

Right to Commercial Speech in India: Construing Constitutional Provisions Harmoniously in Favour of Public Health

Sujitha Subramanian, Nikhil Gokani, Kashish Aneja

Introduction

The scale of India's epidemiological transition was highlighted in a comprehensive study which found that, between 1996-2016, non-communicable diseases (NCDs) contributed to 62% of total deaths, of which 48% were premature.¹ In particular, the rate of overweight and obesity is increasing faster than world average, and the prevalence of overweight and obesity amongst 20–69 year olds is forecast to double and triple respectively between 2010-2040.² Despite alcohol prohibition in some states,³ the per capita consumption in India is expected to increase from 5.7 in 2016 to 7.9 litres in 2025.⁴ Though India has one of the highest tobacco consumption levels in absolute numbers globally, the latest national survey indicates a slight decline in tobacco consumption across most states over the last fifteen years.⁵ An improvement is also seen in the figures for exclusive breastfeeding for infants under 6 months from 55% in 2015-16 to 64% in 2019-21.⁶

India has enacted various rules to prohibit or restrict advertisements that promote unhealthy commodities, including on social and digital media. The Cable Television Networks Rules 1994, for instance, prohibit direct and indirect advertisements that promote “infant milk substitutes, feeding bottle or infant food” and “cigarettes, tobacco products, wine, alcohol, liquor and other intoxicants”.⁷ In 2020, regulations were introduced to prohibit advertisements

¹ The India State-Level Disease Burden Initiative, “India: Health of the Nation's States. Disease Burden Trends in the States of India 1990 to 2016” <<https://phfi.org/wp-content/uploads/2018/05/2017-India-State-Level-Disease-Burden-Initiative-Full-Report.pdf>>; Ishu Kataria *et al* ‘A Research Agenda for Non-Communicable Disease Prevention and Control in India’ (2020) 18 Health Research Policy & Systems 126 (NCDs account for 41 million deaths annually)

² Shammi Luhar *et al* ‘Forecasting the Prevalence of Overweight & Obesity in India to 2040’ (2020) PLoS One 1

³ Bihar, Gujarat, Tripura, Lakshadweep, Mizoram, Nagaland. Varying levels of regulations in other states

⁴ WHO Global Status Report on Alcohol & Health (2018) 355

⁵ India Ministry of Health & Family Welfare National Family Health Survey -5 (2019-2020)

⁶ *Ibid*

⁷ Rule 7(2)(viii) of the Cable Television Networks Rules, 1994 (amended); Cable Television Networks Act, 1995; See also Doordarshan/All India Radio Advertisement Code; Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) 2003; Infant Milk Substitutes, Feeding Bottles and Infant Foods Act 1992; The Food Safety and Standards (Foods for Infant Nutrition) Regulations 2020 and the Code of Ethics of the Advertising Standards Council of India

of unhealthy food products in and near school premises,⁸ and consumer protection rules were strengthened to restrict surrogate or indirect advertisements for products whose advertising have previously been restricted or prohibited.⁹

It is within this context that this article examines the right to commercial speech that has been read into the ambit of Article 19(1)(a) of the Indian Constitution, which guarantees the right to freedom of speech and expression.¹⁰ Though public health is not a ground in the strictly exhaustive list of reasonable restrictions permitted by Article 19(2),¹¹ this article examines how the judiciary has excluded the protection of certain types of commercial speech that are not in the public interest.¹² By resorting to the doctrine of harmonious construction, that adopts a purposive approach to achieve public health, the Indian judiciary has been able to circumvent the omission of “public health” as a reasonable restriction under Article 19(2) and achieve public health objectives.

Section II examines the protection granted to commercial speech within Article 19(1)(a). It explores the case law within the High Courts and the Supreme Court of India, specifically in cases of advertisements promoting unhealthy commodities, to highlight the nuances used by the judiciary to limit commercial speech protection to certain types of commercial speech that are in public interest. Section III examines how the judiciary has harmoniously construed the provisions under Article 19(1)(a) with Article 21 (right to life) and certain public-health related provisions of the Directive Principles of State Policy provided under Article 47, Article 39(e) and Article 39(f) of the Constitution. In conclusion, the article argues that the Indian judiciary’s

⁸ Food Safety and Standards (Safe Food and Balanced Diets for Children in School) Regulations 2020

⁹ Consumer Protection Act 2019; Central Consumer Protection Authority (Prevention of Misleading Advertisements and Necessary Due Diligence for Endorsement of Advertisements) Guidelines 2020

¹⁰ Article 19(1): “All citizens shall have the right (a) To freedom of speech and expression”

¹¹ Article 19(2): “Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”

¹² Article 19(1)(g) (right...to carry on any occupation, trade or business) is not addressed in this article. Note that public health interests have been successful against Article 19(1)(g) in *Health for Millions v Union of India* (2018) 14 SCC 152: Supreme Court refused to uphold 19(1)(g)-related Karnataka High Court’s finding that 85% pictorial warning on tobacco packaging is unreasonable as “...health of a citizen has primacy and he or she should be aware of that which can affect or deteriorate the condition of health. We may hasten to add ...that deterioration may be a milder word and, therefore, in all possibility the expression “destruction of health” is apposite.”

penchant for “judicial creativity,” “hyper-activism” and “judicial over-reach” appear to be consistently used in favour of protecting public health.¹³

2. Constitutional Protection of Commercial Speech that is *Only* in the Public Interest

2.1 Commercial speech initially not protected

The Indian Supreme Court considered the right to commercial speech for the first time in 1959 in *Hamdard Dawakhana*, where advertisers had challenged the constitutionality of the Drugs and Medical Remedies Act 1954 that aimed to prevent misleading advertisements for products claiming “magical” medical remedies.¹⁴ The court noted that advertising “is no doubt a form of speech, but...when it takes the form of a commercial advertisement which has an element of trade or commerce, it no longer falls within the concept of freedom of speech for the object is not propagation of ideas – social, political or economic or furtherance of literature or human thought.”¹⁵ Hence, the right to commercial advertisements cannot fall within the parameters of Article 19(1)(a) if they are “part of a business” as they do not fall within the realms of “essential concept of the freedom of speech,” thereby treating commercial speech as “a classic example of... ‘low-value’ speech.”¹⁶

2.2 Commercial speech begins to be protected

The position taken in *Hamdard Dawakhana* was limited in *Indian Express Newspapers*, where the imposition of levies compelled reduction of the area of newspapers used for advertisements.¹⁷ The loss in advertisement revenue was found to be in contravention of Article 19(1)(a) on the basis that curtailment of newspaper circulation impacted on the ability of the

¹³ For an extensive study of the evolution of the judiciary from “a positivist to an activist court”, see for instance, S.P. Sathe *Judicial Activism in India* (OUP, 2003); see also Justice Chinnappa Reddy *The Court and the Constitution of India* (OUP, 2013) 193; Press Release, Govt of India Prime Minister's Office, PM's Address at the Conference of Chief Ministers & Chief Justices of High Court 3 (April 8, 2007), available at <http://pib.nic.in/newsite/erelease.aspx?relid=26694> (referring to judicial overreach); Somnath Chatterjee, Former Speaker, Lok Sabha, Separation of Powers and Judicial Activism (Apr. 25, 2013), in 2013 AIRJ. 97, 99 (expressing concern about the Supreme Court's involvement in law making).

¹⁴ *Hamdard Dawakhana (Wakf) Lal Kuan v. Union of India* (1960) 2 SCR 671 [12]

¹⁵ *Ibid* at [17]

¹⁶ *Ibid*, citing *State of Bombay v Chamarbaugwala* 1957 SCR 874 [business of betting/gambling not protected within Article 19(1)(g) right to trade and business]; see Gautam Bhatia *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (OUP, India) 260-261

¹⁷ Limited because *Hamdard Dawakhana* was a five-Judge constitutional bench ruling unlike *Indian Express Newspapers v Union of India* 1985 (2) SCR 287

“democratic electorate...to make responsible judgements” as the “purpose of the press is to advance public interests”.¹⁸

Interestingly, *Indian Express Newspapers* observed that the Parliament *intended* to exclude “a clause enabling the imposition of reasonable restrictions in the public interest” whilst amending the provisions of Article 19(2) under the Constitution (First Amendment) Act 1951.¹⁹ This did not prevent *Indian Express Newspapers* to make an expansive reading of Article 19(1)(a) to recognize freedom of press based on the principle of public interest. *Indian Express Newspapers* found *Hamdard Dawakhana’s* observations on “all commercial speech” to be “too broadly stated,” given that the latter had only aimed to curtail specific “type” of misleading advertisement. Thus, commercial speech *per se* should not be denied the protection of Article 19(1)(a) “merely because they are issued by businessmen”.²⁰

2.3 Protection is limited to specific instances where it is in the public interest

The protection of commercial speech was echoed by *Tata Press*²¹ in a case involving the publication and circulation of “Tata Press Yellow Pages”, where a buyer’s guide comprising of advertisements from traders was in dispute. *Tata Press* limited *Hamdard Dawakhana* to advertisements that are “deceptive, unfair, misleading and untruthful” and noted that commercial speech *per se* should not be denied Article 19(1)(a) protection merely because they are issued by business people. What is interesting to note is that the rationale to protect advertisements under Article 19(1)(a) was articulated primarily on public interest grounds and also on the public’s right to receive such commercial speech. The court found that commercial advertisements benefit the public as they help disseminate information in “a democratic economy” and could be of “much more importance to general public than to the advertiser who may be having purely a trade consideration”.²² In other words, the expansive reading of Article 19(1)(a) was specifically to protect the interests of the public as opposed to corporate interests, which were arguably treated as incidental in comparison to the objective of public interest protection.

¹⁸ Ibid at 291

¹⁹ Ibid

²⁰ Ibid at 359-360 [emphasis added]

²¹ *Tata Press v Mahanagar Telephone Nigam* (1995) 5 SCC 139

²² *Tata Press* at [24]; Right to Know protected (*State of Uttar Pradesh v. Raj Narain* (1975) 4 SCC 428); Ministry of I&B v Cricket Association of Bengal 995 SCC(2) 161 (Article 19(1)(a) includes right to educate, to inform and to entertain, but also the right to be educated, informed and entertained)

Tata Press also failed to specify the specific restriction under Article 19(2) that would come into play whilst excluding commercial advertisements that are deceptive, unfair, misleading and untruthful.²³ A similar issue can be seen in *KVHS* where the court did not specify the restriction under Article 19(2) that would come into play whilst preventing tobacco advertisements used in the film industry and once again articulated its finding on the basis of public interest.²⁴ This use of the principle of public interest to read commercial speech into Article 19(1)(a) is not unusual in that this principle has been used consistently to expand the boundaries of the right to freedom of speech and expression.²⁵ Such expansive understanding of free speech was based on instrumental principles whereby free speech aims to secure or promote broader values such as democracy²⁶ rather than being protected for its own intrinsic value.²⁷ Such an interpretation led courts into reading two different types of commercial interests – one that promotes public interest and one that was solely in corporate interests.

In *Mahesh Bhatt*, the petition challenged the constitutionality of legislation prohibiting advertisements of tobacco products on the basis that the list of reasonable restrictions under Article 19(2) does not include “public health”.²⁸ Where an advertisement has the *mere* object of furthering business, the Delhi High Court found that such commercial speech did not fall strictly within the ambit of Article 19(1)(a) which protects free speech *only* where it has the objective to propagate ideas that are social, political, economic or furthers literature or human thought.²⁹ Moreover, the Delhi High Court observed that “commercial speech can be restricted more easily as compared to political or social speeches” when and if there are substantial justification, as Article 19(1) ought to be read in a manner that includes the principle of the larger public interest.³⁰ On this basis, the court upheld the ban on tobacco advertisements and

²³ See also *Devendrappa* 1958 SCR 1052, where the Supreme Court found that reasonable restrictions may have to be imposed on free speech rights to maintain discipline in public services, even though it is not mentioned as a ground in Article 19(2)

²⁴ *Kerala Voluntary Health Services v Union of India* (2012) 2 KLJ 539

²⁵ Freedom of press was read into Article 19(1)(a) in *Sakal Papers v Union of India* AIR 1962 SC 305; *Bennett Coleman v Union of India* (1972) 2 SCC 788; *Romesh Thappar v. State of Madras* (1950) SCR 594; *LIC v Manubhai D Shah* (1992) 3 SCC 596; Similarly Article 19(1)(a) expanded to include the right to remain silent (*Emmanuel v State of Kerala* (1986) 3 SCC 615) and right to broadcasting (*Odyssey Comm v Lokvidayan Sanghtana* (1988) 3 SCC 410)

²⁶ Lawrence Liang ‘Free Speech and Expression’ in Sujith Choudhry *et al* (eds) *The Oxford Handbook of the Indian Constitution* (OUP) 815; for example, *Reliance Petrochemicals v Proprietors of Indian Express* 1989 AIR 190; *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294

²⁷ George Rutherglen ‘Theories of Free Speech’ (1987) 7(1) *Oxford Journal of Legal Studies* 118; Eric Barendt *Freedom of Speech* (OUP, 1985) 23

²⁸ *Mahesh Bhatt and Kasturi and Sons v Union of India* 147 (2008) DLT 561[21]

²⁹ *Ibid* [17]

³⁰ *Ibid* [31]-[32]; [58]

declared that, in cases of commercial speech where “the purpose is to merely earn profits by selling products/services”, it does not receive the protection of Article 19(1)(a) as there is “hardly any element of free speech...involved.”³¹

In *Telecom Watchdog*, the Delhi High Court makes a distinction between “purely commercial advertisement,” the purpose of which is to further trade and commerce – thus placing it “outside the concept of freedom of speech and expression” and those types of commercial speech whose purpose is the propagation of ideas – social, political or economic, or ideas in furtherance of literature or human thought.”³² Such limitation on the scope of commercial speech can be noted from *Suresh*, where the Supreme Court held that in cases where “freedom of speech gets intertwined with business it undergoes a fundamental change and its exercise has to be balanced against societal interest.”³³

3. Construing Constitutional Provisions Harmoniously to Prioritise Public Health

The judiciary has used the principle of harmonious interpretation to give substance to the notion that certain types of commercial speech do not fall within the protection of free speech guaranteed by Article 19(1)(a).³⁴ As the Supreme Court recognised in the seminal case of *Maneka Gandhi*, different fundamental rights within Part III of the Constitution “do not represent separate streams of rights...they are all parts of an integrated scheme” such that “the isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.”³⁵

3.1 Article 21 Right to Life

Over the years, the right to life under Article 21 has been interpreted in the widest and most liberal manner with a view to “anticipate and take account of changing conditions and purposes so that the Constitutional provision does not get atrophied or fossilized but remains flexible

³¹ Ibid [32]; similarly, in relation to alcohol (surrogate) advertising, *see* *Struggle Against Pain v State of UP* (2019) SCC OnLine All 4624

³² *Telecom Watchdog v. Union of India*, W.P. (C) 8529/2011 & C.M. Appl. 1926 of 2011 [23]

³³ *Suresh v State of Tamil Nadu* AIR 1997 SC 1889

³⁴ This principle is also useful in the resolution of conflicts, if any, between different Constitutional provisions: *Moinuddin v State of Uttar Pradesh* AIR 1960SC 27, 93; *Venkataramana v Mysore* AIR 1958 SC 255

³⁵ *Maneka Gandhi v Union of India* 1978 SCR (2) 621, 624

enough to meet the newly emerging problems and challenges...”³⁶ As such, the right to life has been expanded to include the right to health.³⁷ This broad reading of Article 21 is made clear in *Peerless General Finance*, where the Supreme Court observed that the right to life includes the right to live with basic dignity “with necessities of life such as nutrition, clothing, food, shelter over the head, facilities for cultural and [the] socio-economic wellbeing of every individual.”³⁸

This raises the question as to how two provisions of the constitution, such as Article 19(1)(a) that have been broadly interpreted to include commercial speech and Article 21 which has been broadly interpreted to include the right to health, can be reconciled with one another. In early cases such as *Sankari Prasad*, the Supreme Court observed that harmonious construction require one right to be read as controlled and qualified by the other.³⁹ This view has since been refined on the basis that the framers of the Constitution had not intended “conflict or repugnancy” between various provisions and if they “appear to be in conflict with each other, these provisions should be interpreted as to give effect to a reconciliation between them, so that, if possible, effect could be given to all.”⁴⁰

In *Mahesh Bhatt*, though the laws restricting advertisements of tobacco “strictly do not fall within the ambit of Article 19(2)”, they were held to be “intra vires and valid”, as freedom of speech and expression guaranteed under Article 19(1)(a) and the right to life guaranteed under Article 21 have to be “harmoniously construed to advance interest of general public”.⁴¹ Similarly, in *Struggle Against Pain*, the restrictions on advertising of harmful products was found to be “reasonable and justified” these are in the “larger public interest” and promotes the right to life under Article 21.”⁴² The harmonious alignment of Article 19(1)(a) right to speech

³⁶ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* 1981 SCR (2) 516, 517

³⁷ *State of Punjab v Mohinder Singh Chawla* AIR 1997 SC 1225; *Occupational Health & Safety Association v Union of India*; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802; *Parmanand Katara v Union of India* (1989) 4 SCC 286; See generally Sharanjeet Parmar and Namita Wahi ‘India Citizens, Courts, and the Right to Health: Between Promise and Progress?’ in Alicia Ely Yamin and Siri Gloppen (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2011) 155-189. This mainly stemmed from the word “life” being understood through the prism of a dignity-based conception of life. See *People’s Union for Democratic Rights v Union of India* (1982) 3 SCC 235; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *Mohini Jain v State of Karnataka* (1992) 3 SCC 666

³⁸ *Peerless General Finance and Investment v Reserve Bank of India* 1992 2 SCC 343

³⁹ *Sankari Prasad Singh Deo v Union of India* 1951 AIR 458

⁴⁰ Justice Chelameswar and Justice Seshadri Naidu *MP Jain Indian Constitutional Law* (Lexis Nexis, 8th edition, 2018) 1697

⁴¹ *Mahesh Bhatt*, *supra* note 28 at [56]

⁴² *Struggle Against Pain*, *supra* note 31 at [51]

with Article 21 right to life is achieved where, for instance, in *Mahesh Bhatt*, Article 19(1)(a) protections are carved away and removed from “purely commercial speech” as it encourages use of tobacco leading to disease and health problems,⁴³ as these are not in public interest.

3.2 Directive Principles of State Policy

The Directive Principles of State Policy (Part IV of the Constitution) perform an “expressive function” wherein a directive’s endorsement of an agenda, such a public health, “bestows upon it a degree of symbolic constitutional legitimacy.”⁴⁴ Unlike provisions relating to the fundamental rights that are guaranteed by the Constitution, the directive principles are not enforceable even though they are recognised as setting out the “programme and the mechanics...to attain the constitutional goals set out in the Preamble.”⁴⁵ The directive principles are “fundamental in the governance of the country,” and it shall be the duty of the state to apply these principles in making law.⁴⁶ It is important to note that the mere lack of justiciability should not be a ground for discrediting the importance of the directive principles vis-à-vis the fundamental rights.⁴⁷

In the seminal case of *Kesavananda Bharati*, the Supreme Court declared both directive principles and fundamental rights to represent the “conscience of the Constitution” and found it necessary to harmonise them to achieve “the dignity of the individual.”⁴⁸ Holding that the makers of the Constitution “did not contemplate any disharmony between the fundamental rights and directive principles,” as they “were meant to supplement one another,”⁴⁹ *Kesavananda Bharti* put forth the notion that it “can be said that the directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal was to be achieved.”⁵⁰ In *Minerva Mills*⁵¹ the Supreme Court noted that the directive

⁴³ Mahesh Bhatt, *supra* note 28 at [32]

⁴⁴ Tarunabh Khaitan ‘Directive Principles and the Expressive Accommodation of Ideological Dissenters’ (2018) 16 (2) International Journal of Constitutional Law 389, 398

⁴⁵ See Justice Chinnappa Reddy *The Court and the Constitution of India: Summit and Shallows* (OUP, 2010) 73

⁴⁶ Article 37 of the Constitution of India

⁴⁷ MP Singh ‘The Statics and Dynamics of the Fundamental Rights and Directive Principles – A Human Rights Perspective’ (2003) 5 Supreme Court Cases Journal 1; Upendra Baxi ‘The Little Done, The Vast Undone: Some Reflections on Reading Granville Austin’s *The Indian Constitution*’ (1967) 9(3) Journal of Indian Law Institute 323

⁴⁸ *Kesavananda Bharati vs. State of Kerala* 1973 4 SCC 225 [564], [521]

⁴⁹ *Chandra Bhavan Boarding v State of Mysore* (1969) 3 SCC 84

⁵⁰ *Ibid*

⁵¹ *Minerva Mills v Union of India* (1980) 1981 SCR (1) 206, 208

principles and fundamental rights “are like two wheels of a chariot, one no less important than the other.”⁵²

The directive principles under Article 47, especially since it refers to issues arising from intoxicating drinks, have been used by the courts in alcohol control cases.⁵³ The Supreme Court broadly interpreted public health on the basis that a “true interpretation” of the term “public health” includes several aspects that promote healthy living since “public health refers to both a goal for the health of a population and to professional practices aimed at its attainment.”⁵⁴ In *MC Mehta*,⁵⁵ the Supreme Court prioritised concerns for public health by reducing air pollution and observed that “to allow industries to benefit at the expense of public health” is a violation of the directive principles, including Article 39(e) and Article 47. Allowing a public interest petition filed by the *Centre for Public Interest Litigation*, that sought to protect children from the harmful effects of soft drinks arising from misleading advertisements, the Supreme Court observed that it is the paramount duty cast on a state to achieve “an appropriate level of protection to human life and health” from any food article that is “hazardous or injurious to public health” by reading Article 21 with Article 47.⁵⁶

The directive principles under Article 39(e) provides that the state shall direct its policy towards securing “the health and strength of workers” and Article 39(f) provides for opportunities and facilities to be given for the development and growth of children in conditions of freedom and dignity. A harmonious construction of Article 19(1)(a), Article 21, Articles 47, 39(e) and (f)

⁵² The judiciary has harmoniously construed fundamental rights and the directive principles: see generally Chinnappa Reddy, *supra* note 13; Devdatta Mukherjee ‘Judicial Implementation of Directive Principles of State Policy: Critical Perspectives’ (2014) 1(1) Indian Journal of Law and Public Policy 14. In doing so it has held that the right to live a life with dignity that is guaranteed under Article 21 is breached where the state fails in its mandated primary duty to improve public health by raising the level of nutrition and standard of living as provided under Article 47: *Centre for Public Interest Litigation v UOI* (2013) 16 SCC 279 [19]; *State Of Punjab v Ram Lubhaya Bagga* (1998) 4 SCC 117 [Article 21 right to life reinforced by Article 47]; *Khoday Distilleries v State of Karnataka* 1995 SCC(1) 574 [60] [Article 19(1)(g) fundamental right to carry on any occupation, trade or business does not give a citizen the fundamental right to engage in the business and that it conflicts with Article 47 directive principles]. In *Bandhua Mukti Morcha*, the Supreme Court held that the right to live with human dignity enshrined in Article 21 derives its “life breath” from the directive principles, including clauses (e) and (f) of Article 39: *Bandhua Mukti Morcha vs Union of India* 1984 SCR (2) 67, 69.

⁵³ Article 47: “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.” See for instance *Ashok Lanka v. Rishi Dikshit* 2006 9 SCC 90 at para 35

⁵⁴ *Ibid*

⁵⁵ *MC Mehta v. Union of India*, (2002) 4 SCC 356 at para 16

⁵⁶ *Centre for Public Interest Litigation*, *supra* note 52 at para 21

can thus allow for the protection of public health when placed alongside Article 19(1)(a) that protects commercial speech only in cases of public interest.

Conclusion

India has a well-developed public interest litigation system, which has allowed individuals and civil society bodies to approach the Supreme Court directly on behalf of others or specific social causes, through a broad construction of locus standi.⁵⁷ Most public health and NCD-related cases are filed as public interest litigation petition with one of the earliest order relating to public smoking ban being ruled by the Kerala High Court in 1999, followed by a nationwide ban order ruled by the Supreme Court in 2001 on the basis of indirect violation of the right to life of non-smokers.⁵⁸ The expansion of Article 21 right to life to include right to education, health, to live with dignity, right to shelter, right to food security, right to life in healthy environment etc were all issued as part of public interest litigation. The zealotry of the judiciary to engage in “social revolution”⁵⁹ has come at a price.⁶⁰ The Indian Supreme Court has been accused of “deciding cases based on a certain conception of its own role – whether as a social transformer, sentinel of democracy or protector of the market economy” and this “unique decision-making process has side-lined reason-giving in preference to arriving at outcomes that match the Court’s perception” to the extent that the decisions can sometimes be “detached from precedent, doctrine, and established interpretive methods.”⁶¹

This explains why the judiciary has not sufficiently explored reasonableness of the restrictions available under Article 19(2) to limit commercial speech.⁶² Instead, to circumvent the omission of “public health” in Article 19(2), the judiciary has resorted to riving up freedom of commercial speech into two parts – one that furthers public interest and those that are primarily based on purely commercial interest - to rule that whilst commercial advertisers may have rights guaranteed under Article 19(1)(a), they are protected only where they are in the interests

⁵⁷ Bidyut Chakrabarty *Constitutional Democracy in India* (Routledge, 2018) 165

⁵⁸ Ramakrishnan v State of Kerala AIR (1999) Ker 385; Murli Deora v Union of India (2001) 8 SCC 765

⁵⁹ See generally Granville Austin *Working a Democratic Constitution: A History of the Indian Experience* (OUP, 2003) and Gautam Bhatia *The Transformative Constitution* (Harper Collins 2019)

⁶⁰ See Manoj Mate ‘Public Interest Litigation and the Transformation of the Supreme Court of India’ in Diana Kapiszewski (et.al.) *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 262

⁶¹ Chintan Chandrachud ‘Constitutional Interpretation’ in Sujit Choudhry *et al The Oxford Handbook of The Indian Constitution* 86-87

⁶² It is arguable that the term ‘morality’ could have been given the interpretation of ‘constitutional morality’

of the public. Left without an identifiable test that can determine the distinction, the judiciary has relied on the doctrine of harmonious construction to engage in a purposive interpretation of various constitutional provisions that can be linked to the issue of public health in order to arrive at findings that promote public health.

As highlighted in this paper, emerging jurisprudence indicates that it has become increasingly difficult for industry to judicially challenge rules and regulations that prohibit or restrict advertisements of unhealthy commodities. This position is further entrenched against advertisers of unhealthy commodities intending to challenge legislation protecting public health as they need to cross the hurdle of presumption in favour of the constitutionality of such enactments as provided by Article 13 of the Constitution.⁶³ Even so, such rulings have not always translated into effective compliance.⁶⁴ Over the last decade, the food lobby has successfully delayed the introduction of a comprehensive and clear food-labelling system to warn consumers about harmful levels of fat, salt and sugar in processed food. A harmonious interpretation of the little referred to statement in *Tata Press* to the second facet of freedom of expression – the consumer’s “right to receive” information – may provide future opportunities to move beyond restrictions on commercial speech to granting consumers the protection to become informed about known harms of products.⁶⁵

⁶³ Chiranjit Lal Chowdhuri v Union of India 1950 SCR 869

⁶⁴ P.K. Surendran ‘Ban on Smoking: The Kerala Experience’ (Times of India, 17 February 2001) <https://timesofindia.indiatimes.com/ban-on-smoking-the-kerala-experience/articleshow/21454644.cms>; Monika Arora and Gaurang Nazer ‘Prohibiting Tobacco Advertising, Promotions & Sponsorships: Tobacco Control Best Buy (2013) 37(5) Indian Journal of Medical Research 867; Sonu Goel *et al.* ‘How Compliant are Tobacco Vendors to India's Tobacco Control Legislation on Ban of Advertisements at Point of Sale? A Three Jurisdictions Review’ (2014) 15(24) Asian Pacific Journal of Cancer Prevention 10637

⁶⁵ *Tata Press*, *supra* note 11, citing *Bennett Coleman & Co. v Union of India* 1973 2 SCR 757