

RIGHT TO SMOKE IN INDIA: JURISPRUDENTIAL ANALYSIS**Dr. Mona Goel¹**

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Abstract

The right to health is basically a human right which means that everyone has the right to the highest attainable standard of physical and mental health. For attaining right to health, a clean and fresh environment is the basic need of a person. People consider right to smoke as their fundamental right to live life with leisure but, on the other hand the Constitution of India is perhaps one of the rare Constitutions of the world which contains specific provisions relating to environmental protection. Besides individual health problems, smoking is an environmental pollutant and environmental protection is an individual's fundamental duty too. Thereby, restricting smoking in public places, we secure few of the rights of non-smokers and contribute to environmental protection.

Hence, the above paper provides an insight on the jurisprudence of right to smoke in India and also highlights the health hazards, penal provisions and judicial approach concerning the same.

Keywords: Right, Smoke, Law, Health, Jurisprudence.

INTRODUCTION

Rights are the grounds for duties in the sense that one way of justifying of holding a person to be subject to a duty is that this serves the interest on which the others right is based.⁴ Thus every right has a correlated duty. A right is a right only when it is not offensive to anyone, when it is not embarrassing and when it contributes to human flourishing. No right is a right unless it is essential to social development.⁵ Every right has a corresponding obligation or duty. Without rights there can be no duties

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⁴ Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 140 (2000).

⁵ *Ibid.*

or vice-versa. If I have a right everyone else has a duty to respect my right. If I have a duty, someone else has a right to the thing so I must do it or omit the same. Thus men have rights and duties towards each other.⁶

The right of one is an obligation of another. Hence, the right of a citizen to live under Article 21 casts an obligation on the State. This obligation is reinforced under Article 47 which deals directly with the duty of the State in connection with health. It lays down that the State shall regard the raising of the level of nutrition and the standard of living of its people and improvement of public health as among its primary duties and in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs.⁷ Thus fundamental rights and the directive principles have to be read in the light of each other because the fundamental rights themselves has no fixed content.⁸ The fundamental rights provided to us by the Constitution of India are not absolute and are subject to reasonable restrictions as necessary for the protection of general welfare.

Article 21 of the Constitution of India reads as:

“No person shall be deprived of his life or personal liberty except according to a procedure established by law. So this Article secures two rights: (1) Right to life; (2) Right to personal liberty.”

The right to life is undoubtedly the most fundamental of all rights. ‘Life’ under Article 21 of the Constitution is not merely the physical act of breathing, it does not connote mere animal existence or continued drudgery through life but it has much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air and many more. Moreover after the case of *Maneka Gandhi v. Union of India*⁹ the term ‘personal liberty’ is no longer confined to liberty from external restraints, rather it extends to “protection from deprivation of all those limbs and faculties by which life is enjoyed.”¹⁰

The right to health is basically a human right which means that everyone has the right to the highest attainable standard of physical and mental health. For attaining right to health, a clean and fresh environment is the basic need of person and if a person is living in a polluted environment, he cannot attain a good health. Hence, smoking tobacco is also an obstacle in getting clean and fresh environment.¹¹

RIGHT TO SMOKE AS FUNDAMENTAL RIGHT: A MYTH

People consider right to smoke as their fundamental right to live life with leisure. However it is elementary right of all to live in a healthy environment. Yet, the protection of environment is a global issue. Therefore, Constitution of India is perhaps one of the rare Constitutions of the world which contains specific provisions relating to environmental protection. Besides individual health problems, smoking is an environmental pollutant too.

The Supreme Court has asserted Article 21, in the heart of fundamental rights. The Apex Court has

⁶ S.N. Dhyani, *Jurisprudence and legal theory* 233 (Central Law Agency, Allahabad, 4thedn., 2010).

⁷ Veena Madhav, “A Case for Banning Sports Sponsorship by Cigarette and Coca Cola & Pepsi Companies” 27(2), *Indian Bar Review* 129(2000).

⁸ *Id.*, p. 131.

⁹ AIR 1973 SC 597.

¹⁰ *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494.

¹¹ Atul Mishra, “Right to Health and Anti-Smoking Laws in India” 3, *IJSARD* 49 (2017).

taken the view that in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated as Fundamental right. Accordingly, the Supreme Court has impliedly taken the bundle of human rights from Article 21.¹²

Thereby, restricting smoking in public places, we secure few of the rights of non-smokers. For instance the Fundamental right under Article 19(1)(g) i.e. Right of movement secures the non-smokers right to move freely without fear of compulsive passive smoking and also their right to pollution free and healthy environment under Article 21 of the Constitution of India.¹³

Basically, producing and marketing cigarettes, come within the ambit of fundamental rights to practice any business or trade under Article 19(1)(g). But such a right “does not prevent” the State from making any law imposing reasonable restrictions on the exercise of the right to carry on the business etc. in the interest of the general public as stated in Article 19(5).¹⁴

GLOBAL VISION

Right to smoke in United States

Smoking is not mentioned anywhere in either Constitution. Nevertheless, some people may claim that there is a fundamental “right to smoke”. These claims are usually made in two ways: (1) that the fundamental right to privacy in the state or federal constitution includes the right to smoke, or (2) that clauses in the state and federal constitutions granting “equal protection” provide special protection for smokers. Neither of these claims has any legal basis. Therefore, a state or local law limiting smoking usually will be judged only on whether the law is rational, or even plausibly justified, rather than the higher legal standard applied to laws that limit special constitutionally protected rights.

The U.S. Supreme Court has held that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in the guarantee of personal liberty.” The privacy interest protected by the U.S. Constitution includes only marriage, contraception, family, relationships and the rearing and interests, and smoking is not one of them.¹⁵

Canada

Contrary to the claims of various smokers' rights groups, the *Canadian Charter of Rights and Freedoms* does not provide protection against discrimination as a smoker. The *Charter* does not recognize smokers as a group suffering social, political, or legal disadvantage in the society. Under this legislation smoking is not considered a physical disability, and this has been demonstrated in a small handful of cases.

Every province and territory in Canada has a piece of legislation governing human rights, and in most jurisdictions it is called the Human Rights Code or Act. Each Code or Act overrides all other pieces of legislation in that jurisdiction, unless a specific exemption is given. These provincial and territorial laws protect people from discrimination on the basis of disability, race, ancestry, sexual orientation, age, gender, family status, income, etc. Smoking is not identified anywhere as grounds for protection in these

¹² M.P. Jain, *Indian Constitutional Law* 1158 (Lexis Nexis, New Delhi, 7thedn., 2015).

¹³ Aseem Juneja, C.N. Singh, “Right to Smoke: Conflicting Interest” 87, *AIR* 140-141(2000); *M.C. Mehta v. Union of India* AIR 1987 SC 965

¹⁴ Veena Madhav, “A Case for Banning Sports Sponsorship by Cigarette and Coca Cola & Pepsi Companies” 27(2), *Indian Bar Review* 132(2000).

¹⁵ Available at: www.Phlpnet.org. (Last Modified September 15, 2018).

Acts. Just because someone exercises their freedom to smoke does not mean they have an absolute right to smoke.¹⁶

China

Smoking in China is prevalent, as the People's Republic of China is the world's largest consumer and producer of tobacco. There are 350 million Chinese smokers and China produces 42% of the world's cigarettes. The China National Tobacco Corporation is by sales the largest single manufacturer of tobacco products in the world and boasts a monopoly in Mainland China generating between 7 to 10% of government revenue.¹⁷

Article 21 of the Constitution of China asserts that the state "promotes public health activities of a mass character, all to protect people's health," thus enshrining government responsibility to reduce the tobacco epidemic. But like most other governments, China is caught between historical acceptance and tax benefits of tobacco and the recognition of its responsibility to the health of its people.¹⁸

LEGISLATIVE FRAMEWORKS IN INDIA

Of the various forms of smoking, the popular forms are Bin and Cigarette. Till date two main legislations have been passed. In 1975, the Cigarettes (Regulation of production, Supply and Distribution) Act, 1975 (hereafter referred as the Act of 1975), was enacted.¹⁹ The sole purpose and object of the present enactment was to make provisions as to certain restrictions relating to productions, supplies, distribution and also trade and commerce in the Cigarettes. In short, the statutory warning as appearing on the cover or packets of the Cigarette i.e. 'the Cigarette is injurious to health' is provided due to the provisions of this Act. However, given that only 20% of India's total tobacco consumption is in the form of cigarettes, the Cigarettes Act was greatly flawed in that it was restricted to cigarettes and did not include bidis, cheroots or cigars and therefore excluded the greater tobacco consumer population of India, where bidis are more commonly consumed by those of a lower socioeconomic position due to their relatively low cost. It was also considered that the Cigarettes Act failed to achieve a significant reduction in tobacco consumption because it was deemed that the warning specified under the Act was far too mild to be an effective deterrent. Furthermore, it was understood that the Act supported and favored tobacco production and trade because tobacco was considered a major source of public revenue. As a result, the first attempts of tobacco control were unsuccessful. In accordance with the landmark judgment of the Supreme Court²⁰ the Parliament has enacted the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. This law has three broad components: (1) Prohibition of smoking in a public place; (2) Prohibition of all types of Tobacco advertisements; (3) Prohibition on sale of cigarettes or other tobacco products

¹⁶Available at: <http://www.tobaccoeducatorsmb.ca/history-of-cigarette-use-in-canada.html> (Last Modified September 15, 2018).

¹⁷ Available at: https://en.wikipedia.org/wiki/Smoking_in_China (Last Modified September 16, 2018).

¹⁸Available at: <http://www.wpro.who.int/china/mediacentre/factsheets/tobacco/en/> (Last Modified September 16, 2018).

¹⁹ S.N. Sharma, "Smoking: Legislative Policy and Judicial Approach in India", 27 *Delhi Law Review*, 67(2005).

²⁰*Murli S. Deora v. Union of India*, AIR 2002 SC 40.

to minors.²¹

Furthermore, the Prohibition of Smoking in Public Places Rules, 2008 has been made which bans the tobacco consumption in all government or private buildings have come into effect from October 2, 2008. These rules were amended in 2014.²² Also, the National tobacco control programme was piloted during the 11th five year plan.

JUDICIAL PERSPECTIVE

Our Constitution contains no provision conferring right to wholesome right to health within the ambit of fundamental right. But the attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meanings and content by process of judicial Constitution.²³ Principle of interpretation requires that constitutional provision must be construed, not in narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes.²⁴

In the exercise of its powers, judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the mandate contained in Article 21, Article 38 and Article 51(a) of the Constitution of India. The Kerala High Court²⁵ held that smoking in any form is illegal, unconstitutional and violative of Art. 21 of the Constitution and directed all District Collectors of the State of Kerala to promulgate an order prohibiting public smoking.²⁶

Furthermore in the case of *Consumer Education and Research Centre v. Union of India*²⁷, it was held that it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. Under our constitutional set up the dignity of man and subject to law, the privacy of home shall be inviolable. Thus, it can be concluded that a person is entitled to the protection of law from being exposed to hazards of public smoking.

In a landmark judgment in the case of *Murli S. Deora v. Union of India*²⁸ the Supreme Court observed that a non-smoker was afflicted by various diseases only because he was required to go to public places and acknowledged the harms caused by active and passive smoking. The Court prohibited smoking in public places and directed the Union of India, State Governments as well as the Union Territories to take step to ensure prohibiting smoking in public places. It is positive step and would further assist the enforcement of anti-smoking laws.

EFFECTS OF INCLUSIVE RIGHT TO SMOKE

Smoking in general has adverse consequences of varied nature. No matter how a person smokes, tobacco is dangerous to his health. Smoking can lead to a variety of ongoing complications in the body, as well as long-term effects on the body system. The researcher has made an attempt to enumerate the direct effects of smoking. These are as follows:

²¹ Dr. Shallu, "Smoking Law vis-à-vis Rights of Non-Smokers", 44 *Civil and Military Law Journal*, 130(2008).

²² *Id.* p. 132.

²³ *Ganesh Chandra Bhat v. Distt. Magistrate*, Almora, AIR 1993, ALL.291, 298.

²⁴ Rakesh Kumar, "Environment Protection vis-à-vis, Right to Health: Judicial Approach" 1 *Chetnagar Law Journal* 2008-09.

²⁵ *K. Ramakrishnan v. State of Kerala*, AIR 1999 Ker 385.

²⁶ Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 142(2000).

²⁷ AIR 1995 SCC 922.

²⁸ SCC (2002) SC 40.

1. Health Impacts on Smoker

Habitual or excessive cigarette smoking causes lung cancer and many other diseases, such as heart disease, pancreas, breast cancer, circulatory ailment, cerebral hemorrhage, blindness, loss of sense of taste and smell, nervousness, respiratory diseases, nutritional defects, undesirable effects on glands etc.²⁹ Smoking damages the entire cardiovascular system, raises blood pressure, weakens blood vessel walls and increases blood clots.³⁰

2. Psychological Impact

According to “Medical news today”, both smokers and non-smokers experience different emotional reaction to cigarettes smoking. Although the reasons for smoking differ from person to person understanding why many people smoke can help those who want to stop. Moreover, many smokers claim that smoking helps them to relax and extract themselves for some time from their everyday stressful life which is considered to be a physical pleasure.³¹

3. Social and Economic Impact

The use of tobacco is an expensive luxury and its evil effects generally occur among youth. Smoking is often associated with other bad habits such as gambling, drinking, and undesirable social contacts. Import of foreign brand cigarettes and tobacco is unnecessary burden on foreign exchange.³²

4. Environment

Smoking is greatest polluter as number of smokers is on increase. People smoke everywhere in homes, buses, trains, bus stands and other public places causing suffocation. Smokers inhales voluntarily and others inhale involuntarily. Smoking causes air pollution.³³

CONCLUSION

Cigarette smoking is universally regarded as major health hazard and directly or indirectly is linked with many diseases such as, lung cancer, chronic bronchitis, various diseases of heart, pulmonary diseases, cancers of different organs etc. This is why smoking has not been given as right under the Constitution of India. Thus, movement against smoking needs to be strengthened further. And, it is testified by international efforts and national legislation on the subject.

Smokers dig not only their graves prematurely but also pose a serious threat to the lives of lakhs of innocent no-smokers. Let all the non-smokers to take it as a duty to help others quit smoking and may all the smokers think for a while before they take their next fag: “*DO I REALLY NEED TO SMOKE?*” To reduce the consumption of cigarettes, it is necessary to focus on rural areas by increasing public awareness about the harmful effects and about the penal provisions of the legislation. The other way out is to educate the people who smoke that how it is harmful for them as well as for the people around them and to tell them if they have a right to live then it is their duty too not to harm others.

²⁹ S.N. Sharma, “Smoking: Legislative Policy and Judicial Approach in India”, 27 *Delhi Law Review*, 66(2005).

³⁰ Available at: https://www.cdc.gov/tobacco/data.../fact.../health_effects/effects...smoking/index.htm (Last Modified September 25, 2018).

³¹ Available at: <https://www.psychologytoday.com/intl/blog/when.../smoking-and-mental-health> (Last Modified September 29, 2018).

³² S.N. Sharma, “Smoking: Legislative Policy and Judicial Approach in India”, 27 *Delhi Law Review*, 67(2005).

³³ *Ibid.*
