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FOREWORD

It brings us immense pleasure to mark the beginning of the second leg of the Comparative Constitutional and Administrative Law Quarterly by introducing Volume 2.1. The Journal has, since its inception, continuously strived to be a platform for discourse on the subjects of Constitutional Law and Administrative Law, lending a comparative colour to the same. Our previous editions have elevated the benchmark of articles and have compelled us to adopt strict standards for selection, in order to cull the best pieces which make for an engaging read. The first issue of Volume 2 contains three outstanding contributions, vivid with a diverse palate of issues touching upon Constitutional Law and Administrative Law.

The opening article titled 'Commercial Speech: A Variant or a Step-Child of Free Speech' explores the oft discussed freedom of speech and expression afresh against the backdrop of commercial speech. It attempts to discuss the various tests for classifying speech as commercial, relying on American and EU jurisprudence and how the same has been interpreted by courts in India. It further delves into the need for an open market and freedom of consumer choice, fortifying the recognition of this right in other jurisdictions and consequently, India.

The second piece titled The Panoply of Socio-Economic Rights: Indian and the South-African Model is an interesting take on the non-justiciable nature of socio-economic rights in India vis-à-vis the enforceable nature of such rights in South Africa. The author deliberates the need for making socio-economic rights justiciable, and contrasts the judicial minimalism in South Africa with the inclusive approach of the Indian judiciary in order to enable the State to attain its minimum core obligations.

The final piece sheds light on the recent Maharashtra Government amendment banning dance bars in the state. The author in his piece scrutinises the legitimacy of such a move on the touchstone of reasonableness and the right to livelihood enshrined in the Constitution. The

crux of the article attempts to answer the question of whether the intolerance of a section of the society is sufficient for the government to adopt a ban, or if such action requires the fulfilment of the test of constitutional morality as opposed to public morality.

The success of the journal has to be traced to the monumental effort of the Editorial Board which ensures that the articles are published in the best possible form. We also express our gratitude to the support and guidance extended by our Chief Patron Prof. Poonam Saxena, our Director, Prof. I P Massey and our Faculty Advisor Prof. K L Bhatia. We hope to continue our effort of providing a platform ablaze with contemporary issues of Constitutional and Administrative Law which transgress domestic regimes and introduce a global perspective.

Abhimanyu Malik and Pooja Menon

[*Editor-in-Chief*]

COMMERCIAL SPEECH: A VARIANT OR A STEP-CHILD OF FREE SPEECH

- Akhil Deo[*] &JoshitaPai[*]

ABSTRACT

The manufactured notion of commercial speech has played a vital role in the establishment of a water-tight hierarchy amongst different forms of speech. It has been argued time and again that the diminished protection given to commercial speech is to prevent the dilution of protection afforded to non-commercial speech. The doctrine has successfully determined the criteria for qualifying a speech as commercial, the existential element of an economic interest. The absence of a more tangible definition must firstly berectified. The residual acknowledgment given to commercial speech is because in a market place, the free flow of information is significant. The proponents of commercial speech vehemently oppose the paternalistic treatment given to commercial speech and justifiably demand the demolition of any distinction between the two forms of speech. They argue that the attempted definition manufactured is solely for the purpose of distinguishing commercial from non-commercial speech rather than identifying and understanding commercial speech. The longstanding doctrine however is potently endangered with the call for heightened scrutiny by the Supreme Court in Sorrell.

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INTRODUCTION:

Freedom of speech and expression, in most democratic countries, is vigilantly guarded, customarily via written constitutions, or after expansive judicial determination. The notion of free speech has been categorically studied and researched; its importance stems from the belief that expression is a necessary human right, and is considered as a cornerstone of a democratic society. While it is emphatically protected and rarely restricted, ever so often forms of expression which do not fit perfectly within the constitutional set up, arise. One such form is commercial speech.

Put simply, an expression of commercial interest is considered commercial speech. The most ordinary and identifiable example is an advertisement, when a seller proposes his goods and wares to a customer; it is a form of speech motivated by commercial interest. Part I of this paper will attempt to define commercial speech; it will answer the most basic question, yet the most challenging one- what is commercial speech? Part II traces the development of the commercial speech doctrine, which in common parlance implies any speech that primarily entails a monetary transaction; The section examines both an American and Indian perspectives; it will highlight initial problems the court faced when grappling with the issue of commercial speech. Part III will analyse the importance of commercial speech or more specifically what fundamental values it serves to deserve protection. Part IV delves into the regulation of such speech; by identifying its exclusive nature in the domain of free speech jurisprudence, the means and methods of restricting it will be analysed.

This paper draws mostly from American and Indian constitutional set up, case-laws and commentary; dispersed in-between will also be the position of commercial speech in the EU. The primary objective of this paper will be to successfully draw forth a commercial speech doctrine for India. American and EU jurisprudence will be used to draw parallels and inferences and for a more complete picture of the same.

DEFINING COMMERCIAL SPEECH

Generally, commercial speech is defined as speech which proposes a commercial transaction;[1] or as expression solely related to the economic interest of the speaker and its audience.[2] This definition has however proved incongruous when it comes to classifying commercial speech;[3] courts often struggled to classify speech as non-commercial when it was motivated by profit[4] and conversely have found that communications can be commercial despite containing issues of public importance.[5] A predictable definition is essential for identifying whether the speech is commercial or not and as a consequence, what level of protection it receives.[6]

The distinction in the US has proved troublesome because commercial speech is essentially less protected than non-commercial speech[7]; in India however, the opposite is true. By placing commercial speech within the ambit of Article 19(1)(a), the Supreme Court of India has granted commercial speech a higher level of protection than would ordinarily be offered by Article 19(1)(g).[8] To differentiate commercial speech from other forms of speech, courts in the US have often referred to a "common sense distinction",[9] roughly categorizing any type of advertisement or its equivalent as commercial speech.

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[1] Tata Press Ltd v. Mahanagar Telephone Ltd., AIR 1995 SC 2438*;* Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 414 U.S. 376, 385 (1973); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Metromedia Inc. v. City of San Diego, 453 U.S. 490, 505 (1981); Posadas v. Tourism Co., 478 U.S. 328, 340 (1986); Edenfield v. Fane, 507 U.S. 761, 767 (1993); United States v. United Foods, 533 U.S. 405, 409 (2001).

[2]Central Hudson Gas & Elec. Corp. v. Public Service.Commission, 447 U.S. 557, 562 (1980).

[3]City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 79 (1999).

[4]Bigelow v. Virginia, 421 U.S. 809 (1975); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[5] Bolger v. Young Drug Prods. Corp., 463 U.S. 60 (1983).

[6] Ross D. Petty, *Advertising and the First Amendment: A Practical Test for Distinguishing Commercial Speech from Fully Protected Speech*, 12 J. PUB. POLICY & MARKETING 170, 171 (1993).

[7]*See generally*, Stephanie Marcantonio, *What is Commercial Speech? An Analysis in Light of Kasky v. Nike*, 24 PACE L. REV. 357 (2003); Troy L. Booher, *Scrutinizing Commercial Speech* 15 MASON U. C.R. L.J. 69 (2004); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979).

[8]Tata Press Ltd v. Mahanagar Telephone Ltd., AIR 1995 SC 2438.

[9]Ohralik v. Ohio State Bar Association, 436 U.S. 447, 455 (1978); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985).

The courts have alluded to the fact that, *"the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."*[10]Keeping that in mind:

a.) *Are Advertisements Commercial Speech?*

Since the ruling in the *Indian Express*[11]case which borrowed the rationale from *Hamdard,*[12] advertisements have been accorded protection in India.[13] The court in *Tata Press*[14] approved of defining an advertisement as *"merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase."*[15] This falls in line with the definition of commercial speech, adopted in the U.S., as speech which relates to the economic interest of the speaker and its audience and speech which proposes a commercial transaction.[16] The essential idea communicated here is "I will sell you X product for Y price."[17]

b.) *Are Information Pamphlets Commercial Speech?*

In *H.T. Annaji v. The District Magistrate and the Deputy Commissioner*,[18] a state government notification prohibiting a private company from publishing the time table of their tourist buses, either in any local or largely circulated newspapers in Karnataka was in question. In this case the communication being published was not entirely an advertisement or a speech proposing only a commercial transaction but also contained a schedule of the buses plying within Karnataka. The Karnataka High Court found that *"The publication of time table of arrival and departure of the buses by private bus owners or public service vehicle owners is*

[10]Bigelow v. Virginia, 421 U.S. 809, 826 (1975).
[11]Indian Express Newspapers (Bombay) Ltd v. Union of India, 1985 SCR (2) 287.
[12]HamdardDawakhana v. Union of India, 1960 SCR (2) 671.
[13]*Id.* at 361.
[14]Supra.
[15]*Id.* at 2443.
[16]Cent.Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, (1980).
[17]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).
[18]1998 (4) Kar L.J. 75.

nothing but publication and advertisement of the Transport Service Vehicles amounting to commercial advertisement or commercial speech covered by protection guaranteed under Article 19(1)(a) of the Constitution."[19]

The position in the U.S. stands on similar footing. In *Bolger,*[20] a prophylactic manufacturer who published information pamphlets which discussed the availability of various contraceptives challenged a federal law prohibiting the mailing of unsolicited advertisements for contraceptives. The court found that a combination of three factors would provide strong support for classifying speech as commercial:[21] (1) Advertising format, (2) Product references and (3) commercial motivation.

c. *Is Film Distribution Commercial Speech?*

The position in India with respect to distribution and exhibitions of films was that it is outside the scope of Article 19(1)(a),[22] despite the same being provided for producers of films. The reason behind this it was that an exhibitor shows films merely to earn a profit.[23] However, this position was changed in the *TataPress* case[24], since the court did not consider whether exhibition of films could be considered as protected speech despite its commercial motive.

Subsequently, when a state government notification suspending the exhibition of the film was challenged in the Andhra Pradesh High Court on grounds of Article 19(1)(a),[25] the court, without explicitly identifying what constitutes commercial speech, made references to American decisions which dealt with regulations on commercial speech on grounds of indecency and morality.[26] A Film neither contains an advertising format nor does it make product references for commercial motivation. However the court did find that *"the right to*

[19] *Id.* at¶ 8.
[20] *Supra* note 5.
[21] *Id.* at 67 (noting however that each of these factors might not be necessary for classifying speech as commercial).
[22] Sitar Video v. State of Uttar Pradesh, AIR 1994 All 25.
[23] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1050 (6th ed. 2011).
[24] *Supra* note 8.
[25] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374.
[26] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, 427 U.S. 50 (1976).

communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, drama, theatre, dance, music, film, through a newspaper, magazine or book is an essential component of the protected right and may be exercised untrammelled by unreasonable Governmental restraint."[27] Along with a communicative idea, the presence of a commercially motivated entity seemed to compel the court to consider film exhibition as commercial speech. The position taken in the *Sitar Videos*[28] case is no longer correct and a commercial motive alone cannot make a certain form of speech ineligible for constitutional protection.

d. *Are Unsolicited Commercial Communications ("*UCCs*") Commercial Speech?*

UCCs are essentially a form of telemarketing that can take the form of automated messages, calls or emails.[29] On considering this question, the Delhi High Court[30] found that UCCs are essentially commercial advertisement but they are meant for furtherance of trade and commerce and hence, would not *prima facie* amount to freedom of speech under Article 19(1)(a).[31] While such a position appears to conflict with the Supreme Court's rulings in the *Tata Press* and *Indian Express* cases, the Delhi High court places heavy reliance on the *Hamdard Dawakhana* case[32] in distinguishing commercial speech with merely entailing a trade aspect, and the one with a social aspect in addition to the commercial angle.[33] However, the court was quick to observe that even if UCCs were classified as commercial speech under

[27] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374 at ¶ 50.
[28] Sitar Video v. State of Uttar Pradesh, AIR 1994 All 25.
[29] Steven R. Probst, *Telemarketing, Commercial Speech and Central Hudson: Potential Problems for Indiana Code Section 24-4.7 and Other Do-Not-Call Legislation,* 37 VAL. U. L. REV. 347, 348 (2002).
[30] Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012 (involved a challenge to regulations issued by the telecom regulatory authority of India limiting the number of short message service to only 200 per day).
[31] *Id.* at 13.
[32] *Supra* note 12.
[33] *Id.* at 22.

Article 19(1)(a), they would be subject to the limitations imposed upon them by Article 19(2) and regulating the number of UCCs was permissible.[34]

The authors feel that the courts observation that, an UCC would form a part of protected commercial speech under Article 19(1)(a), is substantially better than completely excluding it from the purview of the same. The court correctly concluded that it was permissible to impose a reasonable restriction on the volume of UCC's, thereby allowing for both constitutional protection and regulation.

e. *Difficulties in Defining Commercial Speech*

Attempting to define commercial speech or to draw a distinction between commercial and non-commercial speech is, by the courts' own admissions, not an easy one to make.[35] Some have criticized the very distinction itself.[36] Even where support is drawn for the distinction, the method adopted by the court is almost always criticized for being uncertain and vague.[37] It seems evident that defining commercial speech is decided on a rough set of factors, mainly the motivation of the speaker, the interest of the listener and the content of the proposed message which is generally commercial in nature. However it is apparent that none of these factors are decisive in concluding whether speech is commercial or not;

[34] *Id.* at 13.

[35] *In re* Primus, 436 U.S. 412, 438 (1978); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 536 (1981) (stating that the distinction between commercial and non-commercial speech in individual cases is anything but clear); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (noting the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (finding that the "precise bounds" of the category of commercial speech may be "subject to doubt").

[36] 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 520 (1996); *See* Scott Joachim, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations,* 19 HASTINGS COMM. &ENT. L.J. 517, 541-50 (1997); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?,* 76 VA. L. REV. 627, 628 (1990) [hereinafter "Kozinsk i& Banner"].

[37] David F. McGowan, *A Critical Analysis of Commercial Speech,* 78 CAL. L. REV. 359, 397 (1990); Howell A. Burkhalter, Comment, *Advertorial Advertising and the Commercial Speech Doctrine,* 25 WAKE FOREST L. REV.861, 867 (1990).

For example, in India, defining commercial speech as speech which proposes a commercial transaction is too narrow. The *H.T Annaji*[38] case itself demonstrates that commercial speech is capable of more than simply implicating a commercial transaction. Courts in the America also tend to treat this definition as the "core notion"[39] of commercial speech or a mere indication rather than a definitive or necessary condition.[40] Moreover, the *Lakshmi Ganesh Film*[41]caserules out a necessary proposal of commercial transaction but suggests that speech which can be attributed to *effecting* a commercial transaction should be enough. American case laws point to the same, where American courts have treated various forms of speech which only indirectly propose commercial transactions as commercial speech, for instance alcohol content in a beer bottles,[42] professional business cards,[43] and even trade names.[44] Even the fact that the court's primary inference in *Telecom Watchdog*[45]that UCCs are not commercial speech is strange, considering that it evidently encompasses most factors of such speech and given that courts in the United States have even treated unsolicited advertisements as commercial speech.[46]

While clarity in terms of discerning the type of speech is always relevant, it should be noted that some[47] argue that rather than fixating on one particular definition of 'commercial speech', it is more important to treat the case as having fallen within a commercial framework and within this framework of commercial expression; the court must be free to

[38]H.T. Annaji v.The District Magistrate and the Deputy Commissioner, 1998 (4) Kar.L.J. 75.
[39]*Supra* note 5.
[40]*See also*, United Reporting Publ'g Corp. v. Cal. Highway Patrol, 146 F.3d 1133, 1137 (9th Cir. 1998); L.A.P.D. v. United Reporting Publ'g Corp., 528 U.S. 32 (1999).
[41] Lakshmi Ganesh Films v. Government of Andhra Pradesh, 2006 (4) ALD 374.
[42]Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
[43] Ibanez v. Florida Dept. of Bus. & Prof'l Regulation, 512 U.S. 136 (1994).
[44]Friedman v. Rogers, 440 U.S. 1 (1979).
[45] Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[46] *In re* Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1024 (1980); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-74 (1983).
[47]*See generally*, Nat Stern, *supra* note 3.

address factual problems on a case by case basis.[48] The question of defining commercial speech becomes more relevant as we try to address the reasons for its protection.

DEVELOPMENT OF THE DOCTRINE - A HISTORICAL PERSPECTIVE

The Supreme Court of India in the *Tata Press*[49] *case* concluded that *"commercial speech is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the constitution."*[50] This ruling brought about a significant change in the ambit of the words 'freedom' and 'expression' and brought about a change in law with respect to a previous judgement,[51] which had found that misleading commercial advertising would receive no protection under Article 19(1)(a). While the development of the doctrine has been studied significantly in America,[52] this part briefly outlines the same along with case-laws from India.

The categorization of speech as commercial was first seen in *Valentine v. Chrestensen,*[53] in a ruling that was later criticized for being "casual and offhand",[54] the court held that *"purely commercial advertising was ineligible for First Amendment consideration.*"[55] This ruling was later referred to in the matter of *Hamdard Dawakhana v. Union of India,*[56] where a statute restricting "objectionable" and "unethical" advertisements with respect to drugs was challenged; the court found that an advertisement in the interest of trade and commerce cannot be protected under Article 19(1)(a), stating that:

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[48] *Id.* at 111.
[49] *Supra* note 8.
[50] *Id.* at 2448.
[51] *Supra* note 12.
[52] *See generally,* M.H. Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1970) [hereinafter "Redish"]; T.H. Jackson & J.C. Jeffries, *Economic Due Process and the First Amendment,* 65 VA L. REV. 1 (1979) [hereinafter "Jackson & Jeffries"]; C.E. Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 IOWA L. REV. 1 (1986) [hereinafter "Baker"]; D. A. Faber, *Commercial Speech and First Amendment Theory,* 74 NW. U. L. REV. 372 (1980).
[53] 316 U.S. 52 (1942), (discussing Chrestensen's violation of a municipal ban on distribution of advertising material in the streets by disseminating handbills that publicized his exhibit of a retired United States Navy submarine).
[54] Cammarano v. United States, 358 U.S. 498, 514 (1959); Kozinski & Banner, *supra* note 34.
[55] *Supra* note 5.
[56] *Supra* note 12.

> *"An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed…. 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; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business… and…* [has] *no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution."*[57]

This notion did not however survive for long; courts in the U.S. started to recognize that merely because speech is commercial, it cannot be denied protection. In rulings subsequent to *Valentine*, the court significantly eroded its own decision by providing First Amendment protection to periodicals,[58] also clarifying that paid advertisements relating to public affairs receive constitutional protection,[59] and reaffirming that a profit motive did not disentitle speech from first amendment protection.[60] This erosion began brewing in India with the Supreme Court holding in *Indian Express Newspapers (Bombay) Ltd v. Union of India*[61] that "*we are of the view that all commercial advertisements cannot be denied the protection of Art 19(1)(a) of the Constitution merely because they are issued by businessmen."*[62]

[57] *Id.* at 688.
[58] Breard v. Alexandaria, 341 U.S. 622 (1951).
[59] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[60] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).
[61] 1985 SCR (2) 287.
[62] *Id.* at 361.

Beginning with treating a for-profit advertisement as genuine speech, entitled to first amendment consideration on its own merits,[63] courts in the US finally overruled *Valentine* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[64] where a Virginia state ban on advertising the prices of prescription drugs was struck down, finding that "*speech which does no more than propose a commercial transaction*" was fully entitled to first amendment protection,[65] a sentiment which was echoed in the *Tata* case.

While the court in the *Hamdard* case found that misleading advertisements were ineligible for constitutional protection,[66] the bench in the *Tata* case clarified that all advertisements would be protected under Article 19(1)(a) and would be subject to regulation under Article 19(2).[67] Therefore, the fact that an advertisement was misleading would only make it prone to restrictions as opposed to being ineligible for protection. Before delving further into the concept of commercial speech, there are two important observations to be made regarding the *Hamdard Dawakahana* case which found that despite advertising being a *form* of speech it was ineligible for protection under 19(1)(a) because it bore no relationship with the essential concept of speech. The first is that the *Tata* judgement was delivered by a Division Bench while the *Hamdard* judgement was delivered by a Constitutional bench, meaning that the *Tata* judgement clarified the position of law on commercial speech as opposed to over-ruling it.[68] The second significant observation is that the Court here considered the fact that there may be hierarchies of expression with different importance at each level.[69] Both these concepts will be discussed further in Parts III and IV.

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[63] *Supra* note 10.
[64] 425 U.S. 748 (1976)
[65] *Id.* at 762 (quoting Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 414 U.S. 376, 385 (1973)).
[66] Hamdard Dawakhana v. Union of India, 1960 SCR (2) 671, 688.
[67] *Supra* note 8.
[68] *Hierarchies of Expression: Commercial Speech, Hamdard Dawakhana and Tata Press*, INDIAN CONST. L. & PHIL.(Aug. 7, 2013, 4:44 PM),http://indconlawphil.wordpress.com/2013/08/07/hierarchies-of-speech-commercial-advertisements-hamdard-dawakhana-and-tata-press/.
[69] *Id.*

WHY PROTECT COMMERCIAL SPEECH?

While defending the extension of first amendment protection to commercial speech,[70] the Supreme Court of the United States observed that, advertisement was indeed dissemination of information essential to serve a predominantly free enterprise and that it is a matter of public interest that decisions of consumers should be intelligent and well informed and found that the free flow of information serves the foal of public decision making.[71] This view exemplified the belief that commercial speech could not be differentiated from other categories of protected speech in its ability to lead to an informed public;[72] it focused primarily on the perspective of the effect it had on the audience of the speech.[73]

Considering Article 19(1)(a) of the Indian constitution, the right to freedom of speech and expression does not simply extend to communication[74] but also includes the right to acquire and disseminate information.[75] The Supreme Court of India recognized this in *Tata*[76] as well, finding that the public has the right to receive commercial speech, the bench quoted with approval that advertising is also a way of disseminating information.[77] Moreover, the court also linked the importance of commercial speech to free media, finding that advertisements were crucial in keeping prices down. The Supreme Court has also held that laws which place excessive burdens on advertisements resulting in decreased circulation of newspapers as a result of increased prices would be unconstitutional.[78]

[70]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[71]*Id.* at 765.
[72]*See*, Redish, *supra* note 50.
[73] J.S. Werts, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 188-89 (1971).
[74]M.P. JAIN, *supra* note 23.
[75]Secretary Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal, AIR 1995 SC 1236; *See also*, PUCL v. Union of India, (2003) 4SCC 399.
[76]*Supra* note 8.
[77]*Supra* note 8 (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)).
[78]Bennett Coleman & Co. v. Union of India, 1973 2 SCR 757.

Critics of the distinction between commercial and non-commercial speech in America point to the fact that commercial speech does not protect first amendment values such as an individual's meaningfully expressive behaviour,[79] self-government or realization of the individual personality.[80] Moreover, commercial speech is essentially profit motivated.[81]

Courts in India, prior and subsequent to the *Tata* case, have come to acknowledge that an advertisement is a form of speech;[82] however, certain advertisements have no relationship with the essential concept of freedom of speech and as such will receive no protection under Article 19(1)(a).

The question now is when can statements that qualify as commercial speech bear a relationship to the essential concept of freedom of speech? EU jurisprudence on commercial speech is similar and just as under-developed[83] as it is India,[84] ECHR case laws points to the fact that all forms of expression are protected under Article 10,[85] including commercial speech.[86] However, the level of protection accorded would be less than political ideas;[87] and to differentiate commercial and non-commercial elements of speech, the court determines whether there exists a public debate on a particular issue and if the contested speech can contribute significantly to it.[88] Another criterion used in the EU to determine the

[79]*See*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–25 (1989).
[80]Jackson & Jeffries, *supra* note 50; Baker, *supra* note 50.
[81]Redish, supra note 50.
[82]*See generally*, Hamdard Dawakhana v. Union of India AIR 1960 SC 554; Indian Express Newspapers (Bombay) Ltd v. Union of India, AIR 1986 SC 515; Mr. Mahesh Bhatt & Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Telecom Watchdog v. Union Of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[83] G. Quinn, *Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective*, *in*HUMAN RIGHTS: A EUROPEAN PERSPECTIVE (L. Heffernan ed. 1994).
[84]Nishant Kumar Singh, *Should Lawyers be Allowed to Advertise*, 11 STUDENT ADVOC. 67 (1999).
[85]European Convention for the Protection of Human Rights and Fundamental Freedoms art.10, Nov. 4, 1950, E.T.S. 5 (*entered into force* Sept. 3, 1953); Muller v. Switzerland, (1988) 13 E.H.R.R 212, 27.
[86]X and Church of Scientology v. Sweden, App. No. 7805/77, 16 D.R. 68 (1979.)
[87]Colin R. Munro, *Value of Commercial Speech*, 62 CAMBRIDGE L.J. 134 (2003); Markt Intern Verlag GmbH and Klaus Beermann v. Germany, [1989] 12 E.H.R.R. 161.
[88]*See*, Hertel v. Switzerland, [1998] 28 E.H.R.R. 534; J. Krezeminska, *Freedom of Commercial Speech in Europe*, 58 VERLAG DR KOVAC, STUDIEN ZUM VÖLKER- UND EUROPARECHT 292 (2008).

commerciality of speech involves understanding the character of the speech which is determined through the enterprise's objective.[89]

On an examination of various cases that deal with commercial speech in India, it is apparent that the decision in *Hamdard*[90] is still good in law and that there are, in fact, some forms of speech excluded from Article 19(1)(a). Two decisions of the Delhi High Court[91] point to the fact that a purely commercial advertisement which does not bear a relationship with the essential idea of freedom of speech[92] would be ineligible for protection. The Delhi High Court in *Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India and Anr.,*[93] found that commercial speech whose only purpose is to earn profits and further trade cannot receive the protection of article 19(1)(a) unless it claimed and established to be in public interest.[94]

The question of when 'commercial speech' bears a relationship with the essential idea of freedom of speech and expression seems to have been answered by the *Mahesh Bhatt*[95] case as being established in public interest. The difficulty in concluding whether commercial speech contains an aspect of public interest has been highlighted several times in American jurisprudence. In *New York Times co v. Sullivan,*[96] the court granted full protection to paid advertisement because it "*communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.*"[97] Despite the

[89]Demuth v. Switzerland, (2004) 38 E.H.R.R. 20.
[90]*Supra* note 12..
[91] Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Telecom Watchdog v. Union of India, W.P. (C) 8529/2011 and C.M. Appl. 1926 of 2011, decided on 13.7. 2012.
[92]Hamdard Dawakhana v. Union of India, AIR 1960 SC 554 (noting that the essential concept is propagation of ideas-social, political or economic or the furtherance of human literature and thought).
[93] 147 (2008) DLT 561 (discussing the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, impugned for allegedly violating Art 19(1)(a) by placing restrictions on the advertising, surrogate or otherwise, of tobacco products and cigarettes).
[94]*Id.* at ¶ 31.
[95]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561.
[96]376 U.S. 254 (1964).
[97]*Id.* at 266.

existence of a profit motive, in *Central Hudson*[98] the court refused to grant first amendment protection for advertising simply because it links a product to a current public debate.[99] The court defended its decision by drawing out a distinction between "direct comments on public issues" which would receive full protection and speech about public issues "made only in the context of commercial transactions"[100] which would receive an intermediate level of protection. Later, in *Board of Trustees of the State University of New York v. Fox,*[101] the court observed that because a company's commercial statements were not so "inextricabl[y] intertwined with otherwise fully protected speech"[102] it would be regulated under standards for commercial speech.[103]

Moreover, courts in the US as well as well as in India have accepted a subordinate status given to commercial speech without explaining why.[104] In fact, there is some disagreement about whether commercial speech should even be treated differently from other forms of protected speech as long as it is truthful.[105] This public interest test devised by the court lacks theoretical justifications as to why a certain classification of speech is burdened as compared to other forms of protected speech. In *IMS v. Sorrell,*[106] the court found that a regulation by which the sale for marketing purposes of physicians' prescription records without their permission disfavoured marketing speech[107] or speech with a particular content[108] and was thus unconstitutional. Creating a hierarchy of speech within the framework of Article 19(1)(a) with commercial speech or any other form of speech placed on a lower rung or

[98]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557 (1980).
[99]*Id.* at 563.
[100] *Id.* at 563
[101]492 U.S. 469 (1989).
[102] *Id.* (quoting Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988)).
[103]*Id.* at 475.
[104]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561; Robert C. Post, *Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) [hereinafter "Robert Post"].
[105] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572 (2001)
[106]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[107]*Id.* at 2656.
[108] *Id.*

accorded lesser protection seems absurd, especially when Article 19(2) specifically deals with restrictions or regulations on such speech. The most appropriate considerations would have to involve treating all speech as falling within Article 19(1)(a) and devising appropriate regulations within the set-up of Article 19(2).

COMMERCIAL SPEECH: A QUALIFIED RIGHT NONETHELESS

Freedom of speech and expression, like every other right in India, is not exercisable unrestricted. Under the United States constitution, there are no explicitly mentioned restrictions, however, the court has, over the years, come to its own conclusions as to what forms of speech deserve protection from restrictions.[109] As has been noted above, the *Hamdard Dawakhana* case[110] outlines that there are certain forms of speech which deserve the protection of Article 19(1)(a) and restrictions on such speech is based on the degree of value that speech attains. This position has been occasionally endorsed in the United States with the government requiring a lower burden of justification for regulating a certain type of speech, for example, the court has decided that speech that contains adult content,[111] speech which may be harmful to children,[112] speech broadcast on radio and television,[113] even certain forms of employee speech[114] all receive less than full protection. [115]

The courts in the U.S., embracing the 'subordinate position' attributed to commercial speech, have held that this form of speech is "subject to 'modes of regulation that might be impermissible in the realm of non-commercial expression."[116] Speech that enjoys extensive first amendment protection may be subject to content-neutral regulations which are narrowly

[109]*See generally*, Henry Cohen, *Freedom of Speech and Press: Exceptions to the First Amendment*,CONGRESSIONAL RESEARCH SERVICE (July 21, 2014), http://fas.org/sgp/crs/misc/95-815.pdf [hereinafter "Henry Cohen"]; Nishant Kumar Singh, *supra* note 82 (noting that American decisions must be used with caution).
[110]*Supra* note 12.
[111]U.S. v. Playboy, 529 U.S. 803 (2000).
[112]Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).
[113]Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S 367, 388 (1969).
[114] Arnett v. Kenned 416 U.S. 134, 140 (1974).
[115] Henry Cohen, *supra* note 107.
[116]Board of Trustees v. Fox, 492 U.S. 469, 477 (1989).

tailored to serve a significant government interest and leave viable alternative mediums of communication subject to intermediate scrutiny.[117] Moreover, content based restrictions may also be constitutional if they fulfil the test of strict scrutiny, where the government must show that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further that interest."[118]

In India, however, once speech has been deemed to be protected under Article 19(1)(a), the only forms of permissible restrictions are contained under Article 19(2). In light of this compulsion, we look at such restrictions and parallels to a form of intermediate scrutiny developed by the United States Supreme Court.

a.) *Restrictions under Article 19(2)*

Freedom of speech and expression is not an unrestricted right.[119] In *Tata Press,*[120] it was settled that article 19(1)(a) does not exclude commercial speech. The recognition of commercial speech as a fundamental right under article 19(1) makes it a qualified right and the corresponding restrictions that could impede the speech could not be outside the realm of the exceptions laid down in article 19(2).

It has been held that nothing short of a danger to the foundations of the state or a treat to its overthrow could justify a curtailment of the right to freedom of speech and expression.[121] The underlying principle of determining a regulation that is potentially restricting speech is the extent of reasonableness in the law. The limitations under article 19(2) lay down that the freedoms envisaged in Article 19 can be restricted provided that they are[122] based under the authority of law and reasonable.

[117] Henry Cohen, *supra* note 107.
[118] Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); Chaplinsky v.New Hampshire, 315 U.S. 568, 572 (1942).
[119] M.P. JAIN, *supra* note 23.
[120] *Supra* note 8.
[121] Romesh Thapar v. State of Madras, AIR 1950 SC 124.
[122] *Id.*

The Supreme Court, while summarizing the principles of Article 19(1)(a), carved out a string of tests for application of article 19(2):

a. A direct and proximate nexus or a reasonable connection between the restriction imposed and the object sought is to be established.
b. It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on the fundamental rights.
c. Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest.[123]

The Supreme Court, while determining the parameters of adjudging reasonableness of restrictions, emphasised that the purpose of the restriction must be related to the ones mentioned in article 19(2).[124]

The court has found that reasonability cannot have an exact definition and must be construed with respect to each individual case.[125] "Reasonability" enables the court to determine whether the impugned restrictive law is in fact in the interest of the public order, morality, or health. The reasonableness of the restraint would also have to be judged by the magnitude of the evil which it is the purpose of the restraint to curb or to eliminate.[126] There is an absence of a straight-laced definition of reasonableness which makes room for subjectivity, however, the exhaustive set of limitations given in article 19(2) draws a definite framework which is easier to scrutinize.

b.) *Parallels to the Central Hudson Intermediate Scrutiny Test*

[123]Papnasam Labour Union v. Madura Coats Ltd., 1995 SCC (1) 501.
[124]Ramlila Maidan Incident v. Home Secretary, Union of India, 2012 (2) SCALE 682.
[125]State of Madras v. V.G. Row, 1952 S.C.R. 597.
[126]Collector of Customs v. Sampathu Chettty, AIR 1963 SC 316 at ¶ 35.

In *Central Hudson*[127] the United States Supreme Court developed a standard for determining the validity of a regulation on commercial speech using a four part analysis. While it has been interpreted in many ways,[128] it still remains the most dominant test.[129] The test states:

"For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[130]

In terms of false and misleading statements made in a commercial context, the law in India is clear[131] and advertisements which are deceptive, unfair, misleading and untruthful can be regulated under Article 19(2).[132] In the case of *Mahesh Bhatt,*[133] the Supreme Court found that commercial speech could be restricted more easily compared to political or social speech if the government could show substantial justification for doing so. The court held that preventing advertisement of tobacco products was justified because the state had an interest in safekeeping public health after a harmonious reading of Article 19(1)(a) and Article 21.[134] In *Lakshmi Ganesh Films*,[135] the High Court acknowledged that commercial speech ordinarily receives less than the full spectrum of constitutional protection, however any state

[127]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557 (1980).
[128] Matthew Miller, The *First Amendment* and *Legislative Bans of Liquor* and Cigarette Advertisements, 85 COLUM. L. REV. 632, 633-35 (1985); Brian J.Waters, Comment, *ADoctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech,* 27 SETON HALL L. REV. 1626, 1628 (1997).
[129]*See*, Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O'Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 727 (2001) (quoting Madsen v. Women's Health Ctr., 512 U.S. 753, 792 (1994)).
[130]Cent.Hudson Gas & Elec. Corp. v. Pub.Serv. Comm'n, 447 U.S. 557, 566 (1980).
[131] Especially in the form of statutory enactments, see generally The Consumer Protection Act, 1986; Food Safety & Standards Act (FSSA), 2006; The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.
[132]*Supra* note 8.
[133]Mr. Mahesh Bhatt and Kasturi and Sons v. Union of India, 147 (2008) DLT 561.
[134]*Id.* at ¶ 32.
[135] Lakshmi Ganesh Films v. Government of Andhra Pradesh., 2006 (4) ALD 374.

action impacting such a right must be scrutinized to test: *"(a) whether it falls within the permissible area of restriction; (b) whether the restriction is reasonable; and (c) whether there are available less restrictive alternatives that the State ought to have pursued before resorting to the impugned action"*.[136]

c.) *Adapting Strict Scrutiny Standards for Regulation of Commercial Speech*

The variation in the level of protection afforded to commercial speech comes with a corresponding variation in terms of the regulating the restrictions imposed on it. The profit making agenda connected to commercial speech is cited as a primary reason for the step-motherly treatment. However, much expression is engaged in for profit and nevertheless receives full first amendment protection.[137]

The judicial scrutiny which the regulations on speech must satisfy is determined on the basis of the form of speech. In the United States, a comfortable bifurcation in the forms of speech has enabled jurists to afford categorical protection to speech, depending on its form. For commercial speech, an intermediate threshold is applied, which is implemented through the *Central Hudson's* four pronged test while strict constitutional scrutiny is invoked for "fully protected speech".[138] The categorization of the forms of speech has been a subject of immense discord[139] as many jurists vehemently discard the existence of notable differences[140] between the two. While delivering the judgment in *Liquormart*,[141] Justice Thomas was inclined on abolishing the *Central Hudson test* and substantially merging commercial speech with fully protected speech under the First Amendment, subjecting both to a form of strict

[136] *Id.* at¶ 55.
[137] Alex Kozinski& Stuart Banner, *supra* note 34.
[138] Reno v. A.C.L.U., 521 U.S. 844, 868–70 (1997); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[139] Alex Kozinski& Stuart Banner, *supra* note 34.
[140] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[141] Liquormart v. Rhode Island Inc., 517 U.S. 484 (1996).

scrutiny.[142] A strict scrutiny standard that accommodates the context of commercial speech would offer a more coherent approach than Central Hudson's often-criticized[143] multi-pronged test, while retaining the most useful aspects of that standard. Up until *Sorrell,*[144] although the Courts struck down several regulations on commercial speech,[145] they merely sought to determine the scope of the "limited measure of protection."[146]

The demand for a 'heightened scrutiny' in *Sorrell* has triggered the near convergence of commercial speech and core speech.[147] The application of a heightened scrutiny is expectedly going to elevate the position of commercial speech by diluting one of the most fundamental differences that existed between commercial speech and core speech.

The Indian judiciary has only recently attempted developing a normative context to justify its resort to strict judicial scrutiny of laws and is yet to employ it as a standard to regulate restrictions on commercial speech.

THE RELUCTANT CLIMB AGAINST STEP-MOTHERLY TREATMENT:

The Supreme Court of the U.S. in *Virginia State Board of Pharmacy*[148] refused to draw a distinction between publicly '*interesting*' or '*important*' commercial advertising and the '*opposite kind'*,[149] stating that *"advertising, however tasteless and excessive, it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price*."[150] This protection however, was not absolute. The court, while carving a recognition plank for commercial speech, squeezed in a footnote declaring that '*common sense differences'* between commercial speech and non-

[142]STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 2-5 (2d ed. 2014).
[143]Alex Kozinski& Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993).
[144]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[145]Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
[146] Robert Post, *supra* note 102.
[147]Nat Stern and Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171(2012).
[148]Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).
[149]*Id.* at 765.
[150]*Id.*

commercial speech suggest that "a different degree of protection is necessary".[151] In the years following Virginia State Board, the U.S. courts identified two differences between commercial and non-commercial speech. First, commercial speech is supposedly more objective than non-commercial speech because its truth is more easily verifiable. Second, because commercial speech is engaged in for profit, it is claimed to be more durable than non-commercial speech. As a result, it is less susceptible to being chilled by proper regulation.[152] The two differences, till date remain unquestioned and the Courts have not once suggested that they do not justify the lower level of protection granted to commercial speech.

In *Liquormart, Inc. v. Rhode Island,*[153] a divided court, struck down two Rhode Island statutes prohibiting the advertisement liquor prices. The 'special care' review applied by the Supreme Court in *Liquormart*[154] along with the imposition on the government to establish a nexus between the object and the effectiveness of the regulation on commercial speech, demolished the doctrine that had gradually developed over the past fifty years.[155] The vacuum of a judicial compass was felt for a long time to come.[156]

In 2011, the Supreme Court of the U.S. passed a judgment which went largely unnoticed; the impact of which is yet to be realized. In *Sorrell v IMS Health, Inc.*,[157] the Supreme Court by a 6-3 majority, propounded the concept of a *disfavored speaker* in reference to a marketer, while striking down a Vermont statute that was founded upon *viewpoint discrimination.*[158] The statute aimed at limiting the ability of pharmaceutical manufacturers to purchase and use

[151]Kozinski& Banner, *supra* note 34.
[152]*Id.* at 634.
[153]517 U.S. 484 (1996).
[154]*Id.* at 517.
[155] John V. Tait, *Trademark Regulations and the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis*, 67 FORDHAM L. REV. 897, 923 (1998).
[156] Michael W. Field, *On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine*, 2 ROGER WILLIAMS U. L. REV. 57 (1996).
[157]Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011).
[158] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011); Tamara R Piety, *A Necessary Cost Of Freedom? The Incoherence of Sorrell v. IMS*,64 ALA. L. REV. 1 (2012).

for marketing purposes government-collected data[159] regarding the prescribing practices of individual doctors. "*The law on its face*," Justice Kennedy declared, "*burdens disfavored speech by disfavored speakers*"[160] and asserted that the statute *"disfavored marketing, i.e., speech with a particular content,"*[161] and therefore attracted a *"heightened judicial scrutiny".*[162] The judgment delivered in Sorrell, extensively altered the existing law on commercial speech in two ways. First the Court expanded the ambit of protected commercial speech, by striking a law that only objected to the use of data collected under a government mandate. Second, the court held that such regulations are subject to a more heightened scrutiny because it was a content-based and speaker-based regulation of commercial speech,[163] sharply deviating from the standpoint of an intermediate level of scrutiny laid down in *Central Hudson*.

Sorrell presents a deadlock insofar as reaffirmation of the commercial speech doctrine is concerned; and only an application of the "heightened scrutiny" in impending matters will clear the position as to whether the doctrine is withering away in its entirety, or if it's merely a grant of substantial protection[164] under the same doctrine. Regardless, commercial speech stands in a better position today. Owing firstly, to the introduction of heightened scrutiny and secondly, to the strong distaste displayed towards viewpoint discrimination.

Insofar as the evolution of commercial speech within the Indian realm is concerned, the process has been obstinately measured. Projects such as Central Monitoring System (CMS), National Intelligence Grid (Natgrid), Aadhar, Crime and Criminal Tracking Network and Systems (CCTNS), are not governed by any legal framework and procedural safeguards.

[159] *Protecting Commercial Speech and Personal Privacy in the Internet Age: Is the Court Lochnerizing the First Amendment? The Constitution at a Crossroads,* CONSTITUTIONAL ACCOUNTABILITY CENTER, (July 21, 2014), http://www.acslaw.org/CAC%20-%20Protecting%20Commercial%20Speech.pdf.
[160] Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) at 2663.
[161] *Id.* at 2656.
[162] *Id.* at 2657.
[163] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011).
[164] Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?* CATO SUP. CT. REV. 129 (2010).

While they do not entail information exchange for a monetary consideration unlike *Sorrell*, the subject matter of the transaction remains personal data. With the introduction of systems such as assimilation of biometric data and CMS, Indian jurists are compelled to widen the definition of commercial speech. As has been discussed earlier, the decision in *Hamdard Dawakhana* case[165] has not been obliterated in the case of *Tata Press Limited*[166] and the position is yet to be put in order. It is necessary to note that although the concept of viewpoint discrimination and the likes have not found a place in the Indian jurisprudence, there appears to be an inclination to accommodate commercial speech under the same roof as free speech albeit in the garb of public interest and right to receive information.

CONCLUSION

The doctrine of commercial speech evolved from a mere intuition of economic policies to a component of speech that potentially carries ideas of substantial interest. The doctrine has been treated with utmost caution which can be inferred from the dearth of a reasonably clear definition, to a pattern of mighty hesitation in exploring various facets of this form of speech, to granting it a legal status worthy of protection. The fundamental points that were judicially marked as the reasons for lesser protection have continued to subsist only because of the precedence set. The criteria of a transaction being an active or passive carrier of an element which is of public interest or a public debate has gone a long way in categorizing commercial speech, in India. From advertisements to film distribution to compelled disclosure, the question of what constitutes commercial speech is expanding and the reasons to not qualify it as a variant of core speech is diminishing by the day.

The notion of durability and objective verifiability has been discarded as inadequate set of reasons to treat commercial speech differently from core speech. *Sorrell* has opened up a new

[165] *Supra* note 12.
[166] Mahesh Bhatt and Kasturi and Sons v. Union of India,147 (2008) DLT 561.

territory of disclosure of personal information keeping economic interests in mind. Post *Sorrell,* an altered doctrine is inevitable and awaited.

THE PANOPLY OF SOCIO-ECONOMIC RIGHTS: INDIAN AND THE SOUTH-AFRICAN MODEL

- Dr. Uday Shankar[*] & Mr. Saurabh Bindal[*]

ABSTRACT

The discourse on human rights has traditionally been inundated with civil and political rights. In the aftermath of the Second World War, it was thought that the establishment of an orderly state was imperative; to draw a limit on the unfettered powers of the state, countries thought to acknowledge the civil and political rights of an individual as the core of human values, transcending all boundaries. These were acknowledged as negative obligations of the state in the foundational documents of various countries. The Charter of Human Rights which was tabled in 1948 brought autonomy to the fore. However, the realisation that freedom without dignity becomes meaningless, justified the drafting of the International Covenant on Cultural, Social and Economic Rights in 1966. Latterly, socio-economic rights have been visited as the twin sister of civil and political rights.

The freedom movement in India had its genesis in South Africa, as one of the architects of the Indian freedom struggle was inspired by the approach originally adopted in South Africa. Both India and South Africa emerged from similar colonial backgrounds. Thus, the essence of the realization of civil and political freedoms grew on similar lines with both countries, making these freedoms justiciable in the courts of law. Socio-economic rights were also placed in the constitutions of both countries, but their modes of administration differed. Whereas the South African constitution made them justiciable, the Indian Constitution made them non-justiciable.

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This piece endeavours to chalk out the path of justiciablity which the Indian Courts have tried to establish in the recent era of realization of rights. The article examines the approach of the Apex Courts of both jurisdictions in implementing socio-economic rights. 'Reasonableness' and 'Minimum Core' are at the focal point in examining the fulfilment of State obligations in these jurisdictions. The paper suggests a way forward in terms of a symbiotic relationship between the pathways devised by the Supreme Courts of both countries.

INTRODUCTION:

The long fought struggle for the establishment of a just society, establishes a common platform for both the Indian as well as the South African polity. The dimensions of a just society cannot be made merely by illustrating the negative obligations of the state in the foundational charter; the positive obligations, which includesocio-economic interests of the society, also assume great significance. The normative nature of socio-economic rights calls for, amongst others, budgetary concession from the state for buttressing the cause of such rights. Political will and constitutional mandate both play imperative roles in addressing the needs of the socio-economic cluster of rights. They therefore solicit measures which are distributive in nature, rather than corrective. The state should thus be obligated to achieve the minimum core obligations.

The constitution of South Africa makes socio-economic rights justiciable whereas India's constitution makes them non-justiciable.[1] Despite this, the Indian Courts have brought these rights to justice by drawing their content into the leaf of Fundamental Rights. The question which ensues is whether making them justiciable helps in the enforcement of these rights. This question is important for both South Africa and India. From the tides of freedom struggle, both the countries have emptied themselves into the tributaries of struggle for existence. Where the questions of bread, butter and shelter still engulf more than half the population, the respect, protection, promotion and fulfillment of the socio-economic cluster of rights become a state's responsibility. The question whether the enforcement of these rights should be based on the approach of reasonable means or that of minimum core obligations has formed a part of tireless confabulations. India and South Africa stand on the same pedestal and the ladder which connects them to the aspirations and hopes of millions, has a found place in the foundational documents of both the countries. Though the mode of

[1] M Tushnet, *Enforcing Socio-Economic Rights: Lessons from South Africa*, 6 ESR REV. 2 (2005).

realization of the aims has been different, the net result of the placement of these rights in the constitutions of the respective states has been same. The State, in both countries has been kept in check by the Courts for the upliftment of the social order. The remedies enunciated by the Courts have assisted in the realization of the beacon of distributive justice. The fulfillment of justice still lies in the domain of states.

The attainment of socio-economic rights majorly falls under the realm of legislature and the executive, who are entrusted with legitimacy and competency to deal with the ambit of such rights. The next part of this article deals with the role which the judiciary is playing in both India and South Africa to enhance such rights. It can be seen that the judiciary has taken pro-active steps to advance the beat of socio-economic rights. In India, whereas the percussion of minimum core obligation has been taken as a ground for pressing the state to moot in measures for bringing socio-economic parity to the needy; the judicial intervention in South Africa has titled to secure the reasonable dimensions of socio-economic rights.[2]

DEMYSTIFYING THE SCOPE OF SOCIO-ECONOMIC RIGHTS IN INDIA:

Drawing reference from different constitutions of the world, it was the inspiration from the Indian values of compassion for, and well-being of every individual that made the framers of the Indian Constitution confer a significant place to rights relating to autonomy and well-being. The values of the freedom struggle transmuted and provided a fillip to the drafters of the Indian Constitution to envision the inclusion of Fundamental rights and Directive principles of State Policy on which the mammoth structure of the Indian Republic stands today.[3] The Indian Constitution pledges enforceable rights to individuals and groups on the one hand, and on the other hand lays down elaborate guidelines for the State to design

[2] D Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM.RTS.1 (2003).
[3] L Dadwal, *Position of Human Rights: An Indian Profile*, 39 CIV. MIL. L.J. 221, 225 (2003).

policies to make rights worth exercising, by embedding non-enforceable socio-economic rights.[4]

Though traditionally the Principles enlisted in Part IV of the Constitution enumerate socio-economic rights, such enlisting defies the categorization of rights into two parts because some socio-economic rights are placed in the chapter of Fundamental Rights such as the right to form associations and unions,[5] the right to carry on any occupation, trade or business,[6] the right to education[7] and cultural and educational rights.[8] Hence, it can be conveniently asserted that the allocation of rights under Part III and Part IV of the Indian Constitution has not been based upon internationally designed categorization of rights prescribed by the two Covenants on Civil and Political, and Social, Economic and Cultural Rights.

The constitutionalization of human rights in India resulted in the segregation of rights based on justiciability before the court of law. Rights guaranteeing individual freedom have been made justiciable whereas rights ensuring normative freedom have been made non-enforceable due to administrative and practical difficulties in enforcing the latter.[9] The absence of power to enforce social and economic rights is not to offend the prime role of protector and guardian of the constitution. The realization of the directive principles, including social and economic rights, involves factors of budget, human resources, and infrastructure and the like. It is arising out of this fact, that the nature of rights enlisted in the directive principles, requires different mechanisms and institutions for their enforcement. The judiciary has been kept

[4] Part III of the Constitution of India provides for Fundamental Rights and Part IV provides for Directive Principles of State Policy respectively.
[5] INDIA CONST. art.19(1)(c).
[6] INDIA CONST. art. 19(1)(g).
[7] INDIA CONST. art.21-A.
[8] INDIA CONST. arts.29, 30.
[9] CONSTITUENT ASSEMBLY DEBATES VOL. V at 406.

away to arbiter on the matters where the state seeks to formulate policies for the society as a whole in respect of social and economic matters.[10]

In the first two decades after independence, the Supreme Court adopted a conservative approach by treating Directive Principles as being inferior to the judicially enforceable Fundamental Rights.[11] The non-prioritization of social and economic rights and the weak pressure of political necessity marginalized the impetus to bring them into being, even though there has been an increase of unequal social and economic differentials within and across nation-states. Social and economic rights have become optional rather than imperative.[12]

The reluctance of the Apex Court to grant equal status to socio-economic rights as Fundamental Rights got diluted with the assertion made by a Bench of 13 Judges in *Kesavananda Bharati v State of Kerala.*[13] The Court said that"…what was fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual and therefore Fundamental Rights and DPSP [Directive Principles of State Policy] were complementary."[14] Justice Krishna Iyer has eloquently described the jurisprudential development of integrated reading of Fundamental Rights and Directive Principles in *State of Kerala v N M Thomas,*[15] by observing that

> "Kesavananda Bharati has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the Court must wisely read the collective Directive principles of State Policy mentioned in Part IV into individual Fundamental Rights of Part III, neither Part being superior to

[10]*See*, UDAY SHANKAR & DIVYATYAGI, SOCIO-ECONOMIC RIGHTS IN INDIA: DEMOCRACY TAKING ROOTS, LAW AND POLITICS IN AFRICA, ASIA, AND LATIN AMERICA 527-51 (4th ed. 2009).
[11]*See*, State of Madras v.Champakam Dorairajan, AIR 1951 SC 226; *see also,* M H Qureshi v. State of Bihar, AIR 1958 SC 731; *see also, In re* Kerala Education Bill, 1957, AIR 1958 SC 956; *see also*, Jagwant Kaur v. State of Bombay, AIR 1951 Bom. 461; *see also*, Ajaib Singh v. State of Punjab, AIR 1952 Punj. 309; *see also*, Biswambhar v. State of Orissa, AIR 1957 Ori 247.
[12] R Dhavan, *Ambedkar's Prophecy: Poverty of Human Rights in India*, 36 J. INDIA L. INST. 19 (1994).
[13](1973) 4 SCC 225.
[14]*Id* at 879.
[15]AIR 1976 SC 490.

the other! Since the days of Dorairajan, judicial opinion has hesitatingly tilted in favour of Part III but in Kesavananda Bharati, the supplementary theory, treating both Parts as fundamental, gained supremacy."

In the much-acclaimed decision of *Minerva Mills Ltd. v. Union of India,*[16] the Supreme Court has dwelled upon the symbiotic relationship between rights guaranteed under Part III and Part IV. Justice Bhagwati in the aforesaid decision observed that

> "…it is not possible to fit Fundamental Rights and directive principles into distinct and defined categories, but the reality is that Fundamental Rights represent civil and political rights while directive principles embody social and economic rights. Both are clearly part of the broad spectrum of human rights…It is therefore, not correct to say that the Fundamental Rights alone are based on human rights while directive principles fall in some categories other than human rights. The section of human rights embodied in directive principles, are as much as part of human rights as the Fundamental Rights."[17]

The Indian judiciary has been playing a constructive role in infusing dynamic content to Fundamental Rights with the help of the social and economic charter enumerated in the Part IV of the Constitution.[18] The non-justiciable character of Directive Principles could not restrain the judiciary, from employing social and economic values for ensuring dignified existence to individuals, for a very long time. The Court aptly started drawing support from the 'directives' to regulate the state action towards Fundamental Rights. The responsibility of the state towards the realization of rights got impetus with the adoption of the integral

[16]Minerva Mills v. Union of India, AIR 1980 SC 1789.
[17]*Id* at 1844.
[18] ABSKS v. Union of India, AIR 1981 SC 246; *see also*, I R Coelho v. State of Tamil Nadu, (2007) 2 SCC 1; *see also*, Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178.

approach between Fundamental Rights and Directive Principles.[19] The 'reasonableness' of an action in limiting the freedoms guaranteed under Article 19, started being examined in the light of directions entrusted upon the legislature in the chapter of Directive Principles.[20]Since, the early 1980s India's Supreme Court has progressively interpreted the basic socio-economic needs of relatively disempowered groups as integral to the Fundamental 'Right to Life' under Article 21 of the Constitution'.[21]

Later, the Court elevated the socio-economic charter laid down in the 'directives' to being on par with the rights scripted in the Fundamental Rights.[22] This innovative interpretative tool devised by the judiciary has extended beneficial support to many socio-economic rights as part of the right to equality[23]and life.[24] The right to life has been read to include the right to doctor's assistance,[25]the right to emergency medical care as a core component of the right to health,[26] the right to a reasonable accommodation to live in,[27] and the right to shelter,[28] including the necessary infrastructure to live with human dignity.[29] The right to life has been invoked to uplift prostitutes and ensure they live with dignity;[30] it also includes the right to

[19] State of Bihar v. Kameshwar Singh, AIR 1952 SC 252; *see also*, Bijay Cotton Mills v. State of Ajmer, AIR 1955 SC 33; *see also*, UP State Electricity Board v. Hari Shankar Jain, AIR 1979 SC 65; *see also*, Crown Aluminum Works v. The Workmen, AIR 1958 SC 30; *see also*, Express Newspaper Ltd v. Union of India, AIR 1958 SC 578.

[20]Nuserwanji Balsara v. State of Bombay, AIR 1951 SC 318; *see als*o, Kasturi Lal v. State of Jammu and Kashmir, AIR 1980 SC 1992.

[21] Sanjay Ruparelia, *Enacting Socioeconomic Rights: Lessons from India*, Addressing Inequalities - The Heart of the Post-2015 Development Agenda and the Future We Want for All Global Thematic Consultation (Oct, 2012).

[22] Air India Statutory Corporation v. United Labour Union, AIR 1997 SC 645.

[23]Randhir Singh v. Union of India, AIR 1978 SC 1548 (equal pay for equal work).

[24] Centre for Environment and Food Security v. Union of India, (2001) 5 SCC 676; *see also*, Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545; *see also*, Narendra Kumar Chandla v. State of Haryana, (1994) 4 SCC 460, (right to livelihood); *see also*, M H Hoskot v. State of Maharashtra, (1978) 3 SCC 544 (right to legal aid);*see also*, Unnikrishnan at *supra* note 18 (right to education).

[25]Pt. Parmanand Katara v. Union of India, AIR 1989 SC 2039.

[26]Paschim Banga Khet Majdoor Samity v. State of West Bengal, (1996) 4 SCC 37.

[27]Shantisar Builders v. N K Totame, AIR 1990 SC 5151.

[28]Gauri Shankar v. Union of India, (1994) 6 SCC 349; *see also*, Shiv SagarTiwari v. Union of India, (1997) 1 SCC 444; *see also*, Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, (1997) 11 SCC 123.

[29]Chameli Singh v. State of Uttar Pradesh, (1996) 2 SCC 549; *see also*, J P Ravidasv. Nav Yuvak Harijan Uttapam Society Ltd., (1996) 9 SCC 300.

[30]Gaurav Jain v. Union of India, (1997) 8 SCC 114.

reputation,[31] the rights of bonded labourers to be released and rehabilitated,[32] the right to social and economic justice[33] to the extent that welfare programmes have been converted from entitlement to rights,[34] and the right to earn a livelihood.[35]

Judicial interpretation has clearly made considerable advances in the realm of social and economic rights since the first two decades following Independence. This represents a compromise approach to enforceability that can be taken by states, behind which lies the implication that "justiciability" is a fluid notion, and that legal enforcement is not the only way human rights standards can be set and attained.[36] These judicial pronouncements have compelled the policy and law-makers to attend to the cause of socio-economic rights.[37] The judicial contribution to the synthesis and integration of the Fundamental Rights and the Directive Principles has been immense. It has been helping millions of deprived and denied, in realizing their dreams through public interest litigations. On the other hand, the intervention by the Court on a wide range of issues involving socio-economic rights has generated a debate about its competence, and the legitimacy of the judiciary's entry into areas which have for long been perceived as belonging fittingly within the domain of the other organs of the State.[38]

The Indian Supreme Court did not limit itself by reading socio-economic rights under part III of the Constitution. The Court has also transgressed into an arena of policy-making by

[31]State of Bihar v. L K Advani, (2003) 8 SCC 361.
[32]Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.
[33] CESC Limited v. Subhas Chandra Bose, (1992) 1 SCC 441.
[34] PUCL v. Union of India, (2001) 7 SCALE 484 ["PUCL v. UoI"]
[35] Centre for Environment and Food Security v. Union of India, (2011) 5 SCC 676.UOI, *supra* note 24.
[36] Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22:1 AM. U. INT'L L. REV. 35, 58 (2006).
[37]*See*, S. MURLIDHAR, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: AN INDIAN RESPONSE TO THE JUSTICIABILITY DEBATE, IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE 31-32 (Yash Ghai& Jill Cotrell eds. 2004).
[38]*See*, J Cottrell& Y Ghai, *The Role of the Courts in the Protection of Economic, Social and Cultural Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE(2004); *see also*, Rosalind Dixon, *Creating Dialogue about Socio-Economic Rights: Strong vs. Weak Form of Judicial Review Revisited*, (Centre for Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series, NYU School of Law, Working Paper No. 3, 2006).

passing specific orders to the executive.[39] In the case of *PUCL v Union of India*,[40] the Supreme Court demonstrated commitment towards socio-economic rights by interpreting social welfare policies of the government as individuals' entitlement through many interim orders. For instance, States were directed to ensure that all the Public Distribution System shops were reopened and made functional "[t]o see that food [was] provided to the aged, infirm, disabled, destitute women, destitute men, who [were] in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of the family [did] not have sufficient funds to provide food for them,". Thereafter, the States were asked to identify families below poverty line in a time-bound schedule and information was sought on the implementation of various government schemes that were meant to help people cope with the crisis. Subsequently, the Court made a detailed order regarding the policies of the government: 'the benefits available under eight nutrition related schemes of the government were recognized as entitlement, all the state governments were asked to provide cooked mid-day meals for all children in government and government-assisted schools and governments were asked to adopt specific measures for ensuring public awareness and transparency of the programmes.'[41] Thus, it may be concluded that the Court has been instrumental in directing the executive to frame policies on issues of advancement of socio-economic rights.[42]

SOUTH AFRICAN CONSTITUTION AS THE BASTION OF SOCIO-ECONOMIC RIGHTS:

Apartheid in South Africa resulted in the monopolization of resources by few and deprivation of resources for the others. The masses found themselves caught between the questions of

[39]Consumer Education and Research Center v. Union of India, (1995) 3 SCC 42. ["CERC v. UOI"]
[40](2001) 5 SCALE 303.
[41]*Id* at .
[42]Karnika Sawhney (3) v. Union of India, (2007) 15 SCC 637 (eradication of and rehabilitation of beggars); *see also*, Ramakant Rai (3)v. Union of India, (2007) 15 SCC 645 (regulation of sterilization procedures);*see also*, Uday Shankar &Saurabh Bindal, *Right to Environment and Right to Development: A Judicial Conundrum*, 1 Christ U. L. J., 49-62 (2012)

bread, butter and shelter. It was in this scenario that the Bill of Rights was introduced into the Constitution of South Africa. The South African Constitution, 1996 made socio-economic rights justiciable on the same grounds as the civil and political rights.[43] True to the values of the freedom struggle, socio-economic rights were included in the South African Constitution.[44] The first case in South Africa to deal with the content of socio-economic rights was *Soobramoney v. Minister of Health, Kwazulu-Natal,*[45] wherein the constitutional court of South Africa, while drawing the contents of right to health and life held that:

> "…with regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

The Constitutional Court went ahead to state that the Indian jurisprudence on the right to health could be significantly differentiated from the position of Law in South Africa.[46] This case further identifies that the growing panoply of socio-economic rights in India substantially differed from the enunciations of the South African Constitution. The Court further drew a line to limit itself from conquering the realm of the executive or the legislature. In drawing a shroud of reasonability over the aspect of minimum core obligations, the Constitutional Court of South Africa said that "[t]here are also those who need access to housing, food and water, employment opportunities, and social security…The state has to manage its limited resources in order to address all these claims. There will be times when

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[43] S Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool to Challenging Poverty?*, 2 L. DEMOCRACY &DEV. 159 (2002).
[44]CHRISTOPHER MBAZRIA, LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA, A CHOICE BETWEEN CORRECTIVE AND DISTRIBUTIVE JUSTICE 3 (2009); *see also*, S. AFR. CONST. Chapter 2, ("Bill of Rights").
[45]1998 (1) SA 765 (CC). (S.Afr.) at ¶ 11.
[46] 1998 (1) SA 765 (CC). (S.Afr.).

this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

In the case of *Grootboom & Ors. v. Oostenberg Municipality and Ors.,*[47] the Constitutional Court of South Africa, while adjudicating on the right to access to adequate housing said that "socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them." The Constitutional Court, while clearly deviating from the concept of minimum core obligations said that "The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by Section 26 are reasonable." Not to disturb the established position of separation of power, the Court further went ahead to state that "What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers."

[47]2000 (3) BCLR 277 (C). (S.Afr.) at ¶ 24.

In *Ministry of Health v. Treatment Action Campaign*,[48] while adjudicating on the domain of right to health, the Constitutional Court of South Africa said that "The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in Section 1, as the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable."

In*Mazibuko v. City of Johannesburg*,[49] the Constitutional Court of South Africa, while adjudicating on the right to water, rejecting the argument of minimum core approach said that "At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights."

In a recent decision, in the case of *Governing Body of the JumaMusjid Primary School &Ors v. Ahmed Asruff*,[50] while deciding the reach of right to education the Constitutional Court of South Africa made a demarcation between the minimum core and the reasonable obligations

[48] 2002 (5) SA 721 (CC). (S.Afr.) at ¶ 36.
[49] 2010 (3) BCLR 239 (CC).(S.Afr.) at ¶ 58.
[50](2011) ZACC 13.

of the State by stating that "It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."

All the above cited cases shed light on the aspect that though socio-economic rights have attained the status of justiciablity in South Africa, the Constitutional Courts of South Africa have dithered from devising unique measures to pursue the cause of the same. By only judging cases related to socio-economic rights on the touchstone of reasonableness and deviating from the path of minimum core obligations, the South African Courts have tried to maintain a balance of power. Disregard for the minimum core also restricts the essentiality of socio-economic rights.

The next part charters into the determination of establishment of minimum core obligations related to socio-economic rights in India.

INDIA AND THE MINIMUM CORE:

The jurisprudential development about socio-economic rights has progressed from 'recognition' to 'enforcement' with the conceptualization of 'minimum core' developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by state parties to the International Covenant on

Economic, Social and Cultural Rights.[51] According to the Committee "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison de être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take account of resource constraints applying withinthe country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[52]

The Supreme Court of India has been cautious enough to identify obligation of the State to realize socio-economic rights enumerated in the Constitution. For instance, the Court refused to expand the scope of right to education by including all the three levels of education, viz., primary, higher and professional for identifying the obligation of the State. It observed that "… the content and parameters of the right to education: have to be determined. Right to education, understood in the context of Articles 45 and 41 means:(a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes the age of 14 years, his right education is circumscribed by the limits of the economic capacity of the State and its developments."[53]

[51] ECOSOC Resolution 1985/17, 28 May 1985.

[52]UN Committee on Economic, Social and Cultural Rights (CESCR),*General Comment 3, The Nature of States Parties Obligations* (Art. 2, ¶ 1, *of the Covenant*) at ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990)..

[53]Unnikrishnan, *supra* note 18 (explaining the argument of time-lapse to attach enforceability of the right in following words – 'Does not the passage of 44 years – more than four times the period stipulated in Article 45 –

However, identifying the minimum core, in deciding the matter of right to health, the Supreme Court read the right as an integral part of right to life and reminded the State of its constitutional obligation to realize this right.[54] The Court gave detailed directions for making medical facilities available in emergency cases in primary health centres and other hospitals. The Court observed that "… it is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the Constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done."[55] In a matter relating to occupation health hazards and diseases to the workmen employed in asbestos industries, the Court mandated the provision of compulsory health insurance for every worker as enforcement of the worker's fundamental right to health. Along with other directions the Court stated that "the Membrane Filter test, to detect asbestos fiber should be adopted by all the factories or establishments at par with the Metalliferous Mines Regulations, 1961; and Vienna Convention and Rules issued there under."[56]

Recently, the High Court of Delhi was entrusted with deciding the question of whether the Indian government was constitutionally duty-bound to provide free medical treatment to the petitioner, who was suffering from a rare and chronic disease, even though the treatment required was expensive and recurring. The Court held that in its opinion, "no government can wriggle out of its core obligation of ensuring the right of access to health facilities for vulnerable and marginalized section of society, like the petitioner by stating that it cannot afford to provide treatment for rare and chronic diseases." The Court highlighted the significance of core obligation in the realization of the rights. It said that "although

convert the obligation created by the article into an enforceable right?' after which in 2002, Article 21A has been inserted in Part III of the Constitution through Eighty-Sixth Amendment which guarantees right to primary education to every children upto the age of 14 years).

[54]Paschim Banga Khet Mazdoor Samity v. State of West Bengal, AIR 1996 SC 2426.

[55]*Id* at 10.

[56]CERC v. UOI, *supra* note 39 at ¶ 33.

obligations under Article 21 are generally understood to be progressively realizable depending on maximum available resources, yet certain obligations are considered core and non-derogable irrespective of resource constraints. Providing access to essential medicines at affordable prices is one such core obligation."[57]

In the famous right to food petition,[58] the Supreme Court reiterated that the availability of food is an integral part of the right to life under Article 21. In order to ensure the enjoyment of the right to food, the Court converted various government run benefits for poor people to legal entitlements.[59] The orders of the Court could be understood as identification of the core obligation of the State for realization of food. If these obligations could not be complied, it would amount to violation of the right.[60]

Theaforementioned instances indicate the cautious approach taken by the Indian Supreme Court in identifying the minimum core obligations of the State in establishment of the machinery of protection and fulfilment of socio-economic rights. With the international mandate to ascertain establishment of minimum core obligations for the socio-economic cluster of rights, the path traversed by the Indian Supreme Court denotes realization of the essence of these rights.

CONCLUSION:

Discarding the negative language of Fundamental Rights as a constraint on imposing positive obligations upon the State, the Supreme Court of Indiahas employed creative interpretations

[57]Mohd. Ahmed (Minor) v. Union of India, W.P.(C) 7279/2013 (Delhi High Court, Apr. 17, 2014) at ¶ 87

[58] PUCL v. UoI, *supra* note 35 (discussing 'right to food', a massive litigation whose complexity grows every year with 382 affidavits already submitted by the petitioner and respondents, 55 interim applications filed and 44 interim orders issued).

[59]This order focuses on eight food-related schemes: (1) the Public Distribution System (PDS); (2) Antyodaya Anna Yojana (AAY); (3) the National Programme of Nutritional Support to Primary Education, also known as "mid-day meal scheme"; (4) the Integrated Child Development Services (ICDS); (5) Annapurna; (6) the National Old Age Pension Scheme (NOAPS); (7) the National Maternity Benefit Scheme (NMBS); and (8) the National Family Benefit Scheme (NFBS).

[60] The Court was able to specify the minimum quantities of food and nutrition that had to be made available: each child up to the age of six years was to receive 300 calories and 8-10 grams of protein; each adolescent girl 500 calories and 20-25 grams of protein; each malnourished child 600 calories and 16-20 grams of protein.

of constitutional provisions, particularly Directive Principles, to supply content to enumerated rights in the Constitution. Towards the end of last century, the Court has made a phenomenal mark on the development of socio-economic rights by transforming non-justiciable rights such as health, shelter, work, food into justiciable rights.

The approach adopted by the Courts in identifying the minimum core of a right has been a useful yardstick to evaluate the extent of State obligations. The identification of the minimum core further gives clear indication of the possibility of implementation of the resource-based rights and, perhaps, has been playing instrumental role in laying down statutory framework for realization of socio-economic rights in the last one decade.[61] The authors believe that while determining the minimum core obligation of the State, the Court should pay deference to policy measures and the legislative framework put in place in relation to specific socio-economic rights. The authors also are of the view that the accommodative approach of the judiciary will provide much warranted legitimacy to the process of identification of the core obligations, if respect is given to the space provided to the legislature and the executive to work towards the realization of established rights.

The South African approach of 'reasonableness' reflects judicial minimalism in the matter of realization of socio-economic goods which indicates the issue of lack of expertise with the judiciary, priority of policy makers and allocation of budgetary resources. The argument of 'reasonableness' is based upon the idea of inherent limitation of the judiciary to *suo moto* design pathway for implementation of right-based welfare goals.

[61]Mahatma Gandhi National Rural Employment Guarantee Act, 2005 guarantees livelihood security of people in rural areas by guaranteeing one hundred working days of wage-employment in a financial year to a rural household whose adult members volunteers to do manual unskilled works. Food Security Act, 2013 gives right to subsidized food grain to 67 percent of India's 1.2 billion people. It guarantees seventy five percent of rural and 50 percent of the urban population entitled to five kg food grains per month at Rs 3, Rs 2, Re 1 per kg for rice, wheat and coarse grains, respectively. The Right of Children to Free and Compulsory Education Act, 2009, makes the enrollment, attendance and completion of schooling of every child under 14 the obligation of the state.

The ‘minimum core’ and ‘reasonableness’ approaches resemble two concentric rings. The inner circle is the minimum core. The outer circle denotes that of reasonable control, which cannot exist without its core.[62] If judges while formulating a socio-economic minimum core take note of approach of the other two branches of the State, then it would make the realisation of socio-economic rights reality rather than rhetoric.

[62]Ilias Trispiotis, *Socio-Economic Rights: Legally Enforceable Or Just Aspirational?*, OPTICON 1826, Issue 8, Spring 2010 at 1, 8.

DANCE BARS SHUT AGAIN: A CRITICAL EXAMINATION OF THE BAN ON DANCE BARS IN MAHARASHTRA

- *Uday Bedi*[*]

ABSTRACT

The need for a balance between law and morals is inevitable, but the means to achieve the same eludes us. Through this paper, the author seeks to identify the problems with the decision taken by the Maharashtra Government to ban dance bars in the state. This decision was taken to overrule the Apex Court ruling which held that the right to run a dance bar is a fundamental right and no unreasonable restriction can be placed on it. The decision also sheds light on the checks and balances prevalent in the holy trinity.[1]Constitutional law and Administrative Law are two anti-authoritarian branches of law that help in maintaining reasonableness in all governmental actions. However, both these laws propose different understandings of reasonableness and the standards of review therein. As was propounded in the case of *Maneka Gandhi* v. *Union of India*,[2] a golden thread of reasonableness runs through Articles 14, 19 and 21 of the Constitution and any action under review needs to withstand the scrutiny of all three. The article also revisits the meaning of obscenity and morality under the Constitution and identifies the distinction betweensexually explicit representation and sexist representation in order to show that the action of the Maharashtra government is unreasonable.

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[1]BARON DE MONTESQUIEU, ESPIRIT DE LOIS 18, (Britannica Great Books ed., 1952).

[2]AIR 1978 SC 597.

INTRODUCTION

The constant power tussle between the legislature and the courts is not new to this country. Due to the flexible doctrine of separation of powers that India has adopted,[3] one organ of the State often tries to overrule the other while trying to maintain its supremacy in governance. This constant power battle impacts the common man in more ways than one, the most recent example of which is the ban on dance bars that has been reinstated by the Maharashtra Government.[4] In 2005, the Bombay Police Act was amended by the Maharashtra Government prohibiting dance performances in '*permit rooms, beer bars and eating houses'* in the state.[5] The reasons given by the government were that these places were hubs for criminals to meet, for youth to get corrupted and for leading men and women into prostitution.[6] However, hotels with a 3-star rating and above could have continued with such dance performances, thus creating a legal lacuna.[7] As a result of this lacuna, the ban was contested in the High Court of Bombay which struck down the same citing discrimination under Article 14 of the Constitution.[8] The decision of the Bombay High Court was appealed in the Supreme Court, which upheld the Bombay High Court judgment and held that the ban was unconstitutional on the ground that it violated the right to equality by creating an arbitrary distinction between dance bars in permit rooms and dance bars in 5-star and 3-star hotels.It was also held to be an unreasonable restriction on the right to livelihood guaranteed under Articles19 and 21 of the

[3]In Re The Delhi Laws Act, 1912, The Ajmer-Merwara (Extension of Laws) Act, 1947 v. The Part C States (Laws) Act, 1950, (1951) 2 SCR 747 (India).

[4]*Maharashtra Assembly Bans Dance Bars*, HINDUSTAN TIMES,June 13, 2014,http://www.hindustantimes.com/india-news/mumbai/maharashtra-assembly-passes-law-banning-dance-bars/article1-1229218.aspx.

[5]State of Maharashtra v. Indian Hotels and Restaurants Association, (2013) 8 S.C.C. 519 (India) ["Maharashtra v. Indian Hotels"]; Bombay Police Amendment Act of <year>, §§33A, 33B(2005).

[6]Amendment to the Bombay Police Act banning Dance Bars, L.A. Bill, Bill no. LX, http://el.doccentre.info/website/DOCPOST/Legal_Rights/Nov-05/PDF-Nov-05-LR/RE10%20-%20Amendment%20to%20the%20Bombay%20Police%20Act.pdf.

[7]*Maharashtra Cabinet Approves Amendment Bill, Ban On Dance Bars ToStay*, JAGRAN POST(June 13, 2014, 01:38 PM), http://post.jagran.com/maharashtra-cabinet-approves-amendment-bill-ban-on-dance-bars-to-stay-1402646889.

[8]Indian Hotels and Restaurants Association v. State of Bombay, (2006) 3 BomCR 705 (India) ["Indian Hotels v. Bombay"].

Constitution of India.[9] The Court upheld the challenge and revoked the ban stating that banning dance bars for putting an end to obscenity and ensuring women's safety was not a proportionate decision. It stated that"a large number of imaginative alternative steps could be taken instead of completely prohibiting dancing, if the real concern of the state is the safety of women."[10]

In June 2014, the Maharashtra Assembly removed the legal lacuna which prompted the Supreme Court to strike down the ban, by banning dance performances even in 3-star and 5-star hotels. Accordingly, Sections 31 and 32 of the Bombay Police Act have been amended and the Supreme Court's judgment in *State of Maharashtra* v. *Indian Hotels and Restaurants Association*[11] stands overruled. The Maharashtra Cabinet had authorized Ministers in-charge of Excise, Home and Parliamentary Affairs Departments to review the Act and consult group leaders in the state legislature to amend the Act.[12] It is surprising that ministries for Social Justice, Public Health and Family Welfare, and Women and Child Development were not involved in this decision which reflects the ill-informed and hasty decision taken by the Cabinet.

Three major issues emerge from this action of the state government. First, whether the rights of the owners and the performers at these dance bars have been infringed under Article 19 since such bars employ over 65,000 women and 40,000 men.[13] Second, whether dance bars lead to obscenity and are against public interest,the latter judged against the backdrop of the

[9] Maharashtra v. Indian Hotels, *supra* note 3.
[10] *Id.*at 124, ¶ 124.
[11] Maharashtra v. Indian Hotels, *supra* note 3..
[12] *Ban on Dance Bars in Maharashtra ToStay*, BUSINESS STANDARD, June 12, 2014, http://www.business-standard.com/article/politics/ban-on-dance-bars-in-maharashtra-to-stay-114061201216_1.html.
[13] *Maharashtra Bans Bar Dance in 5-stars, Exempts Discos and Orchestras*,(June 12, 2014, 11:11 AM), http://economictimes.indiatimes.com/news/politics-and-nation/maharashtra-bans-bar-dance-in-5-stars-exempts-discos-and-orchestras/articleshow/36474415.cms.

fact that they generate a revenue of Rs. 3000 crore for the government.[14] Third, whether the measure taken by the government is reasonable within the ambit of Article 19.

RIGHTS UNDER ARTICLE 19

Two of the freedoms under Article 19 that are involved in this case are freedom of speech and expression of the performers under Article 19(1)(a) and the right to practice any profession, or to carry on any occupation, trade or business of the performers and the owners under Article 19(1)(g) of the Constitution.

The right under Article 19(1)(a) allows one to freely express one's convictions and opinions in any manner addressed to the eyes or ears.[15] Justice Bhagwati in *Maneka Gandhi v. Union of India*[16] held that the right to paint or sing or dance or to write poetry is also covered by Article 19(1)(a). An expression of creative talent is a part of the freedom of expression.[17] Therefore, there is little debate on the right to dance being a fundamental right as that has not been contested by the State. The Supreme Court had also in its judgment held that the right to open a dance bar and to work in it are both fundamental rights under Article 19(1)(g), and any restriction on this right would have to pass the test of reasonable restriction under article 19(6).[18] According to the apex court, the ban was unreasonable and hence, was struck down. It is worth noting that the Karnataka High court too has recently struck down Rule 11(1) of the Karnataka Excise Licenses (General Conditions) Rules, 1967 which prohibited dancing in bars on the ground that it was gender-discriminatory and an unreasonable restriction on the freedom of speech and expression and livelihood.[19] The Andhra Pradesh High Court has also

[14] *Id.*
[15] Multi Screen Media Pvt.Ltd. v. Vidya Dhar and Ors., 198 (2013) D.L.T. 478, ¶ 1.
[16] AIR 1978 S.C. 597 (India), at 65, ¶698.
[17] Bharat Bhawan Trust v. Bharat Bhawan Artists' Association, (2001) 7 S.C.C. 630, 636 (India).
[18] Indian Hotels v. Bombay, *supra* note 6.
[19] *Reverse Ban on Dancing in Bars, HC Tells State Government*, INDIAN EXPRESS, (July 10, 2014, 08:59 AM), http://www.newindianexpress.com/states/karnataka/Reverse-Ban-on-Dancing-in-Bars-HC-Tells-State-Govt/2014/07/10/article2323287.ece.

held that a total prohibition on dance performances in hotels is unconstitutional.[20] Therefore, the law of the land as it stands is that there exists a fundamental right to open and be employed in a dance bar. TheMaharashtra Government, however, has taken the defense of reasonable restrictions. Having made it clear thatopening a dance bar, working in it and to dance are all fundamental rights guaranteed by the Constitution of India, it is important to discuss the restrictions that can be placed on the exercise of these rights.

OBSCENITY AND PUBLIC INTEREST

This part of the article will throw light on the standard of obscenity that is applied in India and whether the dance bars are indeed obscene in nature.

The right to freedom of speech and expression is subject to decency and moralityunderArticle 19(2) of the Constitution. This has been done to ensure that one person's exercise of rights doesnot interfere with the others'.However,legitimate expression of views or ideas cannot be suppressed on the ground of intolerance of others or the existence of a 'hostile audience'.[21] Obscene has been defined to mean 'offensive to modesty or decency; lewd, filthy and repulsive'.[22] The test of obscenity is thus, a question of degree and varies with the moral standard of the community in question.[23] In *Director General, Directorate General of Doordarshan & Others v. Anand Patwardhan and another,*[24] while judging the obscenity of a film, the court held that obscenity must be judged from an 'average and healthy' point of view.Further, it was also held that when obscenity and art are mixed, in order to protect the work, art must be so preponderant as to throw obscenity into a shadow, or the obscenity to be so trivial and insignificant that it can have no effect and may be overlooked.[25] This test should apply to all forms of art, and hence, it is necessary to look at dance performances from

[20]Big Way Bar and Restaurant v. Commissioner of Police,2003 CrLJ 1360 (India).
[21]Rangarajan S. v. Jagjivan Ram P. (1989) 2 S.C.C. 574 (India) at ¶ 206 ["Rangarajan v. Ram"].
[22]Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881(885) (India) at ¶ 70.
[23]*Id.*
[24]AIR 2005 SC 3346 (India) at4.
[25]*Id* at 6.

the viewpoint of an average audience.It is therefore, submitted that the law is not made from the standpoint of a person who is likely to deviate from the law, but from the perspective of a reasonable man.The question whether the obscenity can overshadow the art in case of dance performances in bars, can be answered only once one understands the difference between free sexual speech and obscene speech.

The grey area between laws and morals has led Indian laws to propagate the latter through the former. However, there needs to be a conscious distinction between sexually explicit representation and sexist representation. While the former should fall under the ambit of free speech which deserves constitutional protection, the latter can be deemed as explicit and indecent/obscene. This distinction has been recognized by Prof. Ratna Kapur, who proposed that sexism involves objectification of women, whereas sexually explicit representation requires the woman to be an active agent in the act.[26] The act of entertainment through dancing in bars is not by itself a sexist activity where all women are objectified. It is, in fact, when the visitors in a bar seek sexual pleasure in such acts of entertainment, that they become sexist. The plight of bar dancers also deserves a mention here. Various employers promote illicit content solely with the motive to gain profits by forcing the dancers,who are mostly underage,to indulge in sexual activities. Therefore, it becomes important to keep a check on such employers instead of banning the act of dancing in bars.

Law-makers with conservative ideologies often tend to indulge in the fallacy of equating sex and sexual representation with obscenity and vulgarity.[27] This is problematic because only negative connotations are attached to any form of sexual speech whereas the Indian society is in dire need of more positive representations of women's sexuality, keeping in mind the

[26]Ratna Kapur, *Sexcapades And The Law*, TOWARDS EQUALITY (SEPT. 2001), http://www.india-seminar.com/2001/505/505%20ratna%20kapur.htm.

[27]*See* Ratna Kapur, *Who Draws the Line? Feminist Reflections on Speech and Censorship*, 31 ECONOMIC AND POLITICAL WEEKLY, (Apr. 20-27, 1996)at 16,17 ["Ratna Kapur"], http://www.jstor.org/discover/10.2307/4404055?uid=3738256&uid=2&uid=4&sid=21104387326183.

social environment. By imposing such a ban, the stereotype of keeping women's sexuality under wraps is reinforced, leading to problems such as lack of awareness and de-recognition of the right of a woman over her body and sexuality. An example of this includes the comments made by various rightist wings claiming that women often provoke men by wearing revealing clothes, which isseen as an 'invitation for rape'.[28]

The reason given by the government in support of its decision is that dance bars are not part of the Indian culture which needs to be protected from the westernization of the society.However, this argument is flawed due to three reasons. First, women who have been active or passive agents in sexually explicit representations are alsopart of the same culture,pointing to the fact that there is no single and defined narrative of Indian culture.Second, Indian culture is replete with examples of promotion of positive sexual expression and erotica such as the Khajurao temple, and works such as Kamasutra and Kalidasa's Sakuntala, which explicitly portrays sexual content. Third, the restrictions mentioned under Article 19(2) to 19(6) of the Constitution of India have no mention of the phrase'culture'and therefore, a restriction on this ground makes it *prima facie* unconstitutional. Even the judgments that do support the argument of safeguarding the cultural heritage of the country, there is no definition of the term 'Indian culture' and therefore it is a term that has been used extremely loosely. The inclusion of culture, which is not a constitutionally recognized restriction under Article 19, will lead to narrowing the scope of the freedom under Article 19 due to the subjectivity in the meaning of the term. As the case of *S. Khusbhoo v. Kannianmal and another*[29] suggests, there is a need for the society to develop a culture of open dialogues about societal issues. Allowing Indian cultureto be an

[28]Desh Kapoor, *Controversial Statements In Delhi GangrapeByWell-Known People*, PATHEOS (Jan. 9, 2013), http://www.patheos.com/blogs/drishtikone/2013/01/controversial-statements-on-delhi-gangrape-by-well-known-people/; Robert MacMillan, *Short Skirts, Bad Stars, Chowmein: Why Men In India Rape Women*, REUTERS (July 1, 2014) http://blogs.reuters.com/india/2014/07/01/short-skirts-bad-stars-and-chow-mein-why-indias-women-get-raped/.

[29]AIR 2010 SC 3196 (India)at ¶ 29.

additional ground will unnecessarily broaden the ambit of the restriction, threatening to curb these essential freedoms on unsubstantiated, rigid perceptions of what culture is, leading to arbitrary decisions by the courts.

Therefore, the argument of the government, seeking to protect Indian culture, is a defective one.Adistinction must be made between ensuring the right of women to be free from sexual harassment and censoring an act to purportedly preserve the culture.[30] To suggest that all dance bars are promoting sexism would be tantamount to forming a generalization.In order to check that obscenity is only trivial and does not interfere with the art, it is important to draft certain guidelines which will keep a check on the dance bars, discussed later in this article.

Coming to the question of 'public interest' which is a ground for restriction under Article 19(6), this industry provides the government with annual revenue of over Rs. 3000 Crore.[31] As has been seen above, this industry alone in Maharashtra employs over one lakh people.It only points to the fact that the industry is flourishing which is in public interest since the government earns revenue from the taxes paid by these establishments and the people employed therein. Admittedly, economic welfare of the community is one of the standards of judging public interest.[32] Therefore, it can be argued that it is the banning of the dance bars which is against public interest, since this will lead to loss of livelihood for the dancers and maybackfire by forcing many into prostitution, something that the government sought to put an end to.

Once again, this defence of the Government tends to point to a single narrative of public interest and morality. This seems to be inspired by the idea that Lord Devlin propounded[33]

[30]Ratna Kapur, s*upra* note 25.
[31]Kiran Tare & Mamta Sen, *Dance Bars A Long Way Off Because Of Government. Reluctance, Money Crunch*, SUNDAY GUARDIAN(July 20, 2013), http://www.sunday-guardian.com/investigation/dance-bars-a-long-way-off-because-of-govt-reluctance-money-crunch.
[32]Municipal Corporation of the City of Ahmedabad & Ors.v. Jan Mohammed Usmanbhai and Anr.,(1986) 3 S.C.C. 20 (India).
[33]PATRICK DEVLIN, ENFORCEMENT OF MORALS (1965).

that morality forms the conscience of the society and that there exists no society without a set of morals or 'community of ideas', as he called it. While this may hold well in a homogeneous society, it certainly does not hold water in a pluralistic society. The Delhi High Court in the *Naz Foundation* case[34] held that public morality is not the correct approach to decide issues of lawandthat one must look at the constitutional morality. Public morality is a diffused concept asit varies from one region to another, one religion to another and even between two different castes within a religion.Therefore, it is hard to perfectly shape public morality and have a precise definition particularly in a multi-cultured, multi-faceted country like India. A rights-based approach is not followed in a public morality argument. On the other hand, constitutional morality is a more concrete concept and can be described in precise words. It has its basis in a written document, the constituent assembly debates and various judgments of the Supreme Court. Even though it is an evolving concept, the interpretations are not as vague as public morality. As Hart would put it, the constitution is a form of secondary rules that are above all other laws, i.e. primary rules.[35] It is the constitution that all the laws must obey as it the highest law in the country. Constitutional morality in this case requires that the freedom of speech and expression and the right to carry on trade are not held hostage to the intolerance of certain sections of the society. Public morality is only a reflection of normative values of a majority of the population which is expressed through the legislature; however, constitutional morality goes a step ahead and fixes the social norms within the social engineering aspect of the constitution.[36] As John Rawls argued, the principles of justice do not give the government either the right or the duty to do what it or a majority wants to do in the question of morals; its duty is limited to underwriting the

[34]Naz Foundationv. Govt. of NCT of Delhi, 2010 Cri LJ 94 (India) ["Naz Foundation"].
[35]H.L.A HART, THE CONCEPT OF LAW 79 (2[d] ed. 1994).
[36]Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-note Of The Naz Foundation Judgement*, 2 NUJS L. Rev. 445 (2009).

conditions of equal morals.[37] Accordingly, a compelling state interest[38] which can rightfully curb fundamental rights must be in the form of constitutional values which are more concrete than mere public morality, as the latter only consists of subjective norms about right and wrong.[39] As has been discussed before, constitutional morality also has room for sexually explicit representation till it remains free of sexism.

Therefore, the burden of proof is on the government to prove that all dance bars promote sexism instead of sexually explicit representation. Until then, the ban is *prima facie* illegal, just like any unreasonable restriction on the freedoms under article 19(1) is*prima facie* unconstitutional.[40]

REASONABLENESS UNDER ARTICLE 19

This part will deal with the constitutional, as well as administrative law understanding of reasonableness. The extent of the meaning of the phrase 'reasonable restrictions' has been widely contested. The expression seeks to strike a balance between the freedoms guaranteed by article 19(1)(a) and the social control permitted by clauses (2) to (6) of Article19.[41] The limitation cannot be arbitrary or excessive.[42] The nature of the right alleged to be infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time[43] should all be considered.[44] A similar test of reasonableness has been defined under administrative law.[45]

[37]JOHN RAWLS, A THEORY OF JUSTICE 212, 213 (2000).
[38]Gobind v. State of Madhya Pradesh (1975) 2 SCC 148 (India) at ¶ 956.
[39]Naz Foundation, *supra*note 32at ¶ 79.
[40]Rangarajan v. Ram, *supra* note 19;Virendra v. State of Punjab, AIR 1957 SC 896 ["Virendra v. Punjab"].
[41]Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118.
[42]PP. Enterprises v. Union of India, AIR 1982 SC 1016.
[43]State of Madras v. VG Row, AIR 1952 SC 196.
[44]Laxmi Khandsari v. State of U.P., AIR 1981 SC 873; Peerless General Finance and Investment Co. Ltd. v. Reserve Bank, AIR 1992 SC 1453.
[45]Theo Barclay, *TheProportionality Test In UK Administrative Law – ANew Ground of Review Or AFading Exception?* THE STUDENT JOURNAL OF LAW, http://www.sjol.co.uk/issue-3/proportionality.

Across common law jurisdictions, various tests of reasonableness have been identified. They include the Wednesbury Principles, Intense Scrutiny Test, Doctrine of Proportionality and Merits Review, where the deference to administrative law is the maximum under Wednesbury Principles and least under Merits Review. To strike down a policy using Wednesbury Principles, the petitioner needs to prove that the policy is so shockingly outrageous that it shocks the conscience of the court and that no sensible person who would apply his mind to the question would come up with that particular policy.[46] The next is the Intense Scrutiny test that requires the court to interfere only where the administrative decision is 'beyond the range of responses open to a reasonable decision-maker'.[47] The Doctrine of Proportionality was discussed in the English case of *R. v Daly*[48] wherein the court explained the doctrine in cogent terms by referring to the judgment of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*.[49] It involves a three step check, i.e. means, end and proportionality. It needs to be checked, whether, 'firstly, the legislative objective is sufficiently important to justify limiting a fundamental right; secondly, the measures designed to meet the legislative objective are rationally connected to it; thirdly, the means used to impair the right or freedom are no more than is necessary to achieve the objective.'[50] The fourth form of judicial review is Merits Review where the court becomes the real decision maker and enters the realm of policy instead of principles. This form of review is not feasible in India because of the doctrine of separation of powers. The Court

[46]*See*, Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1947] 2 All ER 680 (England)at 683.
[47]R v. Ministry of Defence, EX P Smith, [1996] QB 517 (England).
[48](2001) 3 All ER 433 (England).
[49]De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 (England) at ¶80.
[50]Daly v. Secretary of State for the Home Department, [2001] UKHL 26 (England) at ¶27.

cannot go into the merits of the decision taken by the legislature, but can only look at the decision making process as policy making is the exclusive domain of the legislature.[51]

The courts in India are deeply confused about the standard of reviews mentioned above and have often mixed the Wednesbury Principles and Doctrine of Proportionality.[52] The *Om Kumar* decision[53] clearly laid down the distinction between the tests.The case of *Management of Coimbatore District Central Cooperative Bank v. Secretary, Coimbatore District Central Co-operative Bank Employees Association*[54] held that the test in India was different, i.e. a policy should be 'shockingly disproportionate' if the courts have to strike it down. Similarly, the case of *Chairman, All India Railway Recruitment Board v. K. Shyam Kumar*[55] held that proportionality requires the court to determine whether the decision in question is 'well balanced and harmonious' which includes undertaking the 'Merits Review'.[56]

In the United Kingdom, it is well established that when issues of human rights are involved, the courts should apply the proportionality doctrine owing to the importance of such rights. This change was brought by the European Court of Human Rights decision of *Smith and Grady v. United Kingdom*.[57]

Article 19 of the International Covenant on Civil and Political Rights[58] guarantees everyone the right to freedom of speech and expression. Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights[59] recognise the right to work and earn a livelihood as a human right. The same should be kept in mindby the Indian Courts since even the slightest infringement of these rights must be remedied even if the infringement is not

[51]Narayan Iyer, S. v. Union of India AIR 1967 SC 1986 (India) at ¶6,7.
[52]Abhinav Chandrachud, *Wednesbury Reformulated: Proportionality And The Supreme Court of India*, 13 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNALNo. 1 (2013).
[53]Om Kumar v. Union of India, (2001) 2 SCC 386 (India) at ¶ 25-28; *See*, Ashish Chugh, *Is The Supreme Court Disproportionately Applying the Proportionality Principle?*(2004) 8 SCC (JOUR) 33.
[54](2007) 4 SCC 669 at ¶ 15.
[55](2010) 6 SCC 614.
[56]*Id* at ¶ 31.
[57](1999) 29 EHRR 493.
[58] International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (1966).
[59] International Covenant on Economic, Social and Cultural Rights, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 (1966).

shockingly unreasonable. As has been seen above, the right to earn a livelihood and the freedom of expression are both important economic and civil human rights respectively, and therefore the proportionality doctrine must be applied in this case. However, in another House of Lords decision[60] where a person, who was denied the right to open a sex shop where various accessories were sold, challenged the policy on the grounds that it was a disproportionatedecision and claimed violation of his human rights, the court held that there are far more important human rights in the world than the right to sell pornographic literature.[61] Thus, the court did not go into the doctrine of proportionality and consequently, declined to strike down the decision of the city council, impliedly holding that the decision was not a 'shockingly outrageous one' and did not satisfy the test of unreasonableness under the Wednesbury Principles.

A similar argument can be put forwardto say that the right to run a dance bar and work in it are not 'very important human rights.' However, what must be kept in mind is that the socio-economic conditions in India are very different from that of the United Kingdom. Further, the impact on the performers in dance barswho have been affected by this decision of the Maharashtra Government is extremely grave since this renders them virtually unemployable in any other job, owing to the lack of a formal education or training, as noted by the Supreme Court.The right to earn a livelihood is also part of the right to life under Article 21 of the Constitution, as has been held by the case of *Olga Tellis*.[62] The meaning of life is something more than mere animal existence;[63] it involves the right to live with dignity which necessitates working to earn a living. Therefore, the ban not only restricts the right to open a dance bar, but infringes on other basic rights of a human being.

Accordingly, it is necessary to see whether this policy of the Maharashtra Government

[60]Belfast City Council v. Miss Beheavin, (2007) UKHL 19 (England) .
[61]*Id* at ¶ 38.
[62]Olga Tellis & Ors.v.Bombay Municipal Corporation, AIR 1986 SC 180 (India).
[63]Francis Coralie Mullin v.The Administrator, Union Territory of Delhi, AIR 1981 SC 746 (India).

satisfies the test of proportionality. The legislative objective behind the Act was to ensure safety of women and putting an end to forced prostitution. These are very serious issues which can be allowed to limit the fundamental rights, since under Article 19(6), public interest is a major ground for curtailing rights mentioned in Article 19(1). However, it needs to be examined whether shutting down of dance bars is *no more than necessary* to achieve the objective. For instance, roads cannot be closed because road accidents are a leading cause of deaths. Similarly, films cannot be banned merely because they contain obscene material. There are various other checks that have been placed to ensure the interest of the public. A speed limit is prescribed beyond which a fine is imposed, proper traffic rules are drafted, and driving tests are conducted, etc. to ensure safety of the people on the roads. Films with obscene material are censored, or disclaimers are issued, like those which appear when a scene depicting smoking is screened. Similarly, a blanket ban on dance bars is not the solution to the problem at hand. One of the ways to gauge the feasibility of the action of the Maharashtra government is to look at other means that could be useful in achieving the same objective.[64]

The following measures are suggested which can be put in placeto ensure that the objective is met:

1. Security should be stepped up inside the bar to keep a check on the behaviour of the dancers and the visitors.
2. CCTV cameras can be installed which can help in centrally monitoring the activities of the bars, including keeping a check on the criminals since the Government claims that

[64] Maharashtra v. Indian Hotels, *supra* note 3 at ¶ 116.

dance bars have become a crime hub. This guideline has been introduced by the Karnataka State Government.[65]

3. A minimum age limit of twenty one should be prescribed below which no person shall be allowed to enter the bar. Every visitor must be provided with an identification card at the entry gate. Any person found violating any rules or code of conduct can then easily be traced and penalised.
4. No girl below the age of eighteen should be employed in adance bar.
5. The Police should conduct surprise checks as well as annual checks to ensure that all the safety and security guidelines are being followed, the reports of which can be sent to a committee consisting of three or more panellists comprising advocates/senior police officials/ex-judges to judge the compliance. This would act as a supervisory body to ensure that dance bars are in compliance with the guidelines.
6. The government should provide the owner of the bar with a permit/license to carry on the business, which should be revocable in nature, based on the reports of the checks conducted. The granting of license to start a dance bar is prevalent in the state of West Bengal.[66]
7. Heavy fines should be imposed on those barswhich violate the norms. In addition, any dance bar which violates the norms more than five times should be shut down permanently.
8. The owner of any dance bar promoting prostitution should be penalised with imprisonment. This will act as a deterrent to curb illicit acts.

[65]*Bars and Restaurants Given Green Signal To Recall Women Waiters*THE HINDU, JULY 10, 2013, http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/bars-and-restaurants-given-green-signal-to-recall-women-waiters/article4900198.ece

[66]West Bengal Excise (Foreign Liquor) Rules, 1998, Department Notification Number 364-Ex (July 23, 1998) http://www.wbexcise.gov.in/writereaddata/10380001.pdf

9. Striptease and erotic dancing should be prohibited. The dance bars where such activities are undertaken must be penalised. This has also been introduced recently by the Karnataka State government by stipulating a proper dress code inside thebar.[67]

It is also important to note that the nature of business should be an important element in determining whether a reasonable restriction can be in the form of a total prohibition.[68] It has been held by the Supreme Court that in the case of trafficking in women,[69] dangerous and noxious trades, such as production of or trading in liquor[70] or occupation of a tout,[71] it would be a reasonable restriction to prohibit the occupation, trade or business altogether. The above authorities cannot, however, be used to defend the blanket ban as these cases talk strictly about those trades which have been set up for the purpose of illicit activities. It has also been stated by the courts that greater the restriction, the more the need for greater scrutiny by the courts.[72] At the same time, a total prohibition imposed upon the freedom of speech and expression would be *prima facie* unconstitutional.[73] Dance bars and other dance performances in hotels are for the purpose of entertainment, and it has been noted that the bar girls are usually significantly clothed.[74] The observers and dancers are not allowed to touch each other.[75] The dance bars, thus, are to be distinguished from places where flesh trade or trafficking in women is done. The state government seems to be pushing its moral agenda rather than maintaining law and order in the state by imposing such a ban. In addition, due to

[67]*Supra* note 63.
[68]Secretary to Govt, Tamilnadu and Anr.v. K. Vinayagamurthy, 2002 (1) Suppl. S.C.R. 683 (India); DD BASU, SHORTER CONSTITUTION OF INDIA, 268 (14th ed., 2011).
[69]Narendra v. Union of India, AIR 1960 SC 430 ["Narendra v. UoI"]; Cooverjee B. Bharucha v. Excise Commissioner, AIR 1954 SC 220.
[70]Narendra v. UoI, *supra* note 67; Synthetics and Chemicals Ltd. v. State of U.P., AIR 1990 SC 1927.
[71]In Re: Sant Ram,AIR 1960 SC 932 (935) (India).
[72]Narendra v. UoI, *supra* note 67.
[73]Virendra v. Punjab, *supra* note 38..
[74]*Dance Bars Outlawed In Mumbai*, THE SCOTSMAN (June 14, 2005) http://www.scotsman.com/news/world/dance-bars-outlawed-in-mumbai-1-707710.
[75]Paul Watson, *Prostitution Beckons India's Former Bar Girls*, LOS ANGELES TIMES(March 26, 2005) http://www.sfgate.com/news/article/Prostitution-beckons-India-s-former-bar-girls-2501037.php

this ban, dance bars have been equated to workplaces where trafficking of women is rampant. This comparison is demeaning to the owners as well as the performers.

In *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*[76] it was held that ”the standard for judging reasonability of restriction or restrictions which amounts to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate.”[77] In the light of the aforementioned measures, it is clear that there are a lot of measures by which control can be imposed on the dance bars and a blanket ban is in no way a proportionate measure, hence liable to be struck down.

Further, there is a clear lack of a rational nexus between the decision of the government and the objective that is sought to be achieved. Women’s security or safety cannot be guaranteed by taking away their source of livelihood. It further degrades the quality of living that they would otherwise enjoy. It is disappointing that the focus of the government is not in controlling the offenders but restricting the source of employment for lakhs of women. The argument that closing down of dance bars isa solution to the problem of such bars acting as hubs for criminals to meet is a far-fetched one.Since none of the objectives of the state government are being met through this decision, it necessarily fails on the ground of reasonableness.

CONCLUSION

It is the opinion of the author that the decision of the Maharashtra government needs to be challenged in the court on the aforementioned grounds. The government seems to have acted in a rash manner without considering the available alternatives, enforcing a self-created moral agenda instead of maintaining reasonableness in government action.The intolerance of the government authorities should not be translated to form the legislative mandate, enforcing an otherwise unreasonable ban on dance bars. A blanket ban will further add to the plight of the

[76](2005) 8 SCC 534.
[77]*Id.* at ¶ 33.

bar dancers who will be rendered unemployed and will be pushed into poverty and destitution.Some of the suggestions given in Part II of the article are measures by which the State can balance the interests of the people employed in the dance bars, rights of the owners of the dance bars, as well as prevent criminals from making the bars their hubs for hatching conspiracies.

Good governance can be ensured with the system of checks and balances among the organs of the state,working towards upholding the rule of law, an essential part of which is judicial review.[78] In an event as this, when the object of ensuring the safety of women remains unfulfilled by an unreasonable legislation, the appropriate solution lies in the judicial review of the same. It is hoped that this legislation is challenged and the judiciary intervenes, restores the fundamental freedoms which have been taken away, pointing out the glaring lack of reason in the measure. In addition to protecting the sanctity of Fundamental Rights from whimsical state action, this will set a precedent of enforcing constitutional morality over vague concepts of Indian culture and public morality.

It is also important to note that the judiciary has, on certain occasions, filled the lacuna created by the Legislature.It is only through the courts that the rule of law unfolds its contents and establishes its concept. Therefore, it is suggested that the Court in addition to striking down the decision of the Maharashtra Government, should also lay down guidelines for operating dance bars and ensure that states act in strict conformity with the same.

[78]State of Bihar v. Subhash Singh, (1997) 4 S.C.C. 430, ¶ 3.