competence, derived from Law 9,782/1999, which would imply the illegality of Resolution 14/2012. Consequently, on this point, the Decision had no binding effect. The appeal for clarification filed by the Office of the Attorney General of the Nation was heard, but it was rejected (Appeal for Clarification in Direct Action of Unconstitutionality No. 4.874-DF, Rel. Min. Rosa Weber, j. 8/3/2022).

Another paradigmatic decision was the one handed down in ADI 4.306-DF, in which the National Confederation of Commerce in Goods, Services and Tourism (CNC) questioned the competence of the state of Rio de Janeiro to prohibit the use of tobacco products in collective environments, which would be the exclusive competence of the Federal Government, according to the author's interpretation[58]. The appeal was dismissed, stating in summary:

> Free enterprise must be interpreted in conjunction with the principle of consumer protection, and restrictions on products that present a potential health risk are legitimate. Precedent. It is the duty of the economic agent to respond to the risks arising from the exploitation of its activity.

In the ruling, the rapporteur, Judge Edson Fachin, said that "free enterprise, the foundation of the constitutional economic order, must also observe the principle of consumer protection," and "it is legitimate, therefore, to establish restrictions on the consumption of products that may eventually represent a risk to health." And referring specifically to consumer protection as a principle of economic order, Fachin said:

> It should be added that consumer protection is a guiding principle of the economic order (Article 170, V, of the CRFB). It means that those who wish to explore economic activity and thus appear as an economic agent in the consumer market must answer for the risks arising from this exploitation, especially with regard to consumer protection.

The STF pointed out a relevant position of some Magistrates regarding the harmfulness of tobacco in the judgment of the Precautionary Measure in Precautionary Action No. 1,657-6[59]. Although the change in the composition of the Court must be considered, the cut is valid as a sign of coherence in the reading of the constitutional text. The constitutionality of Decree-Law 1.593/1977, which allows the Federal Revenue to cancel the special registration required by this agency for tobacco companies, was discussed. The argument of unconstitutionality was based on the Supreme Court's own jurisprudence, which prohibits political sanctions in tax matters, such as administrative measures that prevent the free exercise of economic activity. The plenary, by majority, ratified the decision of the tax authority, which had implied the closure of the factory, given the harmfulness of the product in question. The winning vote, headed by Judge Cezar Peluso, registers the following passages:

> All tobacco industry activity is surrounded by special care because of the characteristics of this market [...].
> Given the characteristics of the cigarette market, which considers selective taxation to be one of the determining factors in the price of the product, it seems to me perfectly

[58] STF. Direct Action and Unconstitutionality No. 4.306-DF, rel. Min. Edson Fachin, j. 12/20/2019.
[59] STF. Precautionary measure in Amparo Action No. 1.657-6. Rel. Min. Joaquim Barbosa, j. 27/7/2007

> compatible with the legal system to **limit freedom of initiative** for the sake of other equally or more relevant legal purposes, such as the defence of **free competition** and the exercise of State surveillance over *a sector that is particularly critical to public health* (AC 1.657 MC, emphasis added).

Adhering to the dissent opened by Judge Peluso, Judge Carlos Britto declared that:

> Tobacco activity, in the industrial and commercial sphere, is really delicate. It is so special that it requires an equally special tax regime, in fact, as this Decree No. 1,593 did. Because, due to the harmful effects on the health of tobacco users, *it is a type of activity that is very difficult to reconcile with the constitutional principle of the social function of property*. Of course, there is the strictly economic aspect and also the labor aspect, but *a social function more in line with the dominant values of the Constitution is difficult to reconcile with tobacco activity* in this area of industrialization, commercialization and consumption (AC 1.657-MC/RJ, emphasis added).

He continued:

> On the other hand, it even seems to oppose an explicit public policy in the Federal Constitution. I would like to refer to Article 196, caput, which makes public health a duty of the State, requiring social and economic policies to reduce the risk of diseases and other health problems. In other words, *there is a public policy for the defense of health expressed in the Federal Constitution itself, which also seems difficult to reconcile with this type of industry, commerce and consumption of tobacco* (Ramos, 2012, p.5, emphasis added).

Judge Gilmar Mendes, although he reserved to deepen the debate on constitutional issues for the ADI 3.311 ruling, which deals with the prohibition of cigarette advertising, made relevant statements about the economic values and harmfulness of tobacco. Regarding the case being tried, he said that there is "an immanent conflict between freedom of initiative and free competition, with values of an economic order, on the one hand, and, on the other, the defense of health and the consumer as principles that justify the intervention of the regulatory State."

He also stated that "freedom of initiative is not an absolute freedom, but a freedom that can be conditioned by the legal system", and it is up to "the regulatory State to establish the rules that support the exercise of economic activity, always with a view to social welfare".

He then explained what must be weighed to resolve the conflict:

> The question is to know when this state intervention that regulates economic activity is appropriate and necessary and whether it is justified by imperatives of public health, consumer protection, valorization of human work, protection of the environment, etc.; that is, if it corresponds to the principle of proportionality (RE 550.769-RJ).

Shortly after, he reflected that "the recognized health harms caused by tobacco products have always been used as a reason to justify stricter state intervention in this segment of the economy," based on which, he stated that:

> In the scope of this activity, the proven and serious damage to public health caused by cigarettes and other tobacco products, as well as the need for extra protection for the

> consumer of tobacco products, tend to function as a kind of general justification for stricter state intervention (RE 550.769-RJ).

Finally, he hypothesized that the State could even prohibit the manufacture and sale of tobacco products, given that their "high degree of harm to health" is recognized:

> The central question, I repeat, is whether the regulatory state can go further in the protection of public health to further restrict freedom of initiative; or it would even be the case to reflect on whether, in the case of products widely recognized – both in the scientific field and by common sense – for their high degree of harm to health, the authorization or prohibition of the economic activity of their manufacture and marketing would not be within the scope of the private discretion of the State (RE 550.769-RJ).

Considerations of the same order on tobacco can be seen in the dialogue that took place at a certain moment of the vote of Judge Carlos Britto:

> MR. JUDGE CEZAR PELUSO – Basically, basically – this is not a legal observation, but an extra-legal one – I dislike, in this case, that it is, in fact, a struggle to know who sells the cheapest poison.[60]
> MR. MINISTER CARLOS BRITTO.- Very good. The metaphor seems valid to me. I support him.
> MR. MINISTER MARCO AURÉLIO – So, we are going to prohibit commercialization; if the Supreme Court has the power to do so, let it do so!
> MR. MAGISTRATE CARLOS BRITTO – But the opinion of Judge Cezar Peluso – I want to believe – underlies the affirmation that special taxation, more exacerbated, higher, fulfills an inhibiting function of the activity itself [...].

Ministers Cezar Peluso and Carlos Britto agreed that tobacco is considered a poison, Judge Marco Aurélio, following the example of what Gilmar Mendes would do in his vote, also considered the possibility of prohibition. However, I concise the consideration of Judge Carlos Britto, recalling the opinion of Judge Peluso, in the sense that fiscal policy fulfilled an inhibiting function. Nothing different – it must be added – to the aforementioned decision of the Constitutional Court of Colombia, which coined the concept of the passive market. A similar allusion was made by Judge Cezar Peluso in the judgment of the Special Appeal that judged the merits of the precautionary measure filed by the tobacco company:

> Decree-Law No. 1.593/77 grants **exclusively** to holders of **a special registration** in the Federal Revenue Service the right to carry out activities of cigarette manufacturing, the production of which, as can be seen from the Treasury memorandum, is tolerated only by the Government, which has no reasonable political and regulatory alternative in this regard (emphasis in original).

[60] Judge Peluso's reference referred to the heart of the matter: the failure of a tobacco company to comply with tax obligations as a form of infringement of competition, which, in theory, would allow the defaulting manufacturer an advantage over its competitors.

> The tobacco industry implies, as is intuitive, important implications for other actors and social values, such as consumers, competitors and the free market, whose interests are also protected, no less emphatically, by the constitutional order[61].

As can be seen, the idea that the legality of the manufacture and sale of tobacco is merely tolerated by the State is not alien to the STF – at least it was not in that composition – precisely because it recognized, according to scientific consensus and common sense, as Gilmar Mendes literally pointed out, "the high degree of harmfulness to health" of tobacco products – a concept that corresponds to the risk classification of tobacco products. Article 10 of the CDC.

3.3 The constitutionality of the prohibition on tobacco advertising

In September 2022, eighteen years after the filing of the lawsuit, the virtual plenary of the STF judged the Direct Action of Unconstitutionality of the National Confederation of Industry – ADI No. 3,311 –, which initially questioned the constitutionality of Article 3 of Law No. 9,294/1966, extending to subsequent modifications (Law No. 10,167/2000 and Provisional Measure No. 2,190-34/2001). which ended up prohibiting commercial advertising of products, only allowing the display of the product at points of sale[62].

The arguments of unconstitutionality alleged the violation of Article 220, § 4, of the Federal Constitution, by allowing only the *restriction* of advertising of certain products, including tobacco, but not the *prohibition*. The STF decision, however, pointed out that restrictions on advertising can reach the maximum degree of prevalence of one right over another, depending on the specific circumstances, "because the limits are contextual, relative," and highlighted, in the specific case, "the importance of the constitutional protection of health and the environment in the constitutional mosaic of the protection of the human person."

In addition to the considerations on Article 220, paragraph 4, already set forth in ADI 4.613 (cited above) and recalled in the judgment, this time the STF decision expanded the analysis to the provisions of Article 220, paragraph 3, subsection II, which enables the defense of the person and the family against the advertising of products harmful to health and the environment. If the harmfulness of tobacco is scientifically demonstrated, the incentive to its

[61] STF. Extraordinary Appeal No. 550.769-RJ. Rel. for judgment Min. Cezar Peluso, j. 22/5/2013.

[62] BRAZIL. Federal Supreme Court. **Direct Action of Unconstitutionality No. 3.31**. Rel. Min. Rosa Weber, j. 14/09/2022.

consumption may be prohibited by means of advertising persuasion[63], even if the legality of the production and marketing of the product is maintained[64].

Weighing public health and freedom of expression in advertising activity, the balance made by the STF gave greater prominence to the former, given the threat posed by tobacco. With regard to the private right to freedom of publicity, the duty of the State to guarantee, through social and economic policies, the reduction of the risk of diseases and other health problems, in accordance with the provisions of article 196 of the Constitution, prevails.

Judge Rosa Weber, rapporteur of the judgment, examined the legal restrictions on tobacco advertising in the light of the principle of proportionality. Initially, it considered that tobacco control and anti-smoking policies aim to discourage the consumption of smoking products, with the aim of reducing the risk of diseases, as recommended by the Brazilian Constitution (art. 196). Since the main purpose of advertising is to increase sales of the products it advertises, it considered that restrictions on advertising, as well as health warnings (counter-advertising), are measures appropriate to the objectives of the legislator. He highlighted the informational dimension of health warnings on the harmfulness of tobacco and noted the importance of the Framework Convention on Tobacco Control (FCTC), which expressly recommended that signatory countries implement measures to curb tobacco promotion and sponsorship and include health warnings on packages, citing studies conducted in several countries that found significant reductions in tobacco use after the implementation of the proposed measures. He highlighted a scientific study carried out at Georgetown University, which took into account a universe of 41 countries, covering a total of 287.68 million smokers, pointing to a decrease of 14.84 million smokers in the period from 2077 to 2010, after the adoption of measures to reduce

[63] In this sense, the doctrine of Tércio Sampaio Ferraz Júnior, which distinguishes abuse in the exercise of the right to publicity (which is restricted by the Consumer Protection Code for the types of misleading advertising and abusive advertising) from "restrictions on the right to disseminate ideas or a certain brand or product". The author justifies the prohibition of the right "because there is a State policy that seeks to make people aware of the risks of consuming the product, which clashes with its wide and totally free dissemination", a policy that is "established in the Constitution itself (art. 220, section II, § 3)". And it adds (thus refuting the recurring argument that, if the product is lawful, its advertising cannot be restricted): "If the product is admitted as harmful, nothing prevents the legislator from prohibiting its production, sale, marketing. But, if the product is licit, it is up to the law to make available to the person and the family the legal means of protection" (FERRAZ JÚNIOR, Tércio Sampaio. **Constitutional right**: freedom to smoke; privacy; State; human rights and other issues. Barueri, SP. Manole, 2007, p. 223-224).

[64] In this regard, the decision of the Supreme Court was similar to that of the Constitutional Court of Colombia (expressly cited in the judgment), cited above, which defined the tobacco market as a passive market, to be tolerated, but not encouraged by the State: *it is even valid for the legislator to decide that a certain productive segment must be configured as a passive market. in which the State allows the production and sale of the good service, but at the same time measures to discourage its consumption*. COLOMBIA. Constitutional court. Judgment C-830/10 of 20/10/2010. Available at: https://www.corteconstitucional.gov.co/Relatoria/2010/C-830-10.htm. Retrieved 13. Nov. 2022.

tobacco consumption known as MPOWER.[65] The study estimated that by 2050, 7.42 million deaths will be avoided in the universe considered, of which 613 thousand are attributable to advertising bans and 1.38 million to warnings on packaging. A study conducted in Brazil between 1989 and 2010 was also cited. In that year, the prevalence of smokers was 35.4% of the population. If the scenario is projected for 2010 with the adoption of the measures in force in 1989, the prevalence would fall to 31% in 2010 and 24.9% in 2050. By 2010, it was found that, with the measures adopted in the period, the prevalence dropped to 16.8%, which meant a reduction of almost 50% and 420 thousand deaths avoided, and 7 million lives saved in the projection for 2050. Separately, the contribution of advertising restrictions and health warnings on packaging to the reduction of smoking prevalence in the Brazilian population for 2010 was, respectively, 13.7% and 7.8%. In this way, the suitability of the measures adopted to achieve the proposed purpose was verified.

In the discussion of the second requirement of the principle of proportionality, it was noted that, despite the success of the tobacco reduction policy, there are still 161,853 deaths per year in Brazil due to tobacco-related diseases, an average of 443 deaths per day or 18 per hour. To address this reality, it is not enough to restrict advertising and impose health warnings, but it is necessary to combine them with other measures of various kinds, such as the prohibition of smoking in public places, the setting of a minimum price and the non-fiscal nature of taxes. Regarding the prohibition of advertising, it was argued that the measure is only effective if it is comprehensive, since, otherwise, the advertising budget would only be reallocated to the permitted forms and means, compromising the objective of not encouraging the consumption of products.

The decision cites a study conducted in 22 high-income countries on the basis of data from 1970 to 1992, which shows that understandable restrictions on tobacco advertising do indeed contribute to the reduction of smoking. In addition, a World Bank publication indicates that advertising and promotion of tobacco products have an impact on children, affecting the demand for cigarettes and the formation of new users[66].

[65]MPOWER is a set of seven measures to reduce tobacco consumption, consisting of: monitoring of tobacco consumption and prevention measures; protect the population against tobacco smoke; offer help to quit smoking; warn about the dangers of tobacco; enforce prohibitions on advertising, promotion, and sponsorship; Increase taxes on tobacco.

[66] JHA, Prabhatt; CHALOUPKA, Frank J. **Curbing the epidemic**: governments and the economics of tobacco control. Washington DC: International Bank for Reconstruction, 1999. Available at: https://documents1.worldbank.org/curated/pt/914041468176678949/pdf/multi-page.pdf. Retrieved November 17. 2022.

The context of the extension of anti-promotional measures for tobacco includes those relating to the content and space occupied by warning messages on the packaging of tobacco products. The decision states that subtle messages have no effect, citing a study conducted in Poland with this conclusion. As for the *design* of the packaging, several references are made to laws in countries such as Australia, Canada, Finland and Uruguay, which have already decided to adopt standardized packaging, with the absence of visual elements that can serve as an incentive to tobacco consumption. It is also considered that the ruling not adopted by Brazil on the most radical measures possible, such as not even allowing the display of the product at points of sale or even prohibiting the sale of the product - which, it adds - would not solve the problem. It concludes that the measures questioned in the lawsuit are necessary to achieve effectiveness in the multidimensional context of the problem and the inevitable multifaceted nature of the relevant public policy.

In examining the ultimate requirement, that of proportionality in the strict sense, the court compared the contested restrictive measures with other constitutional values and principles, emphasizing the necessary prevalence, in the first place, of the right to health, endangered by the harmfulness of tobacco. He also placed special emphasis on the constitutional protection of children and adolescents, emphasizing that the tobacco epidemic is considered a pediatric disease, since, according to the Ministry of Health, 90% of smokers start smoking before the age of 19, and experimentation begins around the age of 13, according to the National Cancer Institute.

In view of the collision of the challenged measures with free enterprise, the decision considered that the restriction on the freedom of expression and communication of companies in the sector, although to a high degree, is justified by the danger to public health posed by tobacco, a global phenomenon, and the country has the duty to act in the face of the commitments assumed within the framework of the FCTC. Finally, it considered that the measures were proportionate and analogous to the prohibition of smoking in public places.

Finally, the judgment questioned the argument of paternalism of public policies, stating that the autonomy of the consumer when deciding to smoke "is certainly weakened" in the face of three relevant circumstances: a) many people are not aware of all the risks of smoking; b) Since most of them start smoking at a very young age, children and adolescents are not able to make a thoughtful decision; c) smoking also affects non-smokers, either by inhaling the smoke or by the economic impact on the public health system.

4 Conclusion

The approach of the case-law of the High Court of Justice in rejecting claims for compensation by smokers or their relatives for tobacco-related diseases gives rise to two perplexities: first, because tobacco is a risk factor for a number of serious diseases, but cigarette manufacturers are free from the obligation to compensate smokers, despite the high degree of harmfulness and danger of the products they sell; the second, because, in other countries, such as Canada and the United States, lawsuits against the tobacco industry have been judged to be well-founded. In Canada, there is the recent case of the Quebec trial, cited in this article. In the United States, some lawsuits (not mentioned here) represented serious setbacks for the tobacco industry, especially what was known as the *Master Settlement Agreement*, an agreement by which tobacco companies agreed to pay the State compensation initially budgeted at 246 billion dollars, plus 10 billion dollars per year. permanently, as compensation for diseases caused by tobacco[67].

On the other hand, the STJ rulings reduce the degree of harmfulness of tobacco compared to the risk levels of the Consumer Protection Code, contrary to the international scientific consensus that led the World Health Organization to promote the first international public health treaty: the Framework Convention on Tobacco Control. FCTC.

Finally, the arguments of formal legal logic that underlie the decisions of the STJ are at variance with the constitutional values deduced in the rulings of the Federal Supreme Court on the function and limits of free enterprise, freedom of commercial expression, the social function of property, the recitals on the harmfulness of tobacco itself and the protection of the right to health. It would be appropriate to weigh the criteria present in article 4, paragraph III, of the Consumer Protection Code, in the sense of "harmonizing the interests of the participants in consumer relations and making consumer protection compatible with the need for economic and technological development". So far, the jurisprudence of the STJ in the case of smokers always tips the balance in the same direction.

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