

VAPING BANS AND CONSTITUTIONAL RIGHTS – EXPLORING THE LIMITS OF PUBLIC HEALTH REGULATION

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ABSTRACT

This article explores the multifaceted landscape of vaping bans and regulations, focusing on India's approach through the Prohibition of Electronic Cigarettes Act of 2019. The Act aims to protect public health by altogether banning e-cigarettes, reflecting a precautionary stance amid concerns about youth addiction and potential health consequences. Comparative analyses of regulations in the United States, Singapore, Brazil, China, Russia, France, and the United Kingdom highlight a spectrum of strategies, from strict bans to harm-reduction approaches. The article examines the tension between public health priorities and individual rights, emphasizing the need for evidence-based policymaking and public education and awareness.

Keywords: Vaping, E-Cigarettes, Addiction, Regulations, Public Health, Individual Rights, Evidence-Based Policymaking.

INTRODUCTION

Let's Imagine a college campus where students chat and laugh between their classes. Amidst the lively scene, a group of students discreetly pulls out sleek, pen-like devices, taking quick puffs that release vapour into the air. These devices are called vapes, and they have become a common sight in public spaces, especially among teenagers, perceived as a safer alternative to traditional cigarettes. However, vaping may be a wolf in sheep's clothing, posing a threat to public health.

In this hypothetical scenario, the university administration, concerned about the rising use of vapes and their potential health impacts, enacts a campus-wide ban on vaping. This decision sparks a heated debate: proponents argue the ban protects public health, while opponents claim it infringes on personal freedoms and constitutional rights. This national conversation puts us at a crossroads and has thrust the nation into a dilemma, forcing us to confront the tension between protecting public health and protecting individual freedoms.

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RISE IN VAPING AND BUSTING MYTHS

In recent years, the popularity of vaping has skyrocketed. Vaping, also known as using e-cigarettes, involves inhaling an aerosol. This aerosol, containing nicotine, flavourings, and over 30 other chemicals, is inhaled into the lungs, allowing these substances to enter the bloodstream.

The U.S. Food and Drug Administration has not found vaping to be safe and effective in helping smokers quit. One study found that vaping was more effective than other nicotine replacement therapies in helping people quit cigarettes. However, most people kept vaping after they stopped using cigarettes, so they were still getting nicotine and other dangerous chemicals. The study also noted that vaping may make teens more likely to start smoking. Cigarettes contain poisons, toxic metals, and carcinogens that enter the body with every puff. Vapers also breathe in dangerous chemicals, such as acetone, which is used as a solvent. Acetone may irritate the skin and eyes when you come into contact with it. Other chemicals in vapes may cause cancer over time. One vape pod delivers as much addictive nicotine as 20 cigarettes. Vaping trains the brain to expect more nicotine and creates the desire to vape even more. The teen brain is especially susceptible to the effects of nicotine. That makes it harder to stop vaping and also increases the chance that teens will go on to become smokers, too.¹

ROLE OF LEGAL FRAMEWORK IN VAPING BANS

Vaping's rise has ignited a fiery national debate on regulation. On one side, public health officials have compelling evidence of possible harm emerging, and there is an urge for regulations and even bans. On the other side, proponents of individual liberty stand firm, wary of government intrusion into personal choices. In this legal maze, the framework for vaping bans becomes a crucial tool for navigating this complex issue.

Imagine a game of chess that is a strategic contest of intellect and foresight. In this game, the central government acts as the king, being the most powerful piece that has the authority to make laws that are applicable throughout the country. Think of all the states as rooks who can move strategically across the board that is within their own jurisdiction, enacting their own laws. However, these laws have to be aligned with the laws formulated by the central government, and they cannot be contradicted. Both the central government and the states use

¹ Texas Department of State Health Services, 'What is Vaping?' (Texas Department of State Health Services, 19 June 2024) <<https://www.dshs.texas.gov/vaping/what-is-vaping>> accessed 19 June 2024

their power to regulate public health and safety, much like the pieces strategically manoeuvre to control the board.

The Indian Constitution is the supreme rulebook, the ultimate authority on the chessboard. It establishes the framework for the formulation of laws and ensures fundamental rights for all citizens. Article 19(1)(g) protects the right to practice any profession or to carry on any occupation, trade or business². This right can potentially limit how much the government can regulate the sale and marketing of vaping products. In addition, the Article 21 guarantees the right to life and personal liberty.³ This right can be used to challenge overly restrictive vaping bans, similar to how a pawn can be strategically promoted to be a queen, ultimately gaining more power to challenge the opponent's king.

Finally, the courts are the judges who ensure fairness on the chessboard. They can interpret the Constitution and decide if vaping bans are legal. Their decisions can become precedents for future cases.

It can be interpreted that laws establish the authority to enact a nationwide ban or empower local governments to implement strict regulations. Laws set penalties that are the consequences for violating the ban, which may include fines, confiscation of vapes or even criminal charges. Legal frameworks help determine who can sell vaping products, which adds to age restrictions, licencing requirements, and limitations on advertising.

Further, this has led to a firing debate where the proponents argue that the bans protect public health, particularly youth, from the potential harms of vaping. Opponents argue for a regulated market as it offers an alternative to smoking. The interesting part is the black-market impact. Some argue complete bans push vaping underground, creating a black market with potentially unsafe products and limited or absolutely no oversight.

HARM REDUCTION OR HIDDEN HARM- EXAMINING INDIAS E-CIGARETTE BAN

The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage, and Advertisement) Act, 2019, commonly referred to as the E-Cigarette Prohibition Act, marks a significant legislative step in India's public health policy.

² Constitution of India, art 19(1)(g)

³ Constitution of India, art 21

The Act aims to address the burgeoning use of electronic nicotine delivery systems (ENDS) through a complete ban on e-cigarettes.⁴ Key provisions of the Act include the Prohibition on Production and Distribution, Prohibition on Advertisement, and Penalties that include imprisonment, fines, or both in case of violation of the Act. For instance, producing or manufacturing e-cigarettes can result in imprisonment of up to one year or a fine of up to one lakh rupees, with harsher penalties for repeat offences. Additionally, Authorized officers have the power to search premises and seize stocks of electronic cigarettes without a warrant, and consequently, the Owners or occupiers must submit existing stocks to authorized officers for disposal as per the law.⁵

While the Act aims to protect public health, several shortcomings need to be addressed, such as - The Act does not provide alternatives for smokers who might use e-cigarettes as a harm reduction tool. By completely banning e-cigarettes, it may inadvertently drive users back to more harmful traditional tobacco products. India is a vast country with a population of 1.44 billion⁶. Effective enforcement of the ban becomes challenging. The Act primarily focuses on prohibition without sufficiently addressing the need for public education on the dangers of both e-cigarettes and traditional tobacco products. Banning e-cigarettes without curbing demand can lead to the growth of an unregulated black market, posing greater health risks due to the lack of quality control and regulatory oversight. Despite hefty fines and imprisonment, e-cigarettes reportedly remain available through illicit channels. This undermines the intended public health goals and exposes users to unregulated products with unknown quality, potentially causing even greater health risks.

Despite its shortcomings, the Act has several advantages, such as it aims to protect young people from nicotine addiction by eliminating the availability of e-cigarettes, which often come in attractive Flavors and designs. Traditional cigarettes are a significant health burden in India, and the potential dangers of e-cigarettes, though not fully understood, were a cause for concern. Given the uncertainties about the long-term health consequences of e-cigarettes, the Act adopts a precautionary approach to safeguard public health until more conclusive evidence is available. It makes public health its priority by reinforcing India's commitment to reducing the

⁴ The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage, and Advertisement) Act 2019

⁵ The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage, and Advertisement) Act 2019, s 4, s 6, s 10

⁶ BBC, 'India Country Profile' (BBC, 19 February 2011) <<https://www.bbc.com/news/world-south-asia12557384>> accessed 19 June 2024

burden of tobacco-related diseases and aligning with global tobacco control strategies. It establishes a clear legal framework, consequently facilitating coordinated efforts between various government agencies and law enforcement bodies to tackle the issue effectively.

The impact of the Act remains unclear. It is multifaceted, affecting public health, industry, and society at large. The primary impact is expected on public health, particularly among the youth. By reducing access to e-cigarettes, the Act aims to prevent nicotine addiction and related health issues in the long term. The ban has significant economic implications for businesses involved in the e-cigarette supply chain. However, the government's stance prioritizes health over economic interests. There may be a behavioural shift among current e-cigarette users, some of whom might revert to traditional tobacco products or seek alternative harm-reduction strategies. Most importantly, The Act sets a regulatory precedent for other countries grappling with the rise of e-cigarettes, showcasing India's proactive approach to public health regulation.

As India continues to navigate its public health journey, the Act serves as both a milestone and a learning opportunity in the complex interplay between policy, health, and society.

VAPING AROUND THE WORLD– A COMPARATIVE ANALYSIS OF REGULATIONS

India has taken a stringent stance on vaping with the Act of 2019. This law bans all activities related to e-cigarettes, emphasizing the potential health risks and aiming to prevent a new generation from nicotine addiction. The rationale behind this comprehensive ban is to safeguard public health, particularly among the youth, from the unknown long-term effects of e-cigarettes and to avoid undermining existing tobacco control measures.

The U.S. Food and Drug Administration (FDA) regulates e-cigarettes under the Deeming Rule, established in 2016. This rule requires manufacturers to submit applications for premarket authorization (PMTA) for all vaping products (including e-cigarettes, e-liquids, and pod systems) introduced after August 8th, 2016. The sale of e-cigarettes to individuals under 21 is prohibited. Manufacturers must disclose ingredients in e-liquids. Restrictions exist on advertising and marketing practices to limit youth appeal.⁷

⁷ U.S. Food and Drug Administration, 'E-cigarettes, Vapes, and Other Electronic Nicotine Delivery Systems (ENDS)' (U.S. Food and Drug Administration, 2024) <<https://www.fda.gov/tobacco-products/productsingredients-components/e-cigarettes-vapes-and-other-electronic-nicotine-delivery-systems-ends>> accessed 19 June 2024

Singapore enforces a strict ban on the import, distribution, sale, and possession of all vaping products, including e-cigarettes and refill liquids. The Ministry of Health cites concerns about the lack of long-term health data on vaping and the potential for addiction, particularly among youth.⁸

China prohibits the production, sale, and import of e-cigarettes, with some exceptions. The country allows the manufacturing of e-cigarettes for export only. Public health concerns about youth addiction and potential health risks are the primary reasons behind the ban.⁹

Russia technically does not have a complete ban on e-cigarettes. However, a 2017 law equates e-cigarettes to tobacco products, subjecting them to similar restrictions on advertising, sale location, and public use. Additionally, a high tax rate on e-liquids discourages their sale.¹⁰

France adopted a harm-reduction approach in 2016, legalizing the sale of nicotine-containing e-cigarettes in vape shops and pharmacies. However, the nicotine strength of e-liquids is limited to 20mg/ml, and advertising is restricted. The policy acknowledges vaping as a potentially less harmful alternative for smokers seeking to quit traditional cigarettes.¹¹

The U.K. regulates e-cigarettes as consumer products under the Medicines and Healthcare Products Regulatory Agency (MHRA). E-cigarettes are legal to purchase and use but are subject to age verification (18+), advertising restrictions, and limitations on nicotine strength. The U.K. adopted a harm-reduction approach, acknowledging the potential for e-cigarettes to help smokers quit traditional cigarettes.¹²

The global landscape of vaping regulations is diverse, reflecting a range of priorities and approaches. While some countries like India and Singapore have opted for strict bans, others like the U.S., U.K., and France have embraced a harm-reduction approach with regulations

⁸ Ministry of Health Singapore, 'E-cigarettes and Vaping' (Health Hub, Ministry of Health Singapore, 2024) <<https://www.healthhub.sg/programmes/iquit/e-cig>> accessed 19 June 2024

⁹ South China Morning Post, 'Smoking' (South China Morning Post, 2024) <<https://www.scmp.com/topics/smoking>> accessed 19 June 2024

¹⁰ Tobacco Reporter, 'Russian Vape Ban' (Tobacco Reporter, 12 April 2024) <<https://tobaccoreporter.com/2024/04/12/russian-vape-ban-radical-korolev/>> accessed 19 June 2024

¹¹ Tobacco Control Laws, 'France - Laws' (Tobacco Control Laws, 2024) <<https://www.tobaccocontrolaws.org/legislation/france/laws>> accessed 19 June 2024

¹² UK Government, 'E-cigarettes and vaping: policy, regulation and guidance' (UK Government, 2024) <<https://www.gov.uk/government/collections/e-cigarettes-and-vaping-policy-regulation-and-guidance>> accessed 19 June 2024

aimed at minimizing potential risks. As research on the long-term health effects of vaping continues, these regulations may need to adapt to ensure public health protection.

CONCLUSION

The debate surrounding vaping bans throws light upon a fundamental tension – the government's responsibility to safeguard public health versus the individual rights and freedoms of people. India's strict ban elucidates this tension, raising questions about the limitations of public health regulation. While protecting youth and public health are compelling arguments for regulation, the complete ban approach raises concerns. Does it infringe on individual freedoms and liberties over personal choices? Can a complete ban be effectively enforced, or does it simply push the market underground, creating a black market with very little oversight? The global landscape offers various approaches. An approach to Investing in research, formulating evidence-based regulations, and promoting public education on vaping risks and cessation of all tobacco products must be considered. Ultimately, the path forward lies in fostering open dialogue and evidence-based policymaking. By learning from international experiences and adapting regulations, governments can navigate the tightrope between public health and individual freedoms, ensuring a future where both are safeguarded.

