

LEGAL PROBLEM CONCERNING NON-SMOKER'S HEALTH PROTECTION

BY

MISS PATHAMA SIAMHAN

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAW IN BUSINESS LAWS (ENGLISH PROGRAM) FACULTY OF LAW THAMMASAT UNIVERSITY ACADEMIC YEAR 2015 COPYRIGHT OF THAMMASAT UNIVERSITY

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THAMMASAT UNIVERSITY FACULTY OF LAW

THESIS

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ENTITLED

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ABSTRACT

In decades past, the topic of second-hand smoke was commonly mentioned in the medical profession. Scientists stated that toxic chemicals in second-hand smoke cause harm to people's health and that there is also no safe level of exposure to second-hand smoke. Second-hand smoke contains a mixture of particulate matter and thousands of chemicals such as carcinogens and formaldehyde which are cancer-causing; it has harmful chemicals which are similar to those which smokers inhale. Since much research concerning the hazards of second-hand smoke are well-known, people are beginning to want to live in smoke-free society. Many rights were established to protect people from the hazard of second-hand smoke. The right to live in healthy environment and the right to breathe clean air are two such rights.

With this concern in mind, the World Health Organization (WHO) enacted The Framework Convention on Tobacco Control (FCTC) to protect people from the devastating health, social, environmental and economic consequences of tobacco consumption and especially exposure to tobacco smoke. The FCTC adopted guidelines on the protection from exposure to tobacco smoke by providing fundamental considerations and principles such as Principle 2, which provides that "All people should be protected from exposure to tobacco smoke. All indoor workplaces and indoor public places should be non-smoking areas."

In Thailand, to protect non-smokers' health from exposure to tobacco smoke, the Thai government enacted the Non-Smokers' Health Protection Act B.E. 2535 two decades ago. The law gives the power to the Minister to define non-smoking areas and if smokers are smoking in non-smoking areas which are provided by law, they shall be subject to a fine not exceeding two thousand baht. However, exposure of second-hand smoke to non-smokers is not only restricted in non-smoking areas, but also the non-smoker who lives outside the non-smoking areas should have protected the rights to breath clean air by law similar to the people who also live in non-smoking areas. A protection for the right to breathe clean air should not restrict only in specific places but law should protect everyone equally.

The purpose of this study is to study legal measures for the non-smoker's health protection outside non-smoking areas, are which provide by law. Domestic and Foreign laws, theories of human rights and related international laws have been researched to see whether Thai law can protect non-smokers outside non-smoking areas from hazard of second-hand smoke and the justifications for doing so. If Thai laws are not capable of protecting non-smokers' health outside non-smoking areas, research must be conducted to find the cause of this problem and to make improvements to the law. This study would be conducted as a qualitative research by researching and gathering related documents from various information sources, then analyzing the data and compiling with the content of the study in each chapter.

The research finds that Thailand is a country which has recognized the problem concerning the dangers of second-hand smoke for a long time, but legal measures under the Non-Smokers' Health Protection Act B.E. 2535 did not protect non-smokers' health beyond the places outside non-smoking areas which are provided by law despite the fact that non-smokers who live outside the non-smoking areas should have their rights to breathe clean air protected by law, just as the people who live in non-smoking areas do. Moreover, the Non-Smoker's Health Protection Act B.E. 2535 has as its aim to protect the health of non-smokers, especially children from cigarette smoke. However, many children are still being exposed to second-hand smoke in houses and cars, not being protected by this law and the direct impact second-hand smoke has on children in these areas. Furthermore, the legal enforcement process under the Non-Smokers' Health Protection Act B.E. 2535 which was stated to be the responsibility of the inquiring officer cannot be carried out in practice because of the nature of smoking, since smokers will not take a long time to smoke, and when the smoking is finished, the smoker quickly leaves the area. If the enforcement of the Non-Smoker's Health Protection Act of B.E. 2535 is not possible, the law will not achieve its objective, which is to protect the non-smoker from the hazards of second-hand smoke.

According to the study, the writer recommends that in order to protect nonsmokers' right to breathe clean air outside non-smoking areas, the law should specify the protection of non-smokers' health outside non-smoking areas in the Non-Smokers' Health Protection Act B.E. 2535 so that it is defined as "any areas which are not arrange to be a non-smoking area, smoking is allowed, except if such smoking is causing damage to life, body, health or infringing on any right of another person shall result in a fine under the law."

To protect children from the hazard of second-hand smoke in house and car, which are private places, the Non-Smoker's Health Protection Act of B.E. 2535 should be amended to protect cover areas beyond a house and a car in which there are children should be enacted to protect children in a house and a car specifically. For example, in case of car, the law may define that "smoking in any motor vehicle in which there is a minor (under 18 years of age) and regardless of whether the vehicle is in motion or at rest is prohibited by law." And in case of house, the law may defined that "All units of a duplex or multi-family residence, including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor such as a private balcony, porch, deck, or patio shall be designated places that protect the health of non-smokers and are declared tobacco-free areas. However, smoking areas can be established, if such areas are not located within, and are at least 100 feet from, enclosed areas primarily used by children and enclosed facilities for physical activity, such as playgrounds, swimming pools, and school campuses".

Moreover, for the effectiveness of law enforcement and to achieve the intention of the Non-Smokers' Health Protection Act B.E. 2535, the law should give powers to the authorities to impose a fine by operating under the administrative procedure. The immediate and serious enforcement will make offenders fear wrongdoing and will lead to orderliness in the end. Furthermore, the law should

impose the duty of the operator to prohibit smoking in their own place, since operators have a duty to control and dissuade smoking in non-smoking areas.

Keywords: Second-Hand Smoke, Non-Smoker's Health Protection, Non-Smoking Areas



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TABLE OF CONTENTS

	Page
ABSTRACT	(1)
ACKNOWLEDGEMENTS	(5)
	(0)
CHAPTER 1 INTRODUCTION	
CHAFTERTINTRODUCTION	

1.1 Backgrounds	1
1.2 Hypothesis	5
1.3 Objectives of Study	5
1.4 Scope of Study	6
1.5 Methodology	6
1.6 Expected Result	6

CHAPTER 2 BACKGROUND OF CIGARETTE AND RIGHTS CONCERNING ON SECOND-HAND SMOKE PROTECTION

2.1 History of Cigarette	7
2.2 Definition of Cigarette	9
2.3 Electronic cigarettes	11
2.4 Impact of Second-Hand Smoke to Non-smoker's Health.	15
2.4.1 Definition of Second-hand Smoke	15
2.4.2 Health Impact from Second-hand Smoke Exposure	16
2.4.2.1 Impact on Children	16
2.4.2.2 Impact on Adult	17
2.4.3 Economy Impact from Second-hand Smoke Exposure	19
2.5 Cigarette Product Standards	20
2.6 Right of non-smoker	25
2.6.1 Rights under the Constitution	25

2.6.2 Right of the Environment	28
2.6.3 Right to Breathe Clean Air	29
2.7 Rights of the Child	30

(7)

CHAPTER 3 WHO-FRAMEWORKS CONVENTIONAL ON TOBACCO CONTROL AND LEGAL MEASURE TO PROTECT NON-SMOKER'S HEALTH IN CALIFORNIA

3.1 World Health Organization	34
3.1.1 Backgrounds	34
3.1.2 The Constitution of World Health Organization	35
3.2 Framework Conventional on Tobacco Control	36
3.2.1 Establishment of Framework Conventional on Tobacco Control	36
3.2.2 Regulation under the FCTC	37
3.2.3 Guideline for Implementation of Article 8 of WHO FCTC	40
3.2.3.1 Fundamental Consideration	41
3.2.3.2 Statement of Principles underlying Protection	
from Exposure to Tobacco Smoke	42
3.2.4 Framework Conventional on Tobacco Control in Thailand	44
3.3 Legal Measure to Protect Non-smoker's Health in California	49

CHAPTER 4 LEGAL MEASURE TO PROTECT NON-SMOKERS' HEALTH IN THAILAND

4.1 The Non-smoker's Health Protection Act B.E.2535.	55
4.1.1 Background	55
4.1.2 Non-smoking Areas	56
4.1.3 Duty of Operator	59
4.1.4 Power of the Authority	60
4.1.4.1 The Status of the Authority in Law	60
4.1.4.2 The Power and Duty of the Officers	61

4.2 Public Health Act B.E.2535.	63
4.2.1 The key principle of Public Health Act B.E. 2535	63
4.2.2 Source of Nuisance	65
4.2.2.1 Characteristic of Source of Nuisance.	65
4.2.2.2 Power of local officials to control sources of nuisance	67
4.2.2.3 Liability of People who Make Nuisance.	69
4.3 Legal Issue of Non-smoker's Health.	69
4.3.1 Legal Problem concerning Non-Smoking Areas	70
4.3.2 Legal Problem concerning Smoking in House and Car	73
4.3.3 Legal Problem concerning Legal Enforcement	78
CHAPTER 5 CONCLUTION AND RECCOMMENDATIONS	81
5.1 Conclusion	81
5.2 Recommendations	83
REFERENCES	86
BIOGRAPHY	94
	-

(8)

CHAPTER 1 INTRODUCTION

1.1 Background

In a modern society, rights and liberty necessary for integration in that society are the most essential needs for which people should have awareness. Everyone has equal rights for existence, but these rights must not infringe upon the rights of others¹, meaning that the possession of such rights must be held under the rules of morality, without exploitation or violation of others. Thus, any actions taken under privilege of individual rights that result in harm or misfortune to others are unacceptable. This is especially in cases of healthcare. If someone has health problems, they deserve to be treated without difficult or wasted time. Moreover, such negative action caused by others without consent is extremely unacceptable. A tobacco smoker who exposes others to second-hand smoke is the best example of this. Non-smokers are subjected to unnecessary health risks from the hazards of cigarette smoke originating from smokers. It is unfair to non-smokers to face possible risk from this type of situation, especially in public places meant for general access by all people in society; everybody should have equal right to use public spaces without undue risk. The argument is not whether smokers have the right to smoke, but rather that smokers should not abuse their right by infringing on the right of others around them to breathe clean air, which is a fundamental right.

According to several studies, some of the most significant health problems currently faced by Thai people are heart disease and diseases affecting the vascular system. Vascular diseases and heart disease are the cause of roughly 65,000 deaths

¹ ฟ้าดาว คงนกร. พื้นฐานความเป็นพลเมืองในระบอบประชาธิปไตย. พิมพ์กรั้งที่1. กรุงเทพมหานกร: สำนักการพิมพ์สำนักงาน เลขาธิการสภาผู้แทนราษฎร, 2556 (Fhadao Kongnakorn. Fundamentals of Citizenship in Democracy.(1st ed. Bangkok: The Secretariat of the House of Representatives Publishing, 2013))

per year. The World Health Organization (WHO) found that a quarter of those patients (16,250) died as the result of smoking. Furthermore, cancer is the second most significant cause of health problems in Thai people after vascular diseases and heart disease. There are many researches that have confirmed the role of cigarette smoke in motivating at least 10 forms of cancer such as Lung cancer, Cervical cancer, Oral cancer, Urinary bladder cancer, Gastric cancer, Leukemia, Laryngeal cancer, Esophageal cancer, Pancreatic cancer and Kidney cancer.² From this evidence, the conclusion could be made that the poison in cigarette smoke is a significant risk factor for death in Thai people.

It is widely accepted that smoking is harmful to one's health. Worse than that, cigarette smoke harms smokers as well as those around them through harmful second-hand tobacco smoke. Second-hand tobacco smoke contains a mixture of particulate matter and thousands of chemicals, many of which are toxic or cancercausing. Scientists have stated that there is no safe level of second-hand tobacco smoke exposure, even where smokers are confined to a pre-arranged smoking area or room because the area/room are still located within the same air space.³ The American Association of Plastic Surgeons said that more than 40 percent of non-smoking adults and nearly 60 percent of children between 3-11 years old had been exposed at some point to second-hand tobacco smoke. Most regrettably, many of the children exposed to second-hand smoke are put at risk by their parents.

Second-hand smoke exposure by children causes nearly 340 infant deaths. It also causes 24,000 newborns to have low birth weight, 71,900 premature confinement and 200,000 cases of asthma.⁴ It is obvious that second-hand smoke affects the health of non-smokers. According to a survey by the National Statistical

² ประกิต วาทีสาธกกิจ. "ควันบุหรี่มือสอง เรื่องใกล้ตัว." (2556) (Prakit Vathesatogkit. "Second-hand Smoke-Close to Home."(2013)) available at http://www.ashthailand.or.th/th/article_page.php?id=158,

³ ACT Health. "*Tobacco Control and Smoke-Free Environments*." *available at* http://www.health.act.gov.au/public-information/public-health/tobacco-and-smoke-free, (last visited December 10, 2016)

⁴ อมรรัตน์ โพธิพรรค. การคุ้มครองสุขภาพจากควันบุหรึ่มือสอง, พิมพ์ครั้งที่2, กรุงเทพ: เจริญดีมั่นคงการพิมพ์, 2551 (Amornrat Photipak. Health Protection from Second-hand Smoke, (2nd ed., Bangkok: Chareon Mankong Publishing, 2008))

Office for the smoking habits by the population of Thailand in B.E. 2549, the number of Thai people exposed to second-hand smoke was 15.89 million, with 5.61 million people being children less than 5 years old.⁵

In addition to health problems, second-hand smoke exposure also causes economic loss to individuals and society through direct and indirect medical fees as well as higher insurance premiums. Insurance associations in America estimated that economic loss resulting from second-hand smoke each year is a direct medical fee accounting for more than 5 billion dollars. It is also an indirect medical fee, such as deformation or loss of income and other benefits by more than 5 billion.⁶

Under the concern of tobacco control, the World Health Organization (WHO) is a specialized organization of the United Nations tasked with the duty to help, cure and solve problems of public health. The WHO is also charged with improving the standard of health in member states and regulating the rules of public health to serve as guidelines for common practice by member states, as provided by the Framework Convention on Tobacco Control (FCTC). The FCTC is the first international treaty for public health developed in response to the globalization of the tobacco epidemic and aims to reaffirm the rights of all people to a high standard of health.⁷ This convention shows how countries view the need to develop the treaty for use as an international legal instrument. To protect non-smokers' health from tobacco smoke, the FCTC provided Section 8 to protect the rights of non-smokers from air polluted by tobacco smoke toxins under the human rights theory that everybody should have an equal right to breathe clean air. Section 8 has two related objectives: the first is to support member states in meeting their obligation under the FCTC in a manner consistent with scientific evidence regarding the hazards of second-hand

⁵ สำนักงานสถิติแห่งชาติ. "สถิติสำคัญเกี่ยวกับการสูบบุหรึ่งองคนไทย วิเคราะห์และข้อเสนอแนะ แนวทางการแก้ปัญหา." (National Statistical Office, "Statistical of Thai People's Smoking Analysis and Suggestion Solution") available at http://resource.thaihealth.or.th/library/10598, (last visited December 10, 2015)

⁶ Amornrat Photipak, *supra* note 4, at 14.

⁷ WHO Framework Convention on Tobacco Control "*About the WHO Framework Convention on Tobacco Control*", *available at* http://www.who.int/fctc/about/en/, (last visited December 10, 2015)

tobacco smoke and the best practice in the implementation of non-smoking measures. The second objective is to identify the key elements of legislation necessary to effectively protect people from exposure to tobacco smoke.⁸

Thailand, as the member state of the FCTC and a country that recognizes the importance of the danger of second-hand tobacco smoke, has provided the Nonsmoker's Health Protection Act B.E. 2535, which remains in force at present.

The Non-smoker's Health Protection Act B.E. 2535 was legislated from the concerns of physicians that cigarette smoke causes several harmful risks to the health of smokers and non-smokers by emphasizing the risk to children and aiming to protect the right to breathe clean air. Under Section 8, it was provided that "No person shall be allowed to smoke in non-smoking areas". Thus, the definition for nonsmoking areas was provided by the Ministry of Public Health Notice (Volume 19) B.E. 2553; Designation of Names and Types of Public Places that Shall Protect the Health of Non-Smokers and Designating All or Part of Such Public Places as Smoking Areas or Non-smoking Areas, under the Non-Smokers' Health Protection Act B.E. 2535. The law divided non-smoking areas into two categories. The first includes public places that are total non-smoking areas, while the second includes public places that are non-smoking areas with the potential for designating specific smoking areas. This means smokers are prohibited from smoking only in the nonsmoking areas detailed in the notice (No.19). If smokers violate the notice by smoking in those areas, they shall be subject to a fine not exceeding two thousand baht under Section 12.9

Exposure to second-hand tobacco smoke by non-smokers is not only restricted in non-smoking areas. Non-smokers who live outside the non-smoking areas should also have the protected right to breathe clean air by law, just as those people who live in non-smoking areas. The protection of the right to breathe clean air should not be restricted only in specific places. The law should protect everyone

⁸ WHO Framework Convention on Tobacco Control [WHO FCTC], Guidelines for implementation of Article 8 of the WHO Framework Convention on Tobacco Control (protection from exposure to second-hand tobacco smoke), decision FCTC/COP 2(7) (July. 2007) [hereinafter *Guidelines of Article 8*].

⁹ ปกป้อง ศรีสนิท. รวมกฎหมายยาสูบ, พิมพ์ครั้งที่ 2, กรุงเทพ: โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์, 2555. (Pokpong Srisanit, Tobacco Law, (2nd ed., Bangkok: Thammasat University Publishing, 2012))

equally. Focusing on protection for any risk group or place can be translated to mean that another group doesn't have risks or want protection.

Therefore, it is interesting to understand whether or not the present legal measures enforced can really protect children and non-smokers from second-hand smoke. The study also attempts to understand why many people, especially children, continue to tolerate cigarette smoke in public places and how the issue can be solved for mutual benefit.

1.2 Hypothesis

Under the objective of the Non-smoker's Health Protection Act B.E. 2535, the aim is to protect the right to breathe clean air by non-smokers from secondhand tobacco smoke. The law gives power to the Minister to design some public places as non-smoking areas. In actually, however, there are children and nonsmokers who are outside the non-smoking areas and remain at risk to exposure from the toxins in tobacco smoke. The law does not protect them. In order to protect children and non-smokers who are outside smoking areas from the hazards of tobacco smoke, the law should be extended to cover the right to breathe clean air by nonsmokers outside non-smoking areas as well.

1.3 Objective of the study

- 1. To study the legal measures used for the protection of non-smokers' health in Thailand.
- 2. To study the legal measures used for the protection of non-smokers' health in foreign countries.
- 3. To study the background and concept of non-smoker health protection law.
- 4. To study and analyze the legal problems faced by non-smoker health protection law.
- 5. To propose legislative solutions in order to solve the problems arising out of or in connection with the lack of non-smoker health protection outside non-smoking areas.

1.4 Scope of the study

This thesis examines the legal measures used for non-smokers' health protection in Thailand, focusing on the Non-smoker's Health Protection Act B.E. 2535 and the Ministry of Public Health Notice (Volume 19) B.E. 2553, including human rights theory and the World Health Organization's Framework Convention on Tobacco Control, which has the objective of solving the problems arising out of or in connection with the lack of non-smoker health protection outside non-smoking areas.

1.5 Methodology

The method used in this thesis is based on documentary research by investigating and analyzing Thai and foreign textbooks, articles, journals, statutory laws, government publications, newspapers, scholars' opinions, information on the internet, and other relevant documents.

1.6 Expected results

- 1. To understand the legal measures used in the protection of non-smokers' health in Thailand.
- 2. To understand the background and concept of non-smoker health protection law.
- 3. To understand the legal problems faced by non-smoker health protection law.
- 4. To provide appropriate legal measures as a solution to solving the problems arising out of or in connection with the lack of non-smoker health protection outside non-smoking areas.

CHAPTER 2

BACKGROUND OF CIGARETTES AND RIGHTS CONCERNING SECOND-HAND SMOKE PROTECTION

2.1. History of the cigarette

Cigarettes have had a long history before becoming the cigarette known at present. It began around the 9th century in Mexico and Central America during a period known for tobacco. A carved drawing in stone made by the Maya and Aztecs is the best evidence of this presumption. The Maya and Aztecs were members of the American Indian people dominant in Mexico before the Spanish conquest of the 16th century.¹⁰ Their drawings showed how the natives used tobacco. In the past, tobacco was produced mainly for pipe-smoking, chewing, and snuffs. Further, tobacco was only used for special religious and medical purposes.

The beginning of the modern cigarette started from the first voyage to the New World by Christopher Columbus.¹¹ In November 1492, when Columbus reached the Americas, he found the natives carrying lighted firebrands, which they puffed and exhaled as common practice.¹² In San Salvador, an island in the Bahamas, the natives introduced Columbus to dried leaves called tobacco that gave off a distinct fragrance. The natives showed him and his men the methods for using tobacco, such as rolled tobacco leaves, which could be considered a form of cigar. Snuffing the powder of tobacco leaves in their noses and smoking by pipe were also shown. At first, he disregarded the idea. Later, he found that tobacco appeared to have high value among them. Roderigo de Jerez, one of Columbus' crew, was the first known white man to appreciate and use tobacco. He brought a few tobacco leaves and seeds back to

¹⁰ "Maya", available at http://www.history.com/topics/maya, (last visited April 28, 2016.)

¹¹ Gene Borio. "*Tobacco Time Line*", *available at* http://archive.tobacco.org/ History/ Tobacco_History.html, (last visited April 28, 2016.)

¹² Gail Gleason Milgram. **The Teenager and Smoking**. New York City: Richards Rosen Press, Inc., 1972.

Europe¹³, although most European people of the period didn't appreciate their first taste of tobacco.

In 1560, Jean Nicot de Villemain, the French ambassador, was sent from France to Portugal to negotiate the marriage of Princess Margaret of Valois to King Sebastian of Portugal. When he returned, he brought tobacco plants back. Nicot introduced tobacco to the French royal court and presented it to relieve the queen mother, Catherine de' Medici, of her migraines. After that, the fashionable people of Paris began to use the plant, which made Nicot an instant celebrity. The name *"Nicotiana Tabacum"* was given to tobacco in honor of Nicot.¹⁴ The term "Nicotine" came later to refer specifically to the particular chemical in the tobacco plant.

The tobacco plant has been grown in America since the 17th century and it has been used in many forms. Rolling the leaves in fine paper was the form of smoking tobacco frequently done by hand for practiced persons. In 1865, Washington Duke from North Carolina began to roll cigarettes and sell them to others for profit. In 1883, a machine that could roll cigarettes was invented by James Bonsack. It could produce thousands of cigarettes per day.¹⁵

In Thailand, there is evidence showing that smoking began in the Ayutthaya era. From the chronicles of Monsieur De Laloubere, who was a diplomat of France in King Narai's period, he described that Thai people loved smoking, including both men and women. In that period, they obtained tobacco from Manila (the Philippines), China or even grew it in the country. A characteristic of the cigarette or method to rolling cigarettes at that time included having a tapered shape.¹⁶ In the King Rama IV period, Prince Worawong Singhanatarajdoorongrit invented a cigarette which had an obtuse stub, making it easy to smoke during the chewing of betel nut. In the King Rama V period, a British company came to establish a cigarette

¹³ *Id.* at 21.

¹⁴ *Id.* at 21.

¹⁵ Sue Jone, "A Complete Social History of Cigarettes", available at http://www.datehookup.com/ singles-content-a-complete-social-history-of-cigarettes.htm, (last visited May 5, 2016.)

¹⁶ Thailand Tobacco Monopoly, "*Tobacco and the Discovery*", *available at* http://www.thaitobacco.or.th/th/, (last visited May 9, 2016.)

company in Thailand around B.E. 2460, but they still produced cigarettes by hand. During the reign of King Rama VI, a machine was imported from Germany and made the production of cigarettes prevalent.

In B.E. 2482, the Thai government established a cigarette factory by buying Burapa Tobacco Limited Company, located on Rama IV Road in Bangkok under the control of the Excise Department, Ministry of Finance. After that, the Thai government bought Kwanghok Company, Hoffun Company and the British American Tobacco Company to merge together into the "Thailand Tobacco Monopoly", a state enterprise under the supervision of the Ministry of Finance until now.¹⁷

2.2 Definition of a cigarette

From the history of the cigarette, it is obvious that cigarettes were developed in succession. Nowadays, cigarettes and tobacco products are produced in many forms to respond to the needs of smokers. In Thailand, cigarettes are identified by various meanings, which can be considered as follows:

According to the Non-Smoker Health Protection Act B.E. 2535, Section 3 provides the meaning of a cigarette as, "*Cigarette means a cigarette, cigar, other cigarettes, and tobacco or modified tobacco pursuant to the law of tobacco.*"

Based on the meaning under the Non-smoker Health Protection B.E. 2535, a cigarette can be divided into 5 categories. However, the Non-Smoker Health Protection Act B.E. 2535 did not identify the meaning of each word.

However, the Tobacco Act B.E. 2509, Section 4 stated that:

"1. Cigarette means dried tobacco leaves, plug tobacco, shredded tobacco or prepared shredded tobacco rolled in paper.

2. Cigar means dried tobacco leaves, plug tobacco, shredded tobacco or prepared shredded tobacco rolled in tobacco leaves or plug tobacco.

¹⁷ ประกิต วาทีสาธกกิจ, กรองจิต วาทีสาธกกิจ. "ความเป็นมาของบุหรี่และการสูบบุหรี่ในประเทศไทย."สารานุกรมไทยสำหรับ เด็กและเยาวชน โดยพระราชประสงก์ในพระบาทสมเด็จพระเจ้าอยู่หัว. เล่ม 28. (2547). หน้า 161-162. (Prakit Vathesatogkit and Krongjit Vathesatogkit, "Background of Cigarette and Smoking in Thailand", Thailand Encyclopedia for Children and Youth by the royal intention of the King, 28 ed. (2004): 161-162.)

3. Other tobacco rolled for smoking "means shredded tobacco or prepared shredded tobacco rolled in banana leaves, petal of the lotus blossom, leaf sheaf of betel palm, dried leaves of the nipa palm, or materials other than paper, dried tobacco leaves or plug tobacco.

4. Shredded tobacco means tobacco leaves or plug tobacco which has been shredded and dried.

5. Prepared shredded tobacco means dried tobacco leaves cured by methods other than sun-drying, which have been cut into shreds and treated so as to modify the quality."

Under Section 3 of the Tobacco Products Control Act B.E. 2535 regulating the sale and advertising of tobacco products, the meaning of tobacco products is provided as, "Tobacco product means the tobacco under the law on tobacco and any other product composed of tobacco leaves or nicotiana tabacum plant to be used either by smoking, sucking, sniffing, munching, eating, blowing or spraying into the mouth or nose or by other means in order to obtain the same result."

Tobacco products under the Tobacco Product Control Act B.E. 2535 include all products composed of tobacco leaves or the nicotiana tabacum plant, which is inclusive of the 5 kinds of tobacco mentioned under the Tobacco Act B.E. 2509 and tobacco which is used by smoking, sucking, sniffing, munching, eating, blowing or spraying into the mouth or nose or by other means in order to obtain the same result.

Therefore, comparing the meaning of "tobacco product" under the Tobacco Product Control Act B.E. 2535 with the meaning of "cigarette" by the Non-Smokers' Health Protection Act B.E. 2535 makes it possible to observe that the meaning of "cigarette" under the Non-Smoker Health Protection Act is narrower than the meaning of "tobacco product" under the Tobacco Product Control Act. Any cigarette included under the Non-smokers' Health Protection Act must be in 1 of the 5 categories for cigarettes under Section 3. However, tobacco products include all products composed of tobacco leaves or nicotiana tabacum plant. Thus, it can be concluded that the cigarette is a subcategory of tobacco products because cigarettes always contain dried tobacco leaves, plug tobacco, shredded tobacco or prepared shredded tobacco, while tobacco products include other products such as snuff tobacco and chewing tobacco.

2.3 Electronic cigarettes

Tobacco products can be divided into 2 categories including "Smoked Tobacco" and "Smokeless Tobacco". Smoked tobacco is used by smoking it. This category can be subdivided into 3 types comprised of manufactured cigarettes, hand-rolled cigarettes, and other smoked tobacco such as cigars, pipes, baraku or hookah. Conversely, smokeless tobacco is tobacco that is used without burning. There are many types of smokeless tobacco such as chewing tobacco, oral tobacco, spit or spitting tobacco, dip, chew, and snuff.¹⁸

Electronic cigarettes are a smokeless product developed as an alternative to traditional smoking. The electronic cigarette - or "e-cigarette" for short- is a new form of tobacco often promoted as a good choice for smokers due to its claim of being safer than real cigarettes. Based on this reasoning, the consumption of e-cigarettes increased rapidly, though most were sold online by internet sources.

An e-cigarette is a battery-operated device with widely varying designs. It is typically divided into 3 parts: a battery, heater and atomizer, and cartridge or mouth piece. When a smoker uses an e-cigarette from the mouth piece, a red light will turn on and the battery will be operated. The heater and atomizer are controlled by a microchip circuit and electronic spire, which will heat the liquid in the cartridge and vaporize the liquid for inhalation into the lungs of the user.¹⁹ The e-cigarette will not work if it lacks the necessary liquid or e-liquid. The e-liquid is comprised of Propylene Glycol (PG), Glycerine, flavoring, and nicotine.

Nicotine is a type of alkaloid and a nitrogen-containing chemical. It is made by several types of plants, including the tobacco plant, also called Nicotiana tabacum. At present, it is also produced synthetically. However, it is unpopular due to

¹⁸ National Cancer Institutes, "*Smokeless Tobacco and Cancer*", *available at* http://www.cancer.gov/ about-cancer/causes-prevention/risk/tobacco/smokeless-factsheet, (last visited May 17, 2016.)

¹⁹ ประกิต วาทีสาธกกิจ, "บุหรี่ ใฟฟ้ากับคำถามที่ทุกคนอยากรู้" (2556) (Prakit Vathesatogkit, "*E-cigarette* and questions that everyone wants to know" (2013)), available at http://www.ashthailand.or.th/th/strategic_page.php?id=453.

its high price.²⁰ The level of nicotine in e-liquid is defined differently. Generally, it is divided into 5 levels: Extra High has a nicotine level of 20-24 mg; High has a nicotine level of 16-18 mg; Medium has a nicotine level of 11-14 mg; has a nicotine level of 4-8 mg, while None contains no nicotine.

Today, a regulation concerning the use of electronic cigarettes is being debated in many countries. As the e-cigarette is a newly-developed product, it lacks the clear and sufficient information necessary for making effectual regulatory decisions. However, regulators should evaluate the research on e-cigarettes as soon as possible, such as the lack of health information regarding smokers and non-smokers who are exposed to the vapor from e-cigarettes. The manufacturers of e-cigarettes claim that there is no danger to smokers' health because there is not physical smoke from burning the cigarette. However, this claim has not been confirmed by any research.

In many countries, health protection laws for non-smokers do not explicitly mention e-cigarettes because the law was enacted before e-cigarettes were on the market. As such, it can be assumed that the use of the e-cigarette in public places is permitted. This problem is a significant public health concern, not only because of their unregulated constituents and the health impact of the vapor on smoker and others who exposure, but also because e-cigarette usage may cause public misunderstanding as to where smoking is allowed, which may result in compliance problems with health protection laws designed for non-smokers.²¹

The legal status of the e-cigarette was legislated differently. Some countries have totally banned e-cigarettes. For example, Brazil regulates e-cigarettes as a tobacco product for import, sale and marketing, but they are prohibited in Argentina by Resolution 3226/2011, which bans the importation, distribution, commercialization and advertising of e-cigarettes and ancillaries. However, some countries support the use of e-cigarettes. For example, the United Kingdom and

²⁰ Christian Nordqvist, "Nicotine: Facts, Effects, Nicotine Addiction", available at http://www.medicalnewstoday.com/articles/240820.php, (last visited May 5, 2016.)

²¹ American Nonsmokers' Rights Foundation, "*States and Municipalities with Laws Regulating Use of Electronic Cigarettes*", *available at* www.no-smoke.org/pdf/ ecigslaws.pdf. (last visited May 6, 2016.)

United States allow the use and sale of e-cigarettes. In Belgium, the law regulates ecigarettes with partial permission, also called a two-tier system, whereby the sale of ecigarettes is permitted if they contain no nicotine.²²

In Thailand, the law that intends to control tobacco products actually has 2 laws including the Non-Smokers' Health Protection Act B.E. 2535 and the Tobacco Product Control Act B.E. 2535.

The Non-Smokers' Health Protection Act B.E. 2535 is the law which has the intention of protecting non-smokers from the hazards of second-hand smoke by making it illegal to smoke in public places. However, the word "smoking" under the Non-Smokers' Health Protection Act B.E. 2535 must be an act which results in the production of smoke by burning, which is stated in Section 3. Thus, determining whether an e-cigarette is legal or illegal depends on the consideration of whether or not an e-cigarette is a cigarette under the Act.

The meaning of "cigarette" under the Non-Smokers' Health Protection Act B.E. 2535, Section 3 provided that a "*Cigarette means a cigarette, cigar, other cigarettes, and tobacco or modified tobacco pursuant to the law on tobacco*". Thus, a cigarette under the Non-Smokers' Health Protection Act B.E. 2535 is restricted to only the 5 categories of cigarette under Section 3. If it is not, such a product shall not be under this law. The e-cigarette is a new product which is not included in the 5 categories for the meaning of cigarette. Therefore, it is not a cigarette according to the meaning given by the Non-Smokers' Health Protection Act B.E. 2535. Thus, ecigarettes are not subject under the law and the smoking of e-cigarettes in public places is not forbidden by law. However, the smoking of e-cigarettes shall be deemed a nuisance under the Public Health Act B.E. 2535 if it causes annoyance to others.²³

In addition to the Non-Smokers' Health Protection Act B.E. 2535, the Tobacco Product Control Act B.E. 2535 is another law which has the intention of controlling tobacco products. However, this Act focuses on the sale of tobacco products rather than use. The meaning of "tobacco product" under the Tobacco

²² "*E-Cigarette Laws Worldwide*", *available at* http://www.ecigarettepolitics.com/electronic-cigarettes-global-legal-status.html, (last visited May 6, 2016.)

²³ Prakit Vathesatogkit, *supra* note 19 p.9

Product Control Act B.E. 2535, Section 3 provides that "*Tobacco product means tobacco under the law on tobacco and any other product composed of tobacco leaves or nicotiana tabacum plant to be used either by smoking, sucking, sniffing, munching, eating, blowing or spraying into the mouth or nose or by other means in order to obtain the same result.*" Thus, products composed of tobacco leaves or nicotiana tabacum plants are subject to control under the law. However, e-cigarettes have both nicotine, which is a component of tobacco leaves or the nicotiana tabacum plant, and nicotine which is produced synthetically. Thus, the enforcement process must make it obvious that there are tobacco leaves or nicotiana tabacum plant as ingredients.²⁴ At present, the process that can prove whether such a cigarette is composed of synthetic nicotine or nicotiana tabacum plant is not available. As such, the e-cigarette is currently not subject to control under the Tobacco Product Control B.E. 2535.

However, the Order of the Office of Consumer Protection Board No.9/2558 on: Prohibition against Sale or Service for Goods of the Hookah, Electronic Hookah or Electronic Cigarette including Contained Liquids and Refills, Articles 2 and 3, provide that the Baraku and Electronic Baraku or electronic cigarette or contained liquids and refills shall be prohibited from being sold or serviced. Moreover, the Notification of the Ministry of Commerce Prohibition for Importing Hookah and Electronic Hookah or Electronic Cigarettes into Thailand B.E. 2557, defined them as prohibited items from import into Thailand. Therefore, the sale, service and import of e-cigarettes are illegal in Thailand.²⁵

²⁴ สูนย์กฎหมาย: กรมควบคุมโรค. ลู่มือการบังคับใช้กฎหมาย,พิมพ์ครั้งที่ 1,. 2016 (Law Center: Department of Disease Control. The Law Enforcement Handbook, (1st ed., 2016))

²⁵ Notification of the Ministry of Commerce Prohibition of Importing Hookah and Electronic Hookah or Electronic Cigarette into Thailand B.E. 2557, art. 4 provides that

[&]quot;Hookah and Electronic Hookah or Electronic cigarette is prohibited goods for importing into Thailand. Any substances which are source of smoke or vapor for smoking of Hookah and Electronic Hookah or Electronic cigarette importing with Hookah and Electronic Hookah or Electronic cigarette are prohibited from importing into Thailand as well"

2.4 Impact of second-hand smoke on non-smoker health

Tobacco smoke has more than 4,000 types of chemicals in the form of particles such as tar (itself composed of many chemicals), nicotine, benzene and benzo (a) pyrene or gases; such as carbon monoxide, ammonia, dimethylnitrosamine, formaldehyde, hydrogen cyanide and acrolein. Moreover, sidestream smoke, which a smoker wafts off, has higher concentrations of toxic gases than mainstream smoke, which a smoker inhales. An estimated 85% of the smoke in a room is the result of sidestream smoke.²⁶

2.4.1 Definition of second-hand smoke

Under the Guidelines for Implementation of Article 8 in the WHO FCTC, second-hand smoke is defined as "*the smoke emitted from the burning end of a cigarette or from other tobacco products usually in combination with the smoke exhaled by the smoker*". That means exposure to second-hand smoke comes from the inhalation of others' cigarette smoke, also known as 'passive smoking', 'environmental tobacco smoke' and 'involuntary smoking'. Second-hand smoke comprises "sidestream smoke" emitted from the burning tip of a cigarette and "mainstream smoke", which is smoke that has been inhaled and then exhaled by the smoker.²⁷

Second-hand smoke is recognized as an important cause of both short-term and long-term harm to others by the reasoning that mainstream smoke contains chemical irritants such as particles and gases as well as almost 70 carcinogens, the main chemical that could cause cancer. Furthermore, sidestream smoke is also as dangerous as mainstream smoke because the concentrations of toxins and carcinogens are similarly high.²⁸

²⁶ ASH Fact Sheet, "*What's in cigarette*", *available at* http://ash.org.uk/files/ documents/ASH_117.pdf, (last visited December 12, 2015)

²⁷ ASH Research Report, "Secondhand Smoke: the impact on children" available at www.ash.org.uk/files/documents/ASH_596.pdf, (last visited December 12, 2015)

²⁸ *Id*.

2.4.2 Health impact from second-hand smoke exposure

Over the last 50 years, scientists have discovered significant evidence of the health effects of exposure to second-hand smoke. In the 1950s and 1960s, the first study on second-hand smoke focused on the health effects on children and the impact on the fetus of a pregnant mother who smokes while pregnant. Furthermore, there are numerous studies in the past decade demonstrating the result of exposure to second-hand smoke on a diversity of serious diseases in children and adults.²⁹

2.4.2.1 Impact on children

Second-hand smoke has been associated with many negative health effects in children, as follows:

Spontaneous abortion

The dangers of second-hand smoke can impact children before they are even born. Second-hand smoke exposure by non-smoking women during pregnancy can result in low birth weight and preterm delivery. Moreover, exposure to secondhand smoke may also cause Sudden Infant Death Syndrome. Second-hand smoke also affects other perinatal health factors such as intrauterine growth retardation and severe spontaneous abortion (miscarriage)³⁰

Respiratory illnesses and symptoms

The highest level of risk to respiratory illnesses and symptoms in children has been found in families where both parents smoke. Lower respiratory tract illnesses such as bronchitis and pneumonia, particularly during the first year of life, are typically found in families where the mother and father both smoke in the house. Significant evidence suggests that numerous children of smokers suffer from respiratory symptoms such as coughing, phlegm and wheezing.³¹

²⁹ Assoc.Prof.Amornrat Photipak, *supra* note 4, at 9.

 $^{^{30}}$ *Id*.

³¹ *Id*.

Asthma

Second-hand smoke exposure can exacerbate preexisting asthma and encourage new-onset asthma in children as well as adults. Asthmatic children who live in a home with smokers have to visit the emergency room and use medication more than the same asthmatic children who don't.³²

Lung growth and development

There is much evidence, including the conclusion of the United States Surgeon General in 1986, indicating that second-hand smoke can reduce the rate of lung function growth in children. This effect also happens with maternal smoking during pregnancy and exposure to second-hand smoke after birth.³³

Middle-ear disease (otitis media)

Second-hand smoke exposure is the cause of Otitis media, or Middle-ear disease, which is a common childhood illness. Middle-ear disease is a serious disease which, if left untreated by a physician, can lead to permanent hearing disability.³⁴

2.4.2.2 Impact on adults

Second-hand smoke has been associated with many negative health effects in adults, as follows:

Coronary heart disease (CHD)

There is credible evidence from studies revealing that second-hand smoke causes both fatal and non-fatal heart disease. Exposure to second-hand smoke causes acute adverse effects on the blood lipids, clotting systems (platelets) and arterial wall function within minutes. Many of these effects are nearly as large as those seen in active smokers.

³² *Id*.

³³ Id.

 34 Id

Organizations, including the American Heart Association, the United States Surgeon General, Cal/EPA and the United Kingdom Scientific Committee on Tobacco and Health have concluded that second-hand smoke exposure causes heart disease and increases the risk of death from heart disease by about 30%.³⁵

Lung cancer

Smoke is a product of the burning process. Smoke contains gases, vaporized chemicals, particles of ash and other particulate solids. There are 270 chemical compounds present in smoke, fifteen of which are identified carcinogens.³⁶ Many studies from around the world have found that second-hand smoke exposure is connected to lung cancer. In 1981, research showed an increased risk of lung cancer in non-smoking women who were married to cigarette smokers.

The scientists of the IARC, the United States Surgeon General and the United States EPA have all concluded that second-hand smoke is a primary cause of lung cancer in non-smokers.³⁷

Breast cancer

The 2005 Cal/EPA report listed exposure to tobacco smoke as a "toxic air contaminant." The reasoning was that 13 out of 14 studied reviews showed that younger or primarily premenopausal women who were exposed to tobacco smoke had elevated risk for breast cancer by almost 70 %. The Cal/EPA concluded that the harmful chemicals contained in tobacco smoke were a primary causal factor.

The United States Surgeon General's Report found evidence that showed a causal relationship between second-hand smoke and breast cancer, causing breast cancer in younger, primarily premenopausal women. This was based on knowledge of the biology of breast cancer and the fact that there were more than 20 known

³⁵ *Id*.

³⁶ Gail Gleason Milgram, *supra* note 12, p.6

mammary carcinogens in second-hand smoke, which caused detectable genetic damage in women's breasts.³⁸

Respiratory symptoms and illnesses

Data shows that second-hand smoke exposure is one reason for chronic respiratory symptoms and a decrease in effective pulmonary function. Moreover, second-hand smoke exposure also causes and exacerbates asthma in adults.³⁹

2.4.3 Economic impact of second-hand smoke exposure

Besides the obvious health impact that occurs due to individual secondhand smoke exposure, there is also economic loss to business and society. Research from the Society of Actuaries in the United States estimates that economic losses incurred as the result of second-hand smoke exposure each year include medical costs of more than US\$ 5 billion and indirect medical costs such as disability, lost wages and related benefits of more than US\$ 5 billion. Moreover, Hong Kong SAR estimated annual value concerning direct medical costs, long-term care and productivity loss due to second-hand smoke exposure to be US\$ 156 million.⁴⁰

Workplaces where there are arranged smoking areas have to spend money for renovation and cleaning costs as well as considering the risk of fire, which can make insurance premiums higher. ⁴¹

There were many concerns after the non-smoker's protection law was enacted. Entrepreneurs were nervous that the smoking ban might affect customer motivation to go out to eat and drink. Actually, it was the opposite. Many customers

- ³⁸ *Id*.
- ³⁹ Id.
- 40 *Id*.
- ⁴¹ *Id*.

preferred to go out to bars and to eat and drink in restaurants with clean air rather than an atmosphere full of smoke. There are many researches that confirm this issue. ⁴²

In 2005, California was the first state in the US to implement the nonsmoker's protection law in restaurants and bars. There was a study and analysis concerning how the law affected the revenue of bars and restaurants by using tax revenue data from 1990 to 2002. The result from this study was opposite from what the entrepreneurs claimed would happen. The study found that the law did not have any effect on restaurant revenue. Instead, the law was associated with an apparent increase in restaurant and bar revenue.⁴³ Additionally, an Augus Reid poll in the Vancouver and Victoria areas in British Columbia found that restaurants would likely increase their business revenue if the owners provided the restaurants with a complete ban on smoking.⁴⁴

The non-smoker health protection law not only protects the health of non-smokers, but also has a good effect on business. Despite the various negative claims from entrepreneurs, studies have shown that providing non-smoking bans did not affect business revenue, but may increase income because customers would like to rest in places that prohibit smoking instead of sitting in a place that permits smoking. Moreover, making a business non-smoking is one way to protect employees in their working time.

2.5 Cigarette product standard

Cigarettes and the paper-rolling material of shredded tobacco looks like a simple thing comprised of many ingredients that are harmful to people's health such as nicotine, tar, and carbon monoxide as well as formaldehyde, ammonia, hydrogen cyanide, arsenic, and DDT. These ingredients are toxic substances that not only impact the health of smokers, but also impact the non-smokers who are exposed to

⁴² "Smoke Free Law Do Not Harm Business at Restaurants and Bars", available at https://www.tobaccofreekids.org/research/factsheets/pdf/0144.pdf, (last visited May 9, 2016)

⁴³ *Id*.

⁴⁴ Rob Cunningham. **Smoke and Mirrors: The Canadian Tobacco War,** (Canada: International Development Research Centre, 1996.)

second-hand smoke. There is significant evidence to confirm that cigarettes contain around 2,500 chemicals. When burned, the chemicals in cigarette smoke will increase to more than 4,000. Moreover, the amount includes more than 43 types of carcinogenic chemicals.⁴⁵ Therefore, protecting people from the hazard of cigarette smoke is important for the reason that a cigarette is a tobacco product which has consumption of more than 99 percent of all tobacco products. As such, there should be some standard to control the quality of cigarettes before introduction to the market.

Under this concern, the United States signed the Family Smoking Prevention and Tobacco Control Act into law. The Family Smoking Prevention and Tobacco Control Act gives authority to the Food and drug Administration (FDA) to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health. To control the quality of tobacco products, the Tobacco Control Act provided Section 904 of the Federal Food, Drug, and Cosmetic Act to establish requirements for tobacco product ingredient submissions. If there was any failure or refusal to comply with any requirement prescribed under Section 904, a tobacco product shall be deemed misbranded under Section 903 (a)(10)(A). Violations relating to Section 904 are subject to regulatory enforcement action by the FDA, including, but not limited to, seizure and injunction.⁴⁶

Moreover, in the mid-1960s the United States Federal Trade Commission (FTC) also adopted standardized testing methods for the manufacturing process by using the International Organization for Standardization [ISO] for the measurement of tar and nicotine yields of cigarette smoke and carbon monoxide for safer cigarettes. The ISO / FTC methods were adopted as predictors of the differences in exposure to tar, nicotine and carbon monoxide received by smokers of brands with different machine-measured yields. This difference in exposure of cigarette smoke was expected to result in substantive differences in the health effects of smoking various

⁴⁵ "*Have You Ever Wondered What's In a Cigarette? Cigarette Ingredients*", *available at* http://www.quitsmokingsupport.com/whatsinit.htm. (last visited June 4, 2016)

⁴⁶ Food and Drug Administration Center for Tobacco Products Document Control Center, "*Guidance for Industry Listing of Ingredients in Tobacco Products*", *available at* http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ default.htm, (last visited May 28, 2016.)

types of cigarettes, such as low or high yield.⁴⁷The ISO/FTC testing method was also adopted in Europe and many other countries.

In Thailand, the Tobacco Product Control Act B.E. 2535 Section 11 set a standard to control cigarette products by defining that a tobacco product sold in Thailand shall have the composition in accordance with the standards prescribed in the Ministerial Rules. A manufacturer or importer shall have the duty to inform the particular composition, which the Ministry of Public Health prescribed. If the composition of the cigarette does not comply with the standard prescribed, the Minister shall have the power to order the prohibition of sale and import of such tobacco product.⁴⁸ Moreover, in cases of manufacturer or importer not informing the particulars, informing incomplete particulars, informing false particulars or selling or importing in violation of Section 11, such a manufacturer or importer shall be subject to imprisonment not exceeding six months or a fine not exceeding one hundred thousand baht or both.⁴⁹

Therefore, by the virtue of Section 11 of the Tobacco Products Control Act B.E. 2535, Ministerial Regulation B.E.2540 Article 1 stated that "*Cigarettes for sale must have ingredients conforming to the following standard:*

⁴⁸ The Tobacco Product Control Act B.E.2535, sec. 11 provides that

⁴⁷ SACTob, "Conclusions on Health Claims Derived from ISO/FTC Method to Measure Cigarette Yield", available at www.who.int/tobacco/global_interaction/ tobreg/en/ iso_ftc_en.pdf, (last visited May 28, 2016.)

[&]quot;The tobacco products to be sold shall have the composition in accordance with the standards prescribed in the Ministerial Rules.

The manufacturer or importer of tobacco products shall have a duty to inform the Ministry of Public Health of the particulars of composition of the tobacco products in accordance with the criteria, procedures and conditions prescribed in the Ministerial Rules.

In case where the composition of any product does not comply with the standards prescribed in paragraph one, the Minister shall have the power to order the prohibition of sale or import of such tobacco product"

⁴⁹ The Tobacco Product Control Act B.E.2535, sec. 20 is provides that

[&]quot;Any manufacturer or importer failing to inform the particulars or informing incomplete particulars or informing false particulars or selling or importing the tobacco products in violation of Section 11 shall be subject to an imprisonment not exceeding six months or a fine not exceeding one hundred thousand baht or both."

(1) Shredded tobacco, paper or tobacco leaves which are used for rolling and filtering shall not have fungus;

(2) Shredded tobacco or tobacco leaves shall not contain DDT (Dichlorodiphenyl Trichloroethane) or derivatives of DDT in excess of 10 ppm (parts per million);

(3) Additives should not have any substance in quantities harmful to health"

Furthermore, in the case of duty for manufacturer or importer to inform the particulars of the composition to the Ministry of Public Health as stated in Section 11, the details have been defined within Ministerial Regulation B.E. 2540 Article 2, which stated that "*The manufacturer or the importer of cigarettes shall, prior to selling the product or importing them, as the case may be, declare the ingredients of each brand of cigarettes as to:*

(1) Noxious substances in the emission products of each cigarette by specifying the quantity of tar, nicotine and carbon monoxide in milligram, according to the analytical method of the international organization for standardization.

(2) The chemical name, quantity per cigarette, and registration number of the chemical as prescribed by the Chemical Abstracts Service of the American Chemical Society of the additives must be specified.

For additives which have no chemical name, the generic names and biological names, or their standard Latin nomenclature must be specified or, in the absence of the standard Latin nomenclature, other generic or specific names must be given.

In the case of brand variant, the declaration of additives in the first paragraph shall be made per brand variant."

Under Ministerial Regulation B.E. 2540 Article 3, it is stated "After this Ministerial Act comes into force, the manufacturer or importer of cigarettes or cigars shall declare the ingredients of such tobacco products under Article 2 before they leave the source of production or before importing them into The Kingdom, and this shall be made every three years after the first declaration within 30 days after the last day of the 3-year period."

Declaration of the particulars for the composition of cigarettes under this law is beneficial to people in both the short term and long term. In the short term, a declaration of the particulars for the composition of cigarettes helps people to realize and understand the hazards of toxicity in cigarette smoke. This understanding will help people, especially the new generation, to think before starting to smoke. In the case of smokers, they will realize the need to stop smoking. In the long term, a declaration of the particulars for the composition of cigarettes will help scientists to update information, as must manufacturers. They can study the potential hazards of new ingredients in cigarettes and help the Ministry of Public Health to improve measurement of cigarettes before release to the market. This includes cutting or reducing ingredients that are extremely harmful to health or preventing generation and sale in the future.⁵⁰

This standardization is not a qualification that tobacco is safe to health, but rather has the intention of screening tobacco products which have the quality of physical features and basic chemicals lower than tobacco products in the international market before import and sale in Thailand.⁵¹

Therefore, reaching the objective of the law, which intends to protect people's health from the hazards of tobacco smoke involves standardized testing methods for safer cigarettes, is a significant issue which should be developed. The method of qualifying as a safer cigarette in the United States adopted the International Organization for Standardization [ISO] for the measurement of chemicals in cigarettes and enhanced the level of standardization for cigarettes equal to the standardization of drugs. Thus, qualifying as a safer cigarette under the law applies a measurement under the Factory Act 1992 and the Federal Food, Drug, and Cosmetic Act to enhance the quality and safety of cigarettes manufactured in Thailand.

⁵⁰ สถาบันควบคุมการบริโภคขาสูบ, "การแจ้งส่วนประกอบผลิตภัณฑ์บุหรี่ชิกาแรต ตามมาตรา 11 แห่งพระราชบัญญัติควบคุม ผลิตภัณฑ์ยาสูบ พ.ศ.2535",เพื่อเสนอต่อ รัฐมนตรีว่าการประทรวงสาธารณสุข, มิถุนาขน 2537. (Institute of Tobacco Consumption Control, "Declaration of the particular of the composition of cigarette under Article 11 of the Tobacco Control Act B.E.2535", Present to the Minster of Public Health for providing the Ministerial Regulation, June 1994.)

2.6 Rights of non-smokers

The progression of science, technology and medicine at present has a lot of influence on the manners and customs of humans. In the past, smoking was not considered disgusting behavior like in the present. However, the discovery of medical evidence concerning the impact of second-hand smoke has made people realize the need to have the right to protect themselves from the hazards of second-hand smoke. The right of non-smokers to be free from second-hand smoke has been mentioned in many principles, as follows:

2.6.1. Rights under the Constitution

The concepts of human dignity, rights and liberty under the Constitution were not born in Thailand, but rather since the Greek and Roman era. The concepts of human dignity, rights and liberal begin by opening and accepting other races and the equality of mankind. It is different from animals because humans have the ability to contemplate rationality, which can lead them to create and develop themselves until it becomes advanced consciousness. In the context of liberty and selflessness, these abilities comprise human dignity.⁵²

The implementation of protection concerning human dignity in the Constitution did not only provide claims to people's rights, but also has the meaning to define the form of relationship between the state and private sector. It is expressed that the state does not exist for itself. The existence of the state is a result of creation by humans with the objective of mankind living in an honorable and stable society. In accordance with this concept, human dignity has become a guideline for activity and any actions of the state are to be a measure for the organized coexistence of people in the state. Furthermore, it also enhances the dedication of the state to gain complete

⁵² บุญศรี มีวงศ์อุโฆษ. หลักการใช้อำนาจขององค์กรที่ต้องคำนึงถึงศักดิ์ศรีความเป็นมนุษย์ สิทธิ และเสรีภาพตามรัฐธรรมนูญ, กรุงเทพ: บริษัท พีเพรส จำกัด, 2549. (Boonsri Mewongukote, Principle for Using the Power of the Organization Which Have to Concerning about Human Dignity Rights and Liberty under the Constitution, (Bangkok: P. Press Co., 2006.))

human dignity in cohabitation from the level of moral and tradition to be a relationship at the level of legal duties.⁵³

Human dignity is the highest of the principles in the Constitution. It is also one of the most significant basic fundamental rights, which is a source of human understanding and all other fundamental rights. ⁵⁴

Rights under the Constitution can be divided into 2 types: 1) Natural rights and 2) Legal rights, which are explained below.

· Natural Rights

Natural rights mean those that exist in nature to be righteous, which humans should be. This right is under the fundamental requirement of humans. Naturally, humans have fear. As such, they need to find support that is stable and safe as a minimum guarantee, such as security in life, living, work and properties. This includes threats from society.⁵⁵

Legal Rights

Legal rights mean those which can be claimed and enforced in order to comply with societal rules. In general, legal rights exist under the rules of legal systems, such as rights in properties and rights in compensation from tort. Legal rights are those which can be provable, arguable and enforceable.⁵⁶

The Constitution of the Kingdom of Thailand B.E. 2550 confirmed the concept of human dignity, rights and liberty in Section 4, which stated that "*Human dignity, rights and liberties and equality of the people shall be protected.*" Thus, any action which infringes upon human dignity, rights and liberties as well as the equality of the people shall be prohibited by the Constitution.

On the other hand, man is a social animal. All people, from birth to death, have interactions with other people all the time. For the safety of life, individuals cannot live without interdependence. Therefore, everybody should have concern that

⁵³ *Id.* at 6.

⁵⁴ *Id.* at 8.

⁵⁵ อุคมศักดิ์ สินธิพงษ์. สิทธิมนุษยชน, พิมพ์ครั้งที่5, กรุงเทพ: สำนักพิมพ์วิญญชน, 2555, น.16 (Udomsak Sinthipong. Human Rights. 16, (5th ed., Bangkok: Winyuchon Publishing, 2012))

all people have equal rights. If people do not want others to infringe on their rights, they should not infringe on the rights of others. People cannot exercise their right or liberty to infringe on other people. Under the Constitution of the Kingdom of Thailand B.E. 2550 Section 28, it is provided that "A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to the Constitution or good morals."

Under the concept of human dignity, rights and liberties in Section 4, the Constitution of the Kingdom of Thailand B.E.2550 also details the concept to provide fundamental rights in Chapter 3 as "Rights and Liberties of the Thai People." Under Section 32 of this chapter, it is stated that "*A person shall enjoy the right and liberty in his or her life and person.*" Therefore, it can be said that a person shall have the right and liberty to do anything they want or be everything they want to be. Further, the state should protect this right from the interference of others. However, the state should also be restrictive if such action infringes on the right and liberty in their life and person. They can do everything they want, even smoke. However, this right should be restricted if such smoking infringes on the right of non-smokers. Smokers cannot exercise their right or liberty where it is harmful to the health of others or infringes on the right to live in a good environment and breathe clean air.

The right to live is a natural right which is ingrained since we are born. People can live and gain security, including the basic needs of life. In Vietnam, the Constitution of the Socialist Republic of Vietnam has confirmed the right to live within Article 19 by stating "*Everyone has the right to live. Human life is protected by the law. No one shall be illegally deprived of his or her life.*" Moreover, the International Covenant on Civil and Political Rights Article 6 states that "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*". The right to live is the highest right and an inevitable obligation, even in times of public emergency that threaten the life of the nation.⁵⁷

⁵⁷ ศูนย์สึกษาและพัฒนาสันติวิธี มหาวิทยาลัยมหิดล. รายงานการศึกษา โครงการศึกษาสิทธิเสรีภาพขั้นพื้นฐานตามกรอบ รัฐธรรมนูญ ในบริบทของสังคมไทยและมาตรฐานสากลระหว่างประเทศด้านสิทธิมนุษยชน,กรมกุ้มครองสิทธิและเสรีภาพ, 2549. (Institute of Human Rights and Peace Studies. Report on The Fundamental

2.6.2 Right of the environment

The desire to produce better conditions for life on earth is a common need of both environmental law and human rights principles. The benefit of the environment and benefit of mankind on both a local and global scale is the aim of environment law, which seeks to protect. However, it has been restricted by inter-state relations and the behavior of some economic actors. Human rights are a principle of fundamental aspirations for human beings, which are also a mechanism to allow people to claim their rights. The issue of environmental measures in human rights has become a significant view of the recognition of the widespread influence of both local and global environmental conditions upon the realization of human rights.

It is obvious that preservation, conservation and restoration of the environment are necessary and important to the rights to health, food and life, including a good quality of life. Therefore, it is clear that a right to environment can be coordinated into the objective of the human rights protection, such as the principle of human dignity.

Moreover, International Law Theory also said that all human rights are representative of universal claims, which are necessary to allow the decent life of human beings to be a part of core moral codes common to all societies. International human rights are basic since their initiation on this premise should not be seen as another manifestation of imperialism, but as 'the recognition that all human beings aspire to a life in dignity.'

Mostly, the protection and conservation of a clean and healthy environment for the benefit of individuals whose conditions of life are threatened have been linked to environmental and human rights, e.g. by noise disturbances and air pollution arising from airports or motorways and industrial pollution. Thus, arriving at a universal formulation for the right to a healthy environment should also encompass other issues of concern to a majority of the world's population, including access to fresh water and food supplies.⁵⁸

For example, the Stockholm Declaration 1972, Principle 1, proclaimed generally that 'All persons' have the right to 'a secure, healthy and ecologically sound environment' and to 'an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.' This right would include, inter alia, freedom from pollution, environmental degradation and activities that adversely affect the environment or sustainable development; protection and preservation of the air, soil, water, biological diversity and ecosystems; ecologically sound access to nature; the conservation and sustainable use of nature and natural resources; preservation of unique sites; enjoyment of traditional life and subsistence for indigenous peoples.⁵⁹

2.6.3 Right to breathe clean air

Clean air is what people need and also essential to having good health. Therefore, everyone has the right to live in a good environment for his or her health and well-being in conditions for protection and improvement of the environment, for the present and future generations.

Since the early 1980s, the EU has been addressing air pollution as a significant environmental problem. As such, EU policy set limits on emissions and ambient concentrations of air pollutants that harm human health and contribute to other environmental problems such as acidification and eutrophication.

A number of significant rules have been made by the European Court of Justice (ECJ) on the legal terms and outcome of limits for levels of harmful air pollution in ambient (outdoor) air, called limit values. The ECJ has even declared that people must have the right to clean air, which means the ECJ has repeated the certainty of rights to clean air for EU citizens. Such rights are enforceable before

⁵⁸ Philippe Cullet, "Definition of an Environmental Right in a Human Rights Context", available at http://www.ielrc.org/content/a9502.pdf, (last visited December 26, 2015.)

⁵⁹ Alan Boyle, "*Human Rights and the Environment: A Reassessment*", available at http://www.law.ed.ac.uk, (last visited December 26, 2015.)

national courts. This is the cue to make sure that people can go to court to enforce their right to clean air, a right that the court must impose to protect human health according to the rules of the ECJ.⁶⁰

2.7 Rights of the child

Concern for the rights of children has been mentioned by the international community for a long time. In 1924, the League of Nations (which later became the United Nations) began to extend importance to the concept of child protection by adopting the Geneva Declaration of the Rights of the Child.⁶¹ The Geneva Declaration of the Rights of the Child was the first international treaty concerning children's rights, which gave specific rights to children and responsibilities to adults.⁶²

The process of recognition for children's rights according to the Geneva Declaration was continued by the United Nations in 1948. The issue of rights for the children was mentioned again in the first drawing up of program work for the Social Commission of the United Nations. A draft declaration was drawn up by the Social Commission and forwarded to the General Assembly. After it was examined by the Commission for Human Rights, the Declaration of the Rights of the Child was adopted on 29 November 1959.⁶³

In accordance with the preamble of the Declaration of the Rights of the Child, the declaration was enacted based on 4 grounds including 1) for reaffirmed faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life for more

⁶⁰ Alan Andrews, "*The Clean Air Hand Book: A Practical Guide to EU Air Quality Law*", *available at* http://www.clientearth.org/reports/20140515-clientearth-air-pollution-clean-air-handbook.pdf, (last visited December 19, 2015.)

⁶¹ Office of the Public Information United Nations. **The United Nations and Human Rights**, (New York, 1978.)

⁶² "Children's Rights History: Historical overview of the Children's rights evolution", available at http://www.humanium.org/en/childrens-rights-history/, (last visited June 10, 2016.)

⁶³ Office of the Public Information United Nations, *supra* note 61.

freedom, 2) to proclaim that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, 3) by reason that physical and mental immaturity of the child needs special safeguards and appropriate legal protection, both before and after birth, 4) mankind should give the best care to the children.

The Declaration of the Rights of the Child was described in 10 principles as follows:

1) The right to equality, without distinction or discrimination on account of race, colure, sex, religion or national origin;

2) The right to special protection for the child's physical, mental, moral and social development;

3) The right to a name and a nationality;

4) The right to adequate nutrition, housing and medical services;

5) The right to special education and treatment when a child is physically or mentally handicapped;

6) The right to understanding and love by parents and society;

7) The right to recreational activities and free education at least in the elementary stages;

8) The right to be among the first to receive relief and protection in all circumstances;

9) The right to protection against all forms of neglect, cruelty and exploitation;

10) The right to be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood.⁶⁴

The Declaration of the Rights of the Child has not been given consent to be bound by all member countries like an international law, which is made the legal responsibility of the member countries for their conduct. Therefore, the Declaration of the Rights of the Child was not widely or substantially executed. However, the United

⁶⁴ Humanium, "Declaration of the Rights of the Child, 1959", available at http://www.humanium.org/en/childrens-rights-history/references-on-child-rights/declaration-rights-child, (last visited June 10, 2016.)

Nations developed the Declaration of the Rights of the Child into the Convention on the Rights of the Child on 20 November 1989, which is binding on all state parties for the real protection of human rights.⁶⁵

According to the principles of the Convention on the Rights of the Child 1989, there are 2 fundamental rights as follows:

1) Inherit right

Under Article 6 of the Convention, the government should ensure that children have a right to live, including the right to survive and develop healthily. For example, Article 7 of the Convention states that all children have the right to a legally registered name, officially recognized by the government, the right to a nationality and the right to know and, as far as possible, to be cared for by their parents.⁶⁶

2) The best interests of the child

The Convention on the Rights of the Child shall undertake measures for implementation to protect and develop both mental and physical factors or at least recognize this convention without an action that harms the future and life of children. For example, Article 24 of the convention calls for states parties to recognize the right of the child to the enjoyment of the highest attainable standard of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. States parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The Convention should provide support and promote the ability for children to develop at a level which causes children to be good persons in the future. Therefore, in any action of government should take into consideration the best interests of the child.⁶⁷ For example, Article 3 of the convention states that the best interests of

⁶⁶ Id.

⁶⁷ Id.

⁶⁵ ปานรัตน์ นิ่มดลุง, "บทที่ 2 แนวความคิดว่าด้วยสิทธิเด็กตามหลักการสากลและกล ไกในการทำงานด้านเด็กของประเทศไทยใน ปัจจุบัน: โครงการวิจัย การปรับเปลี่ยนกล ไกเชิงสถาบันเพื่อเสริมสร้างสมรรถนะในการทำงานด้านเด็กขององค์กรปกครองส่วน ท้องถิ่น", 2553. (Panrat Nimtalung. "Chapter 2: Concept of right of the child under the international principle and children performance mechanisms in Thailand", Research Proposal on the modification of institutional mechanisms for enhance the children performance capability of local administrative", 2553.) available at http://www.dla.go.th/upload/ebook/column/2012/7/2012_5042.pdf

children must be the primary concern in making decisions that may affect them, no matter undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. All adults should do what is best for children and when adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.⁶⁸ ⁶⁹ Article 4 of the convention states that governments have a responsibility to take all available measures to make sure that children's rights are respected, protected and fulfilled, whether undertaken by all appropriate legislative, administrative, and other measures for the implementation of rights.^{70 71}

⁶⁸ The Convention on the Rights of the Child, art.3 provides that

"1. 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

⁶⁹ UNICEF, "Fact Sheet: A summary of the rights under the Convention on the Rights of the Child", *available at* http://www.unicef.org/crc/files/Rights_overview.pdf, (last visited June 10, 2016.)

⁷⁰ *Id*.

⁷¹ The Convention on the Rights of the Child, art.4 provides that

"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

CHAPTER 3

WHO-FRAMEWORK CONVENTIONAL ON TOBACCO CONTROL AND LEGAL MEASURE TO PROTECT NON-SMOKER HEALTH IN CALIFORNIA

3.1. World Health Organization

3.1.1 Background

The World Health Organization (WHO) is a special institution of the United Nations tasked with looking after public health on the international level. The WHO was formed in 1945 by the United Nations Conference on International Organizations, which have the objective of discussing the setting up of a global health organization. On 19 June 1946 and in conformity with the Charter of the United Nations, the Constitution of the World Health Organization was adopted by the International Health Conference in New York and signed by the representatives of 61 states, including 51 countries from the United Nations and 10 other countries, on 22 July 1946. The constitution entered into force on 7 April 1948 and was also the date of establishment for the WHO. Therefore, the WHO celebrated this day as World Health Day.

The World Health Organization is a member of the United Nations Development Group. However, it did not gain support of all member countries of the United Nations. The WHO supports every country accepted in its constitution.⁷² At present, the WHO has 194 member states with headquarters located in Geneva, Switzerland.⁷³

The WHO is a special institution of the United Nations with its own organization and internal management. They have a general director who works as the

⁷² "World Health Organization", available at http://kanchanapisek.or.th/kp6/ sub/book/book.php?book=9&chap=5&page=t9-5-infodetail09.html, (last visited December 19, 2015)

⁷³ World Health Organization "*Constitution of WHO: principles*", *available at* http://www.who.int/about/mission/en/, (last visited December 19, 2015)

supreme leader. The director comes from an election and is certified by the World Health Assembly. Furthermore, the WHO has a regional director who works as the head of continental and has a General Director's office work with a secretary who reports directly to the general director and is responsible for general administration, including regulation of rules.

3.1.2 The Constitution of the World Health Organization

The World Health Organization was set up to help, remedy, and solve global problems concerning public health and raise the health standards of parties, including prevention and control of any emerging diseases. Moreover, they also have the duty to create rules concerning public health for common practice by all parties according to the principle of the Constitution of WHO, stated as: ⁷⁴

"- Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

- The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

- The health of all people is fundamental to the attainment of peace and security and is dependent on the fullest co-operation of individuals and States.

- The achievement of any State in the promotion and protection of health is of value to all.

- Unequal development in different countries in the promotion of health and control of diseases, especially communicable disease, is a common danger.

- Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

- The extension to all people of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

- Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

⁷⁴ "WHO (World Health Organization)", available at http://www.myfirstbrain.com/ student_view.aspx?id=50687, (last visited December 20, 2015)

- Governments have a responsibility for the health of their people, which can be fulfilled only by the provision of adequate health and social measures."⁷⁵

From this principle, the work of the WHO can be separated into 3 types: First, try to facilitate assistance to any country when they request it. Second, provide health service to all countries in the world; and Third, promote and coordinate international scientific research concerning on any health problem that cannot be addressed within a member country.

3.2 Framework convention on tobacco control

3.2.1 Establishment of the Framework Convention on Tobacco Control

The WHO Framework Convention on Tobacco Control (WHO FCTC) was the first treaty negotiated under the auspices of the World Health Organization. It was adopted under Article 19 of the WHO Constitution, which confirms the right of all people to the highest standard of health. The WHO FCTC was established from the concern for the tobacco epidemic in globalization. At present, the tobacco epidemic had spread rapidly through many factors such as trade liberalization, direct foreign investment or advertising, promotion and sponsorship, including the international movement of contraband and counterfeit cigarettes, which have also increased tobacco use.

The WHO Framework Convention on Tobacco Control is an international legal agreement which frames the common responsibility of parties to protect people from the harm of tobacco consumption and exposure to tobacco smoke. The objective of this convention is provided in Article 3 as:

 $^{^{75}}$ WHO Framework Convention on Tobacco Control, foreword para.2 stated that

The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes have also contributed to the explosive increase in tobacco use.

"The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke."

The WHO FCTC was approved by the 56th conference of the World Health Assembly on 21 May 2003 and opened for signature from 16 June to 22 June 2003 in Geneva and afterwards at the United Nations Headquarters in New York from 30 June 2003 to 29 June 2004. The treaty came into force 90 days after it had been acceded to, ratified, accepted or approved by 40 states. On 1 December 2004, it was ratified completely, making the treaty become effective on 27 February 2005. The WHO FCTC is the first treaty of the WHO adopted under Article 19 of the WHO Constitution. Since 27 February 2005 to the present, it has been signed by 168 states. Under this amount that includes the European Community, the treaty is one of the most widely accepted treaties in UN history.

Thailand signed the WHO FCTC on 20 June 2003, which is 36th of the 40 states and on 8 November 2547, the Ambassador and Permanent Representative of Thailand to the United Nations in New York ratified the treaty to the Chief of the United Nations Treaty section. Thus, Thailand was the one of the first 40 states in the Asia-Pacific region to ratify the WHO FCTC.⁷⁶

3.2.2. Regulation under the Framework Convention on Tobacco

Control

This treaty is a legal mechanism on an international level which intercepts the spread of the tobacco epidemic around the world and prevents deaths from smoking, especially in developing countries.⁷⁷

⁷⁶ สุนิคา ปรีชาวงศ์ และ เนาวรัตน์ เจริญก้า. รู้จักอนุสัญญาว่าด้วยการควบคุมยาสูบ องค์การอนามัยโลก, พิมพ์ครั้งที่ 1, กรุงเทพ: เจริญดีมั่นคงการพิมพ์, 2553. (Sunida Prichawong and Naowarat Charoenka, What is the WHO Framwork Convention on Tobacco Control, (1st ed., Bangkok: Charoen-Mankong Publishing, 2010))

⁷⁷ *Id.* at 1.

The WHO Framework Convention on Tobacco Control was divided into 11 parts and 38 articles, which are comprised of both essential academic and management as follows:

Part 1 is an introduction related to the definition (Article 1) and the relationship between this Convention and other agreements or legal instruments. Article 2 states:

"In order to better protect human health, parties are encouraged to implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law".

Part 2 contains the objective, guideline principles and general obligations detailed in Articles 3-5. For example, Article 4.1 states:

"To achieve the objective of this Convention and its protocols and to implement its provisions, Every person should be informed of the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate governmental level to protect all persons from exposure to tobacco smoke."

Part 3 is a measure relating to the reduction of demand for tobacco, which contains Articles 6-14: Price and tax measures to reduce the demand for tobacco (Article 6); Non-price measures to reduce the demand for tobacco such as protection from exposure to tobacco smoke (Article 8); regulation of the contents of tobacco products (Article 9); Regulation of tobacco product disclosures (Article 10); Packaging and labeling of tobacco products (Article 11); Education, communication, training and public awareness (Article 12); Tobacco advertising, promotion and sponsorship (Article 13); and, Demand reduction measures concerning tobacco dependence and cessation (Article 14).

Part 4 is a measure relating to the reduction of the supply of tobacco, which are contained in Articles 15-17: Illicit trade in tobacco products (Article 15); Sales to and by minors (Article 16); and, Provision of support for economically viable alternative activities (Article 17).

Part 5 is protection of the environment, which is contained in Article 18. All parties agree to protect the environment and the health of persons relating to the environment with respect to tobacco cultivation and manufacture within their territories.

Part 6 is question related to liability, which is contained in Article 19. In cases of necessity, parties shall take legislative action or promote existing law to deal with criminal and civil liability, including compensation where appropriate. Furthermore, the treaty also stated that parties shall cooperate with each other in exchanging information for legal procedures concerning criminal and civil liability.

Part 7 is scientific and technical cooperation as well as the communication of information, which is contained in Articles 20-22: Research, surveillance and exchange of information (Article 20); Reporting and exchange of information (Article 21); and Cooperation in the scientific, technical, and legal fields and provision of related expertise (Article 22).

Parts 8-11 concern management of the treaty. For example, the Conference of the Parties has a duty to approve financial rules, always review the implementation of the Convention, promote and facilitate the exchange of information, as well as promote and facilitate the mobilization of financial resources for the implementation of the Convention, establish the regulation for the participation of observers at its proceedings (Article 23). In case there is a dispute concerning the interpretation or application of the Convention, the parties concerned shall solve the problem through diplomatic channels by settling the dispute through negotiation or any other peaceful means of their own choice (Article 27).⁷⁸

The essence of the treaty mentioned previously is for common responsibility of all parties. However, the Conference of the Parties will determine what implementation should be developed. During the initial 5 years (2005-2010) of the enforcement of the WHO Framework Convention on Tobacco Control, the Conference of the Parties endorsed the Guidelines for Implementation, which can be compared to a handbook for the parties to fulfill their obligations and contains 4 areas including:

- 1. Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry
- 2. Protection from exposure to tobacco smoke
- 3. Packaging and labeling of tobacco products
- 4. Tobacco advertising, promotion and sponsorship under Article 13^{79}

3.2.3 Guideline for implementation of Article 8 of the WHO FCTC

As scientific evidence has confirmed, there is no safe level of exposure to second-hand tobacco smoke; tobacco smoke has toxins which cause serious negative impact on the health of adults and children. Moreover, there is also unarguable evidence that accomplishing 100% non-smoking environments is the only effective way to protect people from the danger of exposure to second-hand smoke.

Therefore, the World Health Organization (WHO) has the duty to help, remedy, and solve problems concerning public health and raise the health standard provided in the treaty, as mentioned by the author in 3.1 and 3.2. The Framework Convention on Tobacco Control (FCTC) protects present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke. Thus, WHO Member States have proposed the need for clearer guidance from the WHO on protection from second-hand smoke in cases of protection from exposure to tobacco smoke. Article 8 of the WHO FCTC requires parties to adopt and implement areas of existing national jurisdiction as determined by national law and actively promote other jurisdictional levels for the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for the protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.⁸⁰

At the first Conference of the Parties which ratified the WHO FCTC in February 2006, parties resolved to give the highest priority to developing guidelines

⁷⁹ *Id.* at 9.

⁸⁰ Amornrat Photipak, *supra* note 4, at 7.

on Article 8 and to request the Convention Secretariat to begin work on these guidelines. Furthermore, the Conference of the Parties also adopted a template for the elaboration of Article 8, which lists several resources for guideline development. The manipulation of these recommendations was recommended. At the Conference of the Parties II in Thailand between 30 June and 6 July 2007, a guideline for implementation of Article 8 of the WHO FCTC was approved for protection from exposure to tobacco smoke.⁸¹

These recommendations are a response to the dangers of exposure to second-hand smoke and include the opportunity to assist the WHO FCTC in the implementation process as well as provide guidance to any department interested in developing smoke-free jurisdictions. These recommendations explain to parties about the science of second-hand smoke exposure and its impact on the health and economic benefits of smoke-free laws. It also guides decision-makers in developing and implementing evidence-based and enforceable smoke-free policies.

To comply with the provisions of the WHO Framework Convention on Tobacco Control and the willingness of the Conference of the Parties, the Guideline on Protection from Exposure to Tobacco Smoke collects the best available evidence and experience of parties that have succeeded as effective measures to reduce exposure to tobacco smoke. Moreover, these guidelines are defined to cover statements of principles and definitions of relevant terms agreed upon between parties. In addition, the guidelines also specify the measures necessary to reach effective protection from the harm of second-hand smoke. Parties should encourage using these guidelines to not only achieve their legal duties under the Convention, but also follow best practices in protecting public health.

3.2.3.1 Fundamental Considerations

The development of the Guideline on Protection from Exposure to Tobacco Smoke has been influenced by the following fundamental considerations:

(a) The duty to protect people from tobacco smoke exposure as mentioned in Article 8 of the WHO Framework Convention on Tobacco Control is under

⁸¹ Sunida Prichawong and Naowarat Charoenka, *supra* note 76

fundamental human rights and freedoms. This duty is implicit in the right to life and the right to the highest attainable standard of health, which is recognized in the constitutions of many counties and provided in many international legal instruments including the WHO Framework Convention.

(b) The duty to protect people from tobacco smoke exposure is one of the obligations for which a government has to enact law to protect people from threats to their fundamental rights and freedoms. Most importantly, this obligation has to extend to all persons and not only certain populations.

(c) Several scientific organizations have shown that second-hand tobacco smoke contains carcinogens. Therefore, beyond the requirement of Article 8, parties shall have the obligation to emphasize the hazard of exposure to tobacco smoke in accordance with existing law to cover exposure to harmful substances, including second-hand tobacco smoke.⁸²

3.2.3.2 Statement of Principles underlying Protection from Exposure to Tobacco Smoke

Under Article 4 (a) of the WHO Framework Convention on Tobacco Control, it is stated that "To achieve the objective of this Convention and its protocols and to implement its provisions, the Parties shall be guided, inter alia, by the principles set out below: 2. Strong political commitment is necessary to develop and support, at the national, regional and international levels, comprehensive multisectoral measures and coordinated responses, taking into consideration: (a) the need to take measures to protect all persons from exposure to tobacco smoke".

Therefore, the following principles should be guidelines for the implementation of Article 8 of the Convention.

Principle 1: Eliminate tobacco smoke to create 100% smoke-free places

"Effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment

⁸² Amornrat Photipak, *supra* note 4, at 65.

in order to create a 100% smoke-free environment. There is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from secondhand smoke should be rejected, as they are contradicted by scientific evidence. Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke."

Principle 2: Protect everyone – don't allow exemptions

"All people should be protected from exposure to tobacco smoke. All indoor workplaces and indoor public places should be smoke-free."

Principle 3: Use legislation rather than voluntary measures

"Legislation is necessary to protect people from exposure to tobacco smoke. Voluntary smoke free policies have repeatedly been shown to be ineffective and do not provide adequate protection. In order to be effective, legislation should be simple, clear and enforceable."

Principle 4: Provide resources for implementing and enforcing the law

"Good planning and adequate resources are essential for successful implementation and enforcement of smoke free legislation."

Principle 5: Include civil society as an active partner

"Civil society has a central role in building support for and ensuring compliance with smoke-free measures, and should be included as an active partner in the process of developing, implementing and enforcing legislation."

Principle 6: Monitor and evaluate smoke-free laws

"The implementation of smoke-free legislation, its enforcement and its impact should all be monitored and evaluated. This should include monitoring and responding to tobacco industry activities that undermine the implementation and enforcement of the legislation, as specified in Article 20.4 of the WHO Framework Convention."

Principle 7: Be prepared to extend the law if needed

"The protection of people from exposure to tobacco smoke should be strengthened and expanded, if necessary; such action may include new or amended legislation, improved enforcement and other measures to reflect new scientific evidence and case study experiences".⁸³

3.2.4 The Framework Conventional on Tobacco Control in Thailand

To achieve the objective of the WHO Framework Conventional on Tobacco Control, The Royal Thai Government developed a National Tobacco Control Policy by appointing the authorities to the National Committee for the Control of Tobacco Use in 1989. This committee is presided over by the Minister of Public Health, with the Director-General of the Department of Disease Control assigned as secretary general. This committee has authority as follows:⁸⁴

1.) Enact laws and provide guidelines for tobacco control in the country,

2.) Cooperate with other organizations concerning tobacco control activities,

3.) Accelerating, controlling, monitoring, and evaluating the law enforcement of notifications issued by the Ministry of Public Health,

4.) Revise existing laws and regulations including review of academic papers and research articles, dissemination of information to the general public; and appointment of sub-committee and working groups for specific tasks.

Thailand has continually attempted to control the use of tobacco for a long time, especially the problem and impact of smoking. Thailand provides many legal measures, which can be concluded as follows: ⁸⁵

⁸³ Amornrat Photipak, *supra* note 4, at 71.

⁸⁴ Tobacco Control Research and Knowledge Management Center (TRC). **Thailand Tobacco Control Country Profile**, Bangkok : Charoendee Munkong Printing,2008.

⁸⁵ ฉัตรสุมน พฤฒิภิญโญ. "กฎหมายและนโยบายการควบคุมยาสูบอย่างครอบคลุม", วารสารกฎหมายสุขภาพและการ สาธารณสุข", ปีที่1,เล่มที่3 ธันวาคม 2558. (Assoc Prof. Dr. Chardsumon Prutipinyo,

1. Monitoring sale prices of cigarettes and collecting taxes on cigarette sales as well as the eradication of illicit and counterfeit cigarettes.

Monitoring of prices and taxation are some of the most effective measurements for tobacco control. Therefore, the Tobacco Product Act 1966 authorizes the Excise Department, Ministry of Finance to determine and collect taxes on cigarettes and other tobacco products, in addition to monitoring sale prices for cigarettes, issuing licenses for tobacco cultivation and processing, determining sale prices for tobacco leaves, issuing licenses for tobacco factories, issuing licenses for cigarette stores and the eradication of illicit and counterfeit cigarettes, while the Customs Department, Ministry of Finance is responsible for collecting taxes on imported cigarettes and other tobacco products.⁸⁶

2. Provide health promotion and campaigns

The Royal Thai Government enacted the Thai Health Foundation Act 2001 by establishing the Thai Health Promotion Foundation to promote and encourage health promotion, create awareness of hazardous behavior from the consumption of alcoholic beverages and tobacco, and support campaigns for health promotion and the reduction of consumption through various activities. The Thai Health Promotion Foundation provides monetary incentives from excise taxes on cigarettes and alcoholic beverages to support the health promotion and tobacco control network comprised of governmental bodies such as the Department of Disease Control, Ministry of Public Health and non-governmental bodies such as the Thai Health Promotion Institute and the Action on Smoking or Health Foundation.

The Thai Health Promotion Foundation is a governmental organization that is neither under the government infrastructure nor a state enterprise under the law on budgetary procedure.⁸⁷

[&]quot;Comprehensive Tobacco Control Laws and Policies", Public Health & Health Laws Journal, Vol. 1, No.3, September-December 2015)

⁸⁶ Tobacco Control Research and Knowledge Management Center (TRC), *supra* note 84, at 37.

⁸⁷ Tobacco Control Research and Knowledge Management Center (TRC), *supra* note 84, at 38.

3. Prohibit smoking in public places

Due to the concern for the hazards of second-hand smoke, The Royal Thai Government enacted the Non-smoker's Health Protection Act 1992 to protect people, especially children, from the hazards of second-hand smoke in public places by authorizing the Department of Disease Control, Ministry of Public Health to enforce the law.

The Department of Disease Control operates the law through 2 offices including the Law Center and Bureau of Tobacco Control, which comprises operations throughout its 12 regional offices and 75 provincial health offices, including regional or provincial resources and community hospitals as well as district health offices and health centers. The Law Center is responsible for monitoring and enforcement of the tobacco law according to the Tobacco Product Control Act 1992 and the Non-smoker's Health Protection Act 1992, while the Bureau of Tobacco Control is responsible for development or improvement of the law.⁸⁸

4. Ban all illegal advertising and promotion

In the case of advertising and promotion, the Tobacco Product Control Act 1992 Section 8 was provided to prohibit tobacco advertisement, sales promotion and sponsorship from tobacco companies by dividing offenses into 3 categories: 1) advertising of tobacco products 2) Displaying the name or logo for tobacco products in printed materials, via radio broadcast, radio, television or any other advertising media 3) using the name or mark of the tobacco products in game shows, services or any other activity with the objective of making the public aware that the name or logo belongs to tobacco products. However, advertising that is live broadcast from abroad via radio or television and the advertisement of tobacco products in printed materials made outside the Kingdom without the objective of specifically selling or distributing them in the Kingdom is not prohibited by law.⁸⁹ Apart from Section 8, Section 9 of

⁸⁸ Tobacco Control Research and Knowledge Management Center (TRC), *supra* note 84, at 36.

⁸⁹ The Tobacco Product Control Act 1992 section 8 is stated that "No person shall be allowed to advertise the tobacco products or exposing the name or mark of the tobacco products in the printed matters, via radio broadcast, radio television or any

this Act also prohibits product placement using the name or logo of tobacco products as a logo for goods in such a way so as to create understanding that it is for tobacco products.⁹⁰ Section 10 prohibits the import for sale, general distribution or advertisement of imitation tobacco products as cigarettes or cigars.⁹¹

5. Define a minimum age

In Thailand, the Tobacco Product Control Act 1992 Section 4 prohibits selling, exchanging or giving tobacco products to a person who is under 18 years old to prevent children from obtaining tobacco products. ⁹² Violating this section shall be subject to imprisonment not exceeding one month or a fine not exceeding two thousand baht or both.⁹³

6. Exhibit displays and pictorial labels as well as statements warning about tobacco

other advertisement thing or to use the name or mark of the tobacco products in the shows, games, services or any other activity the objective of which is to let the public to understand that the name or mark belongs to the tobacco products.

The provisions of paragraph one does not apply to the live broadcast from abroad via radio or television and the advertisement of the tobacco products in the printed matters printed outside the Kingdom without the objective to dispose of specifically in the Kingdom."

⁹⁰ The Tobacco Product Control Act 1992, sec. 9 provides that

"No person shall be allowed to advertise the goods using the name or mark of the tobacco products as a mark of such goods in such a manner as to make such a mark to be understood as that of the tobacco products."

⁹¹ The Tobacco Product Control Act 1992, sec. 10 provides that

"No person shall be allowed to manufacture, import for sale or general distribution or advertise any other goods having such an appearance as to be understood as an imitation of such tobacco products as cigarettes of cigars under the law on tobacco or of the package of the said products."

⁹² The Tobacco Product Control Act 1992, sec. 4 provides that

"No person shall be allowed to dispose of, sell, exchange or give the tobacco products to a person whom in know to the former that the buyer or receiver does not attain eighteen full years of age."

⁹³ The Tobacco Product Control Act 1992, sec 17 provides that "Any person violating Section 4 or Section 5 shall be subject to an imprisonment not exceeding one month or a fine not exceeding two thousand baht or both." The principle concerning displaying pictorial labels and statements of warning for the harm of tobacco was regulated by Section 12 of the Tobacco Product Control Act 1992. To reduce the incentive of smoking and prevent manufacturers from using packaging to motivate people to smoke, the law requires manufactures and importers to print health warning labels in accordance with publishing law from the Government Gazette by the Minister on the packages before moving out of the manufacturing site or before importation into the Kingdom.⁹⁴ Moreover, Section 13 of this law also prohibits the sale of tobacco products that do not exhibit the labels as provided for in Section 12.⁹⁵

7. Monitoring new forms of tobacco product

In modern society, technology is developing fast. Tobacco production is one item which has developed as a new choice to serve smokers. The most famous new items at this time are the electronic cigarette and baraku or hookah. These items are advertised as being safer than ordinary cigarettes, even though there is no research confirming these claims. Thus, the monitoring of new forms of tobacco products includes the impact of the items. The monitoring of the new forms of tobacco product shall require cooperation from every site, no matter whether governmental or nongovernmental organization.

8. Provide medical treatment for people with the desire to stop smoking

Cigarettes are known to contain nicotine and many chemicals which can be harmful to human health. Nicotine is an addictive substance able to affect the

⁹⁴ The Tobacco Product Control Act 1992 sec. 12 provides that

[&]quot;The manufacture or importer of the tobacco products must exhibit the labels on the packages of tobacco products before moving out of the manufacturing site or before importation into the Kingdom as the case may be.

The criteria, procedures and conditions of exhibition of such labels and the statements there in shall be in accordance with those published in the Government Gazette by the Minister."

⁹⁵ The Tobacco Product Control Act 1992 sec. 13 provides that "No person shall be allowed to sell the tobacco products without exhibition of the labels as provided for in Section 12 on the packages of such tobacco products."

systems of the heart, brain and blood vessels of smokers. The body of a smoker will need an increasing amount of nicotine continuously, leading to smoking addiction.⁹⁶ Many smokers have the desire and intention of quitting smoking, but fail to do so even after many attempts. Thus, helping smokers to break the habit of smoking involves providing necessary medical treatment.

In Thailand, there are many organizations which provide medical treatment to smokers, including the Department of Medical Services, which is responsible for the treatment of cigarette addiction and treatment for diseases caused by smoking by operating through hospitals under supervision. Such hospitals include Thanyarak Hospital and hospitals in Bangkok, the Drug Dependent Treatment Center in each region or province, and the Department of Mental Health, which is responsible for providing treatment of cigarette addiction in children through hospitals and mental health centers under supervision.⁹⁷

3.3 Legal measures to protect non-smoker's health in California

California is a state in the US that has had strong and innovative nonsmoker protection and tobacco control laws for a long time. In the early 1970's, the topic of hazards of second-hand smoke was widely discussed among people around the United States. At that time, the anti-smoking movement started and spread to local organizations. The Group Against Smoking Pollution (GASP) in California was formed to study the educational work and seek legislation to protect people from the hazards of second-hand smoke in public places. In 1976, the California Group Against Smoking Pollution was established from the collection of their resources. In the same year, the California Indoor Clean Air Act of 1976 was adopted to declare tobacco smoke a health hazard for the general public.^{98 99}

⁹⁶ Drug Abuse Prevention and Treatment Division, "Cigarette", *available at* http://office.bangkok.go.th/doh/daptd/Knowledge/knowledge005.html, (last visited June 10, 2016)

⁹⁷ Tobacco Control Research and Knowledge Management Center (TRC), *supra* note 84, at 36.

⁹⁸ The American Nonsmokers' Rights Foundation, "*History & Goals*", *available at* http://www.nosmoke.org/aboutus.php?id=443, (last visited June 10, 2016)

Smoking Regulation in California

1) Workplaces

According to California Labor Code Section 6404.5, an enclosed space at a place of employment is a non-smoking place, which is prohibited by law. An employer shall not knowing or intentionally permit smoking in an enclosed space at a place of employment such as lobbies, lounges, waiting areas, elevators, stairwells, and restrooms. An employer has a responsibility to take reasonable steps to prevent smoking by non-employees who access his or her workplace.¹⁰⁰

Except: 1) Up to 65 percent of hotel/motel guest rooms, 2) Up to 25 percent or 50 percent of a hotel/motel lobby, 3) Meeting and banquet rooms in a hotel/motel, except while food and beverage functions are taking place, 4) Retail or wholesale tobacco shops and private smokers' lounges, 5) Cabs of trucks or tractors, in case non-smoking employees are not present, 6) Warehouse facilities, but not areas utilized as office space, 7) Theatrical production sites, if smoking is an integral part of the story, 8) Medical research and treatment sites, if smoking is integral to the research and treatment being conducted, 9) Private residences, except for those licensed as family day care homes during hours of operation and in those areas where children are present, 10) Patient smoking areas in long-term health facilities, 11) Employee break rooms designated by employers for smoking, provided they meet all of the following criteria: (a) air from the room is exhausted directly to the outside by an exhaust fan; (b) the employer complies with applicable state and federal ventilation standards; (c) the room is located in a non-work area; and (d) there are sufficient nonsmoking break rooms to accommodate non-smokers, 12) Small businesses (with five or fewer full or part time employees) when all four of the following conditions are met: (a) the smoking area is not accessible to minors; (b) all employees who enter the smoking area consent to permit smoking; (c) air from the smoking area is exhausted

⁹⁹ "Smoking Regulations in California", available at http://smoking.uslegal.com/ smoking-regulations-in-california, (last visited June 10, 2016)

¹⁰⁰ ChangeLab Solutions, "*Tobacco Law Affecting California*" available at http://www.changelabsolutions.org/sites/default/files/2014_CA_Laws_Booklet_Singl ePageLayout_FINAL_20140624.pdf, (last visited June 10, 2016)

directly to the outside by an exhaust fan; and (d) the employer complies with all applicable state and federal ventilation standards.¹⁰¹

2) Multi-unit residences

According to Labor Code Section 6404.5, apartment and condominium complexes with indoor common areas including hallways, stairwells, laundry rooms, and recreation rooms are considered to be places of employment, where smoking is prohibited by law. Under California Civil Code Section 1947.5, a landlord may prohibit the smoking of cigarettes or other tobacco products on the property or in any portion of the building.¹⁰²

3) State, county, and city buildings

According to California Government Code Sections 7596–7598, smoking is prohibited: (a) inside a public building, which is a building owned and occupied, or leased and occupied, by the state, a county, a city, or a California community college district; (b) in an outdoor area within 20 feet of a main exit, entrance, or operable window of a public building; and (3) in a passenger vehicle owned by the state. However, the smoking prohibition does not apply to private living areas of public buildings such as dormitories or to the parking areas of covered public parking lots. Smoking may be allowed in any outdoor area of a public building unless otherwise prohibited by state or local law and a sign describing the prohibition is posted by the state, county, or city agency, or other appropriate entity. This law explicitly permits local governments and campuses to pass more restrictive ordinances, regulations, and policies.¹⁰³

4) TOT lots and playgrounds

According to the California Health and Safety Code Section 104495, Smoking of tobacco products is prohibited within 25 feet of a playground or tot lot

 $^{^{101}}$ *Id*.

 $^{^{102}}$ *Id*.

sandbox area. The disposal of tobacco-related waste, such as cigar and cigarette butts, in these areas is also prohibited. A playground is defined as a park or recreational area specifically designed for use by children that has play equipment installed. This includes facilities located on public or private school grounds, or on city, county, or state park grounds. A tot lot sandbox area is a play area within a public park designated for use by children less than five years old. The law allows local governments to pass and enforce stricter laws.¹⁰⁴

5) Schools

According to 20 United States Code Section 6083, any indoor facility utilized for kindergarten, elementary, or secondary education or library services for children are prohibited areas for smoking under federal law.¹⁰⁵

6) Day care facilities

According to California Health and Safety Code Sections 1596.795 and 1596.890, California law prohibits smoking on the premises of a licensed day care center and in a licensed family day care home during the hours of operation as a family day care home and in those areas of the family day care home where children are present. The law allows for more stringent local laws.¹⁰⁶

7) Foster homes

According to California Health and Safety Code Section 1530.7, group homes, foster family agencies, small family homes, transitional housing placement providers, and crisis nurseries licensed pursuant to the California Community Care Facilities Act shall be non-smoking areas. A person who has a responsibility in such place shall not smoke or permit any other person to smoke in both of indoor and

¹⁰⁵ *Id*.

¹⁰⁶ *Id*.

outdoor grounds of facilities when a child is present. Moreover, smoking in a vehicle that is regularly used to transport children is also prohibited.¹⁰⁷

8) Smoking in vehicles with children

According to California Health and Safety Code Sections 118947– 118949, smoking or possessing a lighted pipe, cigar, or cigarette containing tobacco in any motor vehicle in which there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law. A violation of this section shall be subject to fine not exceeding one hundred dollars (\$100) for each violation.¹⁰⁸

9) Airplanes and trains

According to California Health and Safety Code Sections 118925– 118945, it is illegal to smoke on vehicles of a passenger stage corporation, the National Railroad Passenger Corporation (Amtrak train) and any aircraft, except to the extent permitted by federal law. A notice prohibiting smoking, such as a nonsmoking symbol, must be expressed in such vehicles, trains and aircraft.¹⁰⁹

10) Youth buses and paratransit vehicles

According to California Vehicle Code Sections 336, 680, 12523(d)(2), 12523.5(d)(2), 13369(c)(3), drivers of youth buses used to transport children shall not be permitted to smoke while operating the bus. Operators of general public paratransit vehicles designed to carry no more than 24 persons that provide local transportation to the public, including students at or below the 12th-grade level to or from a public or private school or school activity may not smoke.¹¹⁰

- ¹⁰⁷ *Id.*
- ¹⁰⁸ *Id*.
- ¹⁰⁹ *Id*.
- ¹¹⁰ *Id*.

11) Adoption the local second-hand-smoke law

According to California Health and Safety Code Section 118910, California Health and Safety Code also allows the local law as well as state law to provide more restrictions to completely ban smoking in a manner not inconsistent with state law.

For example, the City Council of San Rafael, a city located north of San Francisco, approved the strictest type of smoking ordinance in the country by passing a law to prohibit smoking in any homes that share common walls, whether apartments, condominiums, and even multi-family residences that hold three units or more.¹¹¹

The City of San Rafael's municipal code stated that from November 14, 2013 all units of a duplex or multi-family residence including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor such as a private balcony, porch, deck, or patio shall be designated as a nonsmoking unit. However, property owners may designate an outdoor area to be a smoking area if such area meets all of the following criteria:

1) The smoking area is located at least 20 feet from any unit or enclosed area where smoking is prohibited.

2) The smoking area shall not be located and is at least 100 feet from, enclosed areas primarily used by children and enclosed physical activity areas, such as playgrounds, swimming pools, and school campuses.

3) The smoking area shall not comprise more than ten percent (10%) of the total enclosed area of the duplex or multi-family residence.

4) The smoking area shall have a clearly marked perimeter.

5) The smoking area shall be identified by conspicuous signs.

6) The smoking area shall be completely within an unenclosed area.

7) The smoking area does not overlap with any enclosed or unenclosed area in which smoking is otherwise prohibited.¹¹²

¹¹¹ Jess Remington, "It Is Now Illegal To Smoke In Your Own Home In San Rafael, California", available at http://reason.com/blog/2013/11/25/it-is-now-illegal-tosmoke-in-your-own-h, (last visited June 10, 2016)

¹¹² "*Smoke Free San Rafael*", *available at* http://docs.cityofsanrafael.org/CityMgr/ San%20Rafael%20Smoke%20Free%20Housing%20Handbook.pdf, June 10 2016. (last visited June 10, 2016)

CHAPTER 4 LEGAL MEASURE TO PROTECT NON-SMOKERS' HEALTH IN THAILAND

4.1 The Non-smokers Health Protection Act B.E. 2535

4.1.1. Background

"Persons shall have rights and power in life and person" is the law confirmed by The Constitution of the Kingdom of Thailand B.E.2550 Section 32. However, people cannot exercise their right or liberty when it infringes on other people, as provided in The Constitution of the Kingdom of Thailand B.E.2550 Section 28. Smoking is one of a smoker's rights, even if it's going to damage their own health in the long-term. However, smoking in public places impacts the right of non-smokers at the same time because a public place is one that is used by all people together. Smoking in public places may make others suffer nuisance, including suffer the danger of cigarette smoke even if they don't smoke themselves. Thus, a claim of freedom to smoke should be terminated when the cigarette smoke is going to affect the rights of non-smokers to breathe clean air. To make use of public places peacefully, the law should define criteria which can be understood for practicability in society by defining which public places should be smoking areas. From this reasoning, smoking in non-smoking areas arranged by law is illegal, while smoking outside non-smoking areas is legal.¹¹³

In the case of determination, what public places should be smoking areas is under the power of the Minister under Section 4. Section 4 is the main point of this act because it gives the Minister the power to define what public place should be a smoking area or should be a non-smoking area. This law does not identify the name or type of public place, but instead gives the power to the ministry to define it in the notice of the Ministry of Public Health. A notice from the Ministry of Public Health will offer flexibility to announce and ease improvement when the situation is

¹¹³ Pokpong Srisanit, *supra* note 9, at 88.

changed. The Minister has defined a name and type of public place to be non-smoking areas and smoking area since the year when this act was enforced in B.E. 2535, and there is an adjustment time. At present, the notice which enforces is "Ministry of Public Health Notice (Volume 19) B.E. 2553, Designation of Names and Types of Public Places that Shall Protect the Health of Non-Smokers and Designating All or Part of Such Public Places as Smoking Areas or Tobacco-Free Areas, Under the Non-Smokers' Health Protection Act of 1992 Pursuant".

4.1.2. Non-smoking area

Ministry of Public Health Notice B.E.2553 (Volume 19) divided smoke-free areas into 2 types: total non-smoking areas and non-smoking areas which can be designed with a specific smoking area.

1. Total non-smoking area

Total non-smoking areas are provided in Article 2 of the Ministry of Public Health Notice B.E. 2553 (Volume 19) and can be divided into 5 categories:

- Public health service and health protection, such as clinics, hospitals, pharmacies, Thai or traditional massage activities, saunas or locations offering health spa services.
- Educational facilities, such as schools, educational facilities, or educational institutions below college level, college-level educational facilities, specifically within buildings or structures.
- 3) Multi-purpose public facilities, such as sports facilities, entertainment locations, hotels or condominium, service stations dispensing petroleum or gas for fuel, specifically within buildings or structures, workplaces, children's playgrounds, markets.
- 4) **Public vehicles and transport terminals**, such as taxis, trains, passenger vans, aircraft, and train stations specifically within the areas of buildings on platforms or under roofed areas, domestic airports specifically within the area of buildings and under roofed areas.
- 5) **Religious facilities and ceremonial sites for religions and denominations**, such as temples, mosques, and churches.

All these place are prohibited smoking areas without exception. Thus, those smoking in such places shall be guilty under Section 6 and Section 12 of the Non-smoker's Health Protection Act B.E. 2535, which provides that "No person shall be allowed to smoke in non-smoking areas" and "any person violating Section 6 shall be subject to a fine not exceeding two thousand baht".¹¹⁴

The Ministry of Public Health Notice B.E. 2553 (Volume 19) Article 2 (2.2) stated that schools, educational facilities, and educational institutions below college level are non-smoking areas in their entirety. If there is someone smoking in schools, educational facilities, or educational institutions below college level, they shall be guilty and subject to a fine not exceeding two thousand baht". In the case of Article 2 (3.2.7), the buildings of department stores and shopping centers are non-smoking areas, so areas of department stores and shopping centers outside the building are not non-smoking areas. Thus, someone smoking in front of the entrance of department stores and shopping centers but outside such building is not guilty under Section 6 and Section 12 of the Non-smoker's Health Protection Act B.E. 2535.

2. Non-smoking area which can be designed with a specific smoking area

A non-smoking area which can be designed with a specific smoking area is provided in Article 3 of the Ministry of Public Health Notice B.E. 2535 as:

"The following locations shall be designated places that protect the health of non-smokers and are declared non-smoking areas. However, smoking areas can be established.

(1) Higher education facilities, other than in buildings and structures.

(2) Petroleum or gas filling stations, other than in buildings and structures.

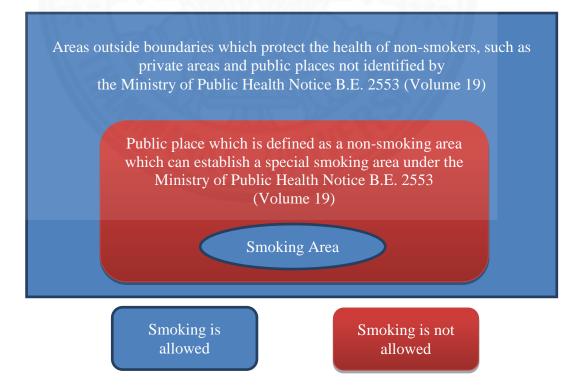
(3) Government, state enterprise, and state agency sites, other than in buildings and structures.

(4) International airports"

¹¹⁴ Pokpong Srisanit, *supra* note 9, at 90.

In actuality, public places under this section are non-smoking areas. Therefore, people who smoke in these areas shall be guilty under Section 6 and Section 12 of the Non-smoker's Health Protection Act B.E. 2535, the same as in Article 2. However, the law states that public places under Article 3 can design a special smoking area. Thus, someone smoking in a smoking area arranged by an operator shall not be guilty under Section 6 and Section 12 of the Non-smoker's Health Protection Act B.E. 2535.

The Ministry of Public Health Notice B.E. 2553 (Volume 19) Article 2 (2.3) states that college-level educational facilities, specifically within buildings or structures, are non-smoking areas in their entirety. Further, Article 3 (1) states that higher education facilities other than in buildings and structures are declared non-smoking areas for the protection of the health of non-smokers, but can establish smoking areas. Thus, someone smoking in a smoking area provided by the operator shall not be guilty. If smoking in college or higher education facilities with no smoking area provided by the operator provided, a person shall be guilty under Section 6 and Section 12 of the Non-smoker's Health Protection Act B.E. 2535.



Figures show smoking areas and non-smoking areas under the Ministry of Public Health Notice B.E. 2553 (Volume 19)

4.1.3. Duty of operator

In order to arrange non-smoking areas under the Ministry of Public Health Notice B.E. 2553 (Volume 19), the Non-smoker's Health Protection Act B.E. 2535, Section 5 provided that an operator shall have the duty in 3 parts: the first part is to arrange a public place lying with the operator as smoking and non-smoking areas. In the case of an operator failing to comply, the operator shall be subject to a fine not exceeding 20,000 baht. The second part is to arrange a smoking area having such conditions, nature and standards as designated by the Minister. In case of an operator failing to comply, the operator shall be subject to a fine not exceeding 10,000 baht. The last part is arranging for signs in accordance with the criteria and procedures designated by the Minister. In case an operator fails to comply, the operator shall be subject to a fine not exceeding 2,000 baht.¹¹⁵ ¹¹⁶

This provision was provided as a preventive measurement for smoking in non-smoking areas by making the operator announce the area of their place that is non-smoking. Thus, an operator that refuses to perform according to the law shall be subject to a fine as previously mentioned.¹¹⁷ However, the term 'operator' does not

¹¹⁵ The Non-smoker's Health Protection B.E.2535, sec. 5 provides that

[&]quot;After the publication by the Minister under section 4, the operator shall have the duty

¹⁾ To arrange any part or all of the public places as the smoking and nonsmoking areas;

²⁾ To arrange the smoking area to have such condition, nature and standard as designated by the Minister;

³⁾ Arrange for the signs in the smoking and non-smoking areas in accordance with the criteria and procedures designated by the Minister."

¹¹⁶ The Non-smoker's Health Protection B.E.2535, section 11 provides that

[&]quot;Any operator failing to comply with section 5(1) shall be subject to fine not exceeding twenty thousand Baht.

Any operator failing to comply with section 5(2) shall be subject to fine not exceeding ten thousand Baht.

Any operator failing to comply with section 5(3) shall be subject to fine not exceeding two thousand Baht."

¹¹⁷ Pokpong Srisanit, *supra* note 9, at 94.

only mean the owner of such place, but includes a manager, supervisor, or person responsible for the operation of the public place.¹¹⁸

4.1.4 **Power of authority**

The effectiveness of law enforcement is dependent on the effective performance of the authority.¹¹⁹ Thus, the principle concerns of authority are on whether the status of the officials or the powers and duty of the authority are significant in the process of law enforcement.

4.1.4.1 The status of authority by law

To perform the duties of the authority, Section 10 of the Non-smoker's Health Protection Act B.E. 2535 provides that "*In executing this Act, the authority shall be officers under the Penal Code*". Therefore, any act which the authority does under the Non-smoker's Health Protection Act B.E. 2535 shall be subject to the Penal Code. The status of the officer under the Penal Code can impact the authority as both advantages and disadvantages.

For advantages, the authority shall receive special protection under the Penal Code in executing this Act. For example, in cases of insulting an official in the performance of their duties according to the act and their function,¹²⁰ or in case of giving false information to any officer that is likely to cause injury to any person or the public, the offender shall be punished with imprisonment under Sections 136 and

¹²⁰ The Penal Code B.E. 2499 (1956), Sec. 136 provides that

¹¹⁸ The Non-smoker's Health Protection B.E.2535, section 3 provides that "operator means an owner, manager, supervisor, or a person responsible for the operation of the public place"

¹¹⁹ สำนักควบคุมการบริโภคยาสูบ, สำนักงานคณะกรรมการควบคุมเรื่องดื่มแอลกอฮอล์ และกรมควบคุมโรคกระทรวง สาธารณสุข. คู่มือพนักงานเจ้าหน้าที่, ฉบับที่ 1, กรุงเทพ : โรงพิมพ์สำนักพุทธศาสนาแห่งชาติ, 2557.(Bureau of Tobacco Control, The Office of the Alcohol Committee. Officers Handbook, (1st edition, Bangkok : the Office of National Buddhism publishing, 2014))

[&]quot;Whoever, insulting the official doing the act according to the function or having done the act according to the function, shall be imprisoned not out of one year or fined not out of two thousand Baht, or both"

137 of the Penal Code.¹²¹ However, a disadvantage is that the offence of malfeasance by officers always has an effect on the public. Thus, the law is necessary to provide heavier punishment to prevent misconduct by officers. Therefore, an authority who dishonestly commits an offence against their position shall suffer heavier punishment than the liability of an ordinary person. For example, in a case where officers dishonestly misappropriate property which they have the duty to purchase, manufacture, manage or keep, the officers shall be punished with imprisonment under Section 147 of the Penal Code with a maximum penalty of life imprisonment. Conversely, dishonestly misappropriating property by an ordinary person shall be liable under Section 352 with a maximum penalty of imprisonment not exceeding 3 years.¹²² In case an official accepted or agreed to accept bribes for exercising or not exercising any function of their duties, the official shall be subject under Section 149 of the Penal Code with a maximum penalty of death.¹²³

4.1.4.2 The power and duty of officers

For inspection and supervision for the implementation of the Non-smoker's Health Protection Act B.E. 2535, Section 7 of this Act specifies the power of

¹²² The Penal Code B.E. 2499 (1956), Sec. 147 provides that

"Whoever, being an official having the duty of purchasing, manufacturing, managing or keeping any thing, dishonestly misappropriates the same for his own or the other person, or dishonestly allows the other person to misappropriate the same, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fine of two thousand to forty thousand Baht."

¹²³ The Penal Code B.E. 2499 (1956), Sec. 149 provides that

¹²¹ The Penal Code B.E. 2499 (1956), Sec. 137 provides that

[&]quot;Whoever, giving any false information to any official, and is likely to cause injury to any person or the public, shall be punished with imprisonment not exceeding six months or fine not exceeding one thousand Baht, or both."

[&]quot;Whoever, being an official, member of the State legislative Assembly, member of the Changwat Assembly or member of the Municipal Assembly, wrongfully demands, accepts or agrees to accept for himself or the other person a property or any other benefit for exercising or not exercising any of his functions, whether such exercise or non-exercise of his functions is wrongful or not, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fined of two thousand to forty thousand Baht, or death."

authority by defining that the authority shall have the power to enter public places under the Ministry of Public Health Notice B.E. 2553 (Volume 19) only during sunrise and sunset or the working hours of such a place.¹²⁴ However, the authority has to present identity as prescribed by the Minister to the operator or person concerned before gaining access to that place.¹²⁵ Furthermore, the operator or people concerned with a public place shall have the duty to reasonably facilitate the authority in performing their duty.¹²⁶ If any person obstructs or fails to facilitate the authority in performing their duty, they shall be subject to imprisonment not exceeding one month or a fine not exceeding 2,000 baht or both.¹²⁷

It should be noted that the authority under this Act is not an administrative or police official under the criminal procedure code, meaning they do not have the power to arrest, search or investigate matters under the criminal procedure code. The authority only has the power to patrol or examine the law. They are like the specialists of legal enforcement to render assistance, support, give advice and coordinate with the administrative or police officials. In case of the power to fine, Section 14 of the Nonsmoker's Health Protection Act B.E. 2535 states that "the competent inquiring officer inquiring a case shall have a power to affect the fine in accordance with the Criminal Procedure Code." Therefore, if the authority under the Non-smoker's Health Protection Act B.E. 2535 finds an offender, the authority only has the power to patrol,

¹²⁵ The Non-smoker's Health Protection B.E.2535, sec. 8 provides that
"In performing the duty, the authority shall present the identity card to the person concerned

Such identity card of the authority shall be in accordance with the form prescribed by the Minister and published in the Government Gazette"

¹²⁶ The Non-smoker's Health Protection B.E.2535, sec. 9 provides that

"The operator and persons concerned with the public places shall facilitate the authority performing the duty under section 7"

¹²⁷ The Non-smoker's Health Protection B.E.2535, sec. 13 provides that

"Any person obstructing or failing to facilitate the authority performing the duty under section 7 shall be subject to an imprisonment not exceeding one month or a fine not exceeding two thousand baht or both"

¹²⁴ The Non-smoker's Health Protection B.E.2535, sec. 7 provides that

[&]quot;The authority shall have the power to enter such public place as published by The Minister under section4(1) and section4(2) during sunrise and sunset or working hours of such place for inspection or supervision of the implementation of this Act"

collect evidence and notify the inquiring officer in that location to bring a charge against the offender.¹²⁸

4.2 Public Health Act B.E. 2535

The law of public health has been aligned with Thai society since the Siamese Revolution of B.E. 2475 that changed the system of government from an absolute monarchy to a constitutional monarchy. The Revolution B.E. 2475 changed government systems in many aspects, such as decentralizing the power of government from central to local areas. The impact of this change in law gives power to each area. Public health law is a result of the revolution in that the government gives power to local administrative groups.

At first, all authority for public health law was under the supervision of local administration. In B.E. 2485, Thailand improved the system by making the Ministry of Public Health. Thus, authority under the law changed to be under the supervision of the Ministry of Public Health. Public health law has been amended many times, but the law that is currently effective at present is Public Health Act B.E. 2535.¹²⁹

4.2.1 The key principles of Public Health Act B.E. 2535

(1) Public Health Act has the objective of protecting people's hygienic and environmental health or environment sanitation, which concerns management and control factors. These may or may not harm the health and living conditions suitable for people's livelihoods.

(2) The Public Health Act is the law that decentralizes the power to local administrative groups. Local administrations have the power to issue local provisions and give such power to local officials to control by issuing orders to improve, allow or not allow, revoked licenses, including the settlement of cases by

¹²⁸ Pokpong Srisanit, *supra* note 9, at 97.

¹²⁹ ศุมล ศรีสุขวัฒนา และ นัทฐ์หทัย ไตรฐิ่น, "*พระราชบัญญัติการสาธารณสุข พ.ศ.2535*", (Sumol Srisukwattana and Nuthathai Tritin, "*Public Health Act B.E.2535*"), *available at* www.lbo.moph.go.th/ enocc/laws/law10.doc, (last visited December 7, 2015.)

consideration. Because local administrations are organizations which come from elections and they are closer to people than state government, the local administration should have the ability to enact laws that are more beneficial than possible by the centralized government.

(3) In order to make local officials implement this act with effectiveness, the law shall provide public health officials power as academic officers who have the power to patrol and give advice to solve academic problems, including being an advisor to local officials to diagnose, command and order.

(4) Provide a "Public Health Committee" as an organization with the duty to control and support the operation of the local administration by prescribing policies, working plans and measures on public health, including offering opinions to improve law, rules, regulations and order on public health.

(5) Provide rights to the people and entrepreneurs who receive orders from local officials and regard them as unfair or incorrect. Such people have the right to appeal such order to the Minister.¹³⁰

Public Health Act B.E. 2535 provided content concerning environment health in Chapter 3 to Chapter 9. It covers the control and disposal of sewage and solid waste, sanitary conditions of buildings and control of sources of nuisance from every activity, including household activities such as burning garbage in the house or cooking. The activity of business in both private and public places such as farms, market places, and places where meals are sold is also included. Every activity should have control for hygienic practices as required by provision or defined standard. The reason is that the livelihoods of people as human beings are required to have healthiness: 1) to live in hygienic buildings and places 2) to eat clean and safe food 3) to work in a clean environment 4) to live in a place that does not have sewage or solid waste. Waste should be disposed of properly under sanitation rules 5) business places or industries which are closed to the community must not cause nuisance to people or the community 6) to have a clean and sufficiently public way and public place. Under the principle of environment health, these things are the basic elements which facilitate people to have sustainable healthiness. This condition is called the "appropriate living condition of people".

4.2.2 Source of nuisance

As mentioned above, Public Health Act B.E. 2535 was enacted to protect people in a hygienic and environment health or environment sanitation, no matter whether controlling and disposal of sewage and solid waste, cleanliness of public places or ways, supervision of the market place, place where meal are sold and place where foodstuff is stored include business which can detrimental to health. The law will define many measures to protect and control people, but the law cannot make rules covering all situations. So, Public Health Act B.E.2535 defines a provision relating to sources of nuisance to gap the law from other situations.

4.2.2.1. Characteristics of source of nuisance

Under Public Health Law B.E. 2535 Section 25, it is defined that

"In the event of an occurrence that may cause annoyance to dwellers in the vicinity or to person experiencing it, such occurrence by the following shall be deemed nuisances":

(1)"a water resource, drainage, shower room, toilets, or dung or ash pit, or any other place situated at an unsuitable locality, which is dirty, or accumulating or amassing any waste causing foul odor or toxic substance dust or becoming or is likely to become a breeding place for carriers of disease or causing degradation or may be hazardous to health"

That meaning involves whoever provides water resources, drainage, shower room, toilets, or dung or ash pit, or any other place used to keep dirty things or used in activities which may cause filthiness such as drain ditches, sewage grooves or slaughter yards 1) is in an unsuitable spot 2) abandoned and not clean until dirty and causing foul odor 3) waste dirtiness in unsuitable spot until become a breeding place

for carriers of disease. All of these conditions shall be considered to be nuisances when causing impairment or potential harm to health.

(2)"A farming of animals in a place or by any method or in excessive number that causes degradation or may be hazardous to health"

This means that the raising of all kinds of animals 1) is in unsuitable place, dirty, emit foul odor, and become a breeding place for carriers of disease 2) by the method which disturbs a living of neighborhood such as leave animal to defecate at next house 3) raise animal in too great a number such as raise animal in great number in restrict place which cause foul odor or outcry of animal.

(3) "any building which is a dwelling place of human beings or animals, factory, or business establishment, without air ventilation, water drainage, disposal of sewage, or control of toxic substances, or with such but without adequate control to prevent foul odor or toxic substance dust, thus causing degradation or which may be hazardous to health"

This provision can be divided into 2 cases, including 1) in cases of buildings which are dwellings of men or farm houses, factories or establishments which have to install air ventilation, water drainage, disposal of sewage or controlling of toxic substance but do not establish until causing impairment or harmful to health, it should be considered to be a source of nuisance. 2) in case of providing a system as mentioned in 1) but the owner or occupant did not maintain or control the system to be effective until it is impaired or tended to be harmful to health, it should be considered to be a source of nuisance.

(4) "Any action causing odor, light, ray, noise, heat, toxic substance, vibration, dust, fine powdery substance, soot, ash, or any other action to the extent of degradation or which may be hazardous to health"

This means any person, group or business causing odor, light, ray, noise, heat, toxic substance, vibration, dust, fine powdery substance, soot, ash, or any other byproduct such as by burning trash to cause smoke and soot, piling until vibrations or husk rice until causing dust and powder and all of these will cause impairment or likely being harmful to health. However, it must occur frequently enough to impact livelihood.

(5) "Any other cause prescribed by the Minister and promulgated in the Government Gazette"

This means that any situation which this act does not provide for as above but was prescribed by the Minister can be considered to be a source of nuisance.

The word nuisance is not defined by law with a specific definition. Thus, it might be considered that the provision under Section 25 is both a definition and characteristic of nuisance. However, Professor Pichit Sakulpram, the first president of the Thai Environment Health Science Association (TEHA), gave the definition that "Nuisance means everything or any condition which causes interference to a peaceful livelihood. Nuisances may occur by annoying or irking any sense frequently or over a continuous period to residents or workers and may harm health."¹³¹

4.2.2.2. Power of local officials to control sources of nuisance

1) Public Health Act B.E. 2535 Section 26 guarantees the power of local officials to issue written orders to operators as follows:

1. Forbid any person to cause nuisance in a public place or way or private place.

2. Look after, improve and maintain roads, land routes, waterways, drainage, trenches, canals, and other places within his/her jurisdiction to be free from nuisances.

3. To abate, eliminate and control sources of nuisance in public places, ways or private places.

2) Under Section 27 in cases of nuisance occurring in a public place or way, the local officials shall have power as follows:

¹³¹ Sumol Srisukwattana and Nuthathai Tritin, *supra* note 129.

1. Issue a written order to the person who is the cause or is involved in the occurrence or possible occurrence or such nuisance requiring him to abate or prevent the nuisance within a reasonable period of time.

2. In case of an issued written order, a local official may prescribe the method of abatement or prevention of such nuisance, including prescribing the method of prevention for future nuisance.

3. In cases of a local official issuing an order, but recipient did not comply within a period of time and such nuisance may cause serious harm to health, local officials shall abate such nuisance as necessary to prevent recurrence of such nuisance.

3) Under Section 28 for nuisances occurring in a private place, the local officer shall have power as follows:

1. Issue a written order to the owner or occupant to abate the nuisance within a reasonable period of time.

2. In case of an issued written order, local official may prescribe the method of abatement of such nuisance or the method of prevention of future nuisance.

3. In case of an owner or occupant not in compliance with an order in a period of time without justification, a local official shall have powers as follows by 2 separate cases.

(a) In case of nuisance not causing serious harm to health; local officials shall have powers to abate such nuisance or manage as needed to prevent the nuisance from occurring again. However, the law states that if such a nuisance occurs because of action, omission or consent of the owner or occupant, they must bear the expenses for management by local officials.

(b) In case of nuisance causing serious harm to health, the law gives power to local officials to issue a written order to prohibit the owner or occupant to use or allow anyone else to use such a place, in whole or some part, until the local official is satisfied that such nuisances are abated.¹³²

¹³² *Id*.

4.2.2.3. Liability of people who make nuisances

Controlling sources of nuisance under Public Health Act B.E. 2535 were enacted with the objective of controlling and preventing nuisances in a community to live together peacefully. However, this law did not have an objective to prevent harm to health. Rather, the law focused on actions which may cause harm to health conditions or conditions which may cause nuisance and impact mental health, such as sleeplessness due to noise, bad smells causing suffocation or having vibrations until make house cracked.

For this reason, the principles of nuisance under the law are not critical situations, but only impact the livelihood of people. Thai society has characteristics which are mutually dependent on each other without impeachment. Thus, complaints are rare except when unbearable.

Offences for sources of nuisance are emphasized to non-observance of order of local official more than action, which cause nuisance because the law proposes to resolve sources of nuisance and believes that ordinary persons do not intend to cause nuisance. Thus, any action considered being a nuisance should have been diagnosed from local officials previously. If they consider an action a nuisance, they will issue an order to improve or settle such nuisance. However, a person who makes nuisance should be guilty under Section 74 if they make no attempt to abate such nuisance; "Any person failing to comply with an order of the local official issued under Section 21, Section 22, Section 27 paragraph one, or Section 28 paragraph one or paragraph three without reasonable cause or excuse, or obstructing the performance of duty of the local official under Section 23, Section 27 paragraph two, or Section 28 paragraph two, shall be punished by imprisonment not exceeding one month or a fine of not exceeding two thousand baht, or both." ¹³³

4.3 Legal issue of non-smoker's health

Since many researches concerning the hazards of second-hand cigarette smoke recognize that second-hand smoke causes harm to non-smokers' health, people

are beginning to realize the need to live in a smoke-free society. Many rights are claimed to protect people from the hazards of second-hand smoke, such as the right to live in a good environment and the right to breathe clean air.

In Thailand, protecting the non-smoker right to breathe clean air motivated the Thai government to enact the Non-smoker's Health Protection Act B.E. 2535 two decades ago. However, there are many non-smokers who still have risk to exposure toxics of second-hand smoke and the law cannot protect their right to breathe clean air despite the fact that everybody should have equal protection. From a study of the Non-smoker's Health Protection Act B.E. 2535, the writer realized that there were legal problems concerning the Act as follows:

4.3.1. Legal problems concerning non-smoking areas

It is obvious that exposure to second-hand smoke has many dangers to health, no matter whether a cause of cancer, asthma, coronary heart disease or abortion in expectant mothers. Nowadays, there are many scientific researches confirming that no safe level of exposure to second-hand smoke exists, even in places that have ventilation systems. The toxic level of tobacco smoke in the air will not evaporate. Thus, all people exposed to tobacco smoke are at risk of diseases occurring from the toxins of tobacco smoke. Smoking is a right of an individual with the desire. The law cannot intrude on this right of a smoker. However, non-smokers do not choose and cannot choose receiving the toxic effects of tobacco through second-hand smoke. Thus, exposure to second-hand smoke from smokers is an infringement of their rights. Non-smokers shall have the right to live in a good environment and the right to breathe clean air.

As mentioned in 4.1, the law provided for the protection of non-smokers' health is the Non-smoker's Health Protection Act B.E. 2535 and enforced through an arrangement of non-smoking areas under the Ministry of Public Health Notice B.E. 2553 (Volume 19). Whoever smokes in non-smoking areas provided by law shall be guilty under the Act. The consequence of this law is the protection of non-smokers in the areas where prohibited by law or where the law appropriated to define areas to be non-smoking. In actuality, smoking in places where the law does not define non-

smoking areas can also affect the health of non-smokers. Although defining nonsmoking areas will decrease second-hand smoke, it is only in a specific place. It does not mean that the health of all people will get better because there are some people outside non-smoking areas who are still exposed to second-hand smoke. The right to live in a good environment shall not only be in specific places.

For example, in the case of transportation under the Ministry of Public Health Notice B.E. 2553 (Volume 19) Article 2 (4.2.2), "*Terminals for all types of land transportation, specifically in the area of buildings, on platforms, or under roofed areas are non-smoking areas in their entirety*". That means only the areas of buildings, on platforms and under roofed areas are prohibited for smoking by law. Thus, someone smoking outside a roofed area but in front of an entrance with many people going in and out is not subject to the law. Retail stores in an area with people all over are not protected by law, especially people who have to stand in a certain place for long periods such as vendors. As such, second-hand smoke will affect them significantly.

In the case of department stores and shopping centers, the Ministry of Public Health Notice B.E. 2553 (Volume 19) Article 2 (3.2.7) states "the buildings of department stores and shopping centers are tobacco free areas in their entirety". Thus, if the owner of a department store wants to arrange a smoking area in front of a building where there are many people going in and out or people doing an activity, the law cannot protect them beyond its meaning just because it is a non-smoking area as defined by law.

At present, solving the problems with the Non-smoker's Health Protection Act B.E. 2535 not covering beyond the protection of health of non-smokers outside non-smoking areas means the officer will interpret the sources of nuisance under the Public Health Act B.E. 2535. This act provides legal measures to protect people from nuisance by giving power to the local officials. Section 25 (4) of the Public Health Act B.E. 2535 states, "In the event of an occurrence that may cause annoyance to residents in the neighboring area or expose persons to the following, it shall be a source of nuisance:(4) any action which causes odor, light, ray noise, heat, toxic matter, vibration, dust, powder, soot, ash, or any other to the extent that causes impairment or may be harmful to health". Thus, a person or any organization taking actions which cause pollution to the odor, light, ray noise, heat, vibration, dust, soot, ash or other toxic matter, such as the burning of waste, burned grass resulting in soot, ash, percussion / hitting / banging metal, etc. which cause a deterioration or health hazard shall be deemed a nuisance. Such actions must be done regularly until affecting the lives of neighboring residents.

However, in case of nuisance caused from exposure to second-hand smoke, there is no characteristic which comes from doing activities such as business or daily activities in a household which have to control hygienically required by rules or measure of environment sanitation. Smoking is the only action which the law intends to protect non-smoker's health from toxic exposure. Therefore, the nature of the offence which occurs from smoking is not suitable with an offence under Public Health Act B.E. 2535 because it is not an activity which has to be controlled hygienically. Rather, it is an activity which causes harm to non-smoker health directly. Moreover, the power to control or eliminate sources of nuisance under Public Health Act B.E. 2535 is with the local officials who issue written orders and operate under the process which is provided by law. A process that must be subject to the law makes enforcement difficult because eliminating nuisances must be done in many stages. Under the Public Health Act B.E. 2535, local officials do not have authority to stop sources of nuisance immediately, even if such offence is happening in front of them.

Therefore, this writer recommends that protecting non-smokers' health from exposure to second-hand smoke outside non-smoking areas and improving the effectiveness of law enforcement means the law should specify the rules for sources of nuisance which occur from second-hand smoke exposure outside non-smoking areas in the Non-smoker's Health Protection Act B.E. 2535 to achieve the objective of protecting the health of non-smokers directly.

The Non-smoker's Health Protection Act B.E. 2535 is going to make the authority eliminate nuisances by giving local officials the power of authority under the Non-smoker's Health Protection Act B.E. 2535 to make enforcement easier. In this regard, the law should provide protection for non-smokers outside non-smoking areas by enacting an exception of right to smoke outside non-smoking areas, such as defining, "In any areas which are not arranged as non-smoking areas, smoking is

allowed except when such smoking causes damage to life, body, health or any right of another person. If any person infringes on the right of others, they shall be fined under the law.

4.3.2. Legal problems concerning the lack of child protection in homes and vehicles

The health impact of second-hand smoke is a topic that has been mentioned by scientists for a long time. There are many researches expressing the toxicity of cigarette smoke and the harm it can cause to people's health, in addition to the fact that there is no safe level of exposure to second-hand smoke. The severity on health impact is not only the pain which the patient is going to receive, but also includes the difficulty of maintenance. For example, patient with cancer must take a long time for treatment and spend money for the cost of medical expenses, which is made difficult due to the lost income from not being able to work during treatment. Therefore, good health is something everyone desires, whether it is a smoker who desires to smoke or a non-smoker who is exposes to toxicity from others. Therefore, the right to live and right to breathe clean air was raised against such infringement in order to protect the non-smoker from the hazards of second-hand smoke. Some nonsmokers claim these rights by confronting smokers directly, while other non-smokers choose the legal process to show their intentions. However, such infringement is more of an issue when it occurs to children who are immature, smaller and in the developmental phases of maturity, aside the fact that they lack the knowledge and mental ability to assert their rights by themselves.¹³⁴

Children are the victims of second-hand smoke, with exposure forced on them by adults. They have no voice and no choice to choose to be in a safe environment. They are innocent and unable to stand up to protect themselves from bad things.

¹³⁴ American Public Health Association, "Children's Secondhand Smoke Exposure in Private Homes and Cars: An Ethical Analysis", available at

http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636518/, (last visited May 8, 2016)

In addition to the health impact exposure to second-hand smoke may have on children, children shall have an impact on their behavior in the future. In Buddhism, there is a statement that children are like white cloths; it depends on the adults to write. A parent's attitude and environment around them absolutely affect children's behavior as smoking behavior of children. Children's smoking is not a simple problem that can be abandoned. They can very quickly start becoming seriously addicted to smoking, even days after first experimenting with cigarettes.¹³⁵ Cigarettes are the first drug children can become addicted to. It also brings them to other more severe narcotics. Many researches from various countries including Thailand found that all persons who were addicted to other severe narcotics such as alcohol, heroin, opium, hashish and cocaine, typically started from smoking cigarettes.¹³⁶ There are several reasons that motivate children to smoke, whether they are advertisements, media or friends. The worst influential source is their parents.

To protect children from exposure to the hazards of second-hand smoke, Thailand regulated this problem with two laws including the Non-smokers' Health Protection Law B.E. 2535 and the Tobacco Product Control B.E. 2535.

The Tobacco Product Control B.E. 2535 is the law which has the objective of controlling the sale of tobacco products. In addition to preventing children from being targets of the tobacco market, Tobacco Product Control B.E. 2535 was regulated several forms of legal measures to protect children:

1. Prohibiting the sale of tobacco products to children below 18 years old, as provided under Section 4.

2. Banning or restricting sales of tobacco products from vending machines, as provided under Section 5.

3. Prohibiting all sales promotions by providing Section 6 and Section 7 to include free distribution, additions, and gifts of tobacco products as well as samples or exchanges with tobacco products or others including prohibiting any sales promotion.

¹³⁵ "How Parents Can Protect Their Kids From Becoming Addicted Smokers", available at www.tobaccofreekids.org, (last visited May 8, 2016)

¹³⁶ "Youth and Smoking", available at http://www.ashthailand.or.th/th/data_center_page.php?id=470, (last visited May 9, 2016)

4. Prohibiting every form of cigarette advertising, as provided under Section 8.

The Non-smokers' Health Protection Law B.E. 2535 is the law with the objective of protecting the health of non-smokers, especially children, from cigarette smoke in public places as provided by law. As mentioned in 4.1, the Ministry of Public Health Notice (Volume 19) B.E. 2553, Designation of Names and Types of Public Places that Shall Protect the Health of Non-Smokers and Designating All or Part of Such Public Places as Smoking Areas or Tobacco-Free Areas, Under the Non-Smokers' Health Protection Act B.E. 2535, provide non-smoking areas in two categories; the first is public places, which are total non-smoking areas; second is public places which are non-smoking areas but can designate a specific smoking area.

It can be seen that regardless of whether a total non-smoking area or nonsmoking area with designated and specific smoking area is the issue, protection under the Non-smokers' Health Protection Act B.E. 2535 prohibits smoking only in public places. The law does not include coverage beyond homes and vehicles.

A house is a basic human need where people live and do the essential activities of life such as eating, sleeping and bathing. For children, a house is the first place where they learn about life. Good quality of life in a house has a direct effect on the mental and physical health of children. They will feel safe and stable with strengthened personality from family. However, under the Non-smoker's Health Protection Act B.E. 2535, a house is a place where the law does not provide a nonsmoking area by the reason that it is a private place. Many families still smoke in the house before the eyes of children. In the United States, there is information showing that an estimated 40 percent of children who live in a family with smokers are younger than 5 years old. Infants and children are more exposed to second-hand smoke in a house than in other places because children always spend more time at a house. Therefore, it can be concluded that there are many children still exposed to the hazards of second-hand smoke in their own house and have to face the bad actions of adults without protection of family and law, despite the main concern of the Nonsmoker's Health Protection Act B.E. 2535 being the protection of children's health. The law did not specify coverage of a house, which has a direct impact on children.

Besides a house, it must be accepted that a car is a small space where many people spend more time at present. In a busy city like Bangkok, some families have to spend their time in a private car more than in a house; children may have to do homework on the way home or even eat on the way to or from school. A car becomes a basic need for people in the modern society. It is something that every person aspires to have next to a house. By the reason that a car is a small space, smoking in car can cause second-hand smoke concentrations, which may have a severe impact on the health of people who are exposed to smoke. Therefore, whether how must the risk that children may get from exposure to second-hand smoke in house, the car is also the same.

Although, in the case of prohibition of smoking in a car under Ministry of Public Health Notice (Volume 19) B.E. 2553 Articles 2(4), the law provides that public vehicles such as scheduled buses, taxis, trains and railcars, passenger vans, and school buses, whether in service or not, shall be deemed a non-smoking area in their entirety. However, the law did not provide coverage to the protection of non-smoker's health in a private car, so children in private car with smoking still get a risk to exposure a hazard of second-hand smoke without the protection of law.

Therefore, achieving the objective of the Non-smoker's Health Protection Act B.E. 2535, which intends to protect children from the hazards of second-hand smoke means the law should expand the legal measures to cover the rights of the child, in the house and car.

According to the Convention on the Rights of the Child 1989, Article 6 states that the government should ensure that children have a right to live including right to survive and develop healthily. Under Article 24, it is stated that State Parties shall recognize the right of the child to reach the highest attainable standard of health. As such, states parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

According to Article 3 of the Convention on the Rights of the Child 1989, the best interests of children must be the primary concern in making decisions that may affect them, no matter whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Governments have a responsibility to take all available measures to make sure that children's rights are respected, protected and fulfilled, whether undertaking all appropriate legislative, administrative, and other measures for the implementation of rights.

In order to improve the protection of children from the hazards of secondhand smoke in a home or vehicle under the Non-smokers' Health Protection Act B.E. 2535, the government should take the staple consideration in the best interest of the child. Even though a house and car are private places, no children should be exposed to cigarette smoke to any degree. The right to smoke in a house and car is not a fundamental privacy right, which should be examined to be higher than the rights of the child. Children should confirm that they have a right to live and the right to survive and develop healthily, including the right to reach the highest attainable standard of health. The government shall have a responsibility to take all effective and appropriate measures to protect children from the hazards of second-hand smoke.

The non-smoker's health protection regulation in California is the best example of the legal protection of children. The law has expanded legal protection to houses and cars by stating that smoking or possessing a lighted pipe, cigar, or cigarette containing tobacco in any motor vehicle in which there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law. In the case of a house, the law provides that all units of a duplex or multi-family residence, including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor such as a private balcony, porch, deck, or patio shall be designated as a non-smoking unit. However, if the owner is required to designate a smoking area, such an area shall not be located and is at least 100 feet from enclosed areas primarily used by children and enclosed physical activity areas such as playgrounds, swimming pools, and school campuses.

Under the objective of the Non-smoker's Health Protection Act B.E. 2535, the law was provided to protect the health of non-smokers against cigarette smoke only in public places. Therefore, protecting children from the hazards of second-hand smoke in a house and car, which are private places means the writer recommends that the Non-smokers' Health Protection Act B.E. 2535 be amended to afford protected coverage beyond the house and car where there are children by enacting a regulation to protect children in homes and vehicles specifically. For

example, the law may be defined as "smoking in any motor vehicle in which there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law". In the case of a house, balancing the rights and liberties in a dwelling and the right to breathe clean air of non-smoker, the law may be defined as "All units of a duplex or multi-family residence including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor such as a private balcony, porch, deck, or patio shall be designated places that protect the health of non-smokers and are declared tobacco-free areas. However, smoking areas can be established, if such area is not located and is at least 100 feet from, enclosed areas primarily used by children and enclosed facilitate physical activity areas, such as playgrounds, swimming pools, and school campuses".

4.3.3 Legal problems concerning legal enforcement

In principle, the law is a set of rules made by a government. It was formed to be an instrument used to regulate the coexistence of people and keep peace in society. However, the law is only a form of written guide that cannot effectuate. Therefore, law enforcement is very significant to the achievement of the intentions of the law.

The Non-smokers' Health Protection Act B.E. 2535 is the law which has an intention to protect non-smokers from the hazards of second-hand smoke in public places by the reason that the toxicity of second-hand smoke causes severe harm to non-smoker's health. Smokers should not exercise their right to smoke when it violates the livelihood of non-smokers in society. However, the passing of the Nonsmoker's Health Protection Act B.E. 2535 is not enough to protect non-smoker's health; the intention of the law cannot be accomplished without enforcement of the law. The effectiveness of the law should be comprised of proper implementation and adequate enforcement, including solid efforts and effective instruments for implementation.

At present, Section 14 of the Non-smoker's Health Protection Act B.E. 2535 affords the power to enforce the Act to the liability of the inquiring officers. The authority under the Non-smoker's Health Protection Act B.E. 2535 is only to patrol.

The power to arrest offenders is subject to the power of police officers. Therefore, if the authority finds an offender, they have only the duty to collect evidence such as photos while smoking and pass the case to inquiring officers for apprehension or fine of offenders under the criminal procedure code.

In practice, the gathering of evidence and apprehension or fine under the criminal procedure is almost impossible and hardly makes any benefit to law enforcement because the nature of smoking means a smoker will not take a long time and leave an area suddenly when finished. Therefore, the collecting of evidence such as a photograph must be done quickly. Even with photo evidence, the police officers cannot impose fines on the offender because the offender has often already gone before the police arrive. Thus, law enforcement under the criminal procedure has to wait for the police officer to arrive at the scene, making it impossible to know who the offender is and incapable of enforcing a penalty on the offender. The law enforcement that takes too long to perform makes law enforcement ineffective and unable to achieve the objective of the law. If the enforcement of the Non-smoker's Health Protection Act B.E.2535 is ineffective, the law cannot achieve the objective to protect non-smokers from the hazards of second-hand smoke.

Therefore, this writer recommends that the effectiveness of law enforcement and achieving the intention of the Non-smoker's Health Protection Act B.E. 2535 requires the authority to impose a fine by operating under the administrative procedure. The enforcement under the administrative procedure will make the authority able to enforce the law or impose a fine on an offender immediately, without filing the petition and informing the police officer to apprehend or fine under the criminal procedure code. Immediate and serious enforcement will make an offender afraid of committing wrongdoing and create orderliness as a result.

Moreover, the characteristics of the offence under the Non-smoker's Health Protection Act B.E. 2535 is not a severe offence or the offence which the offender has guilty mind. The law has only intended to prohibit smokers from smoking by infringing and causing a negative health impact on others. Therefore, the implementation of the criminal procedure, which focuses on punishing the offender, is not appropriate to be applicable to the punishment of smokers under the Nonsmoker's Health Protection Act B.E. 2535 because smoking in public places where it is prohibited by law is not an action deemed violent behavior like an assault and battery. The implementation of administrative procedure not only increases efficiency of law enforcement, but the imposing of fine penalty under administrative procedure also makes the law achieve its intention without causing the smoker to have the criminal record from a criminal fine penalty.

Furthermore, increasing the effectiveness of law enforcement for the Nonsmoker's Health Protection Act B.E. 2535 means the law should impose the duty of the operator to arrange non-smoking areas as well as the duty to prohibit smoking in their own place, whether by announcing or informing that such a place is a non-smoking area. This includes the duty to control and dissuade smoking in non-smoking areas. The cooperation of officers and operators will make enforcement of the Non-smokers' Health Protection Act B.E. 2535 much more effective and easier to enforce.



CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

At present, there are much scientific evidence to prove that second-hand smoke can harm the health of non-smokers in the area of a smoker, whether by the main cause of cancer or the negative effects it can have on the health of children and pregnant women. Therefore, non-smokers who have the right to live in a good environment and breathe clean air should be protected by law. Smokers may have the right to choose whether they smoke, but that right should not be exercised when it exploit or violates the rights of others.

Due to this concern, the WHO (World Health Organization) has embraced it duties to help, cure and solve problems regarding global public health and raise health standards by enacting the Framework Convention on Tobacco Control (FCTC), which protects people from the devastating health, social, environmental and economic consequences of tobacco consumption, especially exposure to tobacco smoke. The FCTC adopted guidelines on protection from exposure to tobacco smoke by providing fundamental consideration and principles to all parties, such as Principle 2, which provides that "All people should be protected from exposure to tobacco smoke. All indoor workplaces and indoor public places should be non-smoking areas".

Thailand is also a party to the FCTC and a country that recognizes the harmful potential of second-hand smoke. Thailand has provided the Non-smokers' Health Protection Act B.E. 2535 in an effort to protect non-smokers from unnecessary/unwanted tobacco smoke exposure. The Non-smoker's Health Protection Act B.E. 2535 affords protection to non-smokers by arranging specific places as designated non-smoking areas, which are further divided into 2 types. The first is a total non-smoking area and the second is a non-smoking area which can be designed with a specific smoking area. However, there are many non-smokers outside non-smoking areas still currently at risk to exposure of second-hand smoke and, thus far, the law cannot protect them.

From the study of the Non-smoker's Health Protection Act B.E. 2535, the writer found that the protection provided by the Non-smoker's Health Protection Act B.E. 2535 did not extend beyond the places outside non-smoking areas provided by law, despite the fact that non-smokers who are outside the non-smoking areas may still be within range of second-hand smoke and should have protection of rights to breathe clean air by law, just as people who are within non-smoking areas. However, solving the issue of the Non-smoker's Health Protection Act B.E. 2535 and its lack of coverage beyond the areas outline by law to protect the health of non-smokers outside non-smoking area requires officials to interpret this issue as a source of nuisance under Public Health Act B.E. 2535. Practically, the Public Health Act B.E. 2535 has the objective and management for hygienic and environmental health as well as environmental sanitation. The Act does not implicitly intend to protect people from tobacco smoke exposure. However, it does indirectly wield the power to control or eliminate sources of nuisance under Public Health B.E. 2535, which local officials may classify second-hand smoke as under a complicated process. Thus, Public Health Act B.E. 2535 may not be the most suitable remedy for protecting people from tobacco smoke exposure.

According to the Non-smoker's Health Protection Act B.E. 2535, it can be seen that assigning total non-smoking areas and non-smoking areas that can have designated or specific smoking areas does not satisfy the definition of protection under the Non-smoker's Health Protection Act B.E. 2535. This is because it prohibits smoking only in public places. The law does not cover areas beyond a home or vehicle, which may affect people outside legally affected areas, including children. Despite the fact that the main objective of the Non-smoker's Health Protection Act B.E. 2535 is to protect the health of non-smokers, especially children, from cigarette smoke, many children still presently suffer from exposure to second-hand smoke in homes and vehicles without the protection of the law.

Furthermore, the power to enforce the Non-smoker's Health Protection Act B.E. 2535 presently lies with the liability of inquiring officers. Police officers shall have the power to arrest and impose a fine under the process of criminal procedure code. Authority given under the Non-smoker's Health Protection Act B.E. 2535 only involves the power to patrol and collect evidence such as photos while smoking. The police are ultimately responsible for the apprehension or fining of offenders. However, the gathering of evidence and apprehension or fine under the criminal procedure is almost impossible and has no benefit for law enforcement. Because of the nature of smoking, a smoker will not take a long time to smoke. When they are finished smoking, smokers typically depart from such an area quickly. The enforcement process under the criminal procedure makes it difficult for police officers to impose fines on offenders because the offender has usually already gone by the time police arrive. Law enforcement has to take a long time to perform, which makes the job of enforcement ineffective and unable to achieve the objective of the law. Law enforcement is the most important step to achieving the objective of the law. Even when the law defines more protections, law enforcement is ineffective, meaning non-smokers remain at risk of exposure to the toxic chemicals of second-hand smoke anyways.

5.2 Recommendations

After studying the Non-smokers' Health Protection Act B.E. 2535, the rights concerning non-smoker's health protection and foreign law, the writer puts forth several suggestions to improve the Non-smoker's Health Protection Act B.E. 2535 as follows:

1. In cases of legal issues concerning non-smoking areas

In order to protect the right of non-smokers to breathe clean air outside non-smoking areas, the law should specify the protection of non-smoker's health outside non-smoking areas in the Non-smokers' Health Protection B.E. 2535 to achieve protection for non-smokers' health directly and give power to the authority under the Non-smokers' Health Protection Act B.E. 2535 to make enforcement easier. Such action would also awaken flagrant incidents by enacting an exception to the right to smoke outside non-smoking areas, such as defining that "any areas which are not arranged as non-smoking areas, smoking is allowed except when such smoking causes damage to life, body, health or any right of another person. If any person infringes on others, they shall be subject to fine under the law." 2. In cases of legal problems concerning the lack of child protection in homes and vehicles

In order to achieve the objective of the Non-smoker's Health Protection Act B.E. 2535, which intends to protect children from the hazards of second-hand smoke, the law should be improved with a legal measure to cover the rights of children in a house and car. Even though a house and car are private places, no children should be exposed to cigarette smoke to any degree. According to the Convention on the Rights of the Child 1989, the government should take into consideration the best interest of the child in essence. Children have the right to live and survive as well as develop healthily, including the right to reach the highest attainable standard of health. The government shall have the responsibility to take all effective and appropriate measures to protect children from the hazards of secondhand smoke.

Under the objective of the Non-smoker's Health Protection Act B.E. 2535, the law was provided to protect the health of non-smokers against cigarette smoke only in public places. Therefore, protecting children from the hazards of second-hand smoke in homes and vehicles, which are private places, compels this writer to recommend that the Non-smoker's Health Protection Act B.E. 2535 be amended to include protected coverage beyond a home and vehicle. Children can be protected by enacting a specific regulation extending protection to children in homes and vehicles. For example, in the case of a car, the law may have defined that "smoking in any motor vehicle where there is a minor under 18 years of age, regardless of whether the vehicle is in motion or at rest, is prohibited by law". In the case of a house and in order to balance the rights and liberty of the dwelling with the right to breathe clean air by non-smokers, the law may be defined as "All units of a duplex or multi-family residence, including any associated exclusive-use enclosed areas or unenclosed areas in all indoor and outdoor areas such as a private balcony, porch, deck, or patio shall be designated places that protect the health of non-smokers and are declared tobacco-free areas". However, smoking areas can be established provided such areas are not located within 100 feet of enclosed areas primarily used by children and enclosed areas used to facilitate physical activity, such as playgrounds, swimming pools, and school campuses".

3. In cases of legal problems concerning law enforcement

In order to achieve the objective of the Non-smokers' Health Protection Act B.E. 2535, the law should be comprised of proper implementation and adequate enforcement, including solid efforts and effective instruments for implementation.

Therefore, this writer recommends that the effectiveness of law enforcement and achieving the true intention of the Non-smokers' Health Protection Act B.E. 2535 requires affording power to the authority to impose a fine by operating under administrative procedure. The immediate and serious enforcement will make an offender afraid of committing wrongdoing and create orderliness as a result. Moreover, the implementation of administrative procedure assists the law achieve its intention without causing smokers to have a criminal record if found to be in violation, such as by criminal fine penalty.

Furthermore, this writer recommends that increasing the effectiveness of law enforcement with respect to the Non-smokers' Health Protection Act B.E. 2535 requires the law to impose the duty on operators to prohibit smoking in their places, as well as the duty to control and dissuade smoking in non-smoking areas. The cooperation of officers and operators will make enforcement of the Non-smoker's Health Protection Act B.E. 2535 much easier and more effective.

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