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(IJLGC)**www.ijlgc.com**TOBACCO SMOKE AND CHILDREN: THE LEGAL
PROTECTION UNDER MALAYSIAN LAWS**Farah Sherwani Md Tahir^{1*} NorHusna Emirah Onn²¹ Ahmad Ibrahim Kuliyyah of Laws, International Islamic University of Malaysia
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The well-being of children is a major concern that the public need to be aware of. Health and environment play crucial factors in contributing to children's development. However, tobacco smoking is one of the 'diseases' that has been a concern to many especially secondhand smoke which is a threat not only to adults but also to children. There are almost 7 billion people who die from tobacco smoke while 1.2 billion non-smokers die due to secondhand-smoke (World Health Organization, 2022). The objective of this research is to examine and analyze the extent to which Malaysian law shields children from exposure to tobacco smoke. Thus, this article adopts a doctrinal research by referring to several legislations available in Malaysia as well as the international conventions and treaties to highlight the inductive analysis of this research.

Keywords:

Tobacco Smoke Pollution, Secondhand-Smoke, Smoking Ban, Child Labor, Child Rights, Child Abuse, Child Advocacy, Smoke-Free Regulations

Introduction

Poverty and hunger, protection of the environment, and health improvements are among the promises made by the Members of the United Nations when they adopt the Agenda 2030 for Sustainable Development in 2015. Health for all at all ages is among the 17 Sustainable Development Goals (SDG). To achieve SDG 3 which focuses on health, the agenda recognizes the importance of the WHO Framework Convention on Tobacco Control (WHO FCTC) as the most important instrument in SDG 3.a. This international health treaty, which has 180 signatories, is based on human rights and explicitly references the United Nations Convention

on the Rights of the Child (UN CRC). The WHO FCTC has clear objectives which aim to reduce tobacco consumption and to protect global citizens from exposure to secondhand smoke.

Article 1 of the United Nations Convention on Rights of the Child (UN CRC) defines a child as a human being under the age of 18. In tobacco cultivation and farming, children as young as five years old begin turning soil and felling trees to prepare seedbeds. They weed the fields, fertilize the tobacco plants, and spray pesticides without wearing protective equipment. This is why tobacco is said to violate children's rights in terms of their health (UN CRC Art. 24), an adequate standard of living (UN CRC Art. 27), education (UN CRC Art. 28), leisure (UN CRC Art. 31), and protection from economic exploitation (UN CRC Art. 32). On top of these violations, the marketing of addictive and harmful tobacco products to children and adolescents, as well as the lack of protection from secondhand smoke, both violate children's rights to life (UN CRC Art. 6), information (UN CRC Art. 17), and protection from narcotic drugs (UN CRC Art. 33).

Malawi, Brazil, the United States, and Indonesia are reported to be using children in tobacco-related activities. Many factors contribute to the involvement of children in tobacco cultivation. In 2020, Bharati Pflug, the ILO Senior Specialist on Fundamental Principles and Rights at Work said that "in 2016, there were 152 million children in child labor," she continued by saying that "with the COVID-19 pandemic, we may see a rise in child labor for the first time in 20 years. It may be too early to provide specific figures, but millions of children are at risk of being forced to work too soon or in hazardous conditions." (International Labour Organization, 2020). Money is the biggest reason that leads children to work in the tobacco fields as they need to contribute to family income. Sarah Norton-Staal who is the UNICEF's Chief Child Protection said that "a decrease in family income has a negative impact on children. Children are frequently forced into exploitative labor as economic opportunities dwindle.

As one of the vulnerable groups, children who work in tobacco fields are exposed to various health issues such as green tobacco sickness (GTS). It is a type of nicotine poisoning that occurs when tobacco plants are handled. Vulnerable workers are easy to contract this illness if their clothing becomes saturated with wet tobacco from rain, morning dew, or perspiration. They are also exposed to sunstrokes, snakebites and mosquito diseases, severe exhaustion and fatigue, and also bone and joint deformation due to carrying heavy loads. This is why tobacco production is hazardous to a child's health and the rights of children who work on tobacco farms are not being respected. Rather, their rights are being violated by people with interest because they are easy to be exploited.

The Head of Secretariat of the WHO FCTC, Dr. Adriana Blanco Marquizo in her keynote speech on Tobacco Industry and Child Labour dated 15 June 2021 addressed that a joint report issued by the International Labor Organization (ILO) and UNICEF shows that the first time since 2000, the reduction of child labor has stalled in the last four years. Articles 17 and 18 of the WHO FCTC call for financial support for economically viable tobacco alternatives, as well as protection of the environment and human health from tobacco cultivation and manufacturing. This is consistent with one of the action plans proposed in the ILO-UNICEF report to address the issue of child labor to meet SDG 8.7, which calls for the abolition of child labor by 2025. Fortunately, Malaysia has abolished tobacco farming in 2010. In a way, it can be said that the children in the country are protected rather than exploited by tobacco farming

through laws and regulations in the country. The development of children not only depends on food but also on their health and surroundings. The laws play major roles in ensuring their rights are protected which is a privilege given since they were born.

Methodology

This particular legal doctrinal research focuses on the legal protection for children from tobacco secondhand smoke in Malaysia. It studies the adequacy of the Malaysian laws that prove to protect children and their rights from tobacco smoke. Since Malaysia is a party to CRC and WHO FCTC, the government plays a major role not only in fulfilling its obligations under the treaty but, also responsible in implementing legal measures for society, especially the children. Therefore, this research will highlight several international conventions and treaties to impact the objective of this article. This article will further examine and analyze whether Malaysia has done its part in ensuring the children are safe when they are outside of their homes. Besides, the inductive analysis is conducted in this article by analyzing the existing primary sources of law in Malaysia to see the availability of the said protection in Malaysian context. Since the Tobacco Act of Malaysia has yet to be established, the Control Tobacco Products, and Regulations (CTPR) of Malaysia which is embedded in the Food Act 1983 will be referred to from time to time. Also, this article will review an Islamic approach and perspective on smoking too.

Malaysia and International Treaties

As of today, Malaysia has been part of various international treaties that involve protecting the legal rights of various groups. Children, women, and old people are considered the vulnerable groups in society who are often being oppressed, used, or manipulated by those in power. As a result, these groups of people are being denied their rights as human beings. It is known that every man is born with fundamental rights yet, globalization failed to curb this matter as it is still an ongoing issue globally. Malaysia supports the rights of these people which demonstrates through its participation in international treaties, for instance, the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Optional Protocol on the Involvement of Children in Armed Conflict, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Convention on the Rights of Persons with Disabilities, Constitution of the International Labour Organization (CILO), Constitution of the World Health Organization and also World Health Organization Framework on Convention on Tobacco Control (WHO FCTC).

As a Party to the WHO FCTC, Malaysia is under the obligation to protect society from secondhand smoke. The government also needs to consider the best interest of children, infants, and also unborn children in this matter. Article 3 (1) of the Convention on the Rights of the Child (CRC) states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.” To ensure that the rights of these children are protected, the government shall fulfill its duty under both treaties.

Article 8 of the WHO FCTC provides ways for the Parties to protect society from exposure to tobacco smoke (WHO Framework Convention on Tobacco Control) which comes together with the Guidelines on Protection from exposure to Tobacco Smoke for the Parties to implement in their own countries. The guidelines are intended to support the Parties in meeting

their duties under Article 8 of the Convention with effective measures in reducing secondhand smoke exposure.

Environmental tobacco smoke (ETS) or better known as second-hand smoke (SHS) is used interchangeably to describe the type of smoke prescribed by Article 8 of the WHO FCTC which is defined as “the smoke emitted from the burning end of a cigarette or other tobacco products usually in combination with the smoke exhaled by the smoker.” (Guidelines on Protection from Exposure to Tobacco Smoke: Article 8 of the WHO FCTC)

Parties to the Convention are provided with comprehensive methods for implementing Article 8. In this case, the Guidelines on Protection from Exposure to Tobacco Smoke: Article 8 of the WHO FCTC (the Guidelines) provides places to implement the said treaty. Public places, workplaces, and public transport are the main focus of the implementation of Article 8. These spaces are included indoor or enclosed public places and workplaces areas.

Today, the rising number of scientific research has demonstrated that secondhand smoke is more than just a nuisance; it is deadly (Goldstein, 2015). For children, secondhand smoke causes a variety of diseases including asthma and pneumonia and is responsible for thousands of avoidable hospitalizations. Secondhand smoke is a major cause of sudden infant death syndrome and, with repeated exposure, can lead to lung cancer and heart attacks. Hence, there is no such thing as a safe level of exposure for children if they are exposed to both indoor and outdoor spaces.

Malaysian Legal Framework on Legal Protection for Children from Tobacco Related-Matters

The Child Act 2001 (Act 611) defined a child as a person under the age of eighteen years. This Act is concerned with the care, protection, and rehabilitation of children, as well as providing matters connected with and incidental. The law recognized and acknowledged that children are a crucial component of society besides being the survival, prosperity, and development of the country. Therefore, their physical, emotional, and mental health are protected by the law since they are born. Part V of Act 611 plays an important role as it provides children protection and in need of care. Section 17 (1) of Act 611 highlights various instances whereby a child needs care and protection if the child has been the child has been, or there is a significant risk that the child will be, physically, emotionally, or sexually abused by his parent, guardian, or a relative (Section 17(1)(a), Act 611), and the parent or guardian of the child has acted negligently in exercising proper supervision and control over the child (Section 17(1)(c)(ii) are among examples of legal protection provided under the law for children.

Malaysia signed the FCTC in September 2003 and ratified it two years later in 2005. Since ratification, Malaysia has made significant progress in developing a more comprehensive tobacco control strategy, which is aided by national anti-tobacco campaigns. Malaysia first experienced dealing with smoking issues in 1976 which involved legislation that require a general warning message on all Malaysian cigarette packaging addressing smoking for the first time. In the 1980s, smoking bans in public places were implemented. Since May 14, 1994, it has been illegal to sell cigarettes to anyone under the age of 18. Tobacco advertising was prohibited in 2003; since January 1995, displaying cigarette packaging in advertisements was prohibited, and print media advertising was limited to one page.

The second-hand smoke regulations and other tobacco-related matters in Malaysia are governed under the Food Act 1983. It plays a major role in regulating tobacco use and product regulation in the country. The Control of Tobacco Products Regulations (CTPR) prohibits smoking indoors in healthcare institutions, public spaces such as public lifts or toilets, theatres, and air-conditioned eating establishments, as well as public transportation designated as a 'no smoking zone.' Direct advertisements and sponsorships are strictly prohibited. It also includes clear health warnings and a set maximum amount of tar and nicotine (20 mg) (1.5 mg) (Mokhtar, 2021). The CTPR 1993 also provides that children are prohibited from purchasing, possessing, or smoking tobacco.

Regulation 11 of the CTPR 2004, which is quite similar to CTPR 1993 came into effect through the implementation of the Prohibition of Smoking Areas 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-air conditioned public transportation terminals, and open-air stadiums, could be occupied. However, the CTPR 2004 still permits smoking activity in pubs, discotheques, nightclubs, and casinos. The CTPR 2004 provides a fine of RM10,000 and up to two years, of imprisonment to any individuals who are caught smoking in a non-smoking area while owners and residents who fail to display a no-smoking sign may face an RM3,000 fine and up to six months in jail. If their customers smoke in their no-smoking section, they can be fined up to RM5,000 or imprisoned for up to one year under the same law. However, it was only on January 1, 2019, Malaysia decided to ban smoking at all eateries including open-air stalls. This is due to the changes made by the government to comply with the law and rules of Article 8 of the WHO FCTC. The Ministry of Health stated that the smoking ban would still be in effect for six months in order to "teach a lesson and alert restaurant owners and smokers" during that time.

Malaysia adopts and implements Article 8 of the Convention in the best manner. It is reflected through its CTPR and enforcement of Smoke-Free Zones in many public spaces where children are often can be seen. On the contrary, Claudia and Juerg (Kuehni & Barben, 2015) contend that children are rarely seen in workplaces and public places where smoking is prevalent. It has been a practice in Malaysia that parents sometimes bring their children to the workplace. Therefore, their statement cannot be taken into consideration. Nevertheless, it can be agreed that the smoking ban in Malaysia should extend to their homes or cars because smoking parents are a real threat to their children's health. To improve child health, we need adult-targeted interventions, such as preventing them from starting to smoke or assisting them in quitting. Individual prevention is one approach that tries to change parents' attitudes and educate them through individual counseling, education, or smoking cessation programs. A second approach is structural, which is based on changing the environment and organizational structures through methods such as economic incentives, limiting the availability of cigarettes, tobacco-free advertising, and smoke-free public spaces (Kuehni & Barben, 2015).

Moreover, to solve the smoking problem in the country, Malaysia's tobacco control program includes smoking cessation assistance. For example, the mQuit program was created as part of Malaysia's National Strategic Plan on Tobacco Control 2015-2020 (NSPTC) to strengthen cessation services (Hasan, et al., 2022). A study shows that most smokers want to stop smoking, but nicotine addiction makes quitting difficult. While more than half of current smokers want to quit, and one-third have made at least three attempts in the previous year, less than half succeed in quitting before the age of sixty in many countries. Based on the Transtheoretical

Model (TTM), individual smokers must go through five stages of behavior change (pre-contemplation, contemplation, preparation, action, and maintenance) before they can successfully quit smoking. The process begins with smokers taking into consideration any behavioral changes and, at this point, have no plan to quit smoking; they then progress to a second stage in which they seriously consider the pros and cons of quitting smoking. This is followed by preparing to quit, such as setting a quit date, implementing the smoking cessation plan, and finally maintaining this behavior to avoid relapse. Having a quit intention falls primarily in the preparation stage, making it an important step toward successful quitting. According to this conceptual model, studies have found that having a desire to quit smoking is one of the strongest predictors of future attempts to quit and successful quitting (Hasan, et al., 2022). Canada, China, the United Kingdom, and Australia are some of the countries that prove to have strong intentions to quit smoking is achievable. China, for instance, Chinese smokers who had intentions to quit made at least one attempt to quit the following year, compared to only 17 percent of those who had no intentions to quit.

On 27 January 2022, it was announced that the prohibition of cigarettes sale and tobacco products shall apply to those who are born after 2005 which later changed to those who are born from 2007 onwards. In the 150th meeting session in Geneva Switzerland, the Health Minister, Khairy Jamaluddin said that this plan is hoped to bring out the ‘generation endgame to smoking’ (known as GEG) which will include in the tobacco legislation. This is another positive action as Malaysia follows the example of New Zealand to ban smoking for the next generation. The approach made by New Zealand is to ensure that the next generation will not be legally able to buy tobacco in the country and based on the proposed legislation, people under the age of 14 will not be able to purchase tobacco. According to its Associate Health Minister, Dr. Ayesha Verall, the current legal age to purchase tobacco is 18 will be raised progressively under the new proposed legislation (Mogul, 2021). Unfortunately, the proposed law does not cover vaping which is popular among New Zealand youngsters despite its November report from the Asthma and Respiratory Foundation NZ showing that nearly 20% of students vape daily, with 57% believing it is harmful to their health. On the contrary, Malaysia differs from New Zealand by taking into account vaping under the proposed Control of Tobacco Products and Smoking Bill 2022. In the said bill, Section 2 defines tobacco products as processed tobacco or any products that contain tobacco that is meant for human consumption. So, it is understood that electronic cigarettes (e-cigs), vapes, or any similar smoking devices which contain tobacco cannot be sold to the person who is born from 2007 onwards.

Society needs to stop smoking and vaping altogether. On 6 August 2022, a seventeen-second video showed a man putting a vape device into a baby’s mouth in an incident in a restaurant in Bandar Baru Uda in Johor Bharu went viral is a clear example of child abuse, and negligent towards the child (Bernama, 2022). The man was remanded and investigated under Section 31(1) of the Child Act 2001 which read-

Any person who, being a person having the care of a child—

- (a) abuses, neglects, abandons or exposes the child or acts negligently in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned, or exposed; or

(b) sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both.

In light of this event, children are well protected by the law from any abuse, negligence, or violation done by adults. Therefore, adults play a crucial role in children's upbringing and growth and not the opposite. Even though it was reported that the man was not the father of the baby, he should be liable for his immoral behavior towards the child since he is expected to be a prudent adult who should care for and protect the baby although the vaping device was no longer function.

Islamic Perspectives on Smoking

The key objective of the *Shari'ah* is the fulfillment of benefit (*masalih*) to the people relating to their worldly and hereafter affairs. *Maqasid al-syari'ah* as defined by Shaykh Muhammad Al-Tahir Ibn Ashur, refers to the objectives or purposes behind Islamic rulings (Afridi, 2016). He explained that knowing *maqasid al-shari'ah* is important for mujtahids because it allows them to not only understand or interpret *Shariah* texts but also to find solutions to contemporary problems faced by Muslims (Afridi, 2016). The concept of *maqasid shariah* provides a clear framework and guidance to the process of *ijtihad* in solving issues that conform to human interests while complying with God's will.

Smoking has been proven to have negative impacts on human health. The Qur'an does not specifically prohibit or condemn smoking, but it does provide behavioral guidance (Laldin, 2007) from various verses such as:-

“Do not throw yourself into danger by your own hands...”

(Al-Baqarah 2:195)

“You may eat, drink but not waste...”

(Al-A'raf 7:31)

“Do not kill yourselves for God Almighty is most merciful to you..”

(An-Nisa 4:129)

Smoking is essentially a form of slow suicide. Suicide in any form is forbidden in Islam. So, from the above verses, it is clear that Muslims are under an obligation to protect their religion, life, dignity, intellect, and property as demanded by Islam. These core values are the essentials (*daruriyyat*) under *maqasid shariah* which fail to do so is amount to a violation of the objective of *Shari'ah*.

The ruling on smoking in Islam can be traced back to the reign of King Ahmad Al-Mansoor, who witnessed some guards from an African troop arriving in Morocco in 1598 with gifts smoking which led to the spread of tobacco smoking in Morocco. Due to this, he went to Fez in 1602 to seek validation on tobacco smoking that was happening in Morocco. The Mufti of the Kingdom Muhammad ibn Qassim al-Qasar together with the Wali of Sala, Sidi Abdullah ibn Hasson ruled that tobacco smoking is forbidden and must be destroyed. However, this ruling failed to be upheld after the death of King Ahmad (Khayat, 2000). The action taken by King Ahmad in stopping the tobacco spread in his country was consistent with one of the major

Islamic maxims which is harm shall not be inflicted nor reciprocated (*la Darar wa la Dirar*). This maxim can be divided into two parts where the first part says harm shall not be inflicted (*la Darar*) indicates that all kinds of harm shall be avoided in any environment, society, and individuals. On the other hand, the second part (*al-dirar*) further explains that any harm that is inflicted should not be responded to or retaliated by inflicting another harm because it will add more harm to existing harm (Laldin, 2007).

Islam places a high value on cleanliness because cleanliness and hygiene are considered a part of faith (*iman*) (Juni, 2014). It is well known that a smoker's mouth is filthy and stinks. Due to these reasons, Muslims are advised to avoid eating raw onions and garlic as a courtesy to those around them due to their odor. The same can be said for the smell of cigarettes, which pervades everything around the smoker - hair, clothing, home, car, and others.

The prohibition of smoking has been declared on 23 March 1995 through the 37th National Council for Islamic Religious Affairs Malaysia's Special Muzakarah Fatwa Committee. The usage of electronic cigarettes and vaping too was announced to be forbidden as they have the same negative effects as conventional cigarettes. With this clarification made by the Religious Council, Muslims should stop smoking for their health.

Conclusion

In a nutshell, children in Malaysia are well protected under the law from any kind of harm or risks. The laws not only provide sufficient protection to children's well-being from tobacco smoke exposure but also protect them from any abuse, negligence, or violence of the adults. However, problems occur for parents who smoke at home or in cars that are considered private spaces to be able to protect themselves from second-hand smoke. Therefore, the cessation program which is the initiative of the government should be taken seriously by individuals, especially parents who are smokers in ensuring the life of their families, especially children's growth and development are protected. If more parents are aware and take the effort to quit smoking, children, as well as society, can enjoy the privilege of healthy living which is prescribed by laws.

On another note, the GEG program as proposed by the Health Minister, Khairy Jamaluddin is a laudable plan as he believes this will have a significant impact on the prevention and control of noncommunicable diseases, and future children are safely protected from any harm and risks caused by smoking. At the same time, if the program is successfully implemented, Malaysia is no doubt can achieve a smoke-free country status in the future. To ensure this vision is achievable, the government must improve its enforcement. In many circumstances, Malaysia had experienced problems in implementing and enforcing secondhand smoke regulations. Therefore, the government needs to take into account on strengthening the enforcement of control of tobacco teams to get a better outcome from the laws and initiatives made.

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