



ISSN: 0976-3031

Available Online at <http://www.recentscientific.com>

CODEN: IJRSFP (USA)

*International Journal of Recent Scientific Research*  
Vol. 10, Issue, 06(C), pp. 32849-32853, Jun, 2019

**International Journal of  
Recent Scientific  
Research**

DOI: 10.24327/IJRSR

## Research Article

### RIGHT TO SMOKE IN INDIA: JURISPRUDENTIAL ANALYSIS

Amita Arora

Research Fellow, University Institute of Legal Studies (UILS), Panjab University, Chandigarh

DOI: <http://dx.doi.org/10.24327/ijrsr.2019.1006.3555>

#### ARTICLE INFO

##### Article History:

Received 10<sup>th</sup> March, 2019  
Received in revised form 2<sup>nd</sup>  
April, 2019  
Accepted 26<sup>th</sup> May, 2019  
Published online 28<sup>th</sup> Jun, 2019

#### ABSTRACT

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. Wherefore, 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.

##### Key Words:

Smoke, Fundamental Rights

**Copyright © Amita Arora, 2019**, this is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution and reproduction in any medium, provided the original work is properly cited.

#### 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. 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. Generally it is said that rights and duties are correlative and complimentary. Every right has a corresponding obligation or duty. Without rights there can be no duties 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.

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. This duty extends to restraining any person from so carrying on or promoting his business as would lead to lowering the nutritional levels or causing health hazards. 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. Most of them are mere empty vessels into which each generation must pour its content in the light of its own experience. 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.

Everyone has the right to life, liberty and security of a person. 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 vs. Union of India*, 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. Another fundamental right i.e. Article 19(1)(g) states that right to practice any profession, or to carry on any occupation, trade or business is subject to reasonable restrictions in the interest of general public contained under

\*Corresponding author: **Amita Arora**

Research Fellow, University Institute of Legal Studies (UILS), Panjab University, Chandigarh

Article 19(5) of the Constitution of India. However, no express restrictions have been stated with respect to 'health of the person' under Article 19. But in the *Maneka Gandhi* case, it has been clearly enunciated by judicial interpretation about varied versions of right to health which directly as well as indirectly impose certain limitations on citizen's right to trade/occupation/business/profession.

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, which includes access to adequate food, decent housing, healthy working conditions, appropriate medical facilities and a clean environment. 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.

### ***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. Wherefore, 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. It has enough positive content and is not merely negative in its reach even though Article 21 is worded in negative terms. The Apex Court has taken the view that in order to treat a right is 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. Fundamental rights are to read not only with directive principles but also fundamental duties. Furthermore, in the case of *Kinkri Devi v. State* it was held that the right to live in healthy environment vis-à-vis scavenging of human excretion is a double edged weapon which imposes duty upon the government as well as citizens to protect and maintain the healthy environment. Fundamental rights can be restricted upon reasonable conditions so as to prevent their taking draconian shape.

These restrictions are essential and even justified as the 'liberty of an individual' can be taken for securing the equal liberty of other. 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.

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). Thereby, the question is about the imposition of reasonable restrictions upon the right to profess any profession. Furthermore, the said restrictions contained in Article 19(5) are not mentioned in

detail. It do not says that "State shall not allow such trade, business, which would be injurious to health but the judicial interpretation of Article 21 in *Maneka Gandhi's* case coupled with a parental duty cast upon the State towards its citizens has for all practical purposes imposed this limitation upon the State.

### ***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.

No person has fundamental right to smoke as only certain rights protected by the constitution as fundamental, and smoking is not one of them. 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." These rights are related to an individual's bodily privacy and autonomy within the home. 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.

### ***Canada***

Canada has a written constitution, and is also governed by unwritten constitutional principles. The constitution is the fundamental law of Canada. It constrains the actions of Canadian Governments. If a law is enacted by government that violates the constitution, it may be declared invalid and unenforceable by the Courts. Although Canada's constitution is complex, there are two relevant aspects of the constitution for present purposes. At Confederation, Canada was created as a federal state. Federalism is a corner stone of the constitution.

The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada. It forms the first part of the *Constitution Act, 1982*, and is intended to protect certain political and civil rights of people in Canada from the policies and actions of all levels of government. The *Charter* only applies to government laws and actions, including; the laws and actions of federal, provincial and municipal governments and public school boards. 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. Pertaining to specific things including housing and employment, 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 Acts, and the NSRA is not currently aware of any Canadian human rights case law where smoking was found to be so. Just because someone exercises their freedom to smoke does not mean they have an absolute right to smoke. In addition, smoking is not the only way to feed an addiction to nicotine - there are nicotine replacement therapies like the patch or gum, as well as a variety of smokeless tobacco products. However, there is a difference between smoking and being addicted to nicotine, and there is a body of Canadian case law on addiction and disability.

Nicotine addiction hasn't worked its way through the courts yet, but it is feasible in the future that a judge could find someone's nicotine addiction to be a disability.

### **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.

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. China does not have laws to punish health care facilities, medical workers and health officials who violate smoking bans, and is instead relying on the Chinese media to act as a watchdog. Smoking is a social custom in the PRC and giving cigarettes at any social interaction is a sign of respect and friendliness.

### **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. 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. This Act was brief Act consisting of twenty-two sections only. 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 Court 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 to minors.

However so far as the prohibition of smoking in a public place and prohibition on sale of tobacco products to minors are concerned, a person contravening these provisions shall be punishable with fine only which may extend to two hundred rupees. This Act covers most tobacco products including not only cigarettes, but also cigars, bidis, cheroots, pipe tobacco, hookah, chewing tobacco, pan masala and gutka. It is submitted that smoking in public places result in public inconveniences, adverse health effects on non- smokers and bidis, cheroots, pipe tobacco, hookah, violation of the right to healthy environment under Article 21 of the Constitution.

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 lay down the parameters governing the nature and extent of the health warnings that have to be displayed on Tobacco products, prohibit the use of any message on the Tobacco product that promotes its usage and lay down the principles in accordance with which these warnings have to be altered on regular intervals. These rules were amended in 2014. Moreover the interesting aspect of the Rules is that the road or the park does not come within the definition of public place because smoking on the road or the park will save others from the wrath of passive smoking. Also, the National tobacco control programme was piloted during the 11<sup>th</sup> 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. 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 so that the Constitutional provision does not get atrophied or fossilized but remain flexible to meet with newly challenges.

When the Executive is not carrying out any duty laid down upon it by the Constitution or the law, the Court can certainly require the Executive to carry out such duty and this is precisely what the Court does when it entertains Public Interest Litigation. But at the same time the Court cannot usurp the functions assigned to the Executive and the Legislature under the Constitution and it cannot even indirectly require the Executive to introduce a particular legislation or require the Legislature to pass it or assume to itself a supervisory role over law-making activities of the Executive or the Legislature. In the exercise of such 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 Court, held that smoking in any form is illegal, unconstitutional and violative of Art. 21 of the Constitution and directed all Distt. Collectors of the State of Kerala to promulgate an order prohibiting public smoking. The court also held that the continued omission and inaction on the part of the government to comply with the constitutional mandate to protect life and to recognize the unavailability to dignity of man and their refusal to continuance the baneful consequences of smoking on the public at large has resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Article 21 of the Constitution of India.

Furthermore in the case of *Consumer Education and Research Centre v. Union of India*, it was held that a healthy body is the very foundation for all human activities in a Welfare State, 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. The constitutional rights stand at a higher pedestal than the legal rights conferred by law, be it municipal law or common law. 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 vs. Union of India* 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 and held that non-smokers should not be forced to inhale second-hand smoke in public. Realizing the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, 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. For those who have been championing the cause of anti-smoking laws, the directive by the Supreme Court is a “welcome move”. 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. There are no safe substances in any tobacco products, from acetone and tar to nicotine and carbon monoxide. So the substances that one inhales don't just affect his lungs rather it affects the entire body. 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:

### **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. There are no safe ways to smoke. Replacing cigarettes with a cigar, pipe or hookah won't help a person to avoid the health risks. One of the ingredients in tobacco is a mood-altering drug called nicotine. When nicotine reaches the brain of a person, it energized the person for a while but as that effect wears off, he feels tired and craves for it more. Nicotine is extremely habit-forming, that is why people find smoking difficult to quit. Moreover, physical withdrawal from nicotine can impair the cognitive functioning thereby leading to irritation, anxiety and depression. Smoking damages the entire cardiovascular system, raises blood pressure, weakens blood vessel walls and increases blood clots.

### **Psychological impact**

According to “Medical news today”, both smokers and non-smokers experience different emotional reaction to cigarettes smoking. Though people are aware of its consequences, still they keep on 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 sometime from their everyday stressful life which is considered to be a physical pleasure. Furthermore, smoking is taken as an addiction which results into nausea, irritability, spasms etc. Over and above smoking helps in blowing away troubles as it acts like a consolation. Smoking helps to let off the worry and tension and makes the person breathe more steadily.

### **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. Cigarette smoking is economically injurious to individual, family and nation. Individual and family suffer because of the expenses incurred on tobacco or cigarettes and health problems which may otherwise be used for domestic purposes. Smoking causes loss of time, work and effort. Import of foreign brand cigarettes and tobacco is unnecessary burden on foreign exchange.

### **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. Breathing becomes difficult. Smokers inhales voluntarily and others inhale involuntarily. Smoking causes air pollution.

## **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.

## References

1. Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 140(2000).
2. S.N. Dhyani, *Jurisprudence and legal theory* 233 (Central Law Agency, Allahabad, 4<sup>th</sup> edn., 2010).
3. Veena Madhav, "A Case for Banning Sports Sponsorship by Cigarette and Coca Cola & Pepsi Companies" 27(2), *Indian Bar Review* 129(2000).
4. AIR 1973 SC 597.
5. *Sunil Batra Vs Delhi Administration* (1978) 4 SCC 494.
6. AIR 1973 SC 597.
7. Atul Mishra, "Right to Health and Anti-Smoking Laws in India" 3, *IJSARD* 49 (2017).
8. M.P. Jain, *Indian Constitutional Law* 1158 ( Lexis Nexis, New Delhi, 7<sup>th</sup> edn., 2015).
9. AIR 1988 HP 4.
10. Aseem Juneja, C.N. Singh, " Right to Smoke: Conflicting Interest" 87 , *AIR* 140-141(2000); *M.C. Mehta vs. Union of India* AIR 1987 SC 965
11. Veena Madhav, "A Case for Banning Sports Sponsorship by Cigarette and Coca Cola & Pepsi Companies" 27(2), *Indian Bar Review* 132(2000).
12. Available at: [www.Phlpnet.org](http://www.Phlpnet.org).
13. Available at: <http://www.tobaccoeducatorsmb.ca/history-of-cigarette-use-in-canada.html>
14. Available at: [https://en.wikipedia.org/wiki/Smoking\\_in\\_China](https://en.wikipedia.org/wiki/Smoking_in_China)
15. Available at: <http://www.wpro.who.int/china/mediacentre/factsheets/tobacco/en/>
16. S.N. Sharma, "Smoking: Legislative Policy and Judicial Approach in India", 27 *Delhi Law Review*, 67(2005).
17. *Murli S. Deora vs. Union of India*, AIR 2002 SC 40.
18. Dr. Shallu, "Smoking Law vis-à-vis Rights of Non-Smokers", 44 *Civil and Military Law Journal*, 130(2008).
19. *Ganesh Chandra Bhat v. Distt. Magistrate, Almora*, AIR 1993, ALL. 291, 298.
20. Rakesh Kumar, "Environment Protection vis-à-vis, Right to Health: Judicial Approach" 1 *Chetnagar Law Journal* 2008-09.
21. *K. Ramakrishnan v. State of Kerala*, AIR 1999 Ker 385.
22. Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 142(2000).
23. AIR 1995 SCC 922.
24. Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 142(2000).
25. (2002) SC 40.
26. Aseem Juneja, C.N. Singh, "Right to Smoke: Conflicting Interest" 87, *AIR* 142(2000).
27. S.N. Sharma, "Smoking: Legislative Policy and Judicial Approach in India", 27 *Delhi Law Review*, 66(2005).
28. Available at: <https://www.psychologytoday.com/intl/blog/when.../smoking-and-mental-health>.
29. S.N. Sharma, "Smoking: Legislative Policy and Judicial Approach in India", 27 *Delhi Law Review*, 67(2005).

### How to cite this article:

Amita Arora., 2019, Right to Smoke in India: Jurisprudential Analysis. *Int J Recent Sci Res.* 10(06), pp. 32849-32853.  
DOI: <http://dx.doi.org/10.24327/ijrsr.2019.1006.3555>

\*\*\*\*\*