

SMOKING: A STUDY BETWEEN PERSONAL FREEDOM AND PUBLIC HEALTH

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Abstract

Everybody has a clear right to breathe a clean air and to live in a healthy environment without having any pollution including pollution produce from cigarette smoking. It is a well – known fact that smoking a cigarette will not only pollute the air quality surround us but also could potentially danger anyone who had to consume the smoke generated from it. There have been many studies conducted by various prestige institutions in the world including the international body like the World Health Organization (WHO) on this matter. Sadly there are individual who argued smokers have right to smoke regardless constant education and awareness been given on the danger of smoking. It is the researcher humble view that between the right to excess to clean air and to have a good health and the right of smokers to smoke their cigarette, the former should be given top priority. There is no clear written right given to smoker either under the country highest law in the land namely the Federal Constitution or in any of the existing legislations over the right for them to smoke. In Malaysia, smoking is prohibited in specified public places and workplaces listed under the Control of Tobacco Product Regulations 2004 of the Food Act 1983 [Act 281]. Starting January 1, 2019, Malaysia government through the Ministry of Health (MOH) has enforced a smoking ban at restaurants, coffee shops and hawker stalls nationwide. The latest ban cover all air–conditioned and non-air-conditioned restaurants, coffee shops, as well as open - air hawker centres and street stalls. Anybody who violates the rules will be charged accordingly under the Control of Tobacco Product Regulations 2004 of the Food Act 1983 [Act 281]. The latest efforts taken by the government to deter smoking habit among its people has received huge criticism especially from the smokers themselves which consist millions of peoples. Some of the smokers even argued, the latest efforts taken by the government on the issue violated their basic right to smoke. Crucial to note, all the efforts taken on the matter by the government is in fact in line with the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) in which Malaysia is also one of the member party. As one of the member party to the WHO FCTC, the Malaysian government should continue its efforts to reduce the number of smoking habit among its people and find ways to protect its citizen who want to live in a better and healthier environment free from cigarette and the pollution its generates. It will be the object of this paper to examine further the issue of smoking, the dangers it carry, examine the philosophical argument over the issue on the right to smoke, and come out with possible recommendations in order to bring down the number of addiction on smoking and prevent the smoking habit in the country.

Keywords: Smoking, Right, Health

1. INTRODUCTION

There is no single universal accepted definition over the word smoking itself, however from many writings, smoking has been defined as a practice in which a substance is burned and the resulting smoke breathed in to be tasted and absorbed into the bloodstream of the person who smoke such substance. Most commonly known to us the substance is the dried leaves of the tobacco plant which have been rolled into a small square of rice paper to create a small, round cylinder called a cigarette. Along with cigarette, there is also existed in place the oldest form of smoking device like shisha. With the advance of modern technology, smoking nowadays has been transform into modern form like electronic cigarette (e – cigarette) as well as vape. Regardless the device which being use for smoking, smoking activities not only affects the life and well – being of Malaysian society but it also effects life and well – being of all societies in the world. All countries in the world will need to face with this smoking addiction and habit problem among its people. A lot of money has been spending by those countries including Malaysia to stop the addiction and habit among its people to smoking activities. At the same time also, a lot of money have been spend by smokers themselves to buy cigarette and other modern form of smoking devices like shisha, vape and electronic cigarette (e – cigarette) in order to fill up their never ending desire to smoking. A lot of money has also been spend not only by the smokers themselves but also other innocent victim to deal with health issue resulted from this smoking activities.

On the occasion of the World No Tobacco Day 2017 (WNTD) which being observed around the world every year on 31 May, the World Health Organization (WHO) has published and revealed a shocking report assessing the health and economic costs of tobacco and, for the first time, the environmental impact it generates. According to WHO, every year, more than 7 million people die of tobacco use. (Emy Torres, *The Talking Democrat*, 30 May 2017). Tobacco epidemic are now being seen as one of the biggest public health threats which being faced by the world in this modern time. According to WHO, more than 6 million out of those 7 million deaths are the result of direct tobacco use while around 890 000 are the result of non – smokers who are being exposed to the second – hand smoke. Second – hand smoke is the smoke that fills up the air inside any place like restaurants, workplaces or other enclosed spaces when people burn tobacco products such as cigarettes and other forms of smoking devices within that enclosed area. According to WHO, there are more than 4000 chemicals in tobacco smoke, of which at least 250 are known to be harmful and more than 50 are known to cause cancer. According to WHO around 80% of the 1.1 billion smokers worldwide live in low – and middle – income countries, where the burden of tobacco – related illness and death is heaviest. Tobacco users who die prematurely deprive their families of income, raise the cost of health care and hinder economic development. (WHO on Tobacco, 9 March 2018).

According to the key finding in the Report on Smoking Status among Malaysia Adults carried out through National Health and Morbidity Survey 2015 (NHMS 2015) published by the Institute for Public Health, National Institutes of Health, Ministry of Health Malaysia (MOH), approximately 22.8% (4,991,458) of Malaysian population aged 15 years and above were smokers. Out from the number, 43.0 % (4.85 million) of men and 1.4% (143,566) of women smoked manufactured cigarettes, hand – rolled and smokeless cigarettes. (Report on Smoking Status among Malaysia Adults 2015, National Health and Morbidity Survey 2015, p.11). On record, as to 2015, there are around 31.2 million of Malaysian population (Current Population Estimates, Malaysia, 2014 – 2016, 22 July 2016). The statistic is a shocking exposure to many Malaysian, as the statistic number includes those people who are under the age of 18 years old who are practically still in school.

Through the given statistic number above it is clear to us that the number of smokers in the world including in Malaysia is very high as it can seriously effects the life of millions of people. It is very important for us to note that smoking has been regarded as one of the leading causes of preventable death globally. According to a study, many death occurred in United States of America are attributed to smoking – related diseases and many people life have been shorten due to smoking. (Please refer further to Leslie Iverson, 2004, p. 320). Due to these smoking activities, male and female smokers lose an average of 13.2 and 14.5 years of life, respectively. (Centers for Disease Control and Prevention (CDC) (2002), Annual smoking – attributable mortality, years of potential life lost, and economic costs – United States, 1995 – 1999, pp. 300 – 303). At least half of all lifelong smokers die earlier as a result of smoking. (Doll R, Peto R, Boreham J, Sutherland I; Peto; Boreham; Sutherland (2004), Mortality in relation to smoking: 50 years' observations on male British doctors, p. 1519). Among the common serious effects of smoking activities towards individual smoker health includes lung cancer (American Legacy Foundation factsheet on lung cancer Archived 2007-09-27) and potential risk to heart related disease (Nyboe J, Jensen G, Appleyard M, Schnohr P; Jensen; Appleyard; Schnohr (1989). Risk factors for acute myocardial infarction in Copenhagen. I: Hereditary, educational and socioeconomic factors. *Copenhagen City Heart Study*. *Eur Heart J*. 10 (10), pp: 910 – 916) (Please refer to

Sufean Hussin, Lai Chin Chin, Mohd Firdaus Hussin, and Abu Talib Putih, 2004, pp: 103 - 118). The effects of smoking activities do not stop to the smokers themselves, it also effects the life and health of surrounding people through the smoke which being generate. According to the WHO, there is no safe level of exposure to second – hand tobacco smoke. For adults, second –hand smoke causes serious cardiovascular and respiratory diseases, including coronary heart disease and lung cancer. For infants, it causes sudden death. For pregnant women, it causes low birth weight. (WHO on Tobacco, 9 March 2018) (Please refer to Rehenah Mohd Zain, 2013, pp: 20 – 26). Besides causing harm to person health, smoking activities can also lead to waste of money. Many governments in the world including in Malaysia has taken a step to deter people from becoming addicted to smoking activities namely by increasing the price of cigarette. (Martin Carvalho, The Star Online, 28 March 2017). As cigarette becoming more expensive from time to time, buying such item can cause huge problem to the smokers financially. (M. Hussain Habil, 1994, p. 39).

2. EXISTING LEGISLATION IN MALAYSIA

Presently, there is no specific law which regulate smoking activities in Malaysia. Smoking activities especially the use of tobacco based product for cigarette are been regulated under difference kinds of laws in the country. However, smoking activities are been dominantly regulated under the Control of Tobacco Product Regulations 2004, a component of Food Act 1983 [Act 281]. The Control of Tobacco Product Regulations 2004 was developed based on the WHO Framework Convention on Tobacco Control (WHO FCTC). Malaysia becomes a signatory to WHO FCTC on 23 September 2003, ratifies the WHO FCTC on 16 September 2005, and officially becomes a party to the WHO FCTC 90 days later on 15 December 2005. (Report on Smoking Status among Malaysia Adults 2015, National Health and Morbidity Survey 2015, p.14). WHO FCTC entered into force in February 2005 and has today 181 Parties covering more than 90% of the world's population. WHO FCTC has been consider as a milestone in the promotion of public health. It is an evidence – based treaty that reaffirms the right of people to the highest standard of health, provides legal dimensions for international health cooperation and sets high standards for compliance. (WHO on Tobacco, 9 March 2018). The Control of Tobacco Product Regulations 2004 were drafted to regulate, among other things, the smoke free zones areas in the country, tobacco advertising, promotion, sponsorship, selling as well as tobacco packaging and labelling. The Control of Tobacco Product Regulations 2004 have been amended several times by the Malaysian Ministry of Health. (Tobacco Control Laws, Malaysia, 2019).

In Malaysia, smoking is prohibited in specified public places and workplaces listed under the Control of Tobacco Product Regulations 2004. According to Regulation 11 (1) of the Control of Tobacco Product Regulations 2004, the non – smoking areas which have been specified are in entertainment centres, or theatres (does not include pubs, discotheques, night clubs, or casinos during their operation hours), in any area of a hospital or clinic, in public lifts and toilets, in air-conditioned eating places or shops, in public vehicles and public transport terminals, in airports, in any area of government premises, in any area of a building used for assemblies (other than private or residential buildings, or in a public place), in any area of an educational institution or higher educational institution, in any area of a nursery, in school buses, in any floor with a service counter in buildings listed in the Second Schedule, in any area of shopping complexes, in any area of petrol stations, in any area in stadiums, sports complexes, fitness centres, or gyms, in any religious building or public place, in any area of a library, in any area of internet cafes, in any area of National Service training grounds, in any air conditioned working spaces with a centralized air conditioned system, in any rest and recreational areas in buildings, playgrounds, or gardens, and the area within 3 meters of that place, in any public parks, except an open public car park, and in any observation towers, camp site, canopy bridges, and 5 meters from the entrance/exit of the canopy bridge (national parks and state parks). Anybody who violates this particular rule will be charged accordingly under Regulation 11 (3) of the Control of Tobacco Product Regulations 2004 whereby the offenders can be fined up to RM10,000 or be imprisoned for up to 2 years. Regulation 22 of the Control of Tobacco Product Regulations 2004 also allow the Health Minister to declare any building, premise, or place accessible by the public (or any part of these places) as a non-smoking area. Beginning January 1, 2019, Malaysia has enforced a smoking ban at restaurants, coffee shops and hawker stalls nationwide. The ban will cover all air-conditioned and non-air-conditioned restaurants, coffee shops, as well as open-air hawker centres and street stalls. (Nurul Azwa Aris, Free Malaysia Today, 12 November 2018). There is also a plan to extend such no smoking areas in the country in the distant future. (Ainaa Aiman, Free Malaysia Today, 1 January 2019). Under Regulation 12 of the Control of Tobacco Product Regulations 2004 the premise owners can be fined up to RM3,000 or be imprisoned for up to 6 months if they fail to put up “No Smoking” signs, and they can also be fined up to RM5,000 or be imprisoned for up to 1 year if they don't take steps to stop people from smoking at their premises.

As for other form smoking activities like shisha and modern devices which associated with smoking activities like vape and electronic cigarette (e – cigarette), there is no specific regulation for their use in the country. (Please refer further to Shaarani Ismail, New Straits Times, 20 October 2018). If the substance use inside those mentioned items involve the use of tobacco, then it can be subjected to the Control of Tobacco Product Regulations 2004. If dangerous and prohibited chemical or substance are being used for such items, it's also can be subjected to the Poisons Act 1952 [Act 366]. To regulate non – nicotine products there is no law yet in the country. (Please refer further to Andrea Tang, Says, 22 October 2018). The issue of smoking also has been consider under Malaysian Syariah criminal offences, however such matter have been restricted to the event of smoking during the fasting month for the Muslim in the holy month of Ramadan Al – Mubarak. For example, Section 15 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559] which states “Any person who during the hours of fasting in the month of Ramadan (a) sells to any Muslim any food, drink, cigarette or other form of tobacco for immediate consumption during such hours; or (b) openly or in a public place is found to be eating, drinking or smoking, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both, and for a second or subsequent offence to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both. After examine all the existing laws on the issue of smoking in the country, the main issue of discussion now, can smoking be regarded as individual right which must be respected and honour by everybody including by the government. This issue will be further discussing below.

3. RIGHT TO SMOKING

The issue over right to smoke always gained a spotlight in many societies around the world including in Malaysia. (Please refer to Hidir Reduan Abdul Rashid, New Straits Times, 1 January 2019). Smokers will try their very best arguing that they have right to smoke either from moral, human right or even from constitutional perspective. The main issue now, do smokers have such right in the first place? As explained earlier in this research, the impact of smoking towards one's health and the health of other people close to the smoker. Many scientific researches have been carried out by many well – known scientist, medical practitioner, and health institutions including the World Health Organization (WHO) over the issue. The issue concerning smoking cannot be treated lightly by anyone due to the potential health risk it carry to the smoker and to the surrounding people. With this explanation, it will be very hard to accept the idea that smoker have right to smoke or even smoking can be consider as part of human right or should even embodied under the constitution.

The Federal Constitution of Malaysia, which came into force in 1957, is the supreme law of Malaysia. This is clearly stated under Article 4(1) of the Federal Constitution which states that “The Constitution is the supreme law of the Federation and any law which is passed after Merdeka Day (31 August 1957) which is inconsistent with the Constitution shall to the extent of the inconsistency be void”. The Federal Constitution is divided into several parts or main components namely Part I which focus on the States, Religion and Law of the Federation, Part II which focus on Fundamental Liberties, Part III which focus on Citizenship, Part IV which focus on the Federation, Part V which focus on the States, Part VI which focus on the relations Between the Federation and the States, Part VII which focus on Financial Provisions, Part VIII which focus on Elections, Part IX which focus on the Judiciary, Part X which focus on Public Services, Part XI which focus on Special Powers Against Subversion, Organised Violence, and Acts and Crimes Prejudicial to the Public and Emergency Powers, Part XII which focus on General and Miscellaneous, Part XIIA which focus on Additional Protections for States of Sabah and Sarawak, Part XIII which focus on Temporary and Transitional Provisions, Part XIV which focus on Saving for Rulers' Sovereignty, etc., and Part XV which focus on Proceedings Against the Yang di-Pertuan Agong (King of Malaysia) and the Rulers. (Lee Mei Pheng, 1998, p. 15). After examine all the parts or main components inside the Federal Constitution, there is no clear or even specific mentioning about the right to smoke. If we still trying to put the argument over the right to smoke under the Federal Constitution, the closes possibility it can be argued is under the Part II concerning Fundamental Liberties.

Fundamental liberties in Malaysia are set out in Articles 5 to 13 of the Federal Constitution, under the following headings: liberty of the person, prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality, prohibition of banishment and freedom of movement, freedom of speech, assembly and association, freedom of religion, rights in respect of education and rights to property. However, it must strongly state here that, some of these liberties and rights are subject to limitations and exceptions and some are available to citizens only (for example, the freedom of speech, assembly and association). (Wu Min Aun, 1997, pp: 192 – 197). The issue now is can we consider right to smoke be part fundamental liberties itself. Can the issue be entertained particularly under Article 5 of

the Federal Constitution which talk about Right to Life and Liberties? Article 5 of the Federal Constitution enshrines a number of basic fundamental human rights which includes no person may be deprived of life or personal liberty except in accordance with law, a person who is unlawfully detained may be released by the High Court (right of habeas corpus), a person has the right to be informed of the reasons of his arrest and to be legally represented by a lawyer of his choice, and a person may not be arrested for more than 24 hours without a magistrate's permission.

Presently, there are no locally reported cases affirming or rejecting that smoking is a right protected under Article 5 of the Federal Constitution as part of an individual's right to life or personal liberty in the country. (Yiswaree Palansamy, Malay Mail, 6 January 2019). It would be researcher humble view that to bring the issue on right to smoke under the Federal Constitution would be very tough process due to the well – known fact over the potential risk of smoking can bring to the smoker themselves and to the people surround him. It would also equally difficult to challenge government efforts to eradicate people addiction to smoke itself by relying on the Federal Constitution. Furthermore, it is the duty of the government not only in our country but also government around the world to ensure that members of the public in the country are protected from the harmful pollutants which been carry through smoking activities and to ensure their citizen able to live in a safe and healthy environment.

Since there is no local case which can refer to in order to analyse the issue further, we can examine the approach taken by other jurisdiction. In New Zealand, an employer in that country can refuse to hire someone if they smoke because smoking is not covered by their Human Rights Act 1993. Some employers have negative attitudes to smokers and may refuse to hire them. Although this may not be considered fair or reasonable, but it is still not unlawful to be carry out by the employer. It seems that Human Rights Act 1993 in New Zealand makes it unlawful to discriminate in certain areas including employment and on certain grounds like sex or disability. However, smoking is not a ground in the Act. Interesting for us to note that some people argue that smoking is a disability, but in other countries where this argument has been legally tested, the courts have all held that smoking is not a disability. (Smoking and Human Rights, 19 May 2019). Further to note in New Zealand, being a smoker is not one of the specified grounds of unlawful discrimination under their Employment Relations Act 2000, recruiting non – smokers may not, on the face of it, be unlawful discrimination. (Please refer to Smoking at Work, 19 May 2019). A reference can also be made to the case of *Burch v Rush Security Systems Ltd* (2011) whereby the court held that the dismissal of an employee who broke the house rules by leaving the premises to smoke was justified. In this case, the employee was a senior alarm and video monitoring operator. When interviewed for the job, he was asked whether he was a smoker and replied that he was in the process of quitting. The interviewer told the man that the position was such that he would not be able to smoke for a minimum of 12 hours as he was not able to leave the premises, and it was important he took that into account before accepting the position. Some months after the employee started the job, cleaners reported that the premises had been left unattended during his shift. The CEO reminded the employee that he was not allowed to leave the building and that to do so was a serious offence that would lead to dismissal. The following month, the CEO found the premises unattended. The employee walked in and said he had been out smoking. After reviewing CCTV footage, it was discovered that he had also left the premises unattended the previous day. A disciplinary meeting was held and the employee acknowledged that the CEO had spoken to him about leaving the premises unattended. He said that he had complied for two weeks but breached the instruction as he needed to smoke. The employee said he took the phone with him when he left the building and that he would leave the premises again to smoke. He was dismissed for serious misconduct. The employee claimed that his dismissal was unjustified and that the company had breached sections 69ZD and 69ZE of the Employment Relations Act 2000 by not providing him with rest and meal breaks. The Employment Relations Authority noted that the employee had access to a lunch room (where he could hear the alarm if it was activated) and that he was able to have breaks. The employee's real issue was that he was unable to smoke. The Authority determined that it was not for the employee to unilaterally determine he could go outside and smoke while taking the phone with him. He had been told he could not smoke before he accepted the position, and had accepted it on that basis. His dismissal was justified. This case clearly shows to us that there is actually to right to smoke existed through laws even from the angle of human right perspective. (Please refer to Smoking at Work, 19 May 2019).

Another jurisdiction which we can to on this issue is in United States of America. It been argued extensively in the United States of America that constitutional rights are specially protected, so that laws generally cannot take them away. If a law appears to interfere with a constitutional right, those whose rights are affected can challenge such law in court. This seem to be similar with position taken by our Malaysian Federal Constitution under Article 4 (1) which already been explained earlier. A court will invalidate the law if

it finds that the law improperly treads on a constitutional right. Constitutional rights include the right to freedom of speech, freedom of religion, due process of law, and equal protection under the law. Similar like Federal Constitution of Malaysia, the United States of America Constitution does not explicitly mention smoking as the existed or embodied right. Therefore, if there were a constitutional right to smoke, it would have to fall under the umbrella of one of the recognized constitutional rights. People in the United States of America who claims a right to smoke usually rely on one of two arguments namely (1) that smoking is a personal liberty specially protected by the Due Process Clause, or (2) that the Equal Protection Clause extends special protection to smokers as a group. However, this section explains that neither of these claims is legally valid. Since smoking is not a specially protected constitutional right, the Constitution does not bar the passage of local, state, or federal smoke – free laws and other restrictions on smoking. (Samantha K. Graff, 2008, p. 2). It is well settled among state and federal courts in the United States of America that the act of smoking is not a protected activity under the United States of America Constitution. Courts in that country have said simply that “there is no state or federal constitutional right to smoke” (Kurtz v City of North Miami, 653 So.2d 1025 (Fla. 1995)) and “[t]here is no more a fundamental right to smoke cigarettes than there is to shoot up or snort heroin or cocaine or run a red light (Fagan v Axelrod, 550 N.Y.S.2d 552, 559 (1990)).”

4. RECOMMENDATION

Everybody has a right to breathe a clean air and to live in a healthy environment without having any pollution including pollution produce from smoking activities. It is a well – known fact that smoking a cigarette and other devices associated with it will not only pollute the air quality surround us but also could potentially bring unthinkable danger anyone who had to breathe the smoke generate from it. According to the study conducted by World Health Organization (WHO) along with several institutions, there is no safe level of exposure especially to tobacco smoke. Exposure to tobacco smoke is proven to cause heart disease, cancer and many other diseases. As for the smoking devices which are not using tobacco based product in it, there no definite study being done on the effects it might bring to people health. Due to this uncertainty, the potential risk to people health and addiction can be still exist. Whatever it is, proactive steps must be continuously taken by the Malaysian government to protect the life of its innocent citizens from the danger of cigarette along with other devices that can associated with cigarette and the smoke it generate. Between the right to excess to clean air and to have a good health and the right of smokers to smoke their cigarette, the former should be given top priority. In short, public health should be given the prime focus than personal freedom for smoker to smoke.

As mentioned earlier, there are no clear written rights given smokers either under our Federal Constitution or under the Universal Declaration of Human Rights (UDHR) itself. The matter has also been argued extensively in Europe for the last many years. In 1995, the Northern Ireland Human Rights Commission considered the issue of smoking and human rights in 1995 and found that “no treaty or other instrument defines a human right to smoke and the Commission does not accept the position, sometimes advanced by the tobacco lobby, that there is such a right”. Important for us also to know that Malaysia has ratify the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) in 2005. The treaty seeks to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by enacting a set of universal standards stating the dangers of tobacco and limiting its use in all forms worldwide. Article 8 of the treaty clearly states that parties to the agreement to recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability and each party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places. As such, the Malaysian government should continue its efforts to reduce the number of cigarette addiction among its people and find ways to protect its citizen who want to be live in better and healthier environment free from cigarette and the pollution it generates. In order to prevent the matter being pursue or challenged in our court, the government can also consider creating a piece of legislation or amending any of the existing legislations in country which can exclude smoking as a basic right. This step is very important as it could bring a very strong signal to the society that the government will never tolerated with smoking addiction and habit among its people.

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