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(IJLGC)**[www.ijlgc.com](http://www.ijlgc.com)**RIGHT to HEALTH v. RIGHT to SMOKE DURING COVID-19  
PANDEMIC IN MALAYSIA**Farah Sherwani Md Tahir<sup>1\*</sup>, NorHusna Emirah Onn<sup>2</sup>, Husna Fauzi<sup>3</sup>

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**DOI:** 10.35631/IJLGC.728005.This work is licensed under [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/)**Abstract:**

The tobacco epidemic is one of the world's most serious public health threats, killing more than 8 million people each year. More than 7 million of those deaths are directly related to tobacco use, while approximately 1.2 million are related to non-smokers being exposed to second-hand smoke. The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) was adopted by the WHO to control tobacco consumption and provide protection to society from being exposed to tobacco smoke or better known as second-hand smoke (SHS). A smoking ban in public places has been widely implemented across the globe. However, the implementation of the smoke-free law has been challenging for many countries as it is said to impeach constitutional rights areas. In Malaysia, the enforcement of the smoke-free legislation in January 2019 has sparked outrage among smokers as they alleged the smoke-free law is unconstitutional and against human rights. This article also finds that Malaysia needs to be proactive in implementing effective measures to secure public health because tobacco control is a major issue that requires stronger state action which if it fails, the government can be accountable for not protecting individuals' right to health comprehensively.

**Keywords:**

Tobacco Smoking, Right To Health, Right To Smoke, Second-Hand Smoke, Smoke-Free Legislation

## Introduction

The COVID-19 pandemic, which, was first discovered in December 2019, in Wuhan, China has spread rapidly and caught much of the world off guard, resulting in a health and economic emergency that will have long-term consequences. The magnitude of the threat has compelled both governments and businesses to prioritize public health over economic principles, adapt, and reinvent to contain the spread of this highly contagious disease. The infection of COVID-19 is frequently more severe among people over the age of 60 or those who have serious health conditions such as lung or heart disease, diabetes, or immune system disorders (World Health Organization, 2022). These health problems are significant to those who smoke. The tobacco epidemic is one of the world's most serious public health threats, killing more than 8 million people each year. More than 7 million of those deaths are directly related to tobacco use, while approximately 1.2 million are related to nonsmokers being exposed to second-hand smoke (Commissioner, 2008). One of the significant evidences related to the adverse effect of tobacco use was found during the 1920s-1930s when most medical practitioners noticed that there had been an increase in the number of lung cancers. The publication of the four studies on smoking habits of lung cancer patients in 1950 provided the first major and nearly conclusive evidence of the effects of smoking on health in modern history (Musk & Hubert, 2003). Based on the 2019 report, smoking has been one of the top five death risk factors worldwide with 7.69 million deaths, after high blood pressure with 10.85 million deaths (Ritchie & Roser, 2013). Despite this well-known fact, many governments have failed to enact adequate measures to prevent the spread of tobacco addiction due to pressure from tobacco industry lobbyists. The failures of these governments violate their citizens' rights to health and life (Crow, 2005).

The creation of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) which came into force on February 27, 2005, was the first evidence-based treaty under the auspices of the World Health Organization (WHO) (Roemer, Taylor, & Larivier, 2005). It reaffirms the right of every individual to the highest health standards. Various international human rights instruments are recognizing the right to health, for example, the Universal Declaration of Human Rights 1948 (UDHR 1948). Although it is a non-binding international treaty, the UDHR remains the most comprehensive human rights tool as it covers civil, political, economic, social, and cultural rights (Fauzi, 2013). As one of the United Nation's agencies, WHO is responsible for promoting health and ensuring that the global citizens are safe, and serving the most vulnerable groups in attaining the highest level of health. Thus, the establishment of the WHO FCTC highlights not only the danger of tobacco-related matters but also recognizes the importance of health rights which is part of human rights.

One of the measures under the WHO FCTC is prescribed under Article 8 of the Convention which concerns the protection from exposure to tobacco smoke. The objective of the said article leads to two important aspects which are 1) to assist Parties in fulfilling their obligations under the said Article, and 2) to identify the key elements of legislation necessary to effectively protect the society from tobacco smoke exposure (Organization, 2007). Second-hand smoke is defined as the smoke emitted from the burning end of a cigarette or other tobacco product which is normally in combination with the smoke exhaled by the smoker (Organization, WHO Framework Convention on Tobacco Control: Guidelines on Protection From Exposure to Tobacco Smoke Article 8 of the WHO FCTC, 2007).

At present, the Food Act of 1983 is the relevant law relating to tobacco control matters. The Control of Tobacco Products Regulations (CTPR) 1993, enacted under the Food Act of 1993, is the primary law governing tobacco use and product regulation. The Food Act of 1983 and the CTPR of 1993 empower the Minister of Health to carry out the law and regulations (Mokhtar, 2021). The CTPR 1993 prohibits indoor smoking in healthcare institutions, public spaces (including public lifts or toilets), theatres, and air-conditioned eating establishments, as well as public transportation designated as a “no smoking zone”. All direct advertisements and sponsorships are prohibited. It also includes clear health warnings and a set maximum amount of tar (20 mg) and nicotine (1.5 mg). Tobacco sales, possession, and smoking are also prohibited for children. Later, it was replaced by CTPR 2004 which witnessed the improvement of the law and strengthened to make it more stringent by prohibiting tobacco advertisements and sponsorship, restricting smoking in additional specified areas, prohibiting the sale of tobacco products to minors, and limiting tobacco product labelling, packaging, and sale. Slowly, CTPR 2004 began to govern tobacco issues in Malaysia. The Prohibition of Smoking Areas Regulation 11 of the CTPR 2004 went into effect on September 23, 2004. The CTPR of 2004 enacted smoking bans in public places. Only one-third of designated smoking areas, such as air-conditioned restaurants, non-airconditioned public transportation terminals, and open-air stadiums, could be occupied. Smoking was still permitted in pubs, discotheques, nightclubs, and casinos.

On 1 January 2019, Regulation 11 CTPR 2004 (Amendment 2018), extends no-smoking zones to all dining areas. Before the 2018 amendments, smoking was prohibited in restaurants with air conditioning. However, in 2017, amendments were made to designate smoking areas. 27 As a result of the 2018 amendments, any restaurant is now considered a non-smoking zone. Regulation 11 CTPR 2004 prohibits smoking in any "eating place," which is defined as

*“...any premises whether inside or outside building, where food is prepared, served or sold and includes —*

*(a) any room or area on a ship or train where food is prepared, served or sold;*

*(b) any area on a vehicle where food is prepared, served or sold, and any surrounding area within a radius of three meters from the vehicle; and*

*(c) any area within a radius of three meters from any table or chair which is placed for the purposes of preparing, serving or selling food”*

As a result of the smoking ban at public eateries, Malaysia experienced its first tobacco litigation case after the seven smokers or also known as the Defenders of Smokers Rights applied for judicial review to the High Court of Kuala Lumpur on constitutional rights issues. Various constitutional issues are raised especially freedom of liberty and equality. Even though Malaysia is still lacking in tobacco litigation cases compared to other foreign countries, this case is nevertheless a good practice to show that Malaysian courts are taking proactive action in addressing tobacco-related matters like India and other foreign countries. In addition to tobacco-related matters, health rights which health is part of human rights is gaining attention worldwide. For Malaysia, although health rights are not clearly expressed in the Constitution, it is still one of the crucial human rights in Malaysia which remain protected by the country through the various implementation of tobacco control measures.

## Methodology

The qualitative method is used in this article. This article used the primary sources of law derived from the Constitution, legislation, and International Conventions especially WHO FCTC and UDHR in evaluating the legal issues. Further, the secondary sources of law derived from the various published articles and journals are relevant in discussing the concept and the terminology that connected with this article.

This article will examine the implementation of Article 8 of the Convention on the smoking ban which has caused various human rights conflicts in Malaysia. As one of the parties to the Convention, Malaysia managed to implement smoke-free laws as part of legal measures in protecting its citizens from secondhand smoke in indoor workplaces and public places, public transport, and other public places. However, the smoke-free implementation caused a major setback they are alleged to impeach the smokers' rights to personal liberty and equality. Hence, this article discusses human rights issues, especially health rights as well as the right to smoke based on both primary and secondary sources. This article also will evaluate how Malaysia deals with Article 8 of the WHO FCTC and the actions taken especially during the Covid-19 pandemic to curb tobacco smoking issues.

## The Importance of Right to Health in Light of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC)

The international right to health is usually the most important human right in the context of health policies, programs, and interventions. Some characteristics of the right make it particularly well suited to contributing to the effective implementation of health policies and interventions over the medium and long term in countries with varying resource capacities (Hunt, 2016). As an international health organization, it can be said that the right to health was first articulated in the World Health Organization Constitution. The preamble of the said Constitution provides: "...enjoying the highest attainable standard of health is one of the fundamental rights of every human being." (Constitution of the World Health Organization, n.d.) The right to health is also recognized under the Universal Declaration of Human Rights (UDHR). Article 25 of the UDHR states: that health rights are part of the right to an adequate standard of living. This right is also embodied in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) where the "States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Therefore, to maintain both the physical and mental health of their citizens, the States Parties are required to take measures as stipulated in Article 12(2) of the ICESCR which are- a) the provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; b) the improvement of all aspects of environmental and industrial hygiene; c) the prevention, treatment, and control of epidemic, endemic, occupational and other diseases; and d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness. To attain the best standard of physical and mental health enjoyment, a State should realize that the right to health does not refer to access to health care and hospital construction only but it encompasses a wide range of factors that can assist people to lead a healthy life. This includes safe food, drinks, sanitation, proper home and nutrition, a healthy working environment, and also gender equality which are considered qualities in health rights (Dommen, 2003).

However, it is to be noted that the right to health is not the same as the right to be healthy. A common misconception is that the government is obligated to provide the people with adequate health care. However, good health is attributed to several factors and some of these factors are beyond the direct control of the state, such as an individual's biological makeup and socioeconomic circumstances. Rather, the right to health refers to the right to enjoy a wide range of goods, facilities, services, and conditions that are required for its realization. This is why, rather than an unconditional right to health, it is more accurate to refer to it as the right to the highest attainable standard of physical and mental health (World Health Organization, n.d.).

Tobacco smoking is proven to be deadly. The released smoke or better known as second-hand smoke (SHS) contains over 4,000 chemical compounds, such as tar and nicotine, which combine to form at least 60 carcinogenic substances. Without a doubt, secondhand smoke is a human lung carcinogen, causing 3,000 lung cancer deaths in the United States alone each year (Vasquez, 2014). It is understood that not only smokers are in danger, but non-smokers who are exposed to direct tobacco smoke are equally in danger. The establishment of the WHO FCTC is meant to control the consumption of tobacco and protect the global society from second-hand smoke. The Convention tackles every aspect of tobacco which can be divided into two, namely i) core demand reduction and ii) core supply reduction. For the former, it covers the i) price tax measures and ii) the non-price tax measures. The non-price tax measures consist of the protection from tobacco smoke exposure, tobacco products content regulation, tobacco products disclosures regulation, tobacco products packaging and labeling, education, training, and public awareness and communication, tobacco advertising, promotion, and sponsorship as well as demand reduction measures concerning tobacco dependence and cessation (FCTC, 2003) On the other hand, the core supply focuses on measures in reducing the illicit trade of tobacco products, sale to and by minors, and provision of financial assistance for economically viable alternative activities (FCTC, 2003).

The WHO FCTC has more than 80 Parties to the Convention. This demonstrates a positive acceptance that many countries across the globe want to curb tobacco-related matters. Smoke-free laws have been one of the highest implemented measures under the WHO FCTC (Chung-Hall, Craig, Gravely, Sansone, & Fong, Impact of the WHO FCTC over the first decade: a global evidence review prepared for the Impact Assessment Expert Group, 2019). For instance, on 29 March 2004, Ireland became the first country to implement a comprehensive smoke-free law in all indoor workplaces which including bars and restaurants. The Irish workplace smoke-free law was enacted to protect workers from secondhand smoke and to discourage smoking in a country with a high smoking rate. Publicans were the main opponents of the ban in Ireland. Many pubs began to offer "outdoor" seating (generally heated areas with shelters). The implementation of the smoke-free legislation in Ireland was proven to be successful and effective. Based on the fact sheet on smoke-free legislation, Ireland provides compelling evidence of the health benefits of smoke-free environments. Following the implementation of smoke-free legislation in the country in 2004, ambient air nicotine concentrations decreased by 83 percent, and bar workers' exposure to second-hand smoke decreased from 30 hours per week to nearly zero (euro.who.int, 2011) The law resulted in the near-complete elimination of tobacco smoke pollution in a wide range of public venues, including restaurants and bars, and this was accompanied by an increase in smoker support for smoke-free laws in public venues (Hyland, et al., 2007). Based on what Ireland had experienced, it can be inferred that the enforcement of the smoke-free laws is one of the effective measures in curbing the tobacco pandemic, as recommended in the FCTC.

In the United Kingdom, its Department of Health (DoH) is of the view that human rights are the center of healthcare in general. Human rights, according to the publication *Human Rights in Healthcare – A Framework for Local Action*, should be viewed as a "vehicle for making principles such as dignity, equality, respect, fairness, and autonomy central to our lived experience as human beings." As a result, core principles such as dignity and respect are seen as underpinning the rights explicitly stated in human rights legislation (Warner, 2009). However, one could not ignore the central argument of the health and human rights perspective, as first advocated by Jonathan Mann that health promotion and protection are inextricably linked, and both are required for human well-being. The most important aspect of the relationship between health and human rights is recognition of the potential for public health campaigns to burden human rights and the importance of 'an approach to realizing health objectives that simultaneously promotes – or at least respects – rights and dignity (Mann, et al., 1994). Thus, states and other duty-bearers are held accountable in a human rights-based approach for fulfilling and guaranteeing people's rights. A human rights-based approach to tobacco control aims to improve the ability of rights holders to make claims and duty bearers to meet their obligations (Alwis & Daynard, 2008).

### **Tobacco Smoking and Constitutional Issues**

Faced with significant inequalities in the distribution of health care services in the 18th and 19th centuries, philosophers, policymakers, and scholars began to discuss socioeconomic rights and proposed the idea that health can be a "notion of basic individual rights" (Wu, 2008). According to Chuan-Feng Wu, the majority of states around the world have recognized the right to health for all citizens and have explicitly supported and accepted international human rights laws, the state should respond to the tobacco crisis more effectively using the right-to-health paradigm.

Several countries' constitutions guarantee the right to health. Brazilian Constitution, for example, Article 6 of the Brazilian Constitution guarantees an affirmative right to health. Yet, the right has not been developed in any legislation and case law (Alwis & Daynard, 2008). In Italy, the right to health is enshrined in Article 32 of the Italian Constitution as both an individual and collective right. In India, Article 47 of the Indian Constitution provides a provision on the Right to Health, which states that improving public health should be regarded as one of the State's fundamental duties. This provision is found in the Fundamental Rights and the Directive Principles of State Policy.

Despite various scientific evidence that tobacco is harmful to human health, the implementation of smoke-free laws across the globe receives a mixed reaction, especially from smokers. Today, smoke-free laws have been alleged to be one of the most controversial laws among smokers around the world. In many countries, smoke-free laws are claimed to be unconstitutional and against smokers' fundamental rights, particularly freedom of liberty and equality. Many courts around the world order the government to follow international law and treaty obligations. Courts have increasingly transcended national boundaries in recent years to embrace a more universal commitment to human rights (Slaughter, Tulumello, & Wood, 1998). The Indian Supreme Court has interpreted the Indian Constitution's Right to Life Clause broadly and creatively to include the right to live with dignity and all the rights that go with it (E.Boyle & Anderson, 1996). Human rights litigation has prompted the Indian Supreme Court to develop procedural innovations to broaden the constitutional interpretation of the fundamental right to life to include the right to health. These tools have included the use of the Constitution's

Directive Principles and international human rights conventions as interpretive tools to broaden the interpretation of the right to life (The Chairman Railway Board v. Mrs. Chandrima Das, 2000). The Indian social action litigation revolution has sparked far-reaching changes in the adversarial system in South Asian countries. Hence, there is no doubt that human rights litigation quickly became the vehicle in India for realizing constitutional guarantees.

In 1999, in the landmark case of Ramakrishnan v. State of Kerala (Ramakrishnan v., 1999), the court ruled that smoking in public places was a public nuisance. The petitioner argued in this public interest writ before the Kerala High Court that the constitutional right to life includes a right to be free of public smoking and smoking-related disease. Justice K. Narayana Kurup agreed, ruling that:

*“Public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise, is illegal, unconstitutional and violative of Article 21 of the Constitution of India. We direct the District Collectors of all districts of the State of Kerala ...to promulgate an order under Section 133(a)Cr. P.C. prohibiting public smoking within one month from today and direct the Director-General of Police... to issue instructions... to prosecute all persons found smoking in public places.., by filing a complaint before the competent Magistrate...”* (Ramakrishnan v., 1999)

Two years later, the Indian Supreme Court justified the ban on smoking in public places by citing every citizen's fundamental constitutional right to life, health, and a clean environment in the case of Shri Murli S. Deora, et al v. Union of India (Murli S. Deora v. Union Of India and Others, 2001). In this case, Murli Deora, President of the Mumbai Regional Congress Committee, filed a public interest writ petition against the Union of India and major Indian tobacco companies. The petitioner in Deora contended that the Union of India had breached its duty to protect public health, particularly “the health of children of tender age,” by failing to act to control tobacco use. The petition requested that the Ministry of Health and Family Welfare develop a comprehensive national tobacco control policy, including the elimination of public smoking, the adoption of stronger health warnings on cigarettes, the meaningful enforcement of advertising restrictions, the control of sales to children, and the establishment of a fund to compensate victims of smoking, which would be funded by tobacco companies. The Supreme Court, at the request of the petitioner's counsel and with the concurrence of the Attorney General, directed the states of India to issue immediate orders prohibiting smoking in hospitals, educational institutions, railways, public transportation, courts, and public offices, libraries, and auditoriums across the country.

Peru for instance shares a similar experience to India. In 2010, in the case of 5000 Citizens v Article 3 of Law No. 28705, the Plaintiffs (5000 Peruvian citizens) requested that Article 3 of Law No. 28705 – General Law on the Prevention and Control of Tobacco Use Risks – as amended by Article 2 of Law No. 29517 be declared unconstitutional. Article 3 of Law No. 28705 states: -

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

*3.2 Interiors and enclosed public spaces are understood as any workplace or place of public access that is covered by a roof and enclosed between walls, regardless of the material used for the roof and whether the structure is permanent or temporary.*

*3.3 The regulation to the Law establishes the other specifications for interiors or enclosed public spaces.” (tobaccocontrollaws.org, 2011)*

They specifically questioned the precept in the extremes where it prohibits tobacco use in all enclosed public spaces in Peru, thus prohibiting the existence of establishments exclusively for smokers, and where it prohibits tobacco use in open areas of educational establishments for adults. As they maintained that Article 8 of the Constitution is limited to establishing an order to regulate tobacco use rather than outright prohibit it. As a result, to protect the right to health, the state may impose certain restrictions on tobacco use, but not outright ban it. The Plaintiff (citizens), further argued that to protect the right to health, the state may impose certain restrictions on tobacco use, but not to outright ban it. To that end, they claim that the World Health Organization's Framework Convention on Tobacco Control, which they believe has legal standing and on whose regulations the inclusion of the contested regulation is based in large part, could not prohibit tobacco use because the Constitution expressly allows the use of social toxins.

Apart from the citizens' allegations that the laws are unconstitutional, one of the interesting claims made by them is that the smoke-free laws infringe their right to free personal development by preventing them from exercising their right to smoke, even though it does not affect the rights of non-smokers. According to them, the regulation forbids tobacco use in enclosed public places, regardless of whether they are designated exclusively for smokers or where smoking staff members work, as well as tobacco use in open areas of educational establishments for adults. They stated unequivocally that neither of these two cases has any bearing on the health rights of non-smokers. On this basis, they argued that the state cannot punish people who have freely chosen to smoke in places specifically designed for that purpose within the framework of their autonomy.

The Constitutional Court of Peru ruled that the law was strictly proportional, putting the right to health above the alleged violated rights, and the smoking ban was the best way to comply with Framework Convention on Tobacco Control (FCTC) provisions requiring protection from tobacco smoke exposure. The Constitutional Court also addressed the question of whether smoking is constitutionally protected by the basic rights to freedom of personal development, it is clear that the right to personal discovery is not absolute. In other words, it must be exercised in accordance with other people's fundamental rights and constitutionally relevant goods (tobaccocontrollaws.org, 2011) The Court demonstrated a high level of satisfaction with how the questioned bans achieve the goal of reducing tobacco use, which leads to greater protection of smokers' right to health and a reduction in tobacco-related health costs. Since health is a fundamental value in our constitutional system, it must be protected so that every human being can exercise moral autonomy and eventually develop in dignity (constituteproject.org, 2021).

The second constitutional claim frequently advanced by supporters of smokers' rights is that smoke-free laws discriminate against smokers as a group, thus violating the Equal Protection Clause of the Constitution whereby courts have never been swayed by such claims from the pro-smokers (K.Graff, 2008). According to the United States Constitution, the Equal Protection Clause ensures that people have the right to "equal protection under the law." The United States

Supreme Court has interpreted this to mean that the government cannot pass laws that treat one group of people differently than another without an adequate justification. As an example, a smoker may file a lawsuit if he believes that a smoke-free workplace law violates the Equal Protection Clause because it discriminates against smokers while favoring non-smokers without adequate justification (Kingston, 2019).

### **Tobacco Smoking and Smoke-Free Legislation in Malaysia**

Effective from 1.1.2019, Regulation 11 of the CTPR 2004 (Amendment 2018) imposes all dining areas are included as no-smoking areas. Before the 2018 amendments, smoking was banned at places with air-conditioner eating places under CTPR 2004. As a result of this amendment, any eatery now is considered a non-smoking area (Mokhtar, 2021). However, amendments were made in 2017 that designated the smoking areas. The action taken by the government in enforcing the smoke-free legislation received mixed reactions from smokers and restaurant owners as the country imposed a nationwide smoking ban on all restaurants, including public and open-air eateries (Tan, 2019). However, the government initially took a soft approach to enforcement to provide opportunities for people from all walks of life to change their smoking habits as required by law. The Ministry of Health stated that it “will give a six-month period to implement the ban, during which time it will teach a lesson and alert restaurant owners and smokers” (Mokhtar, 2021). The ban's phased implementation demonstrates that it was not intended to penalize smokers, but rather to provide an incentive for them to quit smoking. Following the educational enforcement period, the ban was fully implemented on January 1, 2020, with any individual found smoking in prohibited areas, including all restaurants, subject to an RM250 fine. However, for those who committed the offence for the first time, the compound was reduced to RM150 if the payment was made at any District Health Office within one month of the date the compound was registered. The full RM250 fine must be paid for the second offence, with no exceptions. Those who committed the offence a third time would face an RM350 compound, and so on. Owners of premises must ensure that their premises are smoke-free under Regulation 12 of the CTPR 2004.

The ‘discrimination’ that some of the affected groups experienced due to the FCTC implementation lead them to challenge the FCTC guidelines as ‘bad laws’ and violate their fundamental rights. Like India and Peru, Malaysia experienced its first tobacco litigation on December 31, 2018, whereby seven smokers challenged the laws prohibiting smoking in all restaurants. However, the judge denied their request to suspend the ban until the full hearing of the lawsuit, stating that the “court had no intention of interfering in the operation of the law.” The High Court, however, granted an ex-parte application for judicial review to challenge the ban. The smokers claimed that the smoking ban (hereafter referred to as the ban) violated the Federal Constitution because smoking is not a criminal offense and is not prohibited by law in the country. They also claimed that because the activity is guaranteed by the Constitution and legally recognized, smokers and non-smokers have the same right to be customers at restaurants where they can spend as much time and money as they want. They added also argued that smokers are being discriminated against in being in eateries, which they claimed was illegal and unconstitutional besides claiming the respondent violated the procedure by failing to consult with smokers or other stakeholders prior to enforcing the ban. They also demanded that the government provide a separate smoking area or give food operators discretion to implement the ban and provide a separate smoking area. They also requested a proclamation declaring that the CTPR (Amendment) 2018 P.U (A) 329 and paragraph 5 CTPR (Amendment) 2017 P.U (A) 32 are null and void because the provisions violate articles 5 and

8 of the Federal Constitution (Mohd Hanizam Yunus dan lain-lain lwn Kementerian Kesihatan Malaysia, 2020).

However, the court dismissed the applicant's contention that "if the smoking ban were implemented, eating-place areas across Malaysia would be an exclusive area for non-smokers Malaysians and that smokers would be excluded or discriminated against from visiting and enjoying the food at the restaurants or dining spots" as a "baseless statement that is not supported by any evidence and was a speculation beyond the reach of the court." Elaborating on the smoking ban, the presiding Judge, Dato' Seri Mariana Yahya said: "...they can still smoke outside, three meters or 10 feet outside the premises. There are no laws forbidding the applicant group from smoking in total" (Yen, 2019). The Malaysian court explained two important basic rights in the said case which are- 1) freedom to liberty under Article 5, and 2) equality under Article 8 of the Constitution of Malaysia.

In response to the smokers' contention that the authority's decision and the relevant provisions of the CTPR should be declared null and void for violating Articles 5 and 8 of the Federal Constitution, the court concluded that the ban did not violate Articles 5 and 8 of the Federal Constitution. In relation to Article 5 concerning the right to 'personal liberty,' the court determined that the phrase 'personal liberty' meant liberty relating to the individual's persons or body. It is the polar opposite of physical restraint or coercion. Despite the prohibition on smoking, smokers' rights to life and personal liberty are guaranteed by the Federal Constitution. Personal liberty rights are not synonymous with the right to smoke. People can still smoke as much as they want as long as they follow the rules set by the government. But, personal liberty rights are not synonymous with the right to smoke (Mokhtar, 2021).

### **Is There a Right to Smoke?**

Tobacco control measures established by the FCTC include all aspects, such as measures to prevent exposure to tobacco smoke (Article 8), price and tax measures to reduce demand for tobacco (Article 5) regulating tobacco product ingredients (Article 6) disclosure of tobacco products (Article 10) packaging and labelling of tobacco products (Article 11), tobacco advertisements, promotion and sponsorship (Article 13) and illegal trade of tobacco products (Article 15) and so on. Among all of these measures, the one most closely related to "the right or freedom to smoke" is Article 8 of the FCTC, which deals with preventing second-hand tobacco smoke exposure.

Thus, whether the "freedom or right" that is claimed to be violated by the measure of preventing second-hand tobacco smoke exposure becomes a legal basis for tobacco control is serious across the globe. The question of the exact cause of "freedom of smokers" has yet to be followed by other issues such as questions about whether there is smokers' freedom as citizens, or something called the freedom of smoking" or "the right to smoke" actually exists? Can these arguments be proven? If so, how severe is this right violated? (Xie, 2013)

Some scholars believe that there is a presumptive right known as the "smoking right". This "smoking right" is based on a natural person's free will to decide or choose his own behavior, and it falls under the category of freedom of action, also known as the "right of freedom". The claimed "smoking right" is often referred to as "smoking autonomy" (Zhou, 2011) or simply stated as "people have the right to smoke". They are under no obligation to refrain from smoking (W.Stark, 1992). Tobacco smoking is not a crime, and it is not classified as dangerous

or harmful in the same way as illegal drugs and other harmful substances (Mokhtar, 2021). So, from a legal point of view, smoking does not fulfill the requirement of a stable foundation in values, rather it is considered general freedom which is exercised for smokers' own interests and needs.

Despite all the scientific proof that smoking leads to lung cancer, cancers, asthma, and other chronic diseases, the American Lung Association highlights that since people who smoke have more angiotensin-converting enzyme 2(ACE2) receptors in their lungs, the virus that causes COVID-19 uses these receptors as a 'doorway' to get into lung cells, thus allowing for more severe illness from the virus (American Lung Association, 2021). In tobacco control, ensuring healthcare freedoms is a critical and contentious human rights issue. These liberties are inextricably linked to an individual's autonomy to make his or her own health care decisions (to smoke or not to smoke), to be concerned with his or her own body, and to do so without interference from others (states or individuals). Personal freedom to smoke, however, is not an absolute right.

Individual freedom to smoke must be balanced against the state's responsibility to protect public health, the costs incurred by the state in doing so as a result of tobacco use, and the desired public health benefits (Leary, 2000).

Although at present, there is no clear evidence of the usage of e-cigarettes and severe risks due to Covid-19, other harms continue. It is known that most e-cigarettes contain nicotine, which has been linked to a variety of negative health effects, including inflammation (American Lung Association, 2021). Heavy metals such as lead, volatile organic compounds, and cancer-causing chemicals can be found in e-cigarette aerosol, which is harmful to the lungs (cdc.gov, n.d.) Acrolein, a pesticide found in e-cigarettes can cause acute lung injury, COPD, asthma, and lung cancer, all of which are potential risk factors for developing more severe COVID-19 symptoms.

Due to the long period of Covid-19, it is clear that smoking needs to be stopped. Based on what has been mentioned earlier in this article, whether there is a right to smoke, the answer is negative and impossible for any courts worldwide to recognize smoking rights. In the past, there has been a significant effort to increase government regulation on smoking in public places and at work (Riddle, 1987) which is continued until today despite various legal suits brought to the court. Non-smoker organizations have been lobbying for a long time, arguing that the battle is one of health, not law. Regardless, if non-smokers' rights are to be protected, the law must eventually intervene. The smoke-free laws are one of the highest measures implemented by many countries in banning smoking in public places. The reason is that second-hand smoke can cause harm to human beings and the environment apart from being a public nuisance and discomfort. So, this particular measure is significant not only to protect people from exposure to tobacco smoke but also to reduce the consumption of tobacco among the public. Since Covid-19 is a long-term pandemic, life becomes at stake as to the danger not only of Covid-19 but also tobacco smoke. However, Malaysia took a different approach as Datuk Rosol Wahid, the Deputy Minister of Domestic Trade and Consumer Affairs, said that despite not being listed as an essential item, cigarettes can still be sold because they are "essential to cigarette addicts" (Palansamy, 2021) during the total lockdown period in this country. In this situation, the government should play an active role in curbing the smoking habit yet, the responsibility had been taken lightly. The encouragement that was given by the minister had been put in the wrong way and violates the obligation under the WHO FCTC as

a Party to the Convention. Thus, smoking is only a choice and not a right guaranteed under the Constitution because it is *prima facie* that smoke itself dictated disadvantages, unhealthy and unbeneficial to humans which is against the health rights. What the government can do is by providing punitive measures to control unhealthy habits. the right to health is a matter of public interest while the right to be healthy is a matter of choice.

### Conclusion

Although the WHO FCTC contains discretionary and indirect (rather than mandatory and direct) implementation mechanisms, identifying and evaluating all potential infringements on the right to health in a tobacco control policy can prevent the state from arbitrarily undertaking less effective tobacco control initiatives. The implementation of SFL in Malaysia has not been as successful as it has been in the UK in terms of reducing exposure and negative health effects. One of the reasons is likely due to a lack of enforcement by relevant authorities in ensuring compliance with the SFL on-premises as specified in the Control of Tobacco Product (Amendment) Regulations 2010 (Abidin, Zulkifli, & Abidin, 2016). However, the situation has changed since the smoking ban was enforced in January 2019. It shows how much the governments had taken all the necessary legislative, administrative, budgetary, and other measures to realize human rights by way of enacting comprehensive tobacco control legislation that protects people's health (Oscar A. Cabrera & Lawrence O. Gostin, 2011). Hence, the SFL must be perceived not only as a fulfillment of the obligation under the Convention but also as a commitment of Malaysia to protect the rights of its people.

The Covid-19 period should be the best time for Malaysia to fully exercised FCTC guidelines and free itself from tobacco-related matters. Even though tobacco cigarette is not illegal, the government should be serious in giving its commitment as part of fulfilling its duty as one of the parties to WHO FCTC. The health of the society should be on top of the government's priority in providing a better lifestyle for the public to enjoy. Since the right to equality requires that everyone is to be treated equally by the law and that they have the right to be protected by the law, both non-smokers and smokers have the legal right to be protected as both have the right to breathe clean air. Given that health is a fundamental right under the laws, it must be protected from any harm. Thus, every human being needs to be assured that any tobacco control measures taken by the government, are meant to reduce the danger of tobacco smoking not only to individuals but also to the society at large. The safety of the public becomes a priority, and the government plays a crucial role as they have the power to pass legislation and regulations that can benefit the country and society.

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