A Legal Study of Misleading Advertisements in India with Special Reference to Consumers' Interests

THESIS

SUBMITTED TO THE
BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY
LUCKNOW

FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

SUPERVISOR
PROF. S.K. BHATNAGAR
DEPARTMENT OF HUMAN RIGHTS

SUBMITTED BY
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ENROLLMENT NO.- 764/12

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BABASAHEB BHIMRAO AMBEDKAR UNIVERSITY
(A CENTRAL UNIVERSITY)
VIDYA VIHAR, RAEBARELI ROAD
LUCKNOW-226025

2020

Dedicated to

My Beloved Parents

बाबासाहेब भीमराव अम्बेडकर विश्वविद्यालय
(केन्द्रीय विश्वविद्यालय)
विद्या विहार, रायबरेली रोड, लखनऊ–226025
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DECLARATION

I, **Satyendra Kumar Maurya,** hereby declare that this research work embodied in this Ph.D. thesis titled **'A Legal Study of Misleading Advertisements in India with Special Reference to Consumers' Interests'** has been carried out by me under the supervision of **Prof. S.K. Bhatnagar (Retd.),** Department of Human Rights, School of Legal Studies, Babasaheb Bhimrao Ambedkar University (A Central University) Lucknow, 226025.

This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in this or any other university.

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CERTIFICATE

This is to certify that the thesis titled **'A Legal Study of Misleading Advertisements in India with Special Reference to Consumers' Interests'** submitted by **Mr. Satyendra Kumar Maurya** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

This thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the *Doctor of Philosophy (Ph.D.) regulations, 1999 as amended in 2013* and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy of the University.

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Satyendra Kumar Maurya

PREFACE

Advertising is a tool which can be used for both bad and good reasons. On the one hand, if there is a lot of criticism of advertising, it also has certain advantages. Advertising is multi-dimensional. It is a form of mass communication, a powerful marketing tool, a component of the economic system, a means of financing the media, a social institution, an art form, an instrument of corporate management, a field of employment and profession. Advertising is the cornerstone of the Indian economic system, since low prices for consumers depend on mass production, mass production on sales and sales on advertising. Hence, Henderson Brit rightly quotes: “Doing business without advertising is like winking at a girl in the dark, you know what you are doing, but nobody else does”.

The objective of this thesis is not to present the dark shades of the advertising alone but, to present a holistic picture of the impact of advertising on society in general and consumers on particular. The advantages of advertising also constitute a long list. Advertising is multidimensional. It is a form of mass communication and provides communication between someone with something to sell and someone who needs something. Being having enormous power of persuasion, it has become indispensable for business enterprises of every size and service providers. Manufactures or service providers with higher advertising expenditure tend to dominate in their respective categories. Advertising facilitates the turning of products into brands and brands, in turn, build a company’s image. For consumers, one may say that advertising is a blessing. It helps them in getting all necessary information about goods and services and thereby saves the “search cost” of products which consumer needs for their personal use. It stimulates products, income and employment and thereby raises the standards of modern civilization. To sum up, it can be said that the present world is moving in the vehicle of advertisement.

In India, commercial advertising is a fundamental right protected under Article 19(l)(a) of the Constitution. While it is necessary to maintain and preserve the freedom of commercial speech in a democracy, it is also equally necessary to place some curbs on this freedom for the maintenance of social order. Law has to perform two fold roles in respect of advertising. *First,* it has to promote commercial advertising within the permissible limits; and *secondly,* it should discourage advertisements which are prejudicial to public interests and adversely affect the consumer. That is precisely what all legal systems must seek to address. Several countries starting from authoritarian to democratic have enacted comprehensive laws that govern and control advertising. Advertising law in our country is spread through a number of legislations and judicial decisions. These legislations reveal that there is a lack of an integrated and holistic approach to advertising and instead of directly focusing on commercial advertisements as a whole they reflect a piecemeal, segmented or object oriented approach in the matter of regulation of advertising. Further, none of the existing laws particularly addresses the issues of internet advertising. The absence of a single statutory regulatory body further aggravates the problem.

Before the notification of the Competition Act, 2002, commercial advertising in India was regulated by the MRTP Act, 1969. The MRTP Commission before dissolution had decided a large number of complaints based on false and misleading advertisement and other forms of unfair trade practices and in the process had developed and enriched the jurisprudence of unfair trade practice including false and misleading advertisements in our country. Though the Consumer Protection Act, 1986 provides a better forum for redressal of consumer grievances against false or misleading advertisement and other unfair trade practices, one should not take it for granted that everything is passable with the Act. The Act still suffers from a number of limitations and gaps which has been filled after the coming into force The Consumer Protection Act, 2019.

In this context, this thesis on the topic "*A Legal Study of Misleading Advertisements in India with Special Reference to Consumers' Interests*" is of great importance. The researcher selected a current issue for discussion that affects the lives of each of us. The present work is scholarly and readable. It contains discussions on all major issues related to the Commercial Advertisements. The work deals with the decisions of various judicial and quasi-judicial bodies as well as with the remedial measures that can be taken against unethical, false and misleading advertising. The discussion about the Consumer Protection Act of 2019 gives the thesis considerable added value. The work preoccupies the reader by providing details on this topic in a clear and easily understandable manner. It is certainly a good reading material for readers and policy makers. I recommend the work to academics and policy makers.

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LIST OF ABBREVIATIONS

AAAA : American Association of Advertising Agencies

AAF : American Advertising Federation

ABA : American Bar Association

Ads : Advertisements

AIEI : Association of Indian Engineering Industry

AIR : All India Reporter/All India Radio

All ER : All England Reporters

CONTENT

ANA : Association of National Advertisers

Anr. : Another

ASA : Advertising Standards Authority

ASCI : Advertising Standards Council of India

ATM : Automatic Teller Machine

BDA : Bhopal Development Authority

BDS : Bachelor in Dental Surgery

BIS : Bureau of Indian Standards

CAP : Code of Advertising Practice

CARU : Children's Advertising Review Unit

CBBB : Council of Better Business Bureaus

CCC : Consumer Complaints Council

CCC : Consumer Complaints Council

CDRA : Consumer Dispute Redressal Agencies

CFBP : Council for Fair Business Practices

CIFTI : Confederation of Indian Foods Trade and Industry

Cms. : Centimeters

Co. : Company

Corpn. : Corporation

CP Act/CPA : Consumer Protection Act

CPJ : Consumer Protection Judgments

CRISIL : Credit Rating Information Services of India Limited

CrLJ : Criminal Law Journal

CTJ	:	Consumer Protection and Trade Practices Journal
CULR	:	Cochin University Law Review
Dept.	:	Department
DMR	:	Drugs and Magic Remedies
DOCA	:	Department of Consumer Affairs
Edn.	:	Edition
FERA	:	Foreign Exchange Regulation Act
FICCI	:	Federation of Indian Chambers of Commerce and Industry
FIR	:	First Information Report
FSSAI	:	Food Safety and Standard Authority of India
FTC	:	Federal Trade Commission
FTPA	:	Fair Trade Practices Association
GAMA	:	Grievances Against Misleading Advertisements
GDA	:	Gwalior Development Authority
gm.	:	Gram
Govt	:	Government
Harv. L. R.	:	Harvard Law Review
HMC	:	Hydro Micro Circuits
Hrs.	:	Hours
I&B	:	Information and Broadcasting
IAA	:	International Advertising Association
IAE	:	International Applied Engineering
IAMAI	:	Internet and Mobile Association of India
IAP	:	Indian Association of Physiotherapists
IIM	:	Indian Institute of Management
IMRB	:	Indian Market Research Bureau
IPC	:	Indian Penal Code
JARO :		Japanese Advertising Review Organisation
JFTC	:	Japanese Free Trade Commission
Kant.	:	Karnataka
Kg.	:	Kilogram
LIC	:	Life Insurance Corporation

LPG	:	Liquid Petroleum Gas
Ltd.	:	Limited
M. Tech	:	Master of Technology
MIB	:	Ministry of Information Broadcasting
MRTP	:	Monopolies and Restrictive Trade Practices
MRTP	:	Monopoly and Restrictive Trade Practices
NAD	:	National Advertising Division
NARB	:	National Advertising Review Board
NB	:	National Bureau
NBBB	:	National Better Business Bureau
NC	:	National Commission
NCW	:	National Commission for Women
N Y	:	New York
OFT	:	Office of Fair Trading
P.	:	Private
PABI	:	Project Appraiser Board of India
PCI	:	Press Council of India
Pls.	:	Plus
PVC	:	Poly Vinyl Chloride
QB	:	Queens Bench
RMP	:	Rural Medical Practitioner
Rs.	:	Rupees
SBI	:	State Bank of India
SC	:	Supreme Court
SCC	:	Supreme Court Cases
SCDRC	:	State Consumer Dispute Redressal Commission
Sec.	:	Section
TISCO	:	Tata Iron and Steel Company
TN	:	Tamil Nadu
TV	:	Television
UN	:	United Nations
UNESCO	:	United Nations Educational, Scientific and Cultural Organization

UNICEF	:	United Nations International Children's Emergency Fund
USA	:	United States of America
w.e.f.	:	With effect from
WHO	:	World Health Organization
YoY	:	Year over year

CHAPTER-I

INTRODUCTION

CHAPTER- I
INTRODUCTION

"*Advertising is essentially a thing to induce consumption to make people buy thing they do not want*"[1].

-Pt. Jawaharlal Nehru.

1.1 INTRODUCTION

Advertising is a form of communication that is used to convey the target group of a company on its existing and future products. Advertising is used to encourage the public to use the Products and services by ensuring that the products/services are relevant. They would give the client a social, economic, or psychological advantage over those who do not use these products/services. Communication can either be traditional, media or contemporary media. Traditional/mass media include newspapers, television, advertising in cinemas, magazines, radio jingles and contemporary/new media includes delivery of messages through blogging and advertising for web series (on platforms like YouTube), emails and more recently the use of platforms like Whatsapp, Business etc.[2]

Advertising is used to project a specific image of the company/product into the minds of customers.[3] Companies spend a large chunk of their money on advertising (online and offline) when creating their annual budget. The customer often bears the brunt of the company's exquisite advertising budgets, as the costs are passed on directly to the customer. In a country of a billion plus people, it is very difficult to reach different sections of society without proper advertising. However, advertising becomes superfluous if the product is over

[1] Robin Jeffrey, India's Newspaper Revolution: Capitalism, Politics and the Indian-Language 55 (Oxford University Press, New Delhi, 2000).

[2] Shubhank Khare, "Protection of Consumers with Reference To Misleading Advertisement In India: A Critical Analysis" VOL. 4 ISSUE 2 IJLDAI 352-353 (March 2018).

[3] Advertisement Laws of India–it's time for a uniform legislation, available at: http://legalonline.blogspot.in/2011/04/advertisement-laws-of-india-its-time.html, (Visited on August 29, 2018).

the top and the brand hopes that the product will sell based on lavish advertising or based on the celebrity star power that advertises the product. This study provides an overview of the concept of 'misleading advertising' from a legal perspective and the related laws and their effects on Indian consumers. Existing and possible solutions are also discussed in order to overcome it.[4]

Misleading advertisement is advertising that is actually incorrect or deceptive in the transmission of product information. Misleading advertisement can also be used to determine whether advertising through product components or through product slogans such as 'Boost is the secret of our energy' is misleading. So this is something that is misleading advertisement other than labeling and has a very ambiguous tone because it lacks the facts. The problem with such advertising is that the consequences can only be felt after the purchase of the product. Advertisement can be misleading if it contains false factual statements, hides or omits important facts, contains a promise or implies to do something without the intention of doing it, or gives the wrong impression, even if all of this can be stated literally be true. They also affect consumer economic behavior and can damage an advertiser's product from a competitor.

Misleading ads have a negative impact on society and directly or indirectly disrupt any member of their ecosystem. This leads consumers to imagine a fantasy when reality is completely different. Here the negative effects have to be discussed in detail. Misleading ads can be divided into three main approaches fraudulent, false and misleading. Fraudulent means that the advertiser distorts the facts and projects the product as something that it is not. Falsehood can mean that the advertiser lies based on parameters such as price, quantity and availability. Misleading means media deception focuses on the belief of a consumer. The misleading nature obliges advertisers to heed the

[4] *Supra* note 2 at 354.

false beliefs of consumers about exposure to advertising. Misleading is about the distortion of facts.

The State has a legitimate compelling interest to regulate the advertising sector. Critics of state intervention however, either oppose such interventions in the advertisement sector or argue for the minimalist role of the state in the field of advertising on the following grounds:

(i) Operation of market forces and

(ii) Comparative advantages of self-regulatory measures than government regulation.

Government regulation of advertising has to be within the Constitutional framework. Meaning thereby it should not be inconsistent with Fundamental Rights of manufacturers, producers, distributors, dealers and service providers on the one hand and the consumers' right to receive information about the products and services on the other. It is worthy to mention here that commercial advertisement as a form of speech and expression is protected under the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Indian Constitution. Article 19(1) (g), which guarantees freedom to practice any profession, or to carry on any occupation, trade or business, also protects and safeguards against the imposition of unreasonable restraints on the exercise of the right to advertise and this right can only be restricted on the grounds specified, in Article 19(6) i.e. in the interest of general public Although the commercial advertisement is protected under Article 19(1) (a), it can be restricted on the grounds of public order, decency and morality etc. under Article 19(2) of the Indian Constitution.

Advertising law in our country is spread through a number of legislation, judicial decisions, orders of quasi-judicial bodies like Monopolies and Restrictive Trade Practices Commission and the Consumer Forum and Codes made by the Government and non-government agencies. The existence of a wide array of legislation on advertising reveals a segmented rather than an integrated or holistic approach towards the regulation of advertising. Most of these legislations prohibit obscene or indecent advertising and aim to protect the young minds from the harmful effects of unfair and unethical commercial advertising. To mention few of them: the Indian Penal Code, 1860, the Indecent Representation of Women (Prohibition) Act, 1986 and the Young Persons (Harmful Publication) Act, 1956 etc.

Some legislation regulates advertisements of prohibited drugs and magic remedies, cigarettes and other tobacco products and liquor etc. Interestingly, provisions of these legislations are applicable to commercial as well as non-commercial advertisements and impose criminal liability on the violators. These legislation are: the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the Cable Television Networks (Regulation) Act, 1995, the Drugs and Cosmetics Act, 1940, and the Food Safety and Standards Act, 2006 etc.

The advertisements promoting prize competitions and prize chits and money circulation schemes are prohibited under the Prize Competition Act, 1955and the Prize Chits and Money Circulation Schemes (Banning) Act, 1978respectively The Emblems and Names (Prevention of Improper Use) Act, 1950 prohibits the use of emblems and names specified in the schedule under this Act for the purpose of trade, business etc. The Transplantation of Human Organs Act, 1994 prohibits advertisements relating to commercial dealings in human organs. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 prohibits the advertisements of pre-natal diagnostic techniques for detection or determination of sex. Some legislation relate to advertisements involving intellectual property rights such as the Trade Marks Act, 1999 and the Copyright Act, 1957 etc. Although the ‘brothel advertising’ is not common in India, a new trend has emerged in the form of advertisement column named ‘Health and Physical Fitness’ and ‘Friendship Club’ published in newspapers especially designed for the advertisement of homosexual brothels. Provisions of Indian Penal Code and the Immoral Traffic (Prevention) Act, 1956 are relevant legislation in this regard. While the former punishes homosexuality the latter punishes the act of seducing or soliciting for the purpose of prostitution.

As the society advanced, newer technologies also came to dominate and with this, application and use of these technologies took place in almost all the spheres. In such a situation it is certain that media has to play a greater role which it actually does now a days. The print and electronic media spare some of their valuable times and space for advertising the product. Now, it has also become a fashion to go for advertising all aspects involving the people. Starting from entertainment, products, achievements and sporting events have become a regular feature of the both print and electronic media. The entry of corporate houses and even celebrities in sponsoring some programmes and events which are highlighted in the media circles have been able to arose interest and enthusiasm in public minds. Thus, the advertisement and media are playing a major role in the present day. Turning to internet or online advertising, in coming three years India could have the second largest population of internet users, according to a report by the Internet and Mobile Association of India.[5] The Report claims that the number of online users will rise to more than half a billion by 2018. Internet is increasingly become a part of media mix for advertisers, as they realize its high potential in reach and penetration. According to a recent Report by the Association, digital advertising and classifieds are predicted to grow at 25% by 2018.[6] To regulate online advertising, we have only the Information Technology Act, 2000, which prohibits only the publishing of information which is obscene in electronic form and leaves other aspects uncovered and unregulated.

[5]Available at: http://www.ndtv.com/india-news/over-500-million-internet-users-in-india-by-2020- report., (Visited on 09/12/2019).

[6]Alpesh Shah and Nimisha Jain, et.al.,India@Digital.Bharat 12(The Boston Consulting Group and internet and Mobile Association of India, Mumbai, 2015).

The other legislation controlling advertisements are the Representation of the Peoples Act, 1951, which prohibits the act of displaying to the public any election matter during the period of forty-eight hours ending with the hour fixed for conclusion of the poll, the Companies Act, 1956 which carries provisions regarding the advertisements relating to the statement showing the financial position of the company and the Advocate Act, 1961 which prohibits lawyers from advertising their services or soliciting clients.

Before the notification of the Competition Act, 2002, commercial advertising in India was regulated by the MRTP Act, 1969. Sections 36(A) to 36(E) of the Act regulated the certain categories of Unfair Trade Practices such as false and misleading advertising, bargain, sale, 'bait and switch' selling, offering of gifts or prizes with the intention of not providing them and promotional contests and non-compliance of prescribed standards etc. In order to protect the interests of the consumers, the MRTP Commission has provided compensation, passed 'cease and desist' order and issued injunctions in a large number of cases and in the process has developed and enriched the jurisprudence of unfair trade practice including false and misleading advertisements in our country.[7]

The Consumer Protection Act, 1986, is an another landmark legislation which provides protection to consumers against false and misleading advertisements, bargain, sale, 'bait and switch' selling, offering of gifts or prizes with the intention of not providing them and promotional contests and non-compliance of prescribed standards etc. After the notification of the Competition Act, 2002, it has remained the only legislation on the statute book to deal with cases of false and misleading advertisements. But the Consumer Protection Act 2019 brought the dramatic change by repealing the old Consumer Protection Act 1986.

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[7] Manoj Kumar Padhy, Consumer Protection and Advertisement Laws 5-8 (Satyam Law International, New Delhi, edn. 1st, 2016).

After 33 years of enactment of the Consumer Protection Act, 1986 it is time to revisit its objectives and organizational structure and enlist its shortcomings in the present era. The Consumer Protection Act, 2019 was passed by the Parliament and received the assent of the President on 9 August, 2019.The Central Government has, on 15 July 2020 [8], notified several provisions of the 2019 Act which have come into force from 20 July 2020.[9]It aims at protection of consumers and fast-track alternatives so that justice reaches to the aggrieved consumers immediately. The new Act repeals and replaces the older CPA, 1986 and provides mechanisms for making the consumer complaint system more robust. It envisages to remove anomalies and problems faced by the consumers. Innovative methods such as mediation, establishment of Central Consumer Protection Authority, class action suits etc. would be part of the Consumer Protection Act, 2019.[10]The new legislative enactment has also included express definition of Misleading Advertisement, widened the term consumer as well as Unfair Trade Practices. The Consumer Protection Act, 2019 has provided many rights and option to the consumers. It also imposed certain restrictions on service providers and celebrities promoting the goods and services. Since the rules of the New Consumer Protection Act, 2019 are yet to be framed and implemented it is time to look at what the new Act would deliver and draw a comparison with CPA, 1986.

In addition to enactments mentioned above, advertisements are also controlled by self-regulation mechanisms. The self-regulation instruments in India are: Norms of Journalistic Conduct Regarding Advertising; Codes of the Advertising Standard Council of India; Code for Commercial Advertising on

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[8] Notification No. S.O. 2351(E) dated 15 July 2020, available at: http://egazette.nic.in/WriteReadData/2020/220546.pdf(Visited on 01/10/2020).

[9]Saurajay Nanda and Akash Ray, "The Consumer Protection Act 2019: Key Highlights Of The Notified Provisions And Their Impact" 1 Tuli& Co. (2019), available at: https://www.mondaq.com/india/dodd-frank-consumer-protection-act/972500/the-consumer-protection-act-2019-key-highlights-of-the-notified-provisions-and-their impact#:~:text=The%202019%20Act%20did%20not,force%20from%2020%20July%202020. (Visited on September 5, 2020).

[10] Sheetal Kapoor, "Consumer Protection Act, 2019: A New Milestone in Empowering Consumers" 63 YOJNA 53-56 (December 2019).

Doordarshan; All India Radio Code for Commercial Advertising; Federation of Indian Chambers of Commerce and Industry: Norms of Ethics and Code of Fair Business Practices. These codes are enforced through the commitment and cooperation of advertisers, advertising agenda and the media.

Considering the ever increasing importance of commercial advertising as the lifeline of trade and business and as an effective means of information and communication that the consumer needs to make 'informed buying decisions' in this era of competition and open market, the role of law is to encourage and promote ethical, fair and genuine advertising and to protect the interests of the consumers and the society at large from the adverse impact of modern commercial advertising. In view of the need to regulate the advertising sector, regimes all over the world from the most liberal democracy to the authoritarian one have put in place some regulatory mechanisms to control the menace of present day advertisements. The advertising law and ethics however, vary from jurisdiction to jurisdiction depending upon the social, political and cultural ethos of each country. Further, they are neither equally comprehensive nor adequate in all the jurisdictions.

In view of the above it is necessary to take account of law and ethics on different aspects of commercial advertising as they prevail in India and wherever appropriate to compare them from the advertising laws and the ethical codes of some of the developed countries. Such a study may not only increase our understanding of the law and ethics on advertising but will also be helpful in identifying the gaps, ambiguities and loopholes in the existing law and suggesting measures for strengthening the existing regulatory mechanism on advertising. The present work is a humble attempt in this direction. Its aim is to present a coherent picture of the law and ethics of commercial advertising in India and to discuss and examine their adequacy in meeting the challenges posed by the modern commercial advertising. It may be noted that while the effective regulating mechanism is a *sine qua non* for controlling obscene, vulgar, unethical, lascivious and false and misleading commercial advertisements, the existing legal framework is far from satisfactory and therefore, needs to be further strengthened. It also aims to consider and examine the causes for the poor implementation of the advertising law and suggest the remedial measures.

1.2 REVIEW OF LITERATURE

The literature review plays a very important role in the research process. A review of the selected and useful studies related to the research problem has been identified that served as a basis and useful for understanding and developing for the researcher to evolve his vision on the topic. The main purpose of the literature review is to know research studies related to the misleading advertisements and consumer's interests and incorporate their variable views into the present study.

The researcher has gone through the following research work as follows:

- **Robert Trager, Joseph Russomanno, Susan Dente Ross, Amy Reynolds, The Law of Journalism and Mass Communication, SAGE Publications, 4th edn., 2013.**

This book presents very comprehensive coverage and analysis of this essential topic related to future journalists and media professionals. The text offers an abundance of photos and feature boxes, as well as a marginal glossary of legal terms and concepts.

- **Don R. Pember and Clay Calvert, Mass Media Law, McGraw-Hill International edition, Edition 2007/2008.**

The book discusses the relevant mass media legal decisions, in relation to their relevance to modern American law. This book also examines the issues that are shaping the United States legal system, from the Internet to the political advertising laws.

- **Sukanta K. Nanda, Media Law, 1st Ed., Published by Central Law Publications, Allahabad, 2014.**

The book provides an unparalleled coverage of Media Law and is a comprehensive analysis of various legal provisions relating to media and the press. It covers various important topics like constitutional provisions and the limitations imposed by it, freedom of press and right to information, the parliamentary privileges, the Press Council and its powers and functions, the issues involving obscenity, decency, morality and the acts of defamation, commercial advertisements, the broadcasting laws and the laws relating to copyrights. In the connection of this, researcher has completed chapter number four which is **"Constitutional Framework of Commercial Advertisement in India".**

- **Madhavi Goradia Divan, Facets of Media Law, 2nd Edition, pg. 638, Eastern Book Company, 2013.**

The present book gives emphasis on the examination of the law relating to public media in India. It covers the field, analyzing relevant statutes and cases. The spectrum of subjects covered ranges from issues of constitutional freedoms to vexed questions of censorship, contempt of court and parliamentary privilege, defamation, privacy, copyright, advertising, the right to information, broadcasting and taxation. A separate chapter examines the constitutionality of the advertisement law. This book is perhaps unique both in its scope and its depth.

- **Manoj Kumar Padhy, Consumer Protection and Advertisement Laws, Satyam Law International; 1ST edition, ISBN 13: 9789382823346, 357 pages (2016).**

In this context the present book on "Consumer Protection and Advertisement Laws" assumes great significance. It contains the discussion on all the major issues involved in the law relating to commercial advertising. The book covers decisions of courts and also the relief which may be obtained against unethical, false and misleading advertisements. The book engaged the researcher by providing details of the subject in lucid and easy manner to understand.

1.3 STATEMENT OF PROBLEM

Adequate information regarding the utility, quality, guarantee of product, and price of a product is one of the important basic characters for which the certain product is produced. The content of advertisement aired on television, radio and print media is being regulated by private bodies like the advertising standards council of India. Advertising Standards council of India was established in 1985. ASCI do not have statutory power. It acts only as a moral pressure group. It is publishers and agencies in mass media hands over the matter to statutory authority. Its decisions are not followed by the advertiser. There is no law that declares misleading advertisement as illegal. There is *no* uniform law or statutes to regulate advertisement. Advertisement related ethical issues like obscenity, harmful publication and incident representation of women, advertisement and children, health & safety, health & food are also problematic issues. These issues are violated consumer rights like right to information, right to choice and right to safety.

1.4 OBJECTIVES OF THE STUDY

1. To explain the meaning and concepts of advertisement.

2. To make a comparative analysis national and international regime related to advertisement.

3. To study the right to advertising and freedom of speech and expression.

4. To study the misleading advertisement as an unfair trade practice.

5. To study comparative advertisement and infringement of trade mark.

6. To study of misleading advertisement and protection of consumer rights.

7. To analysing various laws and regulations related to advertisement

8. To study of judicial contribution to regulate the advertisement.

1.5 HYPOTHESIS

The following propositions are to be tested in the present research work:

1. The right to advertisement under Article 19 is not comprehensive enough to include all the commercial aspects of it.
2. The law relating to Trade mark are not effective enough to regulate the practices of comparative advertisement
3. The measures taken by advertisement standard council of India to regulate misleading advertisement are not effective despite this comes within the ambit of unfair trade practices.
4. The laws such as Cable television network (regulation) Act. 1995, Telecom regulatory authority of India Act, 1997, IT Act, 2000 are not specially directed to control the acts of misleading advertisement in cyberspace.
5. The law including such as Consumer protection act, 1986, Drugs & cosmetics Act, 1940 are not specially directed to control the practises of misleading advertisements.
6. The courts are not fully equipped to deal with the commercial aspects of advertisement.

1.6 SCOPE OF THE STUDY

The scope of research will be limited to misleading advertising in the food, pharmaceutical and cosmetics industries. We only discuss the Indian context. In accordance with the requirements of the studies, however, reference is made to other countries.

1.7 RESEARCH METHODOLOGY

The research methodology followed in this work is doctrinal in nature, not involve empirical approach. It involves systematic analysis, and critical evolution of legal principle/doctrinal/concept. The derivation of the concept from the legal principle or doctrine has been highlighted and various proposals put forth. The information shall be based on the analysis of both primary and secondary sources of data. The secondary data is availed from various books, journals, magazines, newspapers, Government publications, earlier studies, media reports. The primary source of has also been used in accordance with the requirement of study.

1.8 SCHEME OF CHAPTER

The Ph.D. thesis on **'A Legal Study of Misleading Advertisements in India with Special Reference to Consumers' Interests'** is based on the doctrinal study. The whole thesis is divided into seven chapters.

Chapter I: Introduction

First chapter is introductory and endeavours to summarize the entirety of the thesis, which has been discussed at length in the chapters to follow.This introductory chapter explains about what is misleading advertisement and what is false advertisement and also discuss adverse effects to the society through these false advertisements and how advertisement creates confusion in the mind of viewers. What are the tactics which been used by the companies to make advertisement good and how to make profit.

Lastly, the work presented in this thesis is based on doctrinal research which is specifically mentioned in the research methodology. The researcher has discussed the literature review, statement of the problem, objectives of the study, hypothesis, scope of study, research methodology and scheme of chapter.

Chapter II: Conceptualization of Advertisement

In Chapter II i.e., Conceptualization of Advertisement, researcher gave a brief introduction about the meaning, definition of the advertisement. Advertising by nature is informative and provides the communication between someone with something to sell and someone who needs something. Advertising is also useful for consumers as it helps them in getting promptly relevant and necessary information about all competing brands and their merits, about their price, potential performance and above all about their use and thereby saves the 'search cost' of products which consumer needs for their personal use.

Further in this chapter researcher discussed the *historical backgrounds of the advertisement.* Researcher has also discussed *modes of advertisement*, *classification of advertisement* in the chapter two.

Chapter III: Comparative Analysis of National and International Framework of Advertisements

Researcher has completed the next Chapter i.e; *Chapter III: Comparative analysis of national and international aspects of advertisements***.** In this chapter, researcher has dealt with a comparative study of Press Freedom in European and other Democracies and mention in brief about the restrictions over the Advertising among 6 countries. The 6 countries include: United States, United Kingdom, Australia, France, Japan and Canada.

Chapter IV: Constitutional Analysis of Commercial Advertising in India

In Chapter IV i.e., *Constitutional Analysis of Commercial Advertising in India*, researcher has discussed about the constitutional provision and judicial pronouncement of the Supreme Court. There is no special provision for regulating advertisement policy in the Constitution of India, which should be adopted by press or media. The Supreme Court has given guidelines for the same through a series of Judgments. Most significant decisions in this context are *Hamdard Dawakhana v. Union of India* [11] *and Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd*.[12]The constitution of India explicitly protects freedom of speech and expression in Article 19 (1) (a). It was asserted in *Hamdard Dawakhana v Union of India*[13], that 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. It assumes the attributes and elements of the activity under Art. 19(1) which it seeks to aid by bringing it to the notice of the public.

[11]AIR 1960 SC 554.
[12](1995) 5 SCC 139.
[13]AIR 1960 SC 554.

It allows us to freely express our ideas and thoughts through any medium such as print, visual, and voice. One can use any communication medium of visual representation such as signs, pictures, or movies.

The Supreme Court of India in ***Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.***[14] held that advertisements to be commercial free speech subject to certain reasonable restrictions. The limitations include restriction on manipulative advertising as well. The Hon’ble apex court in the same judgment remarked “it is expected that by way of advertisement or promotion of its services, the subscriber should not be misled”.

Further, researcher has discussed right to commercial advertising as a fundamental right of manufacturers/sellers in this Chapter. The Indian Constitution guarantees a number of Fundamental Rights to citizens as well as non-citizens. For the purpose of the present discussion the relevant Fundamental Rights are Freedom of Speech and Expression, which also includes the freedom of the press, and freedom of profession, occupation, trade or business. Commercial advertising raises the issue of availability of the freedom of speech and expression guaranteed by the Article 19(l) (a) of the Indian Constitution. But such rights are available only subject to reasonable restrictions mentioned under Article 19 (2) of the Indian Constitution.

Further, researcher has discussed *consumer’s right to information* in this chapter. The constitutional issue of extension of freedom speech of expression to commercial advertisement needs to be examined from the prospective of the consumer’s right to product and service information. As we know the concept of ‘consumer’s right’ is recognized at both international and national level.

As stated previously, no right can be absolute and without restrictions or else they might not act in the best interest of the public. Advertisement has been considered as an act of communication or expressing one’s views but the said right may be exploited by the advertisers if not guarded. Restrictions on advertisements might be imposed when the advertiser indulges in the following

[14](1995) 5 SCC 139

acts, for it is necessary for the government/the appropriate authorities to intervene if such advertisements are detrimental to the interests of the public at large.

Chapter V: Regulatory Framework of Advertisements by various Legislations and Institutions

In Chapter V i.e., *Regulatory Framework of Advertisements by various Legislations and Institutions*, researcher has explored and examined about the various legislations and institution regulating the misleading advertisements. The basic aim of the chapter is to present a coherent picture of legal and statutory controls of commercial advertisements. To this end an attempt has been made here to provide an overview of all major advertising legislation except the Consumer Protection Act, 1986 and the Monopoly and Restrictive Trade Practices Act, 1969. These both legislations has been discussed in separate chapter i.e., Chapter 6.

The Government of India has not set up a regulatory body in India to regulate advertisements. But as in due course depending on the nature of the grievances, the power to regulate advertisements may be exercised by a vast variety of authorities, including the courts, Central and State Governments, tribunals or the police authorities. In addition to that numerous legislations also deal with advertisement provisions in part not *in toto* unfortunately. The rules, regulations and legislations include the following:-

1. Information Technology Act, 2000.

2. Indian Penal Code, 1860.

3. The Contract Act, 1872.

4. The Young Persons (Harmful Publications) Act, 1956.

5. Indecent Representation of Women (Prohibition) Act, 1986.

6. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

7. The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.
8. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955.
9. The Drugs and Cosmetics Act, 1940.
10. The Emblems and Names (Prevention of Improper Use) Act, 1950.
11. Securities and Exchange Board of India (SEBI) (Stock-brokers and Sub-brokers) Rules, 1992 - Code of Conduct for Stock-brokers.
12. Securities and Exchange Board of India (SEBI) (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995.
13. Securities and Exchange Board of India (SEBI) (Mutual Funds Regulation), 1996: SEBI Guidelines for Advertisements by Mutual Funds.
14. Securities and Exchange Board of India (SEBI) (Disclosure and Investor Protection Guidelines), 2000.
15. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.
16. The Transplantation of Human Organs Act, 1994.
17. The Representation of the People (Amendment) Act, 1996.
18. The Lotteries (Regulation) Act, 1998.
19. The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.
20. The Competition Act, 2002.
21. The Civil Defense Act, 1968.

Regulatory authorities have power to regulate advertisement

- Advertising Standards Council of India (ASCI).
- Food safety and standards authority of India.
- Insurance Regulatory Development Authority.

- SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Security Market) Regulation, 1995.
- Telecome regulatory authority of India.

To scrutinize certain principles and fairness in the sphere of advertising, Advertising Standards Council of India was established in India in 1985. ASCI deal with complaints received from consumers and industry against such advertisements which are false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and are in contravention to the advertising code. Even though there is no as such provision for regulating advertisement policy in the Constitution of India, which should be adopted by press or media, the Supreme Court has given guidelines for the same through a series of decisions.

It is interesting to note that most of these legislation are criminal in nature and control commercial as well as non-commercial advertisements. The prime objectives of these legislations are to save the society from immoral and unethical practices rather than individuals. The individual who has been wronged probably will not benefit financially from the Court proceedings.

Chapter VI: Protection of Consumer Interests from Misleading Advertisements under Consumer Protection Act

In Chapter VI i.e., ***Protection of Consumer Interests from Misleading Advertisements under Consumer Protection Act***, researcher has dealt with the consumer, Misleading advertisements, unfair trade practices and enforcement of protection against unfair Trade practices.

Further, researcher has made a comparative analysis between on The Consumer Protection Amendment Act, 1986 and The Consumer Protection Amendment Act, 2019 which will help me to focus on the present scenario sought by the legislators to fulfill the need of the consumers.

Chapter VII: Conclusion and Suggestions

In Chapter VII, I (researcher) have concluded my research and mentioned some findings based on research work and tested the hypothesis on the ground of such findings. It contains some of the important suggestions to protect the consumers from misleading advertisements which they are facing by any means.

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CHAPTER-II

CONCEPTUALIZATION OF ADVERTISEMENT

CHAPTER-II

CONCEPTUALIZATION OF ADVERTISEMENT

"Advertising is of the very essence of democracy. An election goes on every minute of the business day across the counters of hundreds of thousands of stores and shops where the customers state their preferences and determine which manufacturer and which product shall be leader today, and which shall tomorrow?"

—Bruce Barton[1]

2.1 INTRODUCTION

When a manufacturer has developed a product as per the market demand and after thoroughly analyzing the market, there is a need for establishing communication with the target group to eventually sell the product. Needless to say, this has to be a mass contact with an ability to reach at large number of people so that the said product may receive optimum publicity and popularity. Naturally, the best way to reach this mass market is through mass communication and advertising is one of the means of such mass communication along with such other means as publicity, sales promotion and public relations. As noted by Ralf Alexander "advertising" is controlled, identifiable information and provision by means of mass media communication.[2]

Advertising is multidimensional. It is a form of mass communication, a powerful marketing tool, a component of the economic system, a means of financing the mass media, a social institution, an art form, an instrument of business management, a field of employment and profession. Advertising is the cornerstone of Indian economic system, as the low prices for consumers are dependent upon mass production, mass production is dependent upon volume

[1] Bruce Barton,quoted in James B.Simpson, *Contemporary Quotations82*(New York: Vail-BailorPress, 1955).
[2] Ralf Alexander, *The Committee on Definitions, Marketing Definitions* 9 (American Marketing Association, Chicago, 1963).

sales, and volume sales are dependent upon advertising.[3] Undoubtedly, the present economic system is moving in the vehicle of advertisement.

Apart from being the lifeline of the free economy in a democratic country like India, advertising has emerged as the lifeblood of free press and electronic media, paying most of the costs and thus making newspapers available at a very few reduced price and news and entertainment TV, channels almost free. For a democratic press the advertising subsidy is crucial because without advertising the resources available for expenditure on the 'news' would decline which may lead to an erosion of quality and quantity of the news.

Advertising by nature is informative and provides the communication between someone with something to sell and someone who needs something. For this reason, it has emerged as an indispensable marketing tool in today's globalized economy. Because of enormous power of persuasion, advertising has become indispensable for business enterprises of every size and service providers. To quote, *Henderson Brit*, "doing business without advertising is like winking at a girl in the dark, you know what you are doing, but nobody else does".[4] *Clyde R. Miller* in his very prospective analysis of impact of persuasion on business observed: "All successes in business, industrial production, invention, religious conversion, education and politics depend upon the process of persuasion".[5] Advertising as a vital means of communication and persuasion not only tones up the tempo of business turnover, but also stabilizes the sales volume, explores new and maintains existing markets, popularizes new products, assists in beating competition and finally creates a name for the enterprise.

Advertising is also useful for consumers as it helps them in getting promptly relevant and necessary information about all competing, brands[6] and their merits, about their price, potential performance and above all about their use and thereby saves the "search cost" of products which consumer needs for

[3] *Tata Press Ltd* v. *Mahanagar Telephone Nigam Limited and others*,(1995) 5 SCC 139.
[4] Source: quoted in the New York Herald Tribune, October 1956,
available at: http:// blog.gaiam.com/quotes/authors/stuart-henderson-britt, (Visited on 3/6/2017).
[5] Clyde R. Miller, *The Process of Persuasion* 6(Crown Publishers, New York1946).
[6] F. Scott Fitzgerald, *The Crack Up 76* (New Direction, United States, 1945).

their personal use. Advertising cultivates new taste and requirements and by introducing new lifestyle and values, raises the standards of people. Advertising stimulates products, income and employment and thereby secures maximum utilization of physical and manpower resources, with in turn raises the standards of modern civilization. It can be said that the present world is moving on the wheel of advertisement.

Children are more vulnerable to unethical or false or misleading advertising because they are neither of the age of discretion nor possessed of sufficient intelligence to distinguish between right and wrong. Advertisements electronic media showing *pan masala*, obscene matter and indecent representations during the children's programmes as well as general programmes are bound to have harmful impact on the young persons. Obscene, vulgar, and lascivious advertisements which appeal to prurient interest are likely to corrupt the minds of the children. Although the advertisements of liquor in the electronic media are prohibited they are still being shown in a surrogate manner by replacing liquor by mineral water, soda and apple juice.

Advertisement is different from publicity, propaganda and salesmanship in the following respects: both advertising and publicity are marketing communications and both may appear in the same media but whereas advertising is paid for by its sponsor publicity is not. In publicity, materials are published free of charge because of their newsworthy content and importance to the public at large. News or a message about Presidents, Prime Ministers, social dignitaries and film artists is publicity.

Propaganda is a communication without an identifiable source of sponsor. The identifiable sponsor is necessary as for as thee influence on the audience is concerned because the acceptance of a message depends upon the reputation of the source. Even so, propaganda is effectively used by politicians and government to influence the public by repeated messages though the controlled media.

Both advertising and salesmanship play a significant role as the essential adjuncts; they are the link in the chain of marketing functions. However, there exist differences between them. Advertising is a non-personal form of promotion while salesmanship is a personal form of promotion. Advertising is a means of mass communication but salesmanship is not a mass communication means. Face-to-face communication is not possible in advertising while in salesmanship it is possible.

2.2 MEANING AND DEFINITION OF ADVERTISING

The word ‘advertising’ is derived from the Latin word *advertere*, which means “to return (to mind) to”. The term ‘Advert’ means “to turn one’s attention” or to “refer”. So, ‘Advertise’ may be defined as “to inform” or “give notice to”; “to give public information about merits claimed for”; “to draw attention to”; and “to offer or for sale by public notice”, printed or broadcast.[7]

Broadly speaking, advertising does turn the attention of the public to a commodity or service, and in the broad sense it might be said that anything that turns attention to an article or service might be called advertising is usually considered as any form of paid public announcement intended to aid directly or indirectly in the sale of a commodity or service.[8]One of the earliest attempts at formulating a defining of ‘advertising’ defines it as: “the dissemination of information concerning an idea, service or product to compel action in accordance with the intent of the advertiser”.

According to *Encyclopedia Britannica*- ‘Advertising’ is a form of paid public announcement intended to promote the sale of the commodity or service, to advance an idea or to bring about some other effects desired by the advertiser. It is essentially a form of communication through such diverse media as handbills, newspapers, magazines, billboards, letters, radio and television broadcasts and motion pictures. The term is broad enough to include a wide range of types, from a small two line entry in a newspaper, a magazine

[7]*The Chamber Dictionary*, p. 22.
[8] Charles J. Dirksen and Arthur Kroeger, *Advertising Principles, Problems and Cases* 1 (Taraporevala sons and Co. Pvt. Ltd., Bombay, 1977); see also Jefkins, *Introduction – Advertising Marketing* 1 (MacMillan Press, England).

to a spread of several full pages, or from small sign in a shop window to huge billboard with changing design in colored lights.[9]

"Advertising" has been defined in many different ways. At one point of time it was defined as "salesmanship in print". A somewhat less apt but more precise definition would be the following:

> *"Advertising is the paid use of any channel of communication to identify, explain or urge the use or adoption of a product, service or idea".*[10]

The American Marketing Association (AMA) has defined 'advertisement' in the following words:

"Any announcement or persuasive message placed in the mass media in paid or donated time or space by an identified individual, company, or organization heavily."[11]

This aforesaid survey of definitions of advertising reveals the following features: *firstly,* advertising is the paid use of any channel of communication and hence is commercial in nature. *Secondly,* advertising is non-personal i.e. it is directed at a mass audience and not directly at the individual, as in public (personal) selling and *finally,* advertisements are identifiable with their sponsoring authority, which is not always the case with publicity.[12]

In *Eskayef (Now known as Smith Kline beecham Pharmaceuticals India Ltd.) v. Commissioner of Income Tax, Bangalore*[13], the question was raised, whether the physician's sample constitute an advertisement or not? The Apex Court answered this question in the affirmative and held:

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[9]*Encyclopedia Britannica,*1969, Vol. 1, p. 179.

[10]*Encyclopedia Americana,*I960, Vol. 1, p. 165; According to Oxford Dictionary the term 'advertisement' may be denned as follows : (i) Present or describe (a product service or event) in a publication or on television in order to increase sales; or(ii) Seek to fill (a vacancy) by placing a notice in a newspaper or other publication; or(iii) make (a fact) known; According to Webster Dictionary the expression advertising' denotes : "To make something known to; to make publicly or generally known; to announce publicly esp. by a printed notice, or a broadcast; to call public attention to esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize".

[11] Available at:https://www.ama.org/resources/Pages/Dictionary.aspx?dLetter=A, (Visited on 9/04/2017).

[12]*Ibid.*

[13]AIR 2000 SC 2567.

" we have no doubt, of distribution of the samples of the drugs to the doctors is to make them aware that such drugs are available in the market in relation to the cure of a particular affliction and, therefore, to persuade them to prescribe the same in appropriate cases. So doing is, in our view, tantamount to advertisement and sales promotion".

The legal definition of advertising is closely resembles its literal or general definition. Thus, in ***Municipal Corporation of Greater Bombay v. Bharat Petroleum Corporation Ltd.***[14], the Supreme Court interpreted the meaning of the word "advertisement" as follows:

"In common parlance, 'advertisement' means to make publicly known, an information by some device and to draw or attract attention of public/individual concerned to such information. It need not necessarily be to sell only or solely for commercial exploitation".

In this case the Supreme Court declared the structure (erected pole with a metallic board projecting on the pavement, which displayed the symbol of a shell) of the respondent to constitute an advertisement.

Again, in ***ICICI Bank v. Municipal corpn. Of Greater Bombay***[15], the Supreme Court opined that an 'advertisement' is a matter that draws attention of the public or segment of the public to a product, service, person, organization or line of conduct intended to promote sale or use of product or range of products. An advertisement is an information that producer provides about its product or services. An advertisement tries to get consumers to by a product or service, an advertisement is generally of goods and services and is intended for the potential customers and not a mere display of the name of the company unless the same happens to be a trade mark or trade name. In the instant case, the Apex Court laid down a litmus test to identify an 'advertisement' in the following words:

"Whether a particular action is an advertisement or not would depend on whether the person wants to promote directly or indirectly his product or

[14]AIR 2002 SC 1638.
[15](2005) 6 SCC 404.

service. If by any communication, the communicator tries to influence the people to buy his product or service or attract towards his product or service than it would be guiding factor to identify whether a particular communication of the communicator tantamount to be an advertisement".

2.3 EVOLUTION AND DEVELOPMENT OF ADVERTISING

The origins of advertising lie thousands of years in the past. The oldest written advertisement was traced about more than 3000 years ago. The form of advertising for transmission of information dates back to ancient Greece and Rome.[16]One of the first known methods of advertising was an outdoor display, usually an eye catching sign painted on the wall of a building. Archaeologists have uncovered many such signs, notably in the ruins of ancient Rome and Pompeii. An outdoor advertisement excavated in Rome offers property for rent, and one found painted on a wall in Pompeii calls the attention of travelers to a tavern situated in another town. As much as some three thousand years ago Papyrus sheets were used in Thebes in Egypt for announcing the reward for return of runaway slaves[17].The first advertisement was somewhat in the form of stenciled inscriptions, which were found on earthen bricks prepared by the Babylonians about three thousand years before Christ. The bricks carry the name of the temple in which they were used and the name of the king who built it, just as a modern public building which contains a corner stone or stone tablet with the names of officials in office when the structure was erected. The method was to cut a stencil in hand stone and with it each brick was stamped while the clay had been in its son stage. The kings who did this had advertised themselves to their subjects which could be read in hieroglyphics[18].

Advertising in a broader sense has been a part of economics since at least the beginning of trade. One can say that advertising is as old as man. One can go to the extent of saying that advertising is a part of nature i.e. it is as old

[16]Mukesh Trehan and RanjuTrehan, *Advertising and sales Management* 4(V. K. India Enterprises, New *Delhi,* 2010-11).
[17]Meenakshi R. Chandran, *Advertising: The Social Ad. Challenge24* (Manas Publication, New Delhi, 1998).
[18] F. Pres Berg, *The History and Development of Advertisement*2 (Doubleday &Co. Inc, Garden City, NewYork, 198O).

as nature. The dancing daffodils or sweet smelling roses, which silently invite butterflies to achieve the objective of pollination is an instance of advertising. Even before the existence of men the fruits, flora and fauna were advertising themselves.[19] There is resemblance of advertising in many activities of human beings, especially those activities which influence others either favorably or otherwise. A baby crying for is feed, a girl wooing the price charming, a doting wife desirous of having a new 'sari' is all aspect of advertising. They want to communicate, to persuade, to influence and to lead to some action.[20] As a means of mass communication advertising came to be practiced by royalty who sent drummers to make an announcement or communicate the will and desire of the monarch to his people.[21] Another instance can be shown by merchants who had always shouted out the advantages of their goods in the market place.[22]

In medieval times, a simple but effective form of advertising was very popular. Merchants employed the so called 'town criers' who shouted the praises of the merchant's wares[23] and the arrival of trade-ships[24]. Printed advertising played no big role until the invention of the printing press by Johannes Gutenberg in 1445. Now the printers and later the merchants used little flyers to advertise their products. These flyers often contained characteristic symbols of the guild members and the tradesmen and were also used as a poster on walls. This form of advertisement lasted for a very long time. Criers and signs were used to carry information for advertising goods and services well before the development of printing.[25] The invention of printing by

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[19]*S.A.* Chunawala and K.C. Sethia, *et.al, Advertising (Principles and Practices)* 4(Himalaya Publishing House, Bombay, 1986). See also C.H. Sandage and Fryburer, *et.aL, Advertising Theory and Practice* (Richard D. Irwin Inc., Illinois, 1983); A.F. McGann and J.T. Russel, *Advertising Media* (R.D. Irwin Inc., Illinois, 1981).
[20]*Ibid.*
[21]*Ibid.*
[22]*Ibid.*
[23]*Supra* note 17 at 24.
[24]C.H. Sandage and VarnonFryburger, Advertising Theory & Practice 17 (Richard D Irwin *lnc.*, Homewood, lllinois, 1987).
[25] Dr. ShailaBootwala and Dr. M.D. Lawrence, *Advertising and Promotion* (NiraliPrakashan, Pune, 2007).

movable types ushered in a new age of commercial communication.[26] The first printed advertisement in English commenced in the year 1477.[27] Next year, first press in England was set up by William Caxton.[28] By the middle of the 17th century British newspapers had adopted advertising as an intrinsic part of their contents.[29]

At the end of the 17th century, a great number of commercial newspapers were published in England and elsewhere. Earlier advertisements in the newspapers were for books, marriage offers, new beverages and travel. Soon advertising became the main source of revenue for newspaper, and space-selling came into existence. Around 1840, several people were selling space in newspapers in New York, Philadelphia and other metropolitan centers in countries where newspapers were brought out on a regular basis. Space brokers who later on developed in to advertising agencies came into existence in all these centers. Sampson (1874) in his History of Advertising, which was first published in 1874, points out that "signs over shops and stalls seem naturally to have been the first efforts in the direction of advertisements and they *go* back to the remotest portions of the World's history"[30]. These early signs were, for the most part had been made of stone or terra cotta and set in to the pilasters at the sides of the open shop fronts[31]. Later, signs were hung over the walks and above the entrances of shops. Some of them had been extended entirely across the streets.

In the 1880s a new era of advertising began and new methods of manufacturing led to greatly increased outputs and decreased costs for the producers of consumer goods. The products at that time could be packaged at the plant itself. Moreover, the telegraph network came into existence and a network of rail-roads, had also crisscrossed the continent. All these were the

[26] *Luis* Ugalde, Nicolas Barros, et.al., (eds.), *Love As the Foundation of Moral Education and Character Development A Latin American Contribution for the 21st Century* 103 (The Council for Research in Values and *Philosophy*, Washington, D.C., 1998).
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] Henry Sarnpson, History of Advertising 19 (Chatto&Windus, London, 1930).
[31] *Ibid*., p.22

factors, which allowed a nation-wide distribution and nation-wide advertising. The state necessitated the growth of advertising agencies and dictated their activities. The most widely advertised consumer products at that time had been the patent medicines.

Although as a profession advertising is young but as a mode of communication is as old as civilization. It is true that advertising in past was not advanced when measured by present day standards but objective of advertising in those days was the same as now i.e. to communicate information and ideas to groups of people in order to change or reinforce an attitude or a behavior. Today, advertising has become very significant to business enterprises of every size. Apart from the business enterprises, the service institutions have also started recognizing the value of advertising. Against this background we propose to discuss in this chapter meaning, evolution, development and kinds of advertising and its positive and negative effects on society.

2.4. HISTORY OF ADVERTISING IN INDIA

2.4.1 Pre-independence

Advertising in India dates back to the Indian civilization. Relics of Harappa, Mohenjo-Daro indicates names engraved on exquisite earthen, stone or metal works, which is comparable to the present trade mark system.[32] Paintings or writings on wall indicating slogans or stone engravings indicate a form of advertising.[33]

The earliest forms of advertising were mostly used for religious purposes. That is, advertising was in the form of propaganda. To spread the teachings of Buddha, the emperor Ashoka of Kalinga set up rock and pillar edicts[34]all over the Indian Territory between 563 and 232 B.C. These rock and pillar edicts can be called the forerunners of poster advertising of today. Thus it was the outdoor advertising that came to light with the point of sale display in

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[32]*Supra* note 17 at 29.
[33] Ibid.
[34]Chunnawalla Kumar and Sethia and Subramanniam , Advertising Theory & Practice 18(Himalaya Publishing House, Bombay, 2011).

market places. The indoor visual communications were the wall paintings in the cave temples of Ajanta, Sanchi and Amraoti. Literally the Indian Advertising starts with the hawkers calling out their wares right from the days when cities and markets first began.

Till the advent of British rule in India, advertising was not taken for business purposes. The reasons were that India was the unique example of household industrial activities. At the time of British entry, India was in Village Economy stage where the relations between the producers and consumers were direct. The local markets were weekly and the producers displayed their wares by shouting and giving samples for promoting their trade. The skills of Indian artisans in the areas of textiles-silk and cotton and metal works were all accepted and there was no need of any special efforts of advertising.

British settlement and ruling from 1600 onwards brought about certain changes in our country. British needed advertising efforts to popularize their goods, particularly the luxury goods. They made it possible through the print medium. The first printing press was brought by Portuguese in 1556, which was used exclusively for printing Christian literature. It was only in 1780 that the first Indian newspaper was started, namely the ‘Bengal Gazette’ in Calcutta. By 1786, there were four weekly newspapers and a few monthlies published from Calcutta. It was in the ‘Bengal Journal’ that all the government advertisements were printed during that period. In 1790, ‘The Courier’, published from Bombay during that period also contained advertisements in various Indian languages, namely Marathi, Guajarati. Konkani, Urdu and Kannada. In 1791, the government Gazette was started in which all the Government advertisements in different provincial languages were printed. Though the first newspaper in an Indian language was started in 1833, it took pretty longer time to put advertisements in Indian languages. There were no advertising agencies but the newspapers had provided the services of space selling. [35]

[35] C.N.Sontakki, Advertising 490(Kalyani Publishers, New Delhi, edn. 1st, 2001).

The origin of commercial advertising in India is relatively recent. *'B. Dattaram and Co.'* was the first advertising agency promoted in the country in 1905.[36] The growth of Indian advertising too has been slow with the pre-independence era. Only a few companies were engaged in the business of advertising on an unprofessional basis and had remained almost confined to the media buying services with Very little creative work. Until the outbreak of the World War I (1914-1918), most of the advertising was planned and placed by the foreign manufacturers. During the First World War, the newspaper circulation was increased as the people were interested in hot news of war affairs. During the post war period Indian market was flooded with foreign goods that gave a lot of spurt to newspaper advertising so that more and more space had been reserved for advertising.

After the First World War, the Indian agencies failed because of the acute competition, mostly from the British and the American agencies. The Indian agencies had a tough time but could learn the importance of agency business as a rich source of employment and earnings. It made them to try the outdoor advertising media as many of the newspaper media were under the control of foreign agencies. In 1918, the first professionally managed modern advertising agency, 'Tata Publicity' was started by Lastromach a British army officer in Bombay, followed by D. Jekey More's operation in 1929 and the 'Thompson Advertising Agency' which started its operation in India in early 1930's.[37]

In fact, 1930's can be considered as the period of consolidation in the history of Indian advertising. The 'Swadeshi' movement made a turning point in the history of advertising in India as this movement had led to the increased appearance of advertisements in the country with a view to popularize Indian goods against the imported stuff.

Indian advertising has had many changing faces. The pre-independence advertisements were mostly about ladies goods, gent's clothes, travelling,

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[36] *Supra* note 17 at 30.
[37] Ibid.

restaurants and hotels and entertainments for the British people in India. Motor cars, electricity and lifts in houses were considered to be the items of luxuries in those periods. Many of the early advertisements were about hotels four wheelers, tea, gramophones, cotton goods, tailoring shops, etc., and their target audiences were the British people in India, the princely families and the people from the upper strata of the society. It is only after independence and the abolition of the princely order that a new -born middle class received attention of advertisers.

As against 14 Advertising agencies in 1914, there were 45 agencies in 1944, indicating over a threefold increase in the number of agencies.[38] However, the gross annual media billing was just Rs.5 crore. This indicates that the initial stages were marked by a slow growth in advertising agencies in the country. Among the reasons cited for such a sluggish growth were the unfavourable attitudes of companies towards advertising, limited market, slow pace of industrialization and lack of competition.

The first full-fledged Indian advertising agency was set up in 1931. The increased competition demanded a thorough improvement in the quality of advertising work and services. To improve the art-work and copy illustration, Indian agencies used to send their employees abroad for special training. The All India Radio started telecasting various programmes in 1936. In 1939, the Indian and Eastern Newspaper Society was founded to protect and promote the legitimate interests of the newspapers and to deal collectively with the Government, agencies and the advertisers.[39] In 1941, Indian Languages Newspapers Association was formed to deal with the problems of Indian language newspapers.

By the end of World War II, the political and economic scene underwent a sweeping change. Consequently the scarcity conditions prevailing in the Indian economy gave much impetus to the growth and development of light and small industries. In 1945, the Association of Advertising Agencies of India

[38] *Ibid.*
[39] *Supra* note 35 at 490.

(A.A.A.I) was formed to raise the standard of advertising and regulation of advertising practices through a code of conduct. In 1948 Audit Bureau of Circulations of India (A.B.C.I) was started on the lines of A.B.C of America. In 1952, the Indian society of Advertisers was formed to promote the interests of advertisers so as to raise the standard of Indian advertising. Until independence, the number of large - scale industries in India were limited. Though there were some foreign cosmetic Industries in major cities, their products were not of any natural popularity.

2.4.2 Post-independence

After independence, the Five Year Plans were implemented and several factories and large-scale projects have emerged. Consequently, production and transportation facilities have increased tremendously. These spurts in various activities enabled the distribution of products anywhere in the country and this marked the beginning of the 'Golden Age' of advertising in India Advertisements in the Indian print.[40]

Media achieved a considerable importance only from the beginning of the Twentieth century. Educational development and the popularization of media had also contributed much to the expansion in the field of advertising in India. Advertiser's Club of Bombay was started in 1955 and such clubs had emerged later in all the metropolitan cities in India. The telecasting of programmes through TV had commenced in India on 15th September 1959 at Delhi. Besides these, there are some other forms of publicity used by the advertisers, which include the use of short films, slide shows, messages on the radio and in TV. TV advertising has become popular in India as it is abroad. Film Advertising has also attained popularity among the advertisers and the consumers alike in India to a large extent as these could be exhibited through cinema theatres even in the remotest hamlets in the country by many advertisers. Radio Advertising has been introduced by the All-India Radio at

[40] Esther Thorson, "Advertising Age - The Principles of Advertising at Work", Chicago, pp.22-26 (1992)

Bombay from 1st November 1967.[41] This pilot project was started with commercials being put over low power Vividh Bharati transmitters at Bombay, Poona and Nagpur it has gained a wide popularity among the traders and industrialists. Radio Advertising has also been introduced in Calcutta since September 1968 and later extended to Delhi, Madras, Tiruchirappalli (l969); Chandigarh, Jullundur, Bangalore, Dharwar, Ahmedabad, Rajkot, Kanpur, Lucknow, Allahabad (1970), Hyderabad-Vijayawada (1971) , Bhopal, Indore, Cuttack, Jaipur, Jodhpur, Patna, Ranchi, Trivandrum, Calicut and Srinagar(1975). Advertisement have been accepted in many languages as tape recorded spots of various durations Sponsored programmes have been introduced in radios since May 1970. Now more than 85 percent of the total population in the country is covered by the All India Radio(AIR).

The television age has now dawned on India. It started in a very humble fashion by way of experimental transmissions at Delhi on 15 September 1959 the early television advertisements were merely stills with voice-overs or short versions of cinema advertisements. Regular TV was first introduced in 1965 and there has been a large scale expansion. The television set up in India was delinked from the All India Radio on 1st April 1976 under its new name 'Doordarshan', a separate department meant for the full development of the medium and specialized skills peculiar to television. Presently there are eight TV stations in the country. The year 1976 -77 was a turning point in the history of Indian advertising. It was in this year that the Doordarshan (DD) started accepting advertisements. Commercial advertising on television was introduced in a small way on 1st January, 1976 and the revenue from commercial advertising has shot up at an astronomical rate, leading to a flooding of sponsored programmes and the opening of a second channel in Delhi and Bombay.

The first burst of public sector advertising was in the 1980's but what catapulted the industry on to a higher plane was the landmark launch of colour

[41] Anon, Year Book of Competition Success Review 718(Competition Review Pvt. Ltd, New Delhi, 1992).

television on August 15. 1982. Colour printing in Newspapers and Magazines also brought about a new hue to their readability. To proclaim the serious role of advertising in competitive scenarios, the Advertising Standards Council of India (ASCI) was born.[42] The 1980's also witnessed the first round of sponsored television programming. From Rs.100 million industries in 1955 to Rs.1600 million in 1978 and to a Rs. 50,000 million industry in 1999, the advertising industry has traversed a long way.[43]

Satellite TV has ushered in epochal changes in entertainment in awareness of trends and lifestyles abroad. It has also dramatically expanded media options and influenced the styles and substances of advertising, which is now richer and stronger in imagery and emotional appeal.[44] The economic liberalization of the past twelve years has created challenges as well as opportunities for advertising. Indian products and services face fierce competition, both nationally and internationally. International brand wars are now being played out on Indian turf. During the last cricket world cup-2003, the television image of giant, Coke bottles being wheeled on to the pitch to serve cricketers "the official drink" was obliterated by that of cricket celebrities swilling Pepsi and wise cracking the Pepsi slogan "Nothing official about it".

Market researches by various organizations have also been making spectacular strides in India. Hindustan Lever, the biggest marketing conglomerate of consumer goods in India, for instance, has pioneered the market research, particularly in rural India. Hindustan Thompson Associates (HTA) and Lintas perhaps lead the country in market research competence. Specialist market agencies such as MARG and MODE have also come up offering their specialized services to the producers and marketers of both the industrial and consumer goods.

In 1994-95, the total TV Advertising in India came to the tune of Rs. 775 crore, in which the DD's share was Rs. 400 crore. Out of these, Rs. 200

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[42]S.R. Madhu , "The Visible Persuaders- An Overview of Advertising in India and the U.S.", Span 18 , (June - July 1996).
[43]S.A.Chunnawalla, Advertising, Sales and Promotion Management 158-159(Himalaya Publishing House, New Delhi, edn. 1st, 2002)
[44]*Supra* note 42 at 18.

crore was advertised on the network and the satellite channels accounted for the remaining Rs.175 crore.[45] Consequent upon the Globalization, the Indian advertising firms have also been entering into the sphere of global tie-ups. The styles and the ways of presentation of advertisements have also been changing rapidly in India. Advertising on the Internet is also growing rapidly in India. India's online advertising revenues were expected to increase from $ 2.5 million in 1999 to $ 150 million in 2003.[46]

Technological advancements have changed even the way of functioning of the advertising agencies in India. Many of the advertising agencies in India are splurging on the latest gizmos (note books, digital studios and media planning software). Computers and computer graphics have brought new power, versatility, speed and value to advertisement production in our country. Video editing is smarter, facile and swifter than ever before due to the use of computerized gadgets from the U.S by the Indian commercial advertisers. Advancements in printing technology and colour processing have enabled the Indian advertisers to bring out hi-fidelity advertisements of International standards in various magazines and periodicals. Video electronics and special effects have also enabled the Indian advertisers to improve the production quality of TV advertisements.

Today there are more than 50 channels, including 8 Malayalam channels, active and vying for a share of the mind and money of the advertisers. Even the behemoth Doordarshan has woken up to the market reality of fierce competition leading to a tie up with the CNN for the new channel. Advertisement Researches have indicated that even the rural folk in our country have started watching programmes like Oshin, Santa Barbara, Matrix, Superman, Tom and Jerry and Alias, unlike the traditional programmes filled with Mythological Indian heroes and heroines.

Some brilliant examples of timing and relevance of the history of Indian advertising in the recent past have been Ankhita Jhaveri, the child model, who

[45] Anon. India Today, Vol xix (6), p.188 (1995).
[46]Dr. L. SathyaSundaram "Advertising Industry Bound to Boom" Facts For You 14 (May 2001) .

made ‘Rasna’ a household name in the 1980’s; Penny Vaz and Remo Fernandas as they echoed “Yehihai right choice” for ‘Pepsi’; Circus artists modeling for ‘Action Shoes’, which was broadcasted just before the tele-serial ‘Circus’; ‘Britannia biscuits’ advertising Amjad Khan just before the immortal lines of ‘Sholay’ film. The styles and ways of presentation of advertisements by various advertisers have changed drastically during the recent years. Sachin Tendulkar voraciously grabbing a ‘Britannia Tiger biscuit’ from an impish child, Mohammed Kaif sharing ‘Lays potato chips’ with film star Saif Ali Khan and guys like Harbhajan Singh. Rahul Dravid and Sourav Ganguly playing jungle games with a lion in a ‘Pepsi’ advertisement have become the style of the day[47].

The number of advertisers on TV has grown quickly from just over 2000 in 1994 to a close of 5000 in 2002. At the same time, the number of companies generating 80 per cent of the TV revenues had fallen from 223 companies in 1994 to 173 in 2002. In other words, the number of advertisers on TV has almost doubled during the last 8 years, while the percentage of companies accounting for 80 per cent of the total of Rs. 3900 crore of TV revenues has fallen from 11 per cent to 35 per cent during the same time.[48] On analyzing the history of the growth in the media advertisement expenditure in India from 1985 to 2003, it can be seen that the media advertising in our country has shown a steadily increasing trend from Rs.580 crore in 1985 to Rs. 15000 crore in 2003.

In the development of advertising of advertising media has played a vital role. Advertising, using media as its vehicle, has covered a long path from street cries to 3D multimedia web advertising, through press, radio and television advertising. With the emergence of internet advertising a new era in the area of advertising has started because India has one of the larger and fastest growing populations of internet users in the world with 190 million as of

[47]Neeru Bhatia, “Post World Cup –Crickerer’s brand Equity has shot up” Vol.21 The Week 65-66(April 27 2003).
[48]Rina Chandran, “Televison Ads.-An Exception to 80:20 Rule”, The Hindu Business *Line*6, October 15, (2003).

June 2014. India already has the third largest internet population in the world today. It is estimated that there will be over 500 internet users in India by 2018, making India the second largest population of the internet users in the world.[49]

2.5 MODE OF ADVERTISING

Advertising is a form of marketing communication using different strategies to impact consumer's thoughts, feeling and action.[50]

Advertising can be broadly categorized into two parts:

1. Offline
2. Online

There can be many differences between online and offline advertising but they have just one similarity between them i.e. in the both the form of advertising you need to know your target audience.

Difference between offline and online advertising-

2.5.1 Offline advertising

- Offline mode of communication is physical.
- The approach to the customer is very slow.
- Success of the campaign cannot be tracked easily.
- Everything here is a manual approach.
- Very tough to manage and requires a lot of staff.
- This still captures larger area as many don't use internet.
- No interactivity.
- It is tough to know much about the target audience.
- Retargeting is beyond the advertiser. It's all luck if the same user looks on the same Advertisement.
- No source of knowing the Ads reached how many persons.
- Relevant targeting is not possible.
- People remember it very well as something physical is attached.
- Location of the Ad matters a lot.

[49]For details see Alpesh Shah and Nimisha Jain, *et.al.*, *India@Digital.Bharat*12(The Boston Consulting Group and internet and Mobile Association of India, Mumbai, 2015).
[50]Mode of Advertising, available at: (http://www.knowonlineadvertising.com)/OnlineAdvertising(http://www.knowonlineadvertising.com/factsaboutonlineadvertising/)/ (Visited on 27/09/18).

2.5.2 Online advertising

- Mode of communication is through internet.
- Approach to the customer is very fast and effortless.
- Success of the campaign can be easily tracked and changes can be made accordingly.
- New technologies being used making a lot of work automatic.
- Not very easy to manage but yes comfortable than offline advertising as in online mind plays more.
- The reach is increasing day by day but still a lot users to cover all over.
- Interactivity here is a bigger attraction.
- With rising technologies it has become easy to know your target audience behavior well.
- Retargeting here is much easier than offline.
- In this it can be easily tracked that how many user saw the Advertisement.
- On the maximum case ads are targeted to the relevant users.
- Here you see so many ads that you forget maximum of them.
- Location of the ad matters here but less than as in offline.

2.6 CLASSIFICATION OF ADVERTISING

Advertising may be classified according to the functions which it intends to fulfill, audience to which it is directed, medium utilized and alike.

2.6.1 Classification Based on Audience to which it is directed

2.6.1.1 Consumer Advertising

Consumer advertising is that which is directed at the ultimate consumer i.e. the individual who buys the product for himself or for use in his/her household. It may either done by the manufacturer or retailer handling the product. To illustrate, an advertisement for toothpaste appearing in any newspaper or magazine would be an example of consumer advertising. Advertisers in this area compete with one another to establish their particular brand an advantage over the others.

2.6.1.2 Industrial Advertising

Industrial advertising is directed at the industrial buyer. It is done by manufacturers or distributors of industrial goods and designed to stimulate demand among of such goods. Industrial goods are those goods which are basically used for industrial consumption. The industrial goods might be raw materials, machinery, equipment supplies or fabricated parts.

2.6.1.3 Trade Advertising

Trade advertising is targeted at retailers, wholesalers and contractors. It is designed to obtain the aggressive promotion and sale of the manufacturer's line of products by the dealers who are logical outlets for such products.

2.6.1.4 Professional Advertising

Professional advertising is done by manufacturer and distributors of products to be recommended by the professional people to ultimate buyers or users. Manufacturers and distributors of pharmaceutical products and building materials etc. advertise to doctors and architects respectively through their representatives not with the expectation that the professionals personally will consume the products but with expectation that they will prescribe, recommend or specify them to those individuals or builders who will buy the products on the basis of professional recommendations.

2.6.1.5 Non- Profit Advertising

This advertising is a growing part of the total advertising picture. It generally aims at fund raising for charitable purposes or persuasion to action or attracting clients. Advertising requesting to send cheque for "Prime Ministers flood relief fund" or to get a checkup for Malaria or Hear Indo-Pak *Mushaira* in your city etc. are some of the examples of non-profit advertising.

2.6.1.6 Public Service Advertising

Public Service advertising is directed at the welfare of a nation or a community. While the effectiveness of the products advertisements may be measured by a rise in sales, the effectiveness of public services advertisements must be measured in terms of good will towards the sponsoring organization.

Advertisements mentioning ‘not mixing drinking and driving’ is a good example of Public Service advertising.

2.6.2 Classification Based on Demand Influence Level

2.6.2.1 Primary Demand

Primary demand is a demand for the product or service in general rather than for a particular brand. Primary demand advertising is designed to increase the demand for a type of class of products such as coffee, steel, cigars, or milk. It is usually done by trade associations or other co-operative industry groups. When a new type of Product is introduced by one or several companies at approximately the same time, the individual firms often will use primary demand advertising to obtain initial demand for the products and get it established on the market.

2.6.2.2 Selective Demand

After the product has been established in the market, then the next step is to establish specific brands. This is done by selective demand advertising. This demand is for a particular brand such a Voltas refrigerators, Surf Detergent powder, Sony television or Vimal fabrics etc. The marketers involved in selective demand advertising attempts to establish their brand at differential advantage over the other to acquire an acceptable sort of market. Comparative advertising stimulates selective demand. It may be of either the direct or indirect type.

2.6.3 Classification Based on Timing of the Response it elicits

2.6.3.1 Direct Action Advertising

Advertising designed to obtain some immediate response from the reader or listener is called direct action advertising. It aims at generating immediate response. Virtually, all mail-order advertising is of this type since it usually attempts to induce the reader to order the merchandise instantly. The e-shopping also aims to obtain immediate response from the reader and hence, it is also direct action advertising.

2.6.3.2 Indirect Action Advertising

It is designed to influence the reader to have a favorable opinion or image of a brand, so that when he does decide to buy that product, he will buy the advertiser's brand rather than any other competing one.

2.6.4 Classification Based on Sponsorship Arrangement

This type of advertisements may be undertaken by an individual or organization as a co-operative activity. The co-operation may be horizontal or vertical:

2.6.4.1 Horizontal Cooperative Advertising

It generally occurs through trade associations which promote primary demand for a specific type of product. Some retailers, particularly, those in shopping centers, may get together in joint promotional efforts.

2.6.4.2 Vertical Co-operative Advertising

It may take place at various points in the distribution channel. It is in the interests of a product's manufacturer and its wholesalers to promote the product to retailers.

2.6.5 Classification Based on the Extent of Geographical Coverage

2.6.5.1 National Advertising

Some brands are universally recognized throughout India and some are restricted to some places. Advertising addressed to the nation at large is called national Advertising. This is mainly practiced by many firms in our country. It encourages the consumer to buy their products wherever they are sold. The famous national advertisers are: Hindustan Leavers, TISCO, Bajaj etc.

2.6.5.2 Local Advertising

It is generally done by retailers and service firms rather than manufacturers. Retailer advertising or local advertisings usually provide specific information about a particular brand for the consumer.

2.6.5.3 Regional advertising

If advertising is confined to only one region of the country, it is known as regional advertising. Regional advertising may be conducted by the manufacturer, the wholesalers, or the retailers. Regional advertising aims to establish a local brand.

2.6.6 Classification according to Medium Utilized

The media which are available to the modern advertisers are really numerous. Depending upon the nature of the media used, the advertising may be classified as follows:

2.6.6.1 Indoor Advertising

Indoor advertising includes Press media, periodicals, Radio advertising, Television, Cinema advertising and e-advertising etc. The press can be regarded as the most powerful force in the field of advertising. Periodicals like Magazine through circulated less in comparison to the newspapers; common experience shows that while a daily paper is thrown away after casual reading by busy people, Magazine is read more carefully or at a greater leisure and case. Radio advertising is highly perishable as compared with press media. Advertising on Radio has been overtaken by the television advertising, which again is superseded by e-advertising. Indoor advertising is considered be the costliest. The distinctive feature of cinema advertising is the wide audiences. In this, films of different kinds serve as media of audio-visual appeal.

2.6.6.2 Outdoor Advertising

Outdoor advertising includes posters, printed display, travelling displays, Electric Signs, Sky writing. Sandwich man etc., Posters can be tanged frequently and enable the advertiser to keep his message more timely reasonable. Printed displays are displayed on the walls whereas travelling plays are affixed in and outside of the vehicles. One of the examples of outdoor advertising is electric signs, where the illuminated figures propagating messages are being used. Another example is skywriting, where the pilots through their aero planes write the image either in the form of smoke or by illumination at a height of nearly 12,000 - 14,000 ft.

2.6.6.3 Direct Mail Advertising

Direct mail advertising is a way of passing the information relating to goods or services for sale directly to potential customers through the medium of post. It is the medium employed by the advertiser to bring personal delivery. Direct mail advertising includes Sales-letters, Envelop enclosures, Board-sides, Booklets, Catalogues etc. Although there are various types of advertising, the book only concentrates on commercial advertising. Social advertising and commercial advertising are totally unlike each other. Social advertising is considered to be much more challenging because it involves the selling of intangibles like ‘ideas’ which is far more difficult than the selling of tangible goods or services. In a number of cases like eye-donation, the transaction which the reader is being asked to enter into is an unequal one i.e. unlike in a commercial transaction the donor does not get an equal return in tangible terms.

2.7 UNETHICAL ASPECTS IN ADVERTISEMENT

Following are some of the situations which amount to “unethical advertisement”.

2.7.1 Exploitation of Religious Sentiments

Advertisement and religion are usually in harmony with each other. In recent years everything includes religion and religion is increasingly becoming a part of commerce in the consumerist Indian society. So, sometimes modern advertisements override religion and thereby exploit religious sentiments of the consumers. Some of the advertisements are guilty of abusing the cultural ethos and values of Indian society. Some of the advertisements not only impose serious challenges to the ageless Indian culture and ethos but adopt all possible means to exploit the religious sentiments of the consumers. In a print advertisement of a television company Goddess Durga is portrayed carrying different models of television in her ten hands instead of weapons. Such an advertisement was inserted during the puja festival when Goddess Durga is worshipped. There was a caption in the advertisement saying “*An offer so irresistible, no one can keep their handsoff our TVs (not even Goddess Durga)*”. This case was a clear exploitation of religious sentiments to the Hindu population. Moreover, some years back an MNC had introduced a range of shoes in the Middle East with calligraphy of Allah stamped on the shoes.

This brought uproar in the Islamic world. This advertisement was withdrawn with a public apology as it was also a clear exploitation of religious sentiments to the Islamic population.[51] These types of advertisements are nothing but unethical.

2.7.2 Obscenity and Sexual Overtone

There is an increase in obscenity and vulgarity in the content of advertisement. Previously, an obscene and vulgar advertisement portrayed female anatomy. Now, both male and female anatomy, sexuality and nudity are used in the obscene and vulgar advertisements. These types of advertisements have crossed the boundaries of morality and decency and they make use of erotica and obscenity in order to attract the attention of the public. These advertisements have downgraded the moral standards of the society.[52]

One of the classic example of obscene advertisement is the print advertisement of Tuff Shoes which was published in a Mumbai tabloid on 23rd July 1995. In this advertisement models Madhu Sapre and Milind Soman posing in nude with a python wrapped around them just about covering there vitals. The controversy with respect to this advertisement dragged for a long time. Again the advertisement of VIP underwear is also vulgar and obscene. In this advertisement a number of females come out from the toilet with pseudo-coy expressions. The camera cuts into the toilet where a handsome male model lies prostrate with lipstick marks across his body. The content of most of these types of advertisements does not have any direct relationship with the product they are advertising. These types of advertisements are mainly shown by the advertisers for certain products like designer jeans, underwear and bras, feminine hygiene aids etc. these are western concepts imposed on Indian advertisements and prove that visuals need not necessarily represent the social norms of the society.[53] In ***P.P. v. Markondeyulu***[54] the Madras High Court said

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[51]Vir Bala Aggarwal (ed.),*Media and Society: Challenges andOpportunities*142-143, (Concept Publishing Company, New Delhi, 1st Edition, 2002).
[52]*Ibid*, pp-145.
[53]Kiran Prasad (ed.), *MediaLaw and Ethics: Reading in Communication Regulations 195* (B.R. Publishing Corporation, New Delhi, 1st Edition, Volume-2, 2008).
[54]AIR 1918 Mad 1195.

that the publisher of the newspaper will be liable for publishing obscene advertisement at the instance of the publisher.[55]

2.7.3 Encouraging Self Medication

Advertisements often allure consumers to try a brand of medicines. Between the consumer and the drug there is a chit of paper called prescription of the doctor. Advertisement often prompts consumers to ignore the prescription. Medicines whether of herbal origin or chemical origin if taken in wrong doses may give rise to side effects and complications. The advertisements of the drugs often promise faster, long lasting relief which lire consumers to self-medicate. So these types of advertisements are considered as unethical. It is ironic that advertisements of cigarettes and pan masala carry statutory warnings but the numerous ayurvedic, herbal and allopathic drugs are advertised without a word or warning.[56]

2.7.4 Endorsement by Children

Advertisements by children have a great impact on the consumer children. As a result the consumer children persuade their parents to buy the same. Classic examples of persuasive advertisements are "*Two Minute Maggie Noodles*" and "*I Love You Rasna*". The children cannot differentiate between good and bad. They are also made to advertise those products which are not meant for them. Children tend to believe anything which is portrayed convincingly. Therefore, advertisements featuring children are received positively by the younger generations. As a fact they are vulnerable victims of the advertisements. Moreover, there are certain products which are primarily meant for children contain certain harmful products. E.g., chocolates contain nickel, soft drinks contain brominated vegetable oil, instant soup and noodles contain monosodium glutamate etc. children are not aware of these harmful products.[57] A classic example of such an advertisement is a TV advertisement on Doordarshan used to show a little girl pretends to have a cough as she

[55]Basu, Durga Das, *Law of the Press*, 4th Edition, p-159.
[56]Raut, Kishore C., "Ethical Dimensions in Indian Advertising", *Media and Society: Challenges and Opportunities*, VirBalaAggarwal (ed.), 1st Edition, p-143-144.
[57]Ibid, pp-144-145.

wanted to suck lozenges with a peppermint taste. But cough drops which contain sub clinical doses of menthol or ephedrine can be harmful. Children become victims in another sense also. A boy jumped out of the window in U.P. and died while intimidating a stunt shown in an advertisement. Moreover, a boy trying to act like the popular “Shaktimaan” in the popular TV show got grievously hurt. Since they are not matured and lack the ability to differentiate between the truth and the lie, it is really unethical to portray children to endorse products, services and ideas.[58] Many countries in the West have banned using children endorsing advertisement on the grounds of morality. But India is yet to make such a legislature.

2.7.5 Surrogate Advertising

When the advertisements of certain products are banned in a country, advertisers promote such products in an alternate manner, which is termed as ‘surrogate advertisement’.[59] The Indian Government has banned advertisements of liquor and tobacco, due to their harmful effects on health. As an alternate, these liquor and tobacco manufacturers started promoting their brand by introducing various other products in the market with the same brand name. E.g., Fuel Vodka is advertised as soda, Alcohol brands like Royal Challenger, Bacardi, and Bagpiper are advertised as music CDs and cassettes.[60]

2.7.6 Puffery

Advertisements which praises the product to be sold with exaggerations, vaguely and generally stating no specific facts. For example, “Eveready” batteries claim nothing outlasts an Eveready battery, “VIP Franchie” would not attract girls for you, detergent powder “Wheel” &“Vim” bars show lemons on their package but contains just lemon fragrance, “Lux” claims to contain milk

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[58]Sultana, Waheeda, “Regulatory Challenges and Ethical Issues in Public Relations and Advertising”, *Media Law and Ethics: Reading in Communication Regulations*, Kiran Prasad (ed.), 1st Edition, Volume-2, p-394.

[59] Surrogate means: substitute for oneself, available at: www.merrian-webster.com (Visited on 28/07/18).

[60]Waheeda Sultana, Regulatory Challenges and Ethical Issues in Public Relations and Advertising 396, *Media Law and Ethics: Reading in Communication Regulations*, Kiran Prasad (ed.), 1st Edition, Volume-2,

and honey but it is up to the consumer to decide whether it really contains what it has claimed? These types of exaggerations are unethical.[61]

2.7.7 Subliminal Advertisements

Inserting sublime messages in advertisements are misleading and therefore unethical. "Sublime messages" means messages which attempt to manipulate a person's thinking without the person realizing any such manipulation is occurring. The effects of sublime advertisements are real and financially significant. Consumer spend large amount of money on tapes embedded with sublime messages that are supposed to teach a person foreign language or help them to lose weight or quit smoking.[62]

2.7.8 False and Misleading Advertisements

Nowadays media is rife with advertisements which blatantly compare features of brands with those of their competitors. e.g, the Telegraphy advertisement which it blatantly compare with the Times of India. Citing opinion of the experts these advertisements claim their advertisements to be qualitatively and quantitatively better than those of their rivals. These types of false and misleading advertisements are unethical.[63]

2.7.9 Libelous Advertisements

Advertisements constituting defamation of third party is also unethical. In ***Peck v. Tribune Co***.[64] the publisher was held liable for publishing defamatory advertisements. In ***Tolley v. Fry***[65] the court said that use of a person's photograph for advertisement may constitute libel because of the caricature done in the photograph. This type of advertisement is unethical. In ***Cf. Corelli v. Wall***[66] the court said that advertisements with photograph are not defamatory even if it causes annoyance to the person. It is ethical.[67]

[61] exaggerated or false praise: his puffery actually was not far from the truth (www.oxford dictionary.com)
[62] *Supra note 60*.
[63]*Ibid*.
[64](1909)214 US 185.
[65](1931) AC 333.
[66](1906) 22 TLR 532.
[67]Durga DasBasu, *Law of the Press*160, (Lexis-Nexis Wadhawa, Nagpur, 5th edn, 2010).

2.7.10 Use of National Emblems and Names

In India use of certain names and emblems for commercial purposes in advertisements are prohibited and are considered unethical. The names and emblems which are present in the Schedule[68] of The Emblems and Names (Prevention of Improper Use) Act, 1950 prohibited. In ***Cf. Sable v. Union of***

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[68]SCHEDULE

1. The name, emblem or official seal of the United Nations Organization.
2. The name, emblem or official seal of the World Health Organization.
3. The Indian National Flag.
4.The name, emblem or official seal of the Government of India or of any State, or any other insignia orcoat-of-arms used by any such Government or by a Department of any such Government.
5.The emblems of the St. John Ambulance Association (India), and the St. John Ambulance Brigade(India), consisting of the device of a white eight pointed cross embellished in the four principal angles, whether or not the device is surrounded or accompanied by concentric circles or other decoration or by lettering.
6. The name, emblem or official seal of the President, Governor, Sadar-i-Riyasat or Republic or Union of India.
7. Any name which may suggest or be calculated to suggest
    (i) The patronage of the Government of India or the Government of a State; or
    (ii) Connection with any local authority or any corporation or body constituted by the Government under any law for the time being in force.
8. The name, emblem or official seal of the United Nations Educational, Scientific and Cultural Organization.
9. The name or pictorial representation of Rashtrapati, Rashtrapati Bhavan, Raj Bhavan.
9-A.The name of pictorial representation of Mahatma Gandhi, Pandit Jawaharlal Nehru, Chhatrapati Shivaji Maharaj or the Prime Minister of India or the words Gandhi, Nehru or Shivaji, except the pictorial use thereof on calendars where only the names of the manufacturers and printers of the calendars are given and the calendars are not used for advertising goods.
10.The medals, badges or decorations instituted by the Government from time to time or the miniatures or replicas of such medals, badges or decorations or the names of such medals, badges or decorations or of the Miniatures or replicas thereof.
11. The name, emblem or official seal of the International Civil Aviation Organization.
12. The word Interpol which is an integral part of the International Criminal Police Organization.
13. The name, emblem or official seal of the World Meteorological Organization.
14. The name, emblem of the Tuberculosis Association of India.
15. The name, emblem and official seal of the International Atomic Agency.
16. The names Ashoka Chakra or Dharma Chakra or the pictorial representation of Ashoka Chakra as used in the India National Flag or in the official seal or emblem of the Government of India or of any State Government or of a Department of any such Government.
17. The name of the Parliament or the Legislature of any State, or the Supreme Court, or the High Court any State, or the Central Secretariat, or the Secretariat of any State Government or any other Government Office or the pictorial representation of any building occupied by any of the aforesaid institutions.
18. The name and emblem of the Rama Krishna Math and Ramakrishna Mission consisting of a Swan floating on waters, with a lotus in the foreground and the rising sun in the background, the whole being encircled by a hooded serpent, with the words superimposed on the bottom portion.
19. The names and emblems of the Sri Sarada Math and Ramakrishna Sarada Mission consisting of a Swan(facing right) floating on water, with a Lotus in the foreground and the rising sun in the background, the whole being encircled by a wild serpent (facing right) with the words superimposed on the bottom portion.
20. The name of `The Bharat Scouts and Guides' with its `Emblem'.
21. The name and emblem of the International Olympic Committee consisting of five interlaced rings.

India[69] the court said names like Rashtrapati Bhavan, Raj Bhavan, Mahatma Gandhi, Pandit Jawaharlal Nehru, and Chhatrapati Shivaji Maharaj etc. cannot be used in advertisements.[70]

2.8 CONCLUSION

While advertising plays a vital role in modern competitive world affecting almost every segment of the society, there are many dark shades in it. Many advertisements are fraudulent, misleading or deceptive. Some of the advertisements create illusion far from the reality which renders people less able to adjust to real life. Advertisements may be exploitative in as much as they play on human weakness, hope, anxiety; insecurity and aspiration. According to critics of advertising, it insults human intelligence and does no good to the society. Further some of the advertisements are in bad tastes and annoying. F. Scott Fitzgerald has ridiculed advertising by describing it "as a racket whose constructive contribution to the humanity is exactly minus zero". Advertising is also criticized on the ground that it tempts people to buy products they do not need, at prices they cannot pay and on terms they cannot need. Deceptive and misleading advertisements have adverse economic impacts on consumers as they very often persuade people to purchase product which they should not purchase or which they do not want or cannot afford.

In the light of our analysis, the case for the regulation of advertising is Self-evident. Advertising should be regulated with the objective of ensuring that consumers are provided with accurate information regarding products. Accurate information not only enables consumers to make choices among available brands but can also facilitate price comparisons and stimulate improvement and in the process facilitates the functioning of a market economy. On the other hand, excessive repetition, exaggeration, praying on consumer's susceptibility and illusions neither serves the cause of consumer protection nor helps the economy. So, is the case with unfair advertising i.e.; which harms other traders or the public by exploiting public susceptibilities.

[69]AIR 1975 SC 1172.
[70]*Supra* note 67at 160.

Similarly, advertising which offends public policy or which is immoral, unethical, unscrupulous should be regulated. Advertisement for products which are dangerous and hazardous to health should also be prohibited.

Advertising is also criticized on the ground that only giant marketers can afford to spend lavishly on extensive and intensive advertising to retain and even enlarge their market share. So, it is considered to be the root cause of monopolies. Again it is criticized on the ground of killing competition and to that extent sacrifices consumer interests.

It has been observed that in order to attract the attention of the public for their products or services manufacturers, producers, distributors and service providers very often indulge in, what one may call ‘unethical advertising’. We read and see a number of advertisements which contain indecent portrayal of woman intended to appeal to the vulgar taste of citizens. Such advertisements create undesirable attitudes of sexism and may have the effect of depraving and corrupting the society especially the young ones. In order to draw attention, women are being shown in scanty clothes in the advertisements of those products or services which are not even remotely connected with them. To illustrate, in the advertisement for a motorcycle which each part of the vehicle is equated with some pan of woman’s to be ridden by the conquering male.

False or misleading advertising should also be controlled because such advertising can result in misallocation or resources either through useless product expenditures or by directing trade to high priced premium products that differ from cheaper substitutes only in the quality and volume of advertising. In fact, deceptive advertising can eventually undermine the whole competitive system by reducing the extent to which consumers will rely on product claims and description. The result of deceptive advertisement for Consumer is disappointment or worse a real economic or physical injury. In brief the consumers need to be protected from false or misleading advertisements.

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CHAPTER-III

COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL FRAMEWORK OF ADVERTISEMENTS

CHAPTER-III

COMPARATIVE ANALYSIS OF NATIONAL AND INTERNATIONAL FRAMEWORK OF ADVERTISEMENTS

"*Advertising may be described as the science of arresting human intelligence long enough to get money from it*"[1].

-*Stephen Leacock.*

3.1 INTRODUCTION

Advertising is communication that revolves around the product or service and is beautifully designed, clear and concise, and conveys an attractive message that aims to attract target customers. Advertising is the most powerful tool for persuading target customers to buy the product or service or simply informing them about the availability of the product or service on the market. According to research from various sources, advertising has a very colorful history of a thousand years, from the primitive story to the word of mouth of the 'town criers' until today on the Internet. The use of scientific methods to solve advertising problems was a blessing for advertisers and technological development, the invention of machines; industrial revolutions, etc. have advertised a nation's economic strength. The countries like United Kingdom, the United States of America, Canada, France, Japan etc. have played a significant role in the growth of advertising.[2]

3.2 UNITED KINGDOM

The United Kingdom is marked by an overabundance of laws through which consumer protection is effected. Which include the Consumer protection Act of 1987, the Consumer Credit Act of 1974, the Sales of Goods Act of 1979, the Competition Act of 1998, the Unfair Terms in Consumer Contract

[1]Leacock and Stephen Butler, Garden of folly 'The Perfect Salesman' (Oxford Dictionary of Quotations and Proverbs, 1924).

[2]Vasanthi Ajay, "Perception of Indian Consumers Towards Indian Advertisements" Vol. 2, Issue 2, Impact: International Journal of Research in Humanities, Arts and Literature (IMPACT: IJRHAL) 89(Feb 2014).

Regulations of 1999, the Enterprise Act of 2002 etc. incorporated with these statutory enactments, there are large number of government agencies, department as well as self-regulatory and citizens' lobby groups that facilitate the implementation of these laws and regulations. Together they have the robust system, which smooth the way of government for consumer protection.

In respect of misleading advertisements, the general framework pertains to two separate regimes: the first being the Statutory Regulatory Regime which consists of the Regulations enacted to give effect to the EC directives 2006/29 and 2006/114 and the regulatory bodies primarily the OFT[3] and the Trading Standards Authority. The second regime is the self-regulatory regime which relates to the Advertising Codes created by advertising industry committees, which in turn are implemented by the Advertising Standards Authority.[4]

3.2.1 Statutory Regulatory Regime

In United Kingdom with respect of Misleading Advertisements, under Statutory Regulatory Regime I am going to discuss two acts and their enforcement mechanism.

3.2.2 Consumer Protection from Unfair Trading Regulations, 2008 (CPRs)

The CPRs were codified under the European Community Act of 1972 and entered into force on May 26, 2008.They give effect to the Unfair Commercial Practices Directive (UCPD), [5] which aims to harmonize the legislations preventing business practices that are unfair to consumers across the European Community Members States in support of the growth of the internal (European) market.[6]

In addition, the CPRs apply to all acts, omissions and other behavior of businesses that are directly related to the advertising, sale or delivery of a product to a consumer. More importantly, they apply not only during or after a commercial transaction but also before any contract is entered into, which in

[3]Office of Fair Trading.

[4]Shubhank Khare, "Protection of Consumers with Reference To Misleading Advertisement In India: A Critical Analysis" VOL. 4 ISSUE 2 IJLDAI 61-89 (March 2018).

[5] EC Directive 2005/29

[6]Guidance on the UK Regulations (MAY 2008) Implementing the Unfair Commercial Practices Directive, Office of Fair Trading, 2008.

relation to misleading advertisements gains significant importance because it then emphasizes the likelihood of damage versus the damage actually caused.[7]

In terms of its general homework it contains a general prohibition of unfair commercial purpose as reflected under Regulation 3. The relevant portions are:

"Regulation 3: [1] Unfair commercial practices are prohibited.

(3): A Commercial Practice is Unfair if: (a) it contravenes the requirements of professional diligence; and (b) it materially distorts or is likely to materially distorts the economic behaviour of the average consumer with regard to the product.

(4): A Commercial practice is unfair if: (a) it is a misleading action under the provisions of regulation 5; (b) it is a misleading omission under the provisions of regulation 6;

(c) ….."[8]

Emerging from this general prohibition: under sub-regulation (4)(a) and (b), a specific reference has been made to regulation 5 and 6 dealing with 'misleading actions' and 'misleading omissions', respectively. These two provisions together form the law on misleading advertising in a retailer-customer relationship. They aim to ensure that the necessary information to make an informed decision is given to the consumers in a clear and timely fashion.[9] A 'misleading action' is said to occur when the average consumer is misled through the information a commercial practice contains, or its deceptive presentation that has the potential to bring about a change in the consumer's decision. Accordingly, the CPRs recognize three types of misleading actions. 'These include: (i) giving misleading information; (ii) creating confusion with competitor's products and (iii) failing to stick to firm commitments made in the code of conduct formulated by the office of Fair Trading.[10]

[7]*Ibid.*
[8]Regulation 3, Consumer Protection from Unfair Trading Regulations, 2008.
[9]Ibid at 37.
[10]Regulation 5, Consumer Protection from Unfair Trading regulations, 2008.

Similarly a 'misleading omission' refers to a situation where the traders leave out certain important information which otherwise is much relevant to enable a consumer to make an informed choice and in the absence of which the average consumer takes or is likely to take a different decision. Three types of misleading omissions have been identified:

i. intentionally leave or hide important information in order to make a purchase decision for the product;
ii. provide information that is not clear, incomprehensible and inappropriate and
iii. not to disclose that the information provided actually serves commercial purposes.[11]

3.2.3 Business Protection from Misleading Regulations, 2008 (BPRs)

While CPRs regulate business-to-customer commercial practices, BPRs regulate business-to business commercial practices. Accordingly, a business, which advertises its goods and services to other business or draws comparisons with a competitor's product/service in the advertisement to the consumers or ' businesses, then such business shall fall under the scope of applicability of the BPRs.

The BPRs came into force on May 28, 2008 and put the Misleading and Comparative Advertising Directive (MCAD) into effect.[12] Further, it has a two-fold function: first, prohibits businesses from advertising products in a manner that shall mislead traders and second, sets out the conditions for permissible comparative advertising to consumers and business.[13]

As regard misleading advertisements the relevant provisions are as follows:

Regulation 3: (1) *Advertising which is misleading is prohibited.*

(2) Advertising is misleading which –

(a) In any way, including its presentation, deceive: or is likely to deceive the traders to whom it is addressed or whom it reaches; and by reason of its

[11]Regulation 6, Consumer Protection from Unfair Trading Regulations, 2008.
[12]EC Directives 2006/114.
[13] Business to Business Promotions and Comparative Advertisements - A Quick Guide to the Business protection from Misleading Marketing Regulations of 2008, Office of Fair Trading, 2009.

deceptive nature, is likely to affect their economic behaviour; or (b) for those reasons, injures or is likely to injure a competitor.

(3) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning - (a) the characteristics of the product (as defined in paragraph (4)); (b) the price or manner in which the price is calculated; (c) the conditions on which the product is supplied or provided; and (d) the nature, attributes and rights of the advertiser (as defined in paragraph(5)).

(4)....[14]

Further, in relation to misleading comparative advertising, the BPRs provides for, the following:

Regulation 1: *Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met-*

(a) it is not misleading under regulation 3;

(b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008 (a) or a misleading omission under regulation 6 of those Regulations;

(c)....[15]

3.2.4 Enforcement Mechanism under the CPRs And BPRs

3.2.4.1 Enforcing Authorities

The principal authority to give effect to the CPRs and the BPRs is the Office of Fair Trading (OFT), which is a non-ministerial government department established under the Fair Trading Act, 1973. It plays a leading role in protecting and promoting the consumer interests all throughout the UK by regulating the businesses so as to ensure that they are fair and competitive. It thus, in other words, is the nodal agency administering consumer law in UK.[16]

[14]Regulation 3, Business Protection from Misleading Marketing Regulations, 2008. Sub-regulation (4) and (5) go on to explain the meaning of "characteristics of the product" and "the nature, attributes and rights of the advertiser", respectively.

[15]Regulation 4, Business Protection from Misleading Marketing Regulations, 2008.

[16]Available at <http://www.oft.gov.uk/about-the-oft/>, (20th February, 2018).

A significant aspect however to be noted is that the OFT cannot act upon individual complaints. Part 8 of the Enterprise Act of 2002 specifically restricts the powers of the OFT to enforcing the legislation only in cases of systemic complaints i.e. a breach affecting the collective interests of consumers.[17] Yet in this regard, 'acting upon individual complaints' is to be understood in the sense of undertaking an individual investigation of an individual's complaint addressing his claims. While such investigation shall not be undertaken by the OFT, nevertheless, it can log the information given by even an individual, highlighting any noncompliance by a business with the consumer and competitive legislation. However, such information shall only be used as intelligence enabling the OFT to determine the areas where traders' activities are required to be monitored and investigated. Consequently, action is taken by the OFT against those in breach either on its own accord or in pursuance of a complaint made by the Local Trading Standards Authority or Super Complainants.[18]

Another, important regulatory authority directly enforcing the CPRs and BPRs is the Trading Standards Authority. Its branches are located across the United Kingdom thereby providing its service locally and thus, enabling easy access to consumers. Broadly, it performs three functions: first, takes legal actions against traders who have violated the law including criminal prosecution, applying for injunctions, issuing statutory notices, entering premises and seizing goods and documents, etc. Secondly, as a preventive control mechanism, it advises and educates the traders about the law and prohibited activities, and thirdly, it offers advice and help to consumers in relation to their consumer complaints or queries.

3.2.4.2 Tools for Enforcement

Numerous tools of enforcement and sanctions are available to the regulatory authorities enforcing the CPRs and the BPRs. These include: (i) education, advice and guidance as a

[17] Part 8, The Enterprise Act, 2002. In light of this observation, in the case of misleading advertisements, the researcher opines that as long as an advertisement.....

[18] *Supra* note 16.

preventive control tool; (ii) resorting to established means i.e. alternate well-effective systems of regulation put in place in UK (for example the ASA)[19] (iii) implementing a code of conduct;(iv) civil enforcement as Community infringements under the Enterprise Act of 2002, and finally (v) criminal enforcement under the CPRs and BPRs.

3.2.5. The Advertising Self-Regulatory System

While television and radio broadcast advertising was regulated by legislation, the same was absent in the zone of non-broadcast advertising. However, in 1961, having realised the importance of consumer acceptability and trust in all mediums of advertising, the Advertising industry came together to form the Committee of Advertising Practice (CAP) and formulated its first advertising code of practice in relation to non-broadcast advertising[20]. Soon thereafter, the Advertising Standards Authority (ASA) was established as the independent adjudicator under the Advertising Code.[21]Post 2004 and with the success of ASA, today the UK advertising self-regulatory system is a mixture of self-regulation for the non-broadcast advertising and co-regulation for broadcast advertising.[22]

3.2.6 The Advertising Codes

The industry is governed by 'Codes of Practice' that are written and maintained by two bodies:

(I) the Committee of Advertising Practice (CAP) that is responsible for the non-broadcast code; and

(II) the Broadcast Committee of Advertising Practice(BCAP) that is responsible for the broadcast code.[23]

[19] The recognition of any resort to established means as an enforcement tool highlights the recognized potential of non-governmental alternate forums such as the ASA by the Government.
[20] Available at: http://www.asa.org.uk/About-ASA/Our-history.aspx, (Last visited 20th February , 2018).
[21] Available at http://www.asa.org.uk/About-ASA/Our-history.aspx, (20th February , 2018). Encouraging these initiatives and efforts taken by the Industry, the Melony Committee on Consumer Protection too, rejected the need of any statutory regulation as in the USA.
[22] Id. at 53.
[23] Available at http://www.asa.org.uk/About-ASA/About-regulation.aspx, (20th February, 2018).

The fundamental thread running through the provisions under the code is that it must be ensured that advertising does not mislead, harm or offend. Instead Ads must be socially responsible and must respect the principles laid down in relation to fair competition.[24]Both the Codes encapsulate the legal requirements otherwise attached to the advertisers in the broadcast and non-broadcast media. However, additionally, special protections for children and other vulnerable people along with such provisions for special kinds of products like alcohol, health and beauty have also been included.

3.2.6.1 The Non-Broadcast Code

This Code provides rules governing non-broadcast advertisements, sales promotions and direct marketing communications. It primarily focuses on the content of the marketing communication as opposed to the terms of business or products themselves.[25] Further, the Code is intended to supplement the law and fill the gaps otherwise existing therein and thus, provide an effective mode of resolving disputes over and above the existing civil and criminal litigation avenues.

Some of the relevant provisions in the Code are as follows:

Rule III (b) defines a "consumer" as "anyone who is likely to see a given marketing communication, whether in the course of business or not".[26]

This definition clearly highlights that to be a consumer, consideration in the form of purchasing the product or service is not required at all. Instead what is required that you are "likely to see a given market communication". This becomes of utmost importance especially in misleading advertisements cause it gives the locus standi also to those consumers who are generally being misled by the content of the advertising yet haven't purchased the product on their own. Consequently, when the ASA sits in judgment over a matter, it is required to take into account the impression created by the advertisements in terms of the likely effect on consumers as opposed to the advertiser's intentions.

[24] *Supra* note 20 at 55.
[25] Introduction, The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing.
[26] Ibid -Rule III (b).

Further, as evident from the definition the Code deals with both trader-to-customer marketing relations as well as business-to-business marketing communication.

Rule 3 of the Code specifically deals with 'Misleading Advertising'. Some of the relevant sub-rules are:[27]

"Rule 3.1: Marketing communications must not materially mislead or likely to do so."

This rule provides a general prohibition on all misleading marketing communications.

"Rule 3.2: Obvious exaggerations ("puffery") and claims that the average consumer who sees the marketing communication is unlikely to take literally are allowed provided they do not materially mislead."

This rules marks the limit of acceptable puffery allowed.

"Rule 3.3: Marketing communications must not mislead the consumer by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner."

This rule corresponds to the concept of 'misleading omissions' under the CPRs discussed above.

> *"Rule 3.4: For marketing communications that quote prices for advertised products, material information [for the purposes of rule 3.3] includes the main characteristics of the product..."*

This provision lays down the definition of 'material information' for advertised products. Based on the same, the misleading nature of an advertisement may be judged.

"Rule 3.9: Marketing communications must state significant limitations and qualifications may clarify but must not contradict the claims that they qualify."

"Rule 3.10: Qualifications must be presented clearly."

[27]Rule 3, The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing.

Rule 3.9 and 3.10 go on to ensure that all claims on a product or in relation to a service are necessarily qualified.

"Rule 3.7: Before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove claims that consumers are likely to regard as objective and that are capable of objective substantiation. The ASA may regard claims as misleading in the absence of adequate substantiation."

Rule 3.11: Marketing communications must not mislead consumers by exaggerating the capability or performance of a product.

Rules 3.7 and 3.11 together are of significant importance. They mandates that all claims made must be substantiated with objective documentary evidence to prevent any form of exaggeration. As a result, in case an advertiser claims that his fairness cream guarantees a substantial change in the skin tone within 4 weeks then the same must necessarily be substantiated with authentic case studies and scientific analysis.

"Rule 3.6: Subjective claims must not mislead the consumer; marketing communications must not imply that expressions of opinion are objective claims."

"Rule 3.45: Marketers must hold documentary evidence that a testimonial or endorsement used in a marketing communication is genuine, unless it is obviously fictitious, and hold contact details for the person who, or organisation that, gives it."

These two rules too are of much relevance. Advertisers often appoint famous celebrities as a brand ambassador for their products who then are often seen making baseless claims in confirmation of the veracity of the performance of the product. Such claims are often untested and in turn have a significant impact on the fan-following of the celebrity. Thus, to prevent any harm caused due to such tactics, this rule mandates that any such testimonies must 'necessarily' be genuine.

"Rule 3.33: Marketing communications that include a comparison with an identifiable competitor must not mislead, or be likely to mislead, the consumer about either the advertised product or the competing product."

Comparative Advertising has also been addressed in the rules corresponding to the provisions in the BPRs.

3.2.6.2 The Broadcast Code

This Code has been made applicable to all advertisements and programme Sponsorship creditson the radio and television services licensed by Ofcom. Similar to the non-broadcast code, this Code too is designed to inform the broadcasters and advertisers as regards the standards in the content that is to be ensured.[28]

Further, once again similar to the Non-broadcast Code, misleading advertisements are dealt under Rule 3.[29] Given the fact that most of the provisions are similar in both Codes with minor variations, the same is not being reproduced to avoid repetition.

3.2.7 The Advertising Standards Authority (ASA)

ASA is UK's independent self-regulator of advertising across all media. This independence must be understood in terms of being independent from both the Government and the Advertising Industry. Nearly two-thirds of the ASA Council is independent of the industry while the remaining have some current or recent knowledge of the media or advertising sections.[30]

It administers the Advertising codes discussed above and in doing so has been recognized by the Courts of Law, the Government and the other statutory regulators like the OFT and Ofcom, as the body of first resort to deal with consumer complaints about advertising.[31]

[28]The UK Code of Broadcase Advertising.
[29] Rule – 3, The UK Code of Broadcase Advertising.
[30] Available at: http://www.asa.org.uk/About-ASA/our-team/ASA-council.aspx , (Visited 20 February, 2018).
[31]A guide for Advertisers and Agencies, Clear cast Limited, 2009 at 9.

Further, its aim is to ensure that all ads are "legal, decent, honest and truthful". In this regard it performs two essential functions: (i) undertakes preventive control measures and, (ii) redresses consumer complaints.

3.2.7.1 Preventive Control Measures

As regards the preventive measures, it actively monitors advertisements to ensure standards are being maintained. It conducts surveys or ads in sectors where the compliance record has been significantly low and also in 'other high profile areas like gambling or alcohol advertising.

Further, it educates and train advertisers in collaboration with CAP and BCAP on the governing rules and advertising codes to prevent the problem of misleading ads appearing in the first place itself.[32]

3.2.7.2 Complaint Redressal Mechanism

In relation to its complaint redressal mechanism, instead of approaching the statutory regulatory bodies first, the consumer may complain against a misleading advertisement to the ASA. Accordingly, when such complaint is made, in order to protect the interests of the complainant, unless otherwise required, the complaints are kept confidential from the advertiser. Thereafter, the Complaints team assesses the marketing communication and the nature of objection to determine how best to resolve the complaint.393 In case of minor changes required the same is first sought to be resolved informally with cooperation of the marketer. However, in complex cases a formal investigation may be undertaken by the ASA. Subsequently, the ASA Council shall rule on the matter in accordance with the Advertising Codes. In the event the complaint is upheld, the Advertiser shall be directed to either amend or withdraw the Ad.[33]

[32] Available at http://www.asa.org.uk/Regulation-Explained/control-of-ads.aspx , (Last visited 20 February, 2018).

[33] Available at http://www.asa.org.uk/consumers/How-to-complain.aspx , (Last visited 20 February, 2018).

Further, an independent review procedure has also been set in place to provide an opportunity for the advertisers and complainants to request a review of the adjudication.[34]

3.2.7.3 Sanctions to ensure Compliance

Given the fact that the ASA has no statutory backing and is merely a self-regulatory body constituted by the industry itself, enforcing compliance with its rulings may prove to be difficult task. However, to counter this, the ASA has adopted numerous sanctions to facilitate and enforce its actions. These include (i) weekly publication of all the rulings of the-ASA Council, which undoubtedly may lead to bad publicity for the advertiser coupled with great media attention; (ii) removal of Royal Mail direct mail discounts; (iii) mandating pre-vetting of the posters of poster advertisers that break the rules on taste and decency; (iv) referral of those who fail to comply with the ASA Council rulings or who persistently break the rules, to the OFT (for misleading non-broadcast ads) or to the Ofcom (for TV and radio commercials). Amongst all the sanctions, this sanction surely gives the ultimate boost to the significant position held by ASA as a self-regulatory authority.

Other than the above, given the credibility and respect ASA has been bestowed with from within the industry as well as outside, the broadcasters and media owners too have grouped together in refusing to feature ads that do not comply with the advertising codes. Thus, too has acted as an essential external sanction to ASA’s authority.

3.2.8 A Comparison with India

Following are certain points of comparison identified by the researcher in relation to UK and India:

Firstly, in India there is no special designated law to deal with misleading advertisements as in the case of UK. Consequently, we are forced to bring claims before the self-regulatory body i.e. ASCI, established in India on the lines of ASA or file a civil suit or. undertake a criminal prosecution on

[34] Available at: http://www.asa.org.uk/consumers/Independent-review-process.aspx , (Last visited 20 February, 2018)

grounds such as misrepresentation, fraud, cheating, etc. The efficacy of these mechanisms is undoubtedly undermined in relation to the misled consumers as in the case of ASCI, apart from lacking statutory backing, it has not yet reached the level of recognition and credibility as the ASA has from the courts of law, advertising industry and the Government, thereby undermining its capabilities in protecting the consumers. Further, as regards the filing a suit, the time and costs incurred in undergoing litigation has proven to be an unfortunate barrier for the consumers to process their claims.

Recourse potentially available to the consumers to process their claims of misleading advertisements is the Consumer Protection Act, 1986. However, this too falls short in providing an effective remedy on account of the absence of any provision specifically dealing with misleading advertisements as well as the definition of 'consumer' being hinged upon the need for consideration. In other words, the latter necessitates the purchase of the product or service to have a valid claim under the Act.

Secondly, the UK law as provided under the BPRS as well as through the definition of 'consumer' under the Advertising Codes (CAP and BCAP Codes), also accounts for and tackles business-to-business misleading advertising over and above business-to-consumer advertising. This is clearly absent in India especially under the Consumer Protection Act where to have a claim it is necessary that the product or service bought be for a non-commercial purpose.

Thirdly, ASA has established itself as a robust self-regulatory body. It has been identified a super-complainant in the sense, capable of making a complaint to the OFT and Ofcom, thereby raising its credibility. Further, it has proved to be effective in terms of its independence from the advertising industry as well as the Government. However, in India, the position and performance of ASCl still hasn't reached appreciable standards. It is still highly influenced by the advertising industry as the persons sitting in judgment over matters come from the same industry leading to potential biased opinion.

Moreover, as stated above, there has been no official recognition of the organisation from the Government.

Fourthly, as regards the Regulations and Rules in the statutory codes and the self-regulatory codes, there are certain such rules and regulations which are absent in India though are much required in light of the enormous lack of consumer awareness coupled with illiteracy. Some of these include, the need to ensure substantiation of claims with objective documentary evidence, mandating that the testimonies advertised in relation to a product are genuine, and necessitating that need for advertising the qualifications and limitations to the claims and guarantees made in relation to the product.[35]

3.3 UNITED STATES

In the United States, consumer rights law encompasses a large body of laws enacted by the government to protect consumers by regulating many transactions and business practices, such as:

- Advertising,
- Sales and business practices,
- Product branding,
- Mail fraud,
- Banking and lending,
- Quality produce and meats,
- Housing (construction) material and other product standards,
- And various other as well.

These laws exist on both state and federal levels. Some states even choose to additionally regulate door-to-door sales, abusive collection practices and referral/promotional sales. The Federal Trade Commission (FTC) is the overarching regulator in this regard although originally established in 1914 to curb unfair competition in markets; its scope was extended in 1938 to include

[35] ShubhankKhare, "Protection of Consumers with Reference To Misleading Advertisement In India: A Critical Analysis" VOL. 4 ISSUE 2 IJLDAI 352-354 (March 2018).

oversight of consumer protection laws in the country as well.[36] Most states in the US have Departments of Consumer Affairs, devoted to regulating certain industries and protecting consumers who use the goods/ services originating from these industries.

There are numerous federal acts that address various aspects of consumer protection in the USA. The Consumer Credit Protection Act (CCPA), for example (also known as the Truth in Lending Act), regulates the credit industry and includes within its ambit credit card companies, credit rating companies as well as loan sharks. The Fair Credit Reporting Act (FCRA) regulates credit reporting agencies as well as their users. The Fair Debt Collection Practices Act was added as an amendment to the CCPA in 1978 to abolish intrusive and abusive collection practices, and give consumers a right to dispute inaccurate debt information. Further, the Fair Credit Billing Act was added to the CCPA in 1975 to regulate the previously uncovered area of billing practices in credit accounts. The Magnum-Moss Act of 1973 regulates product warranty standards both implied and express. To address the growing problem of identity theft, the Congress enacted the Identity Theft and Assumption Deterrence Act in 1998. The Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act (GLBA), sought to enhance competition in the financial services industry (removing barriers that disallowed banking, insurance and securities companies from integrating).

At the state level, many have chosen to adopt the Uniform Deceptive Trade Practices Act (UDTPA). The deceptive trade practices prohibited under this act can be roughly grouped as:

- Conduct involving unfair or fraudulent business practices, and
- Untrue or misleading advertising.

[36] The FTC is extremely active in its approach to consumer protection it has the competence to initiate federal litigation. In FTC v. Cyberspace.com [453 F. 3d. 1196 (9th Cir., 2006], the FTC successfully defended its finding that the defendant, sending mails that appeared to be cheques for $3.50 to the consumer, attached to an invoice, was deceptive since cashing the cheque had the effect of concluding an agreement to pay a monthly fee for internet access. It was held to be misleading to 'reasonable consumers‘.

The UDTPA provides for a private remedy, with attorney's fees, for consumers/parties/plaintiffs prevailing in a suit, where the opposite parties willfully engaged in a conduct, knowing it to 'be deceptive.[37] As stated earlier, state Consumer Welfare Departments (Departments of Consumer Affairs), along with voluntary organizations (which have a strong presence, especially in California where their effect is seen in the form of strict consumer protection laws), enforce the legal frameworks for consumer protection in the states.

3.3.1 False and Misleading Advertisement

In the United States, false or deceptive advertising is, quite basically, the use of false or misleading statements in advertising. Advertising is recognised as a potent tool of marketing, which has the potential to influence people to make commercial decisions or enter into transactions that they otherwise might have avoided. This is the basic premise underlying the legal necessity of regulating advertisements governments generally choose, as the underlying philosophy of regulatory laws, 'truth' and the 'right to know' i.e. all relevant information regarding the product.

False/misleading advertisement is punishable in some way or the other in most jurisdictions, but advertisers find hidden loopholes in the law and manage to get away with ad campaigns that, although technically illegal, are practically unenforceable. It is pertinent to examine some of these strategies in the USA, before we embark on a discussion of the law.

3.3.2 Pricing Based Methods

- **Hidden Fees and Surcharges**

Service providers often levy fees and surcharges that are not disclosed to the customer in the advertised price. One of the most common means is for activation of services such as mobile phones, but is also common in broadband, telephony, gym memberships, and air travel. In most cases, fees are hidden in the small print, although in some cases they are so confusing and hidden by ambiguous terminology that they are essentially not disclosed. Hidden fees are often used in airlines and air travel advertising. In the case of motor vehicles,

[37]Section – 3(b) of Uniform Deceptive Trade Practices Act (UDTPA).

hidden charges may include taxes, registration fees, freight, pre-delivery inspection (FBI), licenses, insurance or other costs associated with getting a vehicle on the road. Airlines and automakers hire companies that disadvantage customers by:

- Unfair contract terms, particularly with regard to consumer compensation.
- Use customer data for purposes other than those for which it was received.
- Apply unfair fees, charges and penalties to transactions.
- Set artificial limits on how long customers can file complaints.

For delivered items in the US, the amount of shipping and handling (S&H) fees are typically not disclosed (although the fact that there will be such charges is disclosed). What is misleading is that they often claim that an item is 'free' even though the S&H fees actually allow them to make a net profit.

- **"Going out of business" sales**

In many cases, the liquidators tasked with selling goods in a locking shop actually increase the prices of items that have already been marked-down during customs clearance. For items already marked-down, this means that the liquidator increases the price and "discounts" from there. It is also common for retail prices in other stores in a retail chain to be lower than the liquidator's prices in closed stores. These two cases came to light in November 2008, when the same liquidator (Hilco) committed the two violations: the increases in Linens' n Things and the higher prices for about a third of the items compared to Circuit City's other stores open. In addition, the liquidators refuse to accept returns. If a customer determines that they have been overloaded, there are no obvious remedial measures. This is used by most advertisers who are trying to demonstrate acceptance of their products.

- **Misuse of the word "free"**

The usual meaning of "free" is 'without cost or obligation'. However, retailers often use the word for something that is simply included in the total price. A common example is a "Buy One, Get One Free" sale. The second item is not “free” according to the normal definition, since the buyer has to pay the full cost of the first item to get it.[38]

3.3.3 India–United States Comparison

In the United States, maximizing consumer well-being and promoting a free and competitive economy is the primary goal and ‘the cornerstone of government behavior towards the commercial scene’ for over 100 years. For example, in the United States, comparative advertising has been a recognized and acceptable form of advertising and has the added protection of freedom of speech laws. The 1969 FTC Policy Statement on Comparative Advertising encouraged the use of comparisons that identify the competitor or competitive product. However, the negative consequences of the false and confusing comparative claims led to the FTC demanding “clarity and, if necessary, disclosure to avoid misleading consumers”.

For example, in ***Tommy Hilfiger Licensing Inc. v. Nature Labs LLC [2002]***, Nature Labs, a pet perfumery store, used “Timmy Hilfiger” as a trademark and the slogan “If you like Tommy Hilfiger, your pet likes Timmy Hilfiger”. Tommy Hilfiger, one of the best-known American fashion brands, has sued Natural Labs for trademark infringement, unfair competition and trade fraud, among other things. The court ruled that the accused’s use of a Tommy Hilfiger-like trademark was a fair travesty, a kind of “freedom of expression” protected by the first amendment to the United States Constitution. Consumers laughed more at the parody humor than at the origin of the products. In addition, the comparison used by the respondent did not affect the applicant's products in any way. Therefore, the court has rejected all of the plaintiff’s claims.

Although Indian law is interpreted to allow comparative advertising, no legislation addresses the issue directly or comprehensively. The trademark law and the law on monopolies and restrictive trade practices need to be read together to understand the concept of comparative advertising. In view of the change in policy from the abolition of monopolies to promoting competition,

[38] *Supra* note 35 at 354.

on 26 June 2001 the Union cabinet approved the repeal of the law on monopolies and restrictive trade practices. This was achieved through the Competition Act and all cases of unfair commercial practices pursuant to Section 36A clause (x) of the MRTP Act pending at the Monopoly and Restrictive Trade Practices Commission. Thereafter, the Restrictive trade was delegated to the Indian Competition Commission.

It must also be noted that several important terms related to the concept of comparative advertising such as “disparagement” and “honest practices” are not defined in any legislation, and the dictionary meaning or judicial interpretations have to be used in ascertaining the meaning of these terms. ‘Unfair trade practice’ has been defined u/s 36A of Monopolies and Restrictive Trade Practices, 1969 that stands repealed now. Under the Consumer Protection Act, 1986, protection has been provided against unfair trade practice but in the cases of ‘comparative advertising’ the parties are firms (whose products are endorsed by the advertisements), which would not come in the ambit of ‘consumers’ to approach the consumer forum.[39]

It should also be noted that some important terms related to the concept of comparative advertising such as “disparagement” and “honest practices” are not defined in any legislation and the meaning of the dictionary or legal interpretations should be used to understand the meaning of these determine terms. The “Unfair Trade Practices” was defined in Section 36A of the Monopolies and Restrictive Trade Practices of 1969, which is now being repealed. Protection against unfair trade practices was granted under the Consumer Protection Act of 1986, but in cases of “comparative advertising” the parties are companies (whose products are approved by advertising) which would not fall into the ‘consumer’ realm to approach the consumer forum.

Absence of a single comprehensive legislation had created a lot of confusion in the advertising industry in India. In 1985, a self-regulatory mechanism of ensuring ethical advertising practices was established in the form of the Advertising Standards Council of India (ASCl), a non-statutory self-

[39]*Ibid.*

regulator. The Consumer Complaints Council (CCC) of the ASCI entertained and disposed off complaints based on its Code of Advertising Practice (ASCI Code). Gradually, the ASCI code has gained tremendous recognition in the advertising industry. In August 2006, the ASCI code for television advertising was made compulsory by amending the 2006 cable television network (amendment) rules: "No advertising that violates the self-regulatory code for advertising as passed by ASCI, Mumbai, will from time to time transported by cable service for a public exhibition in India".[40] This decision had a binding effect on the ASCI code. Rule 7 postulates that any advertising that ridicules any race throws people and incites them to crime is unrestful or indecent or vulgar. In addition, Section 6 of the Cable Television Networks Act of 1955 prohibits the transmission or retransmission of advertisements through a cable service if it does not conform to the ASCI Code, and the primary objectives of the ASCI Code are to ensure that advertising must-

- make truthful and honest statements and explanations of what is important to prevent misleading advertising.
- do not violate public decency or morality;
- do not promote dangerous or harmful products for society or individuals, especially minors; and
- respect the fairness of competition in terms of consumer interests.

According to the ASCI code, anyone who thinks it is wrong, misleading, offensive or unfair can file a complaint against the advertisements. The complaints are evaluated by the independent CCC. The CCC regulates public complaints, including government officials, consumer groups, etc., complaints from one advertiser against another, and even suo-moto complaints from the board member of ASCI, CCC or the secretariat. The CCC generally adjudicate the complaints within 4 to 6 weeks as soon as the party concerned has the opportunity to present their case.

As regards legislative lessons we can import from US law, the extended limitation period (4 years) under the UCL in California is one we can import,

[40]Section 6 of the Cable Television Networks Act of 1955.

especially in View of the fact that the major consumer laws in both jurisdictions require actual injury to be shown in order to have a locus to sue.

3.4 CANADA

3.4.1 Sources of Advertising Law

3.4.1.1Basic principles

The laws regarding advertising in Canada generally prohibit false and misleading advertising and specifically prohibit claims that products have particular endorsements, benefits, characteristics, qualities or history, etc., if such claims are false.[41] They also prohibit, inter alia, inadequate disclosure of certain terms of the offer being advertised. For example, the laws prohibit inadequate disclosure of the odds of winning a promotional contest.[42] In addition, advertising laws also regulate the use of the third party trademarks[43]and copyrights[44] in advertising, as well as inappropriate content in advertising (e.g., the advertising of alcohol to minors).

3.4.1.2 Constitutional sources

The Constitution Act 1867 grants authority to the federal government to regulate each of trade and commerce[45] and copyright.[46] On this authority, the federal government has enacted the Competition Act,[47] the Broadcasting Act,[48] the Copyright Act,[49] and the Trade-marks Act.[50]

The Constitution Act, 1867 also grants authority to the provincial government to regulate local undertakings.[51]On this authority, the provincial governments have enacted consumer protection legislation, which also prohibits false and misleading advertising.[52]

[41] Competition Act, R.S.C. 1985, c. C-34, s. 52, s. 74.01.
[42] Competition Act, R.S.C. 1985, c. C-34, s. 53(2)(a).
[43]Trade-marks Act, R.S.C. 1985, c. T-13, ss. 7, 9-11.15.
[44] Copyright Act, R.S.C. 1985, c. C-42, s. 27.
[45] Constitution Act, 1867, 30-31 Vict., c. 3 (U.K.), s. 91(2).
[46] Constitution Act, 1867, 30-31 Vict., c. 3 (U.K.), s. 91(23).
[47]R.S.C. 1985, c. C-34.
[48]R.S.C. 1991, c. 11.
[49]R.S.C. 1985, c. C-42.
[50]R.S.C. 1985, c. T-13.
[51] Constitution Act, 1867, 30-31 Vict., c. 3 (U.K.), s. 92(10).
[52] See as examples: Consumer Protection Act, 2002, s. O. 2002, c. 30, Sch. A, Consumer Protection, O. Reg. 200/02, Consumer Protection Act, R.S.N.L. 1990, c. C-31, Consumer Protection Regulations,

The Charter is sometimes invoked in Advertising Law cases, usually in attempting to make an argument that the impugned acts should be allowed to further freedom of speech. Indeed, advertising was found to fall within the auspices of section 2(b) of the Charter in a case involving advertising aimed at children.[53] Similarly, a ban on cigarette advertising was also found to violate a corporation's freedom of speech, as the ban was not justified under section 1 of the Charter.[54]

3.4.1.3 Codified sources

The Federal Competition Act [55] is the main statute that regulates advertising in Canada. It is enforced by the federal Commissioner of Competition, who reviews complaints of deceptive marketing practices.

The Trade-marks Act[56] regulates and protects private rights, particularly by protecting the rights of the owners of trademarks against any harm caused by unfair business practices. It outlines what marks are prohibited from being used and when trademarks may be registered.

Various provincial consumer protection laws such as Ontario's Consumer Protection Act 2002 are also relevant and aim to protect consumers from any dishonest practices, including but not limited to issues arising from the performance of estimated goods or services or the receipt of unsolicited goods.[57] The Act also defines false, misleading, or deceptive representations, and the rights and obligations regarding specific consumer contracts. Finally, the Broadcasting Act[58] and the Copyright Act[59] are relevant in this discussion.

C.N.L.R. 773/ 96, Consumer Protection Act, s. S. 1996, c. C-30.1, Consumer Protection Regulations, R.R.S. c. C-30.1 Reg. 1, Consumer Protection Act Regulations, N.S. Reg. 160/2000, Consumer Protection Act, R.S.N.S. 1989, c. 92, Consumer Protection Act, R.S.P.E.I. 1988, c. C-19, Consumer Protection Act, C.C.S.M. c. C200, Consumer Protection Regulations, Man. Reg. 227/ 2006, Consumer Protection Act, R.S.N.W.T. 1988, c. C-17, Consumer Protection Regulations, R.R.N.W.T. 1990 c. C-16.

[53]Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 s. C.R. 927, 58 D.L.R. (4th) 577.

[54] RJR MacDonald Inc. v. Canada (Attorney General), [1995] 3 s. C.R. 199; 127 D.L.R. (4th) 1.

[55]R.S.C. 1985, c. C-34.

[56]R.S.C. 1985, c. T-13.

[57]S.O. 2002, c. 30, Sch. A.

[58]R.S. 1991, c. 11.

[59]R.S.C. 1985, c. C-42.

3.4.1.4 Case law sources

The common law, promulgated by the courts, has assisted in the interpretation of the statutes discussed earlier in this chapter, and has also contributed to the regulation of advertising in the development of numerous torts. Relevant Advertising Law cases are discussed at various points within this chapter.

3.4.2 False Advertising

3.4.2.1 Main sources of law

The main statues dealing with false advertising are the Competition Act,[60] Trade-marks Act,[61] Foods and Drugs Act,[62] Consumer Packaging and Labeling Act,[63] provincial consumer protection legislation,[64] and the Criminal Code.[65]

The Competition Act is a regulatory statute that imposes criminal or administrative sanctions on individuals or corporations that violate its provisions. These sanctions are meant to encourage competition in Canada.

The Trade-marks Act deals with the protection of private rights in regard to false or misleading advertising practices pursuant to section 7, which prohibits advertising or marketing of a product that discredits a competitor, or misleads the public in regard to the nature of competitor's services. It also prohibits the marketing of a product such that it would be confused with a competitor's product.[66]

The Foods and Drugs Act[67] prohibits the labeling, selling, or advertising of any food product that is false or misleading, or that would result in mistaken assumptions by consumers about the product's "character, value, quantity, composition, merit or safety."[68]

[60] R.S.C. 1985, c. C-34.
[61] R.S.C. 1985, c. T-13.
[62] R.S.C. 1985, c. F-27.
[63] R.S.C. 1985, c. C-38.
[64] E.g., the Ontario Consumer Protection Act, R.S.C. 1985, c. C-46.
[65] R.S.C. 1985, c. C-46.
[66] There is concern, i.e., in MacDonald v. Vapor Canada Ltd., [1977] 2 s. C.R. 134, that this provision is unconstitutional.
[67] R.S.C. 1985, c. F-27.
[68] Foods and Drugs Act, R.S.C. 1985, c. F-27, s. 5.

The Consumer Packaging and Labeling Act[69] prohibits the importing or advertising of any products in Canada unless the product is labeled with the correct measurements or count of the items within.[70]

Provincial consumer protection legislation outlines in detail examples of incorrect labeling. For example, the Ontario Consumer Protection Act lists the following as examples of false or misleading representations:[71]

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits, or qualities they do not have.
2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation, or connection the person does not have.
3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.
4. A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test, and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.
5. A representation that the goods have been used to an extent that is materially different from the fact.
6. A representation that the goods or services are available for a reason that does not exist.
7. A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.
8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

[69]R.S.C. 1985, c. C-38.
[70] Consumer Packaging and Labeling Act, R.S.C. 1985, c. C-38, s. 4.
[71]R.S.C. 1985, c. C-46, s. 14(2).

9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.
10. A representation that a service, part, replacement, or repair is needed or advisable, if it is not.
11. A representation that a specific price advantage exists, if it does not.
12. A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.
13. A representation that the transaction involves or does not involve rights, remedies, or obligations if the representation is false, misleading, or deceptive.
14. A representation using exaggeration, innuendo, or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.
15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.
16. A representation that misrepresents the purpose of any charge or proposed charge.
17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers.

Finally, the Criminal Code prohibits false or misleading advertising of lotteries and anything that is involved with illegal lotteries.[72] It is also relevant in regard to offenses regarding trading stamps, trademarks, and currency reproductions.[73] The criminal system, while once the only route to obtain recourse in matters involving false advertising, is now only used for the most egregious violations. The Competition Act also regulates contests and

[72]Criminal Code, R.S.C. 1985, c. C-46, ss. 206, 207.
[73]Criminal Code, R.S.C. 1985, c. C-46, ss. 379, 406 to 413, 427, 457.

promotions.

Given that this text is meant to provide a brief and general overview of false advertising in Canada, the remainder of this section will primarily focus on misleading advertising pursuant to the Competition Act.[74]

To understand the law of false and misleading advertising in Canada, one must first understand what is meant by 'false or misleading advertising'. Neither 'false' nor 'misleading' is defined in the Competition Act. However, section 52(2) provides a non-exhaustive list of examples of what may be considered "false or misleading representation," which includes a representation expressed on an article or its container, or on anything attached to the article, or on a display in the point-of-purchase, or made in the course of selling to a person, or contained in anything made available to the public.[75]

There are also a number of significant sub-divisions in this area of law that have arisen in the common law of torts.

First, the tort of passing off involves passing of one's products as those of another trademark holder. The Criminal Code provides that the tort of passing off occurs when there is an intent to deceive or defraud the public or a person either by passing off other wares or services for those requested, or by using a description that is false in describing the kind, quality, quantity or composition, the geographical origin, or the mode of manufacture, production, or performance of those wares.[76]

Second, the tort of injurious falsehood refers to false statements that criticize another's business, including the quality of their products. It is akin to false advertising. The criteria that need to be established for such a claim include the following:

1. the statements were false;
2. the statements were made with malice and the intent to harm the complainant;
3. the advertiser of the impugned products is identifiable; and

[74] Competition Act, R.S.C. 1985, c. C-34.
[75] Competition Act, R.S.C. 1985, c. C-34, s. 52(2).
[76] Criminal Code, R.S.C. 1985, c. C-46 s. 408.

4. the economic loss was suffered as a result of the statements.

Finally, the tort of wrongful interference with economic relations protects the relations between the trademark holders and their customers. The criteria that need to be established for this tort are not as stringent as those needed to prove injurious falsehood. All that is required is that the complainant establishes that the defendant committed an unlawful act [77] by which they intended to interfere with the complainant's economic relations and, as a result, the complainant suffered economic loss.

3.5 FRANCE

3.5.1 Sources of Advertising Law

3.5.1.1 Basic principles

Under French law, all advertisements should be fair, loyal, truthful, and sound.[78] The use of the French language is required for the designation, offer, presentation, notice, and warranties of goods or services advertised. Advertising Law promotes freedom of expression by balancing between creativity, fair commercial practices, and protection of consumer rights.

The French Advertising Law system is composed of various sources, including laws, case law, and professional rules.

The advertising legal system is framed by codes, laws, implementing decrees, and instructions passed by the French legislature, either directly or indirectly when implementing European Directives. It is completed by the set of professional rules and criteria adopted by a professional union, the 'Association des Agences Conseils en Communication' (AACC), and the rules of the advertising professional ethics laid down by the *Autorite de Regulation Professionnelle de la Publicite* (ARPP), [79] the self-governing body of advertising in France that ensures fair commercial practices between professionals in the interest of consumers. The Courts are responsible for the

[77] Such as the statutory prohibitions outlined in section 52 of the Competition Act, R.S.C. 1985, c. C-34, or section 7 of the Trade-marks Act, RS.C. 1985, c. T-13.
[78] French Consumer Code, Art.L.121-1.
[79] It's old name was "Bureau de Verification de la Publicite" (BVP)— Change of name on June 25, 2008.

construction and enforcement of advertising laws, in addition to ensuring compliance therewith. Both Courts and the ARPP rely on the International Chamber of Commerce's International Code of Advertising Practice, which lists the basic principles, noted above, that every advertisement should respect.[80]

3.5.1.2 Constitutional sources

The French Constitution does not provide a source of Advertising Law; nor is it invoked in cases related to advertisements.

3.5.1.3 Codified sources

The French Code of Consumption qualifies advertising as a commercial practice. The transposition of the European Directive concerning unfair business-to-consumer commercial practices in the internal market[81] occurred in France on January 3rd 2008.[82]

This Directive standardizes advertising laws of the member states in order to promote fair competition in the internal market and to ensure a high level of consumer protection. It punishes misleading and aggressive commercial practices that may deceive consumers or impair their freedom of choice or conduct. The Directive defines ‘misleading’ and ‘aggressive’ as follows:

- “A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer.”[83]
- “A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's

[80] International Code of Advertising Practice, Art. 1: “all advertisements should be legal, decent, honest and truthful.”

[81] Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/ EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).

[82] Law no 2008-3 of January 3, 2008 for the development of competition for the benefit of the consumers.

[83] Directive 2005/29/EC of May 11, 2005, Art. 6.

freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."[84]

In addition to general regulations, there are specific legal regimes depending on the format (TV, Internet, radio, newspapers, etc.) and the nature of the goods or services offered (weapons, drinks, etc.). For example, the Law of September 30, 1986, deals with freedom of communication and provides for the general rules for advertisement broadcasting. These legal regimes are completed by implementing decrees. The most important reforms of this framework were made by a Law of August 1, 2000 (which defines, inter alia, the regime of digital terrestrial television), and by a Law of July 9, 2004 (which adapts the law to the new electronic communications regulatory framework).

The Law of July 10, 1991, is another example of a type of specialized regulation. It implements the EU Directive 89/ 552/EEC and covers advertisements on television. The conditions for audiovisual advertising are specified in the Law of January 18, 1992 as modified and in the Decree of March 27, 1992.

There are two separate regulations that cover advertising on radio. These regulations differentiate based on the nature of the advertisement. The Decree of April 6, 1987, deals with broadcasting on private radio, whereas the Decree of November 13, 1987, authorizes advertising on the French public radio under the control of the Audiovisual Superior Council, which is the French independent broadcasting authority. Advertising on the public radio is authorized, based on the sole condition that advertisements are communal and of general interest.

Advertising via the internet is organized by the Law of June 21, 2004, relating to confidence in the digital economy[85], which implements the

[84]Directive 2005/29/EC of May 11, 2005, Art. 8.

[85] Law no 2004-575 of June 21, 2004 relating to confidence in the digital economy, modified by the law no 2008-3.

European Directive 2000/31/EC on electronic commerce.[86] According to that French law, promotional offers *(e.g.,* discounts, gifts and bonus), competitions and promotional games proposed on online advertisements send by e-mails must be clear.[87] Additionally, the person to whom the advertisement is addressed must be clearly identified.[88]

The Law of August 1, 1986, covers advertisements in newspapers. According to this regulation, all such advertisements must be preceded by the label "advertisement" or by a written statement distinguishing the advertisement from the other noncommercial articles.[89]

Advertisements regarding products such as weapons, tobacco, food, or alcoholic beverages are regulated by the Public Health Code. The Public Health Code provides that only certain authorized products can be advertised to the public. In addition to this, products claiming to be beneficial to health cannot be advertised as such unless the claim can be proven. Furthermore, tobacco and alcohol advertising are regulated by the "loiEvin."[90] Advertising tobacco products is forbidden in all media. The provisions of the "loiEvin" also apply to any beverage above 1.2% alcohol by volume. Advertising for such products is only allowed in certain media and the content of advertisements must correspond to a list of authorized topics and issues. TV advertisements for alcoholic products are completely forbidden. Finally, the French Public Health Code further specifies that alcoholic beverages should not be advertised on children's products.

3.5.1.4 Case law sources

Civil Courts may have jurisdiction to hear false advertising claims. On special request, the "*Autorite de Regulation Professionnelle de la Publicite"* (ARPP), the self-governing body of advertising in France, can ensure

[86] Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce").
[87] Law no 2004-575, Art.21.
[88] Law no 2004-575, Art.20 and Directive 2000/31/EC, Art.6.
[89] Law of August 1, 1986, Art. 9: "Every article of advertisement to editorial presentation must be preceded by the mention advertisement or official statement."
[90] Loi no 91-32 du 10 Janvier 1991 relative a la luttecontre le tabagismeetl'alcoolisme.

compliance of a future or current advertisement with both advertising laws in force and the rules of professional ethics.[91] However, the ARPP only has an advisory power. It may take the necessary steps to stop damage to the plaintiff, but it does not have any power of judicial sanction. It may only issue recommendations, reminders or formal notifications, and may file a civil action.

The ARPP reviews all television advertisements before broadcast. In the case of other media, such as in print or on the radio, the ARPP gives its opinion, if necessary, after an advertisement is published or broadcast, unless the advertiser has sought advice beforehand, which is optional. If an advertiser does not comply with an ARPP decision, the ARPP may request that the advertisement be withdrawn. Further sanctions may include formal warnings and adverse publicity. If applicable, the advertiser or agency may also lose its membership in the ARPP, which can result in a significant deterrent effect. The ARPP produces recommendations on controversial advertising issues that constitute a professional code of ethics. These recommendations are based on the principles of the Code of the International Chamber of Commerce. However, the ARPP has no enforcement power and can only issue recommendations, even with respect to its preclearance of television commercials.

The October 20, 2006, *Dolce Gabbana* case provides an example of the ARPP's scope of authority. In this case, Dolce Gabbana had published an advertisement in the French press that represented a very dark theatrical picture with young persons dressed in dark, a naked woman, and a dying man (with a knife wound in the chest) lying down on the floor. Consumers sent letters to the ARPP and asking it to stop the publishing of the controversial advertising. The ARPP held that this advertisement violated professional rules that prohibit violence in advertisements. The recommendation called the "image of the

[91] Official Statement of the Ministry of Ecology from April 11, 2008, announcing the commitment of the professionals and the ARPP in an ecology-friendly advertising (especially a better information of the consumers, some new rules for the sectors of the automobile and the environment). As of January 4, 2010, a new identification disposal of commercials broadcast on TV should be introduced by the advertising professionals.

Human person" provides that "the advertising shall avoid any scene of violence, direct or implied, and shall not urge on violence, moral or physical. The suggested violence is qualified by an atmosphere, a context or by the result of an act of violence."

3.5.2 False Advertising

3.5.2.1 Main sources of law

In an effort to protect the consumer, article 121-1[92] of the French Consumer Code, implementing the European Directive 84/450/EEC, prohibits misdealing or false advertisements.[93]

3.5.2.2 Definition and significant subdivisions

An advertisement is false when it includes potentially misleading allegations, indications, or representations regarding at least one aspect of a good or service, regardless of the way this information is displayed. In particular, as stated in French Consumer Code article L121-1:

All advertising comprising, in any form whatsoever, representations, information or presentations which are false or likely to mislead, is prohibited, where the latter cover one or more of the items listed hereinafter: existence, nature, composition, substantial qualities, content in useful principles, species, origin, quantity, mode and date of manufacture, properties, price and terms of sale of goods or services which are the subject of advertising, conditions for their use, results which may be expected from their use, reasons for sale or service provision, sale or service provision procedures, scope of obligations undertaken by the advertiser, the identity, qualities or aptitude of the manufacturer, retailers, promoters or service providers.

Possible types of misrepresentation include:

- existence;[94]
- nature;[95]

[92]Amended by Law no 2008-776 of April 4, 2008.

[93]Council Directive 84/450/EEC of September 10, 1984, relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.Codified by Council Directive 2006/114/CE.

[94]Supreme Civil Court, Criminal Chamber,—December 2, 1980, Bull, crim p.847.

[95] Supreme Civil Court, Criminal Chamber,—May 26, 1976, Bull crim p.470.

- composition;[96]
- substantial qualities;[97]
- kinds;[98]
- origin;[99]
- mode and date of production;[100]
- properties;[101]
- price and terms of sales;[102]
- conditions on which a product may be used;[103]
- the results a consumer would expect from its use[104]; and
- causes or process of sale[105].

A comparative advertisement may also qualify as a false advertisement if the advertisement:

- relies on unfair or untrue information;
- does not compare goods or services that meet the same needs or the same objectives;
- does not compare in an objective way one or several essential and relevant features of those goods or services in an objective way; or
- does not mention the source of information to the person to whom it is addressed.

Such practices may mislead consumers and entice them to buy a product that they would not otherwise have bought. Furthermore, the August 23, 2001 Decree,[106] which implemented the European Directive 97/55/EC of October 6, 1997,[107]also regulates comparative advertising.[108]

[96] Supreme Civil Court, Criminal Chamber,—June 25, 1984, Bull crim p 602.
[97]Criminal Court of Albi—November 16, 1986, BID 1986/19 p6.
[98] Court of Appeal of Caen- January 24, 1986, BID 1986/6 p76.
[99] Supreme Civil Court, Criminal Chamber September 18, 1997, BID n° 7-8/1998.
[100] Supreme Civil Court, Criminal Chamber—January 17, 1983, n° 81-92.900.
[101]*Ibid.*
[102] Supreme Civil Court, Criminal Chamber—January 11, 1990, Bull crim p 45 n° 21.
[103] Court of Appeal of Paris May 3, 1976, Gaz.Pal.1977 p 138.
[104] Court of Appeal of Colmar—April 19, 1984, BID 1986/19 p 6.
[105]Criminal Court of Rouen—February 23, 1979, D 1979 p 409.
[106] Decree n° 2001-741 of August 23, 2001.
[107]Directive 97/55/EC of European Parliament and of the Council of October 6, 1997, amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

3.6 JAPAN

3.6.1 Sources of Advertising Law

3.6.1.1 Basic principles

There is no single law applicable to advertising in Japan, although there are multiple statutory and regulatory provisions that relate to this field. Advertisements can be protected by both copyright and trademark. With respect to consumer protection, the general thrust is to ensure that consumers are not deceived by false advertising or harmed by unfair trade practices. For example, certain types of high pressure methods of sale, such as door-to-door sales and multi-level marketing (sometimes referred to as "pyramid sales" or nezumiko in Japanese) are prohibited or severely restricted. Consumers have a right to rescind a contract without penalty within a specified "cooling off" period after having entered into it in certain kinds of contracts.

Japan established a Consumer Affairs Agency on September 1, 2009 to consolidate the consumer protection regime in a central location instead of having it spread throughout a wide range of ministries and agencies. The Consumer Affairs Agency is expected to shift the emphasis of government policy from the interest of manufacturers to that of the consumer.[109]

3.6.1.2 Constitutional sources

The Constitution of Japan does not contain any specific provisions directly relating to advertising or to consumer protection. Commercial speech is protected by the Constitution, but it is given a lesser value than social or political speech.

3.6.1.3 Codified sources

The most directly relevant of the laws bearing on advertising and consumer protection are as follows:

1. Copyright Act;

[108] The provisions of the 2001 Decree are codified, as Art. L. 121-8 and subsequent of the French Consumer Code.

[109] http://www.japantoday.com/mobile/view/consumer-affairs-agency-law-enacted, (Last visited on August 1, 2018). For a history of consumer policy see http://www.consumer.go.jp/english/cprj/index.html,(last visited on August 1, 2018).

2. Trademark Act;
3. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Fair Trade Act");
4. Unfair Competition Prevention Act (the "Unfair Competition Act");
5. Act against Unjustifiable Premiums and Misleading Representations (the "Premiums and Representations Act");
6. Consumer Contract Act;
7. Consumer Basic Act;
8. Consumer Product Safety Act; and[110]
9. Household Goods Quality Labeling Act.[111]

The Copyright Act and the Trademark Act protect the content expressed and any valid marks, respectively, contained in advertising, while the remainder of the Acts mentioned have as their core objective the protection of consumers and the promotion of fair trade practices.[112]

The Consumer Contract Act is representative of the philosophy of the consumer protection laws. Article 1 provides as follows:

The purpose of this Act is to protect the interests of consumers, and thereby contribute to the stabilization of and the improvement in the general welfare and life of the citizens and to the sound development of a national economy, in consideration of the discrepancy in quality and quantity of information and the negotiating power between consumers and business operators, by permitting a rescission of manifestation of intentions to offer or accept contracts made by consumers when they misunderstood or are distressed by certain acts of business operators, and nullifying any clauses, in part or in

[110] Act No. 31 of 1973. This law requires any manufacturer, seller or distributer of certain consumer products that have been designated as dangerous to consumers to label the products in accordance with instructions by the relevant competent ministry.

[111] Act No. 104 of 1962. Under this law, the Ministry of Economy, Trade and Industry (METI, formerly known as MITI) is empowered to designate certain matters that must be included on product labels for household goods with respect to quality such as components, performance, usage, storage conditions and the like. METI is authorized to collect information from manufacturers and/or to conduct site inspections. Sanctions for non-compliance range from public notice to criminal fines.

[112] Japan is currently in the process of establishing a Consumer Affairs Agency that is intended to centralize and administer all of the various consumer protection laws, regulations, and authorities in one place.

whole, that exempt the business operators from their liability for damages or otherwise that unfairly harm the interests of consumers, in addition to providing a right to qualified consumer organization to demand an injunction against business operators, etc. for the purpose of preventing the occurrence of or the spreading of damage to other consumers.[113]

A business operator dealing with a consumer has an affirmative duty to make the rights and duties and all other matters contained in a consumer contract "clear and plain."[114]

The following items will permit a consumer to rescind a contract if done by a business operator:

(i) To represent that which is not true as to an important matter;

(ii) To provide conclusive evaluations as to future prices of goods, rights, services and like matters that are in fact uncertain;

(iii) To represent the advantages of important matters in the contract while intentionally failing to represent disadvantageous factors such that the consumer would "mistakenly believe the non-existence of such factors"; or

(iv) To apply undue pressure to the consumer by refusing to leave or not allowing the consumer to leave when requested.[115]

Entrepreneurs are prohibited from making representations as provided for in any one of the following items in connection with transactions of goods or services:

- Any representation by which the quality, standard, or any other matter relating to the substance of goods or services are shown to general consumers to be much better than the actual one or much better than that of other entrepreneurs who are in a competitive relationship with the entrepreneur concerned contrary to the fact and thereby which tends to induce customers unjustly and to impede fair

[113] Consumer Contract Act, Article 1.
[114] Consumer Contract Act, Article 3.
[115] Consumer Contract Act, Article 4.

competition;

- Any representation by which price or any other trade terms of goods or services will be misunderstood by general consumers to be much more favorable to the general consumers than the actual one or than those of other entrepreneurs who are in a competitive relationship with the entrepreneur concerned, and thereby which tends to induce customers unjustly and to impede fair competition; or
- In addition to what is listed in the preceding two items, any representation by which any matter relating to transactions of goods or services is likely to be misunderstood by general consumers and which is designated by the Fair Trade Commission as such, finding it likely to induce customers unjustly and to impede fair competition.[116]

The Fair Trade Commission may, in the event there is a violation of the events described above, orders the entrepreneur at issue to cease the act, to take the measures necessary to prevent the reoccurrence of the violation, or to take any other necessary measures including public notice of the matters relating to the implementation of such measures. A person who fails to obey an order by the Fair Commission shall be punished by imprisonment with work for not more than two years or by a fine of not more than three million yen.[117]

When a representative of a juridical person, or an agent, an employee, or any other worker in the service of a juridical person or of an individual has, with regard to the business or property of the juridical person or individual, fails to obey an order, not only the offender shall be punished but also the juridical person or the individual shall be punished by a fine of not more than 300 million yen.[118]

A person who intentionally or negligently infringes on the business interests of another person, by acts of misrepresenting information on goods or

[116]Act against Unjustifiable Premiums and Misleading Representations, Article 4 (1).
[117]Act against Unjustifiable Premiums and Misleading Representations, Article 15 (1).
[118]Act against Unjustifiable Premiums and Misleading Representations, Article 18 (1).

services, or in an advertisement thereof or in a document or correspondence used for a transaction related thereto, in a manner that is likely to mislead the public as to the place of origin, quality, contents, manufacturing process, use or quantity of such goods, or the quality, contents, purpose, or quantity of such services, or the act of assigning, delivering, displaying for the purpose of assignment or delivery, exporting, importing, or providing through an electric telecommunication line, goods with such an indication or providing services with such an indication, shall be liable for damages resulting therefrom.[119] Any person who commits such acts can be punished by imprisonment with work for not more than 10 years, a fine of not more than 10 million yen, or both.[120]

When a representative of a juridical person, or an agent, employee or any other worker of a juridical person or an individual has committed such acts, not only the offender but also the juridical person shall be punished by a fine of not more than 300 million yen.[121]

3.6.1.4 Case law sources

To the best of our knowledge, there have been no cases regarding general issues of advertising law. The involvement of the judiciary in the Japanese scenario is very restricted. Consequently, in Japan, no binding judicial case law exists, other than the others of the FTC or the prefectural governors.

3.6.2 False Advertising

3.6.2.1 Main sources of law

The primary agency of the government for regulating false advertising is the Japan Fair Trade Commission (JFTC). The main sources of false advertising law are the Fair Trade Act, the Unfair Competition Act, and the Premiums and Representations Act. The Fair Trade Act is aimed generally against monopolization and predatory practices, and it contains a general prohibition against unfair trade practices.[122]Acts recognized as rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the

[119]Unfair Competition Prevention Act, Article 2 (1) (xiii), Article 4.
[120]Unfair Competition Prevention Act, Article 21 (2) (iv).
[121]Premium and Representation Act, Article 2 (2).
[122] Fair Trade Act, Article 19.

Trademark Act are exempted.[123]

The Premium and Representation Act aims to prevent customers being induced to purchase goods or services by unjustified premiums, or misleading representations.[7] A "premium" is defined as "any article, money or other kinds of economic gain which are given as means of inducement of customers, irrespective of whether a direct or indirect method is employer, or whether or not a lottery method is used.[124]" A "representation" is any "advertisement or any other representations that an entrepreneur makes as means of inducement of customers". [125] The JFTC has authority to limit the value (individual premium or total amount of premiums), kind or method of offering of any premium, and may prohibit premiums altogether if necessary to avoid unjust inducement of customers.[126]

With respect to goods or services, the following representations are prohibited: (i) representing the quality, standard or other matter as being much better than the actual good or service; (ii) representing price or other trade terms, so as to be misunderstood by consumers, as being much more favorable than the actual ones or those of other competitive entrepreneurs; or (iii) representing any other matter that is likely to be misunderstood by general consumers and which is found by the JFTC as being "likely to induce customers unjustly and to impede fair competition."[127]

3.6.2.2 Definition and significant subdivisions

As can be seen from the discussion above, unfair trade practices are prohibited in Japan. Unfair trade practices, in the broadest sense, include misuse of another's trademark as well as false advertising. False advertising includes advertising that, through the inclusion of inaccuracies or omissions, could induce error, deceit, or confusion regarding the specifications, nature, origin, quality, purity, mix, price, quantity, use, or technical conditions of the

[123]Fair Trade Act, Article 21.
[124] Premium and Representation Act, Article 2 (1).
[125] Premium and Representation Act, Article 2 (2).
[126] Premium and Representation Act, Article 3.
[127] Premium and Representation Act, Article 4 (1).

production of goods or services. Advertisements that compare the products of the advertiser inaccurately with those of a competitor can also be a violation of the law.[128]

3.6.3 Comparison with India merits to Adopt and Demerits to Learn From[129]

India is marked by a conspicuous absence *lexspecialis*, i.e. special law on misleading advertisement or representation, India has more to learn from Japan than reject on grounds on non-applicability or merit. The Advertising Standards Council of India – ASCI,[130] is very similar in function and setup to the JARO of Japan. The only difference is the efficiency in implementation of the latter as opposed to the ASCI. This is very significant in light of the wide ambit of the scope of the IARO’s work. The following can be seen as the common salient features of JARO and the ASCI.

- Private body of advertisers
- Handling of Complaints
- Public-interest Advertisements, alongside other organizations
- Protection of consumers -ultimate purpose
- Advertising Review Panel + Supreme Court Adjudicating bodies
- No binding value, however
- Weak enforcement

Thus, it can be seen that except for the enforcement bodies The Advertising Review Panel and Supreme Court, the essential features remain broadly the same between India and Japan. However, India must still lose hold of implementation related inefficiencies, leaving aside problems of corruption and work to ensure that the ASCI remains as powerful a force as the JARO is in Japan.

[128] Premium and Representation Act, Article 4.
[129] *Supra* note 35 at 353.
[130] The Advertising Standard Council of India, available at:http://www.ascionline.org/ (Last visited on July, 2019).

3.6.4 Problems in the Japanese Model, To Be Avoided in India

Although on a rough comparative basis, Japan emerges as possessing the better model, there are some aspects in the mechanism which ought not to be blindly imported into the Indian scenario, for several reasons. Certainly this does not include the special legislation, specifically dealing with 'Misleading Representation'. it is submitted that the eventual Indian legislation could be modeled around the 1962 Japanese law. Nevertheless, some fundamental differences and exceptions will have to be made.

The first and foremost reservation to be adopted in incorporating the Japanese model is to make the model consumer-heavy. As established earlier, the Japanese law was enacted in 1962, before the Basic Consumer Welfare law came about in 1968. Thus the 1962 Act's primary focus is on the competition law regime. Since the fundamental aim is not protection of consumers, some of the provisions are to be taken as reflecting the interests of the entrepreneurs. Hence, in India, a more consumer-intensive approach ought to be taken instead.

There is also a need to support legislation with consumer protection measures. Although JARO fulfils this purpose, it is merely a private body, with no force or binding force whatsoever. Thus in India, specific consumer-oriented measures should be taken. In this context, it is significant that the 1962 Japanese Act provides no scope for a consumer complaint to be filed in furtherance of a misleading representation. This is possible only with the JARO, an unofficial processing organization.

Thus, ignoring consumer rights and failing to provide adequate remedies to address consumer complaints is a serious flaw in the Japanese model. Since, for several years now, India has emphasized the ability of the consumer to raise disputes, this ought not to be rejected following the Japanese Model.

Flowing from the above, the involvement of the judiciary in the Japanese scenario is very restricted. Consequently, in Japan, no binding judicial case law exists, other than the others of the FTC or the prefectural governors. In India, however, it is of utmost importance that either the judiciary per se or the Consumer forum be given wide ambit of judicial decision-making power over these misleading advertisement cases. Otherwise, the system would collapse if left in the hands of a few privately managed entities.

Although, several ideas emerged throughout the document. The most important of them being the fact that Japan, now has a 50 year old effective mechanism to address the problem of misleading advertisements, while India is still struggling to bring forth an applicable law. The crucial aspect of Japan is the intricacy with which the model is framed. It is indeed commendable for incorporating broad and evolving definitions of the terms misleading and representation, but it is more relevant for building the statutory and other bodes simultaneously. Aspects of regulation are dealt with delicately by both public and private organisations, without the problem of corruption and inefficiency. These bodies are the FTC, the governors of the prefecture and the JARO.

India should import the goodness of this model i.e. provision of quick redressal of consumer complaints not only in terms of deficiency in service, but also dealing with the problem of false representation in India. Possessing an enormous consumer base, India soon ought to put in place a model which combines several public policies together, like in Japan. For example, collaborating the purposes of Competition law and consumer law and thus providing one consolidated legislation for prices and publicity.

Marketing is known in the area of the four Ps. Two of the four, price and publicity, are dealt with together and efficiently so in Japan. Certainly, India has more to learn from Japan than criticise.[131]

3.7 CONCLUSION

All the countries of the world distinguish between ordinary commercial speech and political advertising. In some countries (Germany, Spain), political advertising is restricted except during declared campaign periods. Other countries (France, UK) impose restrictions only during campaign periods. In France during the three months preceding an election, paid political advertisements are forbidden in both the print and broadcasting media and the content of unpaid advertisements is regulated, in 1984 the Canadian Supreme

[131] *Supra* note 35 at 354.

Court struck down as unconstitutional sections of the election law which prohibited anyone other than candidates and registered parties from paying for political advertisements during election campaigns. As a result corporations and other private parties are entitled to advertise their views on political issues. In the UK, it is an offence to issue an advertisement during an election campaign in support of a particular candidate without that candidate’s authorization.

The Dutch courts generally will enquire only whether a political advertisement is defamatory or misleading. However, a dutch voluntary code provides additional standards, requiring that political advertisements be clearly marked as such and may not be anonymous, untruthful, below the general standards of good taste, or published in the editorial party of a paper. A Code commission recommends whether or not political advertisements should be published, and publishers associated with the two leading publisher’s associations have agreed to follow the Commission’s recommendations. Although refusal to publish a political advertisement is generally not unlawful, collective refusal pursuant to a commission recommendation may constitute a tort; in one case a court ruled that refusal to publish a political advertisement the included a picture was justifiable only if the picture would be considered extremely tasteless or indecent by an overwhelming majority of the Dutch population. In the US, any regulation of political advertising, including by commercial entities such as corporations is presumptively unconstitutional and would have to satisfy a heavy burden to be permitted.

In Several countries, commercial advertisements (those whose primary purpose is to promote a product or service for profit or other business interest) receive constitutional protection, although to a lesser degree than press freedom and other forms of expression (US, Australia, Germany); On the other hand, in a few countries, commercial speech receives no constitutional protection (Canada, Netherlands).

Most countries restrict or prohibit the advertising of alcohol and tobacco products for reasons of public Health (Austria, Canada, Netherland, Norway) and some also regulate advertisements for pharmaceutical products (France). In Austria, the ban applies only radio and TV broadcasting. In the Netherlands linking the use of alcohol with sports, health, children, or maturity is prohibited and tobacco advertisements are banned from radio and TV. Canada bans all tobacco advertising but permits alcohol advertisements. In the US, while the states have broad authority to regulate tobacco and alcohol advertising, there currently are no federal restrictions on alcohol advertising in the print media and the only requirement concerning tobacco advertisements is that they bear a health warning prescribed by the US surgeon General. The paid advertisements must be marked as such in Germany and are entirely prohibited in the editorial sections of papers.

In the UK, the advertising industry established a private advertising standards Authority which monitors a code of practice to ensure that advertisements are “legal, decent, honest and truthful”. Most newspapers refuse to carry advertisements which the authority considers to fall below code standards.

Several countries require advertisement not to be misleading or untrue (Canada, Germany, US). Norwegian law bans advertisements which “imply any derogatory judgment of either sex or portray a woman or a man in an offensive manner”. A consumer's ombudsman supervises marketing and may forbid advertisements that conflict with the law; decisions may appeal to a Marketing Council.

Comparative advertising (which claims that the advertised brand is better than other named products) was banned in Austria for several years until the European Court of Human Rights ruled that commercial speech is entitled to a certain level of protection. Austria now permits such advertisements so long as they are neither misleading, deprecating, insulting nor offensive. Germany generally prohibits comparative advertising except when there is a serious public interest in the information, such as concerning hazardous products. The government established an independent foundation to carry out comparative tests, the results of which may be published. In Canada, comparative advertising may constitute libel.

Several countries prohibit or regulate advertising by members of certain professions, although the Austrian Constitution Court declared restrictions on advertising by lawyers and tax consultants to be unconstitutional.

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CHAPTER-IV

CONSTITUTIONAL ANALYSIS OF COMMERCIAL ADVERTISEMENT IN INDIA

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4.1 INTRODUCTION

The major purpose of advertising is to attract a prospective consumer towards a particular product or a service. A trend however, is now going on to lure the prospective consumers by making false or misleading advertisement, bargain sale, 'bait and switch' selling, prizes or promotional contests etc., which lead the consumer to purchase goods they do not need. Advertising is being made attractive at the cost of vulgarity, obscenity and at time immorality to attract consumers. While some advertisements promote the sale of harmful substances like cigarette and liquor in an attractive way others mislead the consumers in the name of traditional herbal drugs or self-medication. Even children are not being spared from the clutches of such advertisements.

To regulate certain aspects of commercial advertising a wide range of statutory regulations have been put in this country. But there is always a constant demand for enactment of a comprehensive legislation on those aspects of commercial advertising which are hitherto unregulated especially advertising in the electronic media. Commercial advertising is intimately linked to the freedom of speech and expression and freedom of trade, profession and business. Further, it is also linked to the right of consumers to receive information about the quality, quantity, style standard or usefulness of products or services available in the market. Hence, any attempt to enact a comprehensive legislation or the regulation of commercial advertising is bound to raise a number of constitutional issues of far reaching significance. Against this background, an attempt will be made hereunder to discuss the constitutional aspects of commercial advertising in India.

4.2 CONSTITUTIONAL PERSPECTIVE OF ADVERTISEMENT

Like any other welfare states, India has taken many legislative, administrative and other measures to protect the interests of consumers from the exploitative deeds and deceptive or fraudulent trade practice of unscrupulous market operators. In fact, securing consumer justice to its citizens is the constitutionally mandated responsibility of the state. Though not expressly mentioned anywhere in the Indian Constitution, consumer justice is an aspect and integral to justice- legal, social[1] and economic[2], which the state is obligated to secure to its citizens. It must be recognized that justice is the genus of which consumer justice is one of its species. The aim of consumer justice is to ensure that the consumer gets what he has paid for in quality and in right measure and to enforce his rights. If the consumer does not get the right thing in right measure for which he has paid the money, the social and economic justice cannot be achieved. The concept of consumer justice also involves some kind of safeguards for the members of society from all sorts of malpractices and exploitative deeds of market operators, the incidence of which in the ultimate analysis affects adversely the individual in the society. The notion of consumer justice also involves the idea of redressal of consumer's grievances and the remedy of restitution and compensation. It may be also considered as an aspect of social justice because like the latter, it is a dynamic device to mitigate the sufferings of the poor, weaker and deprived sections of society and so to elevate them to the level of equality to live a life with dignity. Having an

[1]*All India Statutory Corporation v. United Labours Union*, AIR 1997 SC 645, a three judges bench of the Supreme Court has explained the concept of social justice in Article 38 as follows:
The concept of 'social justice' consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is an integral part of justice in generic sense; justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribal and deprived sections of the society and so elevate them to the level of equality to live a life with dignity of person ... The Constitution therefore, mandates the states to accord justice to all members of the society in all facets of human activity.

[2] The banishment of poverty, not by expropriation of those who have, but by the multiplication of the national wealth and resources and an equitable distribution thereof amongst all who contribute towards its production, is the aim of the state envisaged by the Directive Principles, Economic democracy will be installed in our sub-continent to the extent that the goal is reached. In short, economic justice aims at establishing economic democracy and a welfare state. For details see D.D. Basu, *Introduction to the Constitution of India 24* (Prentice Hall of India Pvt. Ltd., New Delhi, 1997).

unequal bargaining position vis-i-vis manufacturers, traders, sellers, and distributors, consumers need legal protection to attain substantial degree of economic equality in the market place, which is the legitimate expectation of the consumers and a constitutional goal, and the social justice is a device to attain the same. Consumer justice is also an aspect of economic justice whose aim is to establish economic democracy and a 'Welfare State'. It is another name for 'distributive justice' embodied in Articles 38 [3] and 39 [4] of the Constitution of India. The concept of distributive justice, it is to be noted, connotes *inter alia* the removal of economic inequalities rectifying the injustice resulting from dealings and transactions between unequal in society.

The philosophy of consumer justice is permeated and reverberated through the Preamble, Fundamental Rights and Directive Principles of State Policy. Article 38(1) of the Constitution mandates the State to promote the welfare of the people by securing and protecting a social order in which social, economic and political justice shall inform all institutions of the national life. In particular, the State is required to direct its policy in such a manner that men and women shall have the right to an adequate means of livelihood [5]. The wealth and natural resources of the country should be either controlled or owned by the State as a trustee of society. The State is also duty bound to direct its policy towards securing the distribution of the ownership and controls of the material resources of the community in such a way as to sub serve the common

[3]Constitution of India, *Article 38(1):* The State shall strive to promote the welfare of the people by securing and protecting an effectively as it may a social order in which social, economic and political, shall inform all the institution of national life. *Article 38(2):* The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

[4]Article 39: the State shall, in particular, direct its policy towards securing- (a) that the citizens men and women equally, have the right to an adequate means of livelihood; (b)that the ownership and control of the material resources of the community are so distributed as best to sub serve to common good; (c)that the operation of economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocation unsuited to their age of strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

[5]Article 39(a).

good[6]. The operation of the economic system has to be such that it does not result in concentration of wealth and means of production to common detriment[7]. In this way, a duty is cast upon the State to protect the consumers from exploitative and monopolistic practices indulged in by the big unscrupulous business houses. Besides this, the Constitution demands that the State should strive to promote the health and strength of the workers[8] and to ensure a decent standard of life to them[9]. It should strive to protect the children from exploitation and raise the level of nutrition and the standard of living of its people[10]. The State is required to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.[11] Article 39-A enjoins the State with a duty to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any *citizen* by reason of economic or other disabilities. This clause has a relevancy in relation to consumers. Consumers by large, due to poverty, ignorance and lack of organization are unable to assert their right through the court of law.

Although Directive Principles of State Policy are not enforceable by any court, still, these are fundamental in governance of the country and it shall be the duty of the State to apply these principles in making laws.[12] So, it can be said that it is one of the constitutional obligations imposed on the State to protect the consumers from all sorts of exploitation in general and the restrictive trade practices and unfair trade practice in particular including false and misleading advertisements.

Apart from the above-mentioned discussion, there are many facets of advertisement which need to enumerate.

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[6] Article 39(b).
[7] Article 39(c).
[8] Article 39(e).
[9] Article 43.
[10] Article 47.
[11] Article 48(A).
[12] Article 37.

4.2.1Competency of legislature

Turning to legislative competence of Parliament and State legislatures to enact legislation on an aspect of consumer affairs or commercial advertising, it is governed by Articles 245 to 255 of the Constitution. The Constitution divides the powers between the Union and the States in three lists - The Union List, the State List and the Concurrent List[13]. The Union List consists of 97 subjects[14]. The subjects mentioned in the Union List are of National importance i.e. defense, foreign affairs, banking, currency and coinage, union duties and taxes. The State List consists of 66 subjects[15], but entries 19[16], 20[17], 29[18] and 36[19] have been deleted by the constitutional amendments. These are of local importance such as public order and police, local government, public health and sanitation, agriculture, forest, fisheries, education, state taxes and duties. The states have exclusive power to make laws on subjects mentioned in the State List. The Concurrent List consists of47subjects.[20] New Entry 11-A,[21],17-A[22],17-B[23], 20-A[24] and 33-A[25] have been added by constitutional amendments. Both Centre and State governments can make laws on the subjects mentioned in the Concurrent List but, in case of conflict between Central and the State law on concurrent subjects, the central law will prevail.

Although, consumer affairs is not expressly mentioned in any of the three lists, it should not present any difficulty for Parliament to enact legislations on different aspects of consumer protection because most of the items concerning such protection are already included in either Union List or Concurrent List. For instance railways, national highways, shipping and

[13]Article 246.
[14]Article 246, Seventh Schedule, List I.
[15]Article 246, Seventh Schedule, List II.
[16]Constitution (Forty-Second Amendment) Act, 1976.
[17]*Ibid.*
[18]*Ibid.*
[19]Constitution (Seventh Amendment) Act, 1956.
[20]Article 246, Seventh Schedule List *III*.
[21]Constitution (Forty-Second Amendment) Act, 1976.
[22]*Ibid.*
[23]*Ibid.*
[24]*Ibid.*
[25]*Ibid.*

navigation, ports, carriage of passengers and goods by railways, ship or air, or by national water ways in mechanically propelled vessels. Banking, bills of exchange, cheques etc., insurance, establishment of standard of weight and measure, film censorship, terminal taxes on goods or passengers, carriage by railway, sea and air, taxation on railway transactions and freights and offences against law with respect to any of the matters in List I are items that find their place in List I. Likewise matter of concern to consumers such as crimes and criminal procedure, adulteration of food stuffs and other goods, drugs and poisons, commercial and industries monopolies, combines and trusts, legal, medical and other profession, price control, trade and commerce, the production, supply and distribution of food stuffs including edible oil seeds and oil, weight and measures, electricity, newspapers, books and printing presses etc., find their place in Concurrent List. These are the item on which the Parliament and State Legislatures have power to enact legislations subject to limitation imposed by the Constitution.

As far as regulation of commercial advertising is concerned, Parliament has the competence to make any law on telephone, wireless broadcasting and other like forms of communication and this power also extends to commercial advertising by radio, television, and Internet. Besides this, Parliament can also make any law relating to taxes on the sale or purchase of newspaper and on advertisements published therein. Power to regulate commercial advertising is also implicit in the power of the Parliament and State Legislature to enact legislation on newspapers, books and printing presses.

The States can make law on the subject mentioned in the State List and the concurrent list. But in case of conflict between the Centre or States law on concurrent subject the central law will prevail. Most significantly the parliament is vested with the residuary legislative power by Article 248 of the Constitution, which reads that Parliament can make any law with respect to any matter not enumerated in the Concurrent list or the State list. Entry 97 of the Union List also lays down that the Parliament has exclusive power to make laws with respect to any matter not mentioned in the state list or the concurrent list including any tax not mentioned in either of these Lists.

It is evident from the foregoing discussion that the State is mandated by the Indian Constitution to protect consumers against false or misleading advertising and other unfair trade practices. Further, Parliament has legislative competence to legislate on consumer affairs and commercial as well as non-commercial advertising. States legislature can also legislate on those aspects of consumer affairs which fall within the state list[26].

4.2.2. Media Freedom and Advertisement

Advertisements are the main source of revenue for newspaper. Generally, the Government issues number of advertisements to various newspapers. In a way, it is another indirect power in the hands of the administration to muzzle the press which does not toe their line. Then the question is whether a newspaper to which the government did not allot any advertisement can complain of the discrimination and as such a violation of freedom of expression.

In ***Dainik Sambad v. State of Tripura*** [27] it was held that the discriminatory allotment of Government Advertisements to different newspapers of the same category by the State Government would impair the freedom of press violating Article 14 and Article 19(l)(a). However, it was held in ***Ushodaya Publication v. State of A.P.***[28] ***(Eenadu Case)***newspapers have no right to demand the advertisements from the Government and the Government has the right to choose the newspaper to bring out advertisement. At the same time, it was held in this case that the Government power to distribute the largess through issue of advertisement should not be arbitrary or discriminatory to muzzle a section of press which criticises its policies and programmes. It was observed in the ***Gutam Nabi v State of J & K***[29]that if the State chooses to

[26] Manoj Kumar Padhy, Consumer Protection and Advertisement Laws 44-46 (Satyam Law International, New Delhi, edn. 1st , 2016).
[27] AIR 1989 Gau 30.
[28] AIR 1981 AP 109.
[29] AIR 1990 J & K 13.

completely stop the issuance of advertisement in the newspapers in the country, no newspaper can have any grievance or seek relief from the court compelling the State to issue Advertisement.

Whether the restriction on advertisement violates fundamental right of freedom of speech or not was the question before the Supreme Court in ***Hamdard Dawakhana v. Union of India*** [30] if there is a restriction on advertisement to promote the drugs, it was held to be valid restriction and such an order would not violate the freedom of expression. A commercial advertisement is part of trade and commerce and not in any way connected with advancement of noble thoughts or literature. All advertisement does not relate to the freedom of speech and expression of ideas as contained in Article 19(l)(a).

4.2.3. Advertisement as part of freedom of press

In ***Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd,*** [31] the Supreme Court held that the freedom of speech and expression under Article 19(a) includes a commercial advertisement, only Article 19(2) could impose restrictions/limitations on commercial advertisements. In this case, the Telephone Nigam had permitted the contractors to publish telephone directories in “yellow pages” and to raise their revenue from advertisements. These “yellow pages” were previously added to the directory published by Nigam in white pages. The Bombay High Court allowed the appeal of Nigam, who asked for a declaration that he had only the exclusive right to publish the telephone directory and that the Tata press did not have the right to publish the list of telephone subscribers without their permission, as this would be a violation of the Indian Telegraph Act. The Tata press appealed in the Supreme Court and the Supreme Court has admitted the appeal, the Court expressed view that: Advertising which is only a commercial transaction is, however, the dissemination of information on the product advertised. The general public benefits from the information available via Advertisements. In democratic

[30] AIR 1960 SC 554.
[31] (1995) 5 S.C.C 139.

economy, the free flow of commercial information is essential. There can be no honest and inexpensive marketing by the general public without being educated by the information disseminated by the advertisements. The economic system in a democracy would be disadvantaged without freedom of “commercial speech”. The general public has the right to receive commercial speech. Article 19 (l) (a) of the Constitution not only guarantees freedom of expression and expression, but also protects the rights no one can hear, read and receive such a speech. The Supreme Court has categorically ruled that the right guaranteed by article 19 (1) denied by the creation of a monopoly in favor of the government, it can only be limited for the reasons mentioned in article 19(2) of the Constitution.

This is a welcome deviation from the judgment of the Apex Court in ***Hamdard Dawakhana v. Union of India***[32], wherein it was held that the commercial advertisement did not fall within the protection of freedom of speech and express as such an advertisement had an element of trade and commerce. It was also held in that case that a law which puts restrictions on the publication, through the press or other means of advertisement to promote the sale of certain good does not violate the right to free speech or the press. But the later developments where the commercial information also became indispensable, it was rightly held in the Tata Press case that the people have right to listen and receive the commercial speech. The commercial speech as such is also a part of general speech.

4.2.4. Right to refuse advertising

There is no legal obligation on a private media company to advertise the products or services of all the advertisers or advertising agencies applying for it. The media have a general right to refuse to publish or broadcast an advertisement, as the case may be, for any reason or for no reason at all. This right is based on the basic principle that the media also has responsibility as regards the advertisements published. Many codes of ethics also clearly

[32]AIR I960 SC 554.

provide that the media persons should be well aware of the laws affecting advertising. If the media doesn't adhere to law or ethics as regarding advertising, it can be held responsible for such advertisement. In the case of print media, the Press Council of India, in its Code dealing with advertisements, has specified that the editor shall be responsible for all the advertisements which are published in his newspaper, unless explicitly stated beforehand.[33] It flows from that provision that the editor shall decide whether an advertisement satisfies the publishing.

Similarly, a newspaper publisher cannot be compelled to accept political advertising. The general principles regarding the said right to refuse are first discussed. The three basis for the right to refuse to publish or broadcast an advertisement are as follows:

1. the general right of businesses to refrain from dealing with anyone, for any reason or for no reason at all, except where the refusal is- a method of illegal economic restraint of trade[34]. Basically it concurs with the principle that the independent businessman has a the right to choose his customers;
2. the First Amendment right of a speaker (in this case, the refusing publisher or broadcaster) to refrain from saying that which he or she does not wish to say[35]; and
3. the fact that the First Amendment does not give rise to a right of publication on the part of a rejected advertiser in this context because a privately owned publisher's or broadcaster's refusal is not "state action" to which the First Amendment applies.[36]

These rights of the media have been highlighted by the Supreme Court of the United States of America, which, in the case of ***Miami Herald***

[33]Regulation 65 of the Norms of Journalistic Conduct regarding advertising evolved by the Press Council of India.

[34] Aspen Skiing Co. v. Aspen Highlands Skiing Corp 472 U.S. 585- 601 (1985)

[35]Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc., 185 W. Va. 168. 19 Media L. Rep. (BNA) 1061 (1991)

[36]Miami Herald Publ'g Co. v. Tornillo.418 U.S. 241, 254, 258 (1974); Yeo v. Town of Lexington, 131 F.3d 241, 26 Media L. Rep. (BNA) 1193 (1st Cir. 1997).

Publishing Co. v. Tonillo[37] held that individual speakers could not have complete access to the institutional press. It observed that "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper constitutes the exercise of editorials and judgments."

In the exercise of editorial content and advertisement, the media publishers have the right to make a choice of the material that will be published in the newspaper. This right extends to all types of media. ***Homefinders of Am., Inc. v. Providence Journal Co.,***[38]it was held that refusal of a newspaper to carry advertising was not unlawful when the reason for the refusal was the misleading nature of the advertisements. In the case of ***Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co***[39]**,** emphasis was laid on the consent of the private newspaper media publishers, as regards publishing an advertisement. The choice of material to go into a newspaper constitutes the exercise of editorial control. Various newspapers and other media have their own codes consisting of norms they should adhere to. If the advertisement in question goes against the said norms, the editor has every right to refuse the publication of such advertisement.

The right to refuse can be exercised even in case the media enjoys a virtual monopoly in the area. But the American experience has shown that this right cannot be an absolute one. The right has its own limitations. If the ulterior motive of the media in refusing to advertise is a part of any unlawful scheme, then there is no right to so refuse. For instance, when the publisher is also engaged in a particular other trade and a rival competitor in that other trade wants to advertise in this particular publisher's newspaper for a reason that it has the widest circulation thereby making the publicity effective, the publisher has to oblige. It is an accepted principle that exercise of such a right by a publisher having a dominant position in a particular area may be an attempt to

[37]418 U.S. 241.254, 258 (1974).
[38]621 F. 2d 441 (1st Cir. 1980).
[39]435 F.2d 470 (7th Cir. 1970).

establish a monopoly by refusing to accept advertisements from such persons who advertise with the publisher's competitors. In ***Lorain Journal v. United States***[40]**,** a newspaper refused to publish the advertisement of products whose advertisements were aired by a competitor radio station. The Court, noting that the refusal was done in a bid to thwart the competition by using its monopoly power, held that the refusal was illegal.[41] The publication becomes an "essential facility" that must be made available to competitors.

The test is "whether it would be economically or technologically impossible for a plaintiff to create a viable alternative to the defendant's facility."[42] In ***Twin Labs., Inc. v. Weider Health & Fitness,***[43]the publisher of a body building magazine was also a supplier of body building nutritional supplements. A rival supplier approached him to advertise the formers products in the said magazine. The Court held that the publisher was under no obligation to publish the said advertisement since the competitor had a "viable alternative" advertising medium. One more interesting decision giving due importance to the viable alternative principle is ***Cyber Promotions Inc. v. America Online Inc.,***[44]wherein the defendant, a leading service provider on the internet was approached by the plaintiff, a competitor, to advertise its products and services on its website. The request was promptly denied. The court held in favour of the defendant since it was neither a monopolist nor an essential facility, whereby it retained its right to control the advertisements which reach its own subscribers.

4.2.5 Hoardings

Hoardings on public streets, buildings and even on vehicles are a popular form of advertising for corporate and individuals. Politicians cash in on the publicity from hoardings- much of it is free publicity, since often times the hoardings are unauthorized. In recent years, citizens have challenged the

[40]342 U.S. 143(1951).
[41] The activity came under Section 2 of the Sherman Act.
[42]*Ibid.*
[43]720 F. Supp. 31, 34 (S.D.N.Y. 1989).
[44]25 Media L. Rep. (BNA) 1144 (E.D. Pa. 1996).

conduct of local authorities in permitting hoardings indiscriminately. Hoardings can be an eyesore apart from creating a traffic hazard. Hoardings on heritage buildings have also been restricted.[45]

In **P.** ***Narayana Bhat v. State*** **of T.N.**,[46] owners of hoardings challenged Section 326-J, City Municipal Corporation Act, 1998 which restricted hoardings which being "visible to the traffic on the road" are "hazardous and disturbance to the safe traffic movement, so as to adversely affect free and safe flow of traffic." The challenge under Articles 14 and 19(1)(a)was rejected. It was, however held that under the impugned provision, the Authorities were empowered to refuse a license or remove a hoarding only where it was found to be hazardous or pose a disturbance to the safe movement of traffic. Merely because hoardings were visible to traffic could not be a ground to refuse a licence or pull down a hoarding.

In ***Municipal Corpn.of Greater Bombay*** **v.** ***Bharat Petroleum Corpn. Ltd.***[47]**,**the Supreme Court held that a projection on a pole in a petrol pump, displaying the trademark of the respondent was an advertisement within the meaning of Section 328, Bombay Municipal Corporation Act, 1888. The erection could not be construed as merely giving directions to motorists as to the location of the petrol pump. The court held that an "advertisement" means to make publicly known information by some device and to draw or attract attention of the public to such information. It need not be necessarily to sell the products of the advertiser or solely for commercial exploitation.

In ***ICICI Bank*** **v.** ***Municipal Corpn. of Greater Bombay,***[48]the question arose as to whether signboards directing customers of a bank to its ATM centres were an "advertisement" within the meaning of Section 328-A, Bombay Municipal Corporation Act, 1888, or a sky-sign in the nature of an advertisement, announcement or direction under Section 328 of the same Act.

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[45] *Prochy Numazar Mehta* v. *Municipal Corpn. of Greater Bombay,* (2003) 5 Bom CR 71;*Mass Holdings (P) Ltd.* v. *Municipal Corpn. of Greater Mumbai,* (2006) 10 SCC 503: AIR 2006 SC 749; V.R. *Advertisers* v. *Municipal Corpn. Of Brihan Mumbai,* (2006) 10 SCC 508.

[46] AIR 2001 SC 1736.

[47] AIR 2002.SC 1638.

[48] (2005) 6 SCC 404: AIR 2005 SC 3315.

It was held that an "advertisement" within the meaning of Section 328-A must have a commercial purpose and should be indicative of the business activity of the displayer so as to attract the attention of people to its business. It was held that signboards directing the bank's customers to its ATM centers may indirectly attract prospective customers.

In ***Novva Ads.*v. *Deptt.of Municipal Admn. and Water Supply***[49] the question arose as to whether the advertisement rules issued by Chennai City Municipal Corporation were violative of Article 19(1)(a), Article 19(1)(b)and Article 14 of the Constitution. The contention was that hoardings are protected as commercial speech under Article 19(1)*(a)* and that dissemination of information, whether political, social or commercial could not be restricted on the ground that it caused an obstruction to traffic, a ground not covered under Article 19(2). Also, hoardings on public roads and private properties could not be treated in the same fashion. Section 326-A, Chennai City Municipal Corporation Act, 1919 defines "hoardings" to mean "any screen or board at any place whether public or private used or intended to be used for exhibiting advertisements". The Act mandates licenses for hoardings in both public places and private places. While the State has the right to regulate hoardings in public places as they vest in the State as a trustee for the public, hoardings in private places also require regulation so as to ensure that they are not hazardous to the public in any manner whether by posing a danger to free flow of traffic, distracting traffic or containing obscene or otherwise objectionable material. The court held that there was no infringement of the freedom of speech which includes the right to advertise. One of the arguments canvassed on behalf of the advertisers was that the rules were violative of Article 14 because private hoardings were treated on the same footing as public hoardings, thereby treating unequal as equals. It was further contended that the regulations resulted in restrictions on the use of private land for advertisements and that display of information on hoardings whether commercial, political or social was

[49](2008) 8 SCC 42; AIR 2008 SC 2941.

permissible under Article 19(1)(a) and no restriction could be placed on that right under Article 19(2) on the purported ground of committing obstruction or hazard to the movement of traffic. The court rejected these arguments holding that the impugned provisions were not restrictive but merely regulatory.

In Supri Advertising and Entertainment (P) Ltd. **v.** ***Anabita Pandole,***[50]the question arose out of a challenge by a public-spirited doctor to the indiscriminate grant of licenses by the Bombay Municipal Corporation for hoardings across the city of Mumbai. According to her, the hoardings had not only damaged heritage buildings and resulted in indiscriminate cutting of trees but also caused serious traffic hazards. The High Court passed far-reaching directions to the effect that:

(i) the mobile hoarding vehicles must not be parked on the main roads of the city concerned or even the carriageways, *(ii)* the State Government and the Corporation must make appropriate regulations in exercise of their respective statutory powers and in consultation with the appropriate bodies in relation to advertisement hoardings, *(iii)* the said authorities must examine whether such mobile hoarding vehicles could at all be granted such permissions and/or licences in the light of the judgment of the High Court and the law in force, *(iv)* the police authorities concerned and the competent authorities in the Corporation and the registering authorities must take action against such vehicles, after giving an opportunity of hearing, in accordance with law and in light of the provisions of the Motor Vehicles Act, 1988,particularly in relation to design, manufacturing, construction, equipping and alteration of vehicles and consequential impact thereof upon registration of such vehicles, *(v)* the State must fix responsibility of all the departments concerned and public authorities, if the officers were found to be erring, and *(vi)* the State should, in consultation with other authorities, including Municipal Corporation and Policy, should frame proper policy in regard to various facets examined by the High Court.

[50](2008) 10 SCC 246: AIR 1009 SC Supp953.

The Supreme Court, however, set aside the order of the High Court, holding that the latter had transgressed the scope of the writ petition. Once the licence granting authorities were satisfied that there was no traffic hazard and the free flow traffic had not been effected, the High Court could not have questioned that decision without having any material to the contrary.

In ***Sunil Pandharinath Jadhav v. State of Maharashtra,***[51] a resident of Aurangabad city sought enforcement of a ban on unauthorised hoardings in the city. The court held that hoardings put up without prior permission of the Municipal Commissioner were unauthorised and therefore liable to be removed. Apart from this, the person responsible was liable to pay a penalty under the Maharashtra Prevention of Defacement of Property Act, 1995. The court referred to the rules to control and regulate hoardings issued by the Municipal Corporation in 2003 and to Section 268, IPC which makes a public nuisance an offence and penalises such nuisance under Sections 290 and 291.The court suggested that a nodal agency be constituted for the purpose of removing illegal posters, banners and hoardings. The Municipal Corporation was directed to identify spots where hoardings could be permitted and allocate such spots to the highest bidder through a public auction so that while the public exchequer earned through the process, the auction-purchasers would ensure that the area remained free of illegal hoardings.[52]

4.2.6. Political advertising

Political advertising has reached huge proportions in recent times. It is difficult to open a national daily without shuffling through page after page of advertisements adorned with pictures of preening politicians. If it happens to be some worthy leader’s birthday (living or departed), one may be lucky to find a little news tucked away somewhere in those sheaves of newsprint, masquerading as a newspaper but really a government glorification dossier.

[51](2010) 5 Mah LJ 588: (2010) 112 Bom LR 2834.
[52]Madhavi Goradia Divan, Facets of Media Law 380-383 (Eastern Book Company, Lucknow, edn. 2nd , 2013).

The then Uttar Pradesh Chief Minister, Mayawati, may have had point when she responded to the opprobrium heaped on her for going on a binge erecting statues of herself, contending that the Central Government was hardly in a position to complain. Surely, advertisement proclaiming the government's achievements and glorifying their leaders with airbrushed photographs day after day at a huge cost to the taxpayer could not be much more refined than Mayawati's obsession with immortality? It would be interesting to know how much the government spend on advertising. The figures are likely to be startling. In response to an advertising blitzkrieg on the death anniversary of Rajiv Gandhi in 2010, Rarachandra Guha had written:

A back-of-the-envelope calculation suggests that on 21 May 2010, perhaps Rs. 60 or 70 crore were spent by the tax payer without his and her consent on praising Rajiv Gandhi. Since the practice has been in place since 2005, the aggregate expenditure to date on this account is probably in excess of Rs. 300crore.[53]

Does the government have a legally sustainable right to advertise or to glorify itself at the taxpayer's expense? Thinly disguised as dissemination of information in the public interest, it is really political advertising by the party in power at the cost of the public exchequer.

There was a time when the government sought to curtail advertising space in newspapers.[54] Today, the government is itself the largest single advertiser in the country, sometimes swallowing up more newsprint than news itself. There is no denying the fact that in times of an economic slowdown, the advertising revenue pumped in by the government is a welcome relief. Following the global meltdown in 2008-2009, globally, newspapers were on the brink of closure, being unable to compete with faster technologies which bring news that comes at virtually no cost to the reader. The strides in technology have resulted in a tectonic shift in dissemination of news—young

[53]Ramachandra Guha, *"Memories* at public expense: Costly advertisements are not the best tribute for Rajiv Gandhi" *The Telegraph,* 5-6-2010.
[54]*Sakal Papers (P) Ltd. V. Union of India, AIR 1962 SC 305: (1962) 3 SCR 842.*

people, particularly in the West, are increasingly accessing news free of cost on the Internet, gradually rendering the newspaper redundant. In India, newspapers are cheaper than anywhere in the world and continue to flourish with the support of huge advertising revenue.

But the question as to whether the government can defend what is really political advertising- a self-glorification campaign by squandering away the tax payers money needs to be answered. Apart from a waste of the taxpayer's money, it has serious ramifications for the independence of the media. Can the media continue to be objective about the government it is so financially beholden to? This is a dangerous trend because it means that the political party in power can mould and manipulate public opinion by its command over the media. This is what Noam Chomsky calls "the manufacture of consent", anathema to the very essence of free speech.[55]

In ***Common cause vs. Union of India***[56] A Supreme Court Bench comprising of Justice Ranjan Gogoi and Justice P.C. Ghose has restrained ruling parties from publishing photographs of political leaders or prominent persons. The advertisements could only carry the photos of Prime Minister, President and the Chief Justice of India.

The modification of the above order by single bench headed by Judge Ranjan Gogoi occurred in requests for review filed by the Center and some other states such as West Bengal and Tamil Nadu.[57]They claimed that it has violated their "fundamental rights and the federal structure". In amending its previous order, the Supreme Court recently declared that photos of governors, chief ministers and ministers may also appear in central and state government announcements published in print and electronic media to announce various projects and greet the public on several occasions.[58]

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[55]*Supra* note 52 at 383-384.
[56] Writ petition (civil) no. 13 of 2003 with W.P. (C) no. 197 of 2004 & W.P. (C) no. 302 of 2012.
[57] Review petition (C) Nos. 1879-1881/2015.
[58] Available at: http://www.livelaw.in/sc-permits-photos-governors-chief-ministers-cabinet-ministers-also-govt-advertisements/(Last visited on 08/12/2017).

In ***M/S Eg. Communications Pvt. Ltd. And Ors. versus Election Commission of India And Ors.***[59], Delhi High Court has held that the restrictions on political advertisements during the Model Code of Conduct does not violate either the freedom of speech or the freedom of carrying out trade.

4.2.7. Disparagement

To disparage another's goods is to make a statement about a competitor's goods which is untrue or misleading in a manner that tends to influence the public not to buy those goods. The guiding principles on the law of disparagement are:

1. An advertisement is part of commercial speech protected under Article 19(1)(a) of the Constitution.
2. An advertisement must not be false, misleading, unfair or deceptive.
3. There may be some grey areas but these need not be taken as serious representations of fact but only as glorifying one's product.[60]

If the advertisement extends beyond the grey area and becomes false, misleading, deceptive or unfair, it cannot be entitled to protection. "It is actionable when the words go beyond a mere puff and constitute untrue statements of fact about a rival's product."[61] As the Delhi High Court held in ***Dabur India Ltd.* v. *Wipro Ltd.*,**[62] "It is one thing to say that the defendant's product is better than that of the plaintiff and it is another thing to say that the plaintiff's product is inferior to that of the defendant".

In ***Procter & Gamble Home Products Private Limited V. Hindustan Unilever Ltd.***[63]Dismissing suits by 'hypersensitive' shampoo manufacturers, the Delhi High Court has held that comparative advertising, i.e., comparing own product with that of competitor's and calling own superior / better than competitor's, would not amount to disparaging the goods/products of the other.

[59] W.P.(C) 12073/2019, Judgment delivered on: 09.01.2020.
[60]*Supra* note 52 at 392-395.
[61]*Halsbury's Law of England*, Vol. 28 (4th Edn.).
[62](2006) 32 PTC 677 (Del.).
[63]CS(OS) No.459/2016 & IA No.11244/2016 (u/O XXXIX R-1&2 CPC), Decision: 17th February, 2017.

In ***Dabur India Ltd. v. Colortek Meghalaya (P) Ltd.***[64] the Delhi High Court rejected the plaintiff's case that the defendant had disparaged his product through a commercial telecast. The defendant advertised its mosquito repellent cream where it asserted that its product contained certain ingredients which would reduce the possibility of the repellent causing rashes or allergy on the skin. It was contended by the plaintiff that although there was no direct or overt reference to its product in the impugned advertisement, since the plaintiff enjoyed a huge market share in the same business, the commercial was obviously targeting its product and the suggestion was that the plaintiff's product causes rashes and allergy. The plaintiff failed to get an injunction since there was nothing to suggest that the commercial referred to the plaintiff's product overtly or covertly. The defendant was entitled to expound the virtues of its own product but that could not automatically amount to disparagement of a rival product. The court held that since commercial speech is protected by Article 19 (1) (a), the advertiser must have sufficient space to play "in the gray areas". But if an advertisement extends beyond "the grey areas" and becomes a false, misleading or deceptive advertisement, it would not be entitled to the protection of Article 19(1)(a).

In ***Pepsi Co. Inc.* v. *Hindustan Coca Cola Ltd.,***[65] the Delhi High Court restated the factors to be taken into account in deciding the question of disparagement:

1. *The intent of the advertisement*- this can be understood from its story line and the message sought to be conveyed.
2. *The overall effect of the advertisement*- does it promote the advertiser's product or does it disparage or denigrate a rival product? In this context, it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

[64](2010) 42 PTC 88 (Del).
[65](2003) 27 PTC 305 (Del).

3. *The manner of advertising*- is the comparison by and large truthful, or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible.

In ***Reckitt & Colman of India Ltd.*** **v.** ***M.P. Ramchandran***[66]the Calcutta High Court enunciated five principles on the law of disparagement:

1. A tradesman is entitled to declare his goods to be the best in the world even though the declaration may be untrue.
2. He can also say that his goods are better than his competitor's even though such statement is untrue.
3. For the purpose of proclaiming that his goods are the best in the world or better than that of his competitors, he can even compare the advantages of his goods over the goods of others.
4. He cannot, however, while claiming that his goods are better than those of his competitor's say that his competitor's goods are bad. If he says so, he is guilty of slander of his competitor's goods.
5. If there is slander of the goods of competitors, an action for defamation lies, in which case, the court is also competent to grant an injunction restraining repetition of the defamation.

These five principles were also stated by the Delhi High Court in ***Reckitt & Colman of India Ltd.*** **v.** ***Kiwi T.T.K. Ltd.,***[67]where the court restrained a disparaging advertisement. A, a bottle of the defendant's shoe polish with the name "Kiwi" written on the wide surface was shown against another liquid polish described as "others" marketed by brand X. While the word "Kiwi" appearing on the defendant's bottle would not drip, the word, "others" written in the other bottle was shown dripping. The other bottle resembled the one used by the plaintiff since it was identifiable by a red blob on its surface.

In ***Dabur India Ltd.*** **v.** ***Colgate Palmolive (India) Ltd.***[68] the impugned advertisement showed the plaintiff's tooth powder to be abrasive. Finding the

[66](1999) 19 PTC 741 (Cal).
[67](1996) 16 PTC 393 (Del).
[68]AIR 2005 Del 102.

advertisement to be disparaging, the Delhi High Court granted an injunction. It was held that the generic disparagement of a rival product without specifically naming or identifying the rival product is also objectionable since clever advertising can adversely impact a rival product, without actually referring to it.

In ***Karamchand Appliances (P) Ltd.* v. *Sri Adhikari Bros.,***[69] the Delhi High Court was concerned with the mosquito repellents “All Out” and “Goodnight”. The offending advertisement showed a lady removing the “All Out” plug and replacing it with “Goodnight” with a background voice that claimed that the latter’s turbo vapour chases mosquitoes at double speed. It was held that an advertisement which disparaged a product by describing it as obsolete could not be permitted.

In ***Colgate Palmolive (India) Ltd.* v. *Anchor Health and Beauty Care (P) Ltd.***[70] the plaintiff objected to the defendant’s advertisement where the latter claimed that it was the “only” toothpaste to contain all three ingredients namely Calcium, Fluoride and Tricklosan. It also claimed that it was the “first” all-round protection tooth paste. The defendant was directed to remove the words “only” and “first” from its advertisement.

4.2.7. Substance of injurious to health related advertisement

In ***Mahesh Bhatt* v. *Union of India,***[71] the petitioner challenged certain rules under the Cigarettes and Other Tobacco Product (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 which prohibited the depiction of smoking in films. Section 5 of the Act prohibits the advertisement of cigarettes and other tobacco products. The expression “advertisement” is defined in Section 3(a) as “Any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas”.

[69] (2005) 31 PTC I (Del).
[70] (2009) 40 PTC 653 (Mad).
[71] (2009) 156 DLT 725.

The act of persons smoking in a film per se was not covered in the definition of "advertisement"—"advertisement" would have to mean the propagation of smoking through announcements or through light, sound or smoke, etc.

Rule 4(8) provides that wherever brand names or logos of tobacco products form a part of the pictures to be printed in any form or print or out-door media or footage to be aired through any form of electronic media, it shall be mandatory for the media to crop or mask the same to ensure that the brands and logos of the tobacco products are not visible, except in case of live or deferred live telecast of sports, cultural and other events or activities held in other countries being aired on television in India.

Sub-rule 8 made an arbitrary distinction between print media and the electronic media. While in a Formula One Race, the electronic media can show a live footage where the winner may be wearing a tobacco brand but the print media cannot show the photograph in the same form. The said rule was struck down as being arbitrary under Article 14. While photos used for advertising purposes, which may have the direct or indirect effect of promoting tobacco products, would be banned, the mere reproduction as a news item of a "Formula One Race" cannot be described as an advertisement of tobacco.[72]

4.2.8. Tele-marketing

Tele-marketing through phone calls and text messages has become indiscriminate and rampant and can be an awful nuisance to the consumer. In a wide reaching order, giving relief to consumers harassed by tele-marketeers, the Delhi State Consumer Commission ruled that every consumer annoyed by unsolicited calls and text messages was to be compensated with damages of Rs. 25,000. Further, an exemplary penalty of Rs. 50 lakhs was imposed on Airtel and the Cellular Operators Association of India and Rs 25 lakhs on ICICI and American Express Banks for indulging in unfair trade practices. Following the Consumer Commission's judgment, the TRAI issued Telecommunications

[72]*Supra* note 52 at 392-395.

Unsolicited Commercial Communications Regulations, 2007to put into place a mechanism to curb such calls. Subsequently, a National Do Not Call Registry (NDNC Registry) was set up. The said ruling of the Consumer Commission was, however, set aside by the Delhi High Court in ***Cellular Operators Assn. of India* v. *Nivedita Sharma,***[73]holding that the State Commission did not have the jurisdiction to award penalties described as "punitive damages". The High Court, nevertheless observed:

Having said this, we feel that the cellular operators must ensure that this menace of unsolicited commercial communications is reduced and put an end to. The counsel for the petitioners states that there are regulations, which have been issued by the TRAI in this regard and which they are duty bound to implement as they are under the guidance of TRAI. We are also informed that a "Do Not Call" Registry has been established and the same is being managed by the National Informatics Centre, Government of India. If there is any violation of these regulations, then the petitioners would obviously be liable for the same.

TRAI has issued the Telecom Commercial Communications Customer Preference Regulations, 2010dated 1December 2010to provide an effective mechanism for curbing unsolicited commercial communications.[74]

4.3 COMMERCIAL ADVERTISEMENT AS FUNDAMENTAL RIGHT

The Indian Constitution guarantees a number of Fundamental Rights to citizens as well as non-citizens. For the purpose of the present discussion the relevant Fundamental Rights are Freedom of Speech and Expression, which also includes the freedom of the press, and freedom of profession, occupation, trade or business. Commercial advertising raises the issue of availability of the freedom of speech and expression guaranteed by the Article 19(l)(a)[75] of the Indian Constitution. The question is whether a manufacturer/seller has a right to advertise his product or service on the print or electronic media. The answer

[73](2010) *166* DLT 558.
[74]*Supra* note 52 at 395-396.
[75] Article 19(1) (a): All citizens shall have the right to freedom of speech and expression.

to the question depends on, whether a commercial advertisement is protected under Article 19(l)(a) of the Constitution, This question came for consideration before the Hon'ble Supreme Court In ***Hamdard Dawakhana*** v. ***Union of India***[76] **,** where the constitutionality of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged. The Apex Court speaking through Justice Kapur recognized, advertising as a mode of expression falls within the ambit of Article 19(1) (a) denied the protection of this clause to commercial advertisements on the grounds that such advertisements do not pertain to freedom of speech and expression but to trade and business and further they do not propagate any ideas - social, political or economic. It is humbly asserted that the above-mentioned decision of the Supreme Court of Justice exceeded the power as per the needs of the case and tended to affect the right to publish all commercial advertisements. The main issue in the instance case was related to the right to advertise prohibited drugs and validity of the impugned Act which aims at prevention of self-medication and self-treatment. But the Court made some of the observations that were not asked to decide the case.

As we have already noted elsewhere, advertising is the cornerstone of our economic system. Apart from being the lifeline of free economy in a democratic society, advertising the life blood of free media, pays most of the cost and thus makes the media widely available. It pays a large portion of the cost of newspapers supplied to the public. Therefore, to hold that the impugned advertisement not being in the general public interest, is not entitled to commercial speech protection, has a valid justification on which there is no controversy, but to hold that commercial speech *per se* is not entitled to such protection overlooks the actual and potential advantages of commercial advertising in a democratic country like India where press is revered as the fourth pillar of democracy.

[76]AIR 1960 SC 554.

In ***Sakal Papers (P) Ltd.* v. *Union of India***[77], a Constitution Bench of the Supreme Court extended the protection of "freedom of speech and expression" clause to the publication of advertisement and declared Section 3(1) of the Newspapers (Price and Page) Act, 1956 as unconstitutional on the ground that the curtailment of the advertisements would bring down the circulation of newspapers and as such would be hit by Article 19(1) (a) of Constitution of India. The Court rejected the contentions that the publication of advertisement was a trading activity; the diminution of advertisement revenue would not be regarded as an infringement of right under Article 19(1) (a); devoting large volume of space to advertisement could not be lawful exercise of the right of "freedom of speech and expression" or right of dissemination of news and views; and that instead of raising the price of the newspaper the object could be achieved by reducing the advertisements. The Supreme Court reasoned:

"Section 3(1) of the Act insofar as it permits the allocation of space to advertisements also directly affects freedom of circulation. If the area for advertisements is curtailed the price of the newspaper will be forced up. If that happens, the circulation will inevitable go down. This would be no remote, but a direct consequence of curtailment of advertisements".[78]

The Court further held that:

"If, on the other hand, the space for advertisement is reduced the earnings of a newspaper would go down and it would either have to run at a loss or close down or raise its price. The object of the Act in regulating the space for advertisements is stated to be to prevent unfair competition. It is thus directed against circulation of a newspaper. When a law is intended to bring about this result there would be a direct interference with the right of freedom of speech and expression guaranteed under Article 19(l) (a)".[79]

[77] AIR 1962 SC 305.
[78] *Id* at p. 313.
[79] *Ibid.*

The apex Court also made similar observations in ***Bennett Coleman and Co.* v. *Union of India***[80]. In this case the constitutionality of Newsprint policy 1972-73 was being challenged on the ground that some provisions of the policy were violative of Articles 14 and 19(l)(a) of the Indian constitution. The Court held:

"The law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by Article 19(2). If the area of the advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in *Sakal Papers Case* to be the direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons has been held by this court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom".

The Court further held:

"A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19(1) (a) on the aspects of propagation, publication and circulation".

In the ***Indian express Newspapers v Union of India***[81], differing from Hamdard Dawakhana ruling, the court has observed: "We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen." Advertising pays large portion of the costs of supplying the public with the newspapers. "For a democratic press, the advertising "subsidy" is crucial." With the curtailment in advertisements, the price of a newspaper will be forced up and this will adversely affect its circulation and this will be a direct interference with the right of freedom of speech and expression guaranteed under Article 19(1)(a).

[80] (1972) 2 SCC 788.
[81] (1985)1 SCC 641

The Supreme Court in ***Tata Press Ltd.* v. *Mahanagar Telephone Nigam Limited and Others***[82], set at rest the lingering controversy regarding the protection of commercial advertisement under Article 19(1) (a) of Constitution of India by holding that the commercial speech cannot be denied such protection merely because the same is issued by businessman. The facts of this case were as follows:

The Mahanagar Telephone Nigam was a Government company controlled by the Government of India. Initially, the Nigam used to publish and distribute on its own, the telephone directory consisting of white pages only. However, from 1987 the Nigam started entrusting the publication of its telephone directory to outside contractors and permitted such contractors to raise revenue for themselves by procuring advertisements and publishing the same as "Yellow Pages" appended to the telephone directory. The telephone directory published and distributed by the Nigam now consist of white pages which contain alphabetical list of telephone subscribers and also "Yellow Pages" consisting of advertisements procured by the contractor to meet the expenses incurred by the contractor in printing, publishing and distributing the directory. Tata Press Ltd. was engaged in publication of Tata Press Yellow pages. The Nigam and the Union of India filed a civil suit before a Civil Court at Bombay for a declaration that they alone have die right to print, publish the list of telephone subscribers and Tata Press Ltd. have no right to print or publish without its permission as it was violative of the Indian Telegraph Act and they should therefore, be restrained by permanent injunction from publishing the 'Yellow pages'. The City Civil court dismissed the suit but a single judge of the Bombay High Court allowed the appeal. Tata Press's letter patent appeal was dismissed by the Division Bench of the High Court. Tatas filed appeal before the Supreme Court.

The learned single judge of the Bombay High Court, as the Supreme Court observed, rested his judgment on the ground that the publication of

[82](1995) 5 SCC 139.

advertisements in the form of yellow pages appended to the white pages was within the bar contained in Rule 458 of the Indian Telegraph Rules, 1951. The learned judge accordingly allowed the appeal and restrained the appellant from publishing the Tata pages. Highlighting the importance of commercial advertisement Kuldeep Singh, J. held:

"Advertising is considered to be the cornerstone of our economic system. Low prices for consumers are dependent upon mass production, mass production is dependent upon volume sales, and volume sales are dependent upon advertisement".[83]

His Lordship added:

"Advertising as a 'commercial speech' has two facets. Advertising which is no more than a commercial transaction is nonetheless dissemination of information regarding the product advertised. Public at large is benefited by the information made available through the advertisement. In a democratic economy free flow of commercial information is indispensable. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisement. The economic system in a democracy would be handicapped without there being freedom of commercial speech".[84]

The learned judge examined the issue from the angle of the right of the public at large to receive the commercial information and in this way recognized the consumer's right to information.[85]

4.4. ADVERTISING AS FACET OF THE CONSUMER'S RIGHT TO INFORMATION

The constitutional issue of extension of freedom speech of expression to commercial advertisement needs to be examined from the prospective of the consumer's right to product and service information. As we know the concept of 'consumer's right' is recognized at both international and national level.

[83] *Id* at p. 154.
[84] *Id* at p. 156.
[85] *Supra* note 26 at 46-54.

These rights include right-to safety, right to be informed, right to choose, right to be heard, right to redress, right to consumer education, right to a healthy environment and right to basic needs. The first six rights are also recognized under Consumer protection Act, 1986. The right to information about the quantity, quality, potency, standard, purity and price of product are crucial to the exercise of other consumer rights. As commercial advertising helps consumers to get information about products and services which they need, they have legitimate interest in the free flow of information within permissible limits. In India the right to know and the right to receive and impart information have been recognized as a part of the right to freedom of speech and expression. In ***Horlicks Ltd. & Anr. V. Heinz India Private Limited,***[86] the protection given to an advertisement under Article 19(1)(a) of the Constitution is a necessary concomitant of the right of the public to receive the information in the advertisement. The Delhi High Court has held that advertisement is a facet of commercial speech which is protected by Article 19(1)(a) of the Constitution of India and the same can be restricted only in accordance with law enacted under Article 19(2) of the Constitution. Time and again the Supreme Court has held that a citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. The freedom to telecast on the Doordarshan has been recognized by the apex court in the ***Odyssey Communication (P.) Ltd v, Lokvidayanm Sangathan (Doordarshan cases)***[87].In ***Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengali***[88], The apex Court has made it clear that an Individual has a right under Article 19(l)(a) to have an access to telecasting, which issubject to the limitation on account of use of public property, i.e. the air waves involved in the exercise of the right can be controlled and regulated by the public authority even on grounds not strictly covered under Article 19(2) of the Constitution.

[86]CS(COMM) 808/2017.
[87](1988) 3 SCC 410.
[88](1995) 2 SCC 161.

A vital aspect of advertising that makes it part of Article 19(1)(a) is that it facilitates the dissemination of information about who is selling what product and at what price. Advertising enables the citizen to make well-informed and intelligent economic choices. More important than the right of expression of the advertiser is the right of the recipient to the information which he receives from the advertisement.[89]The right to receive information regarding products and services from advertisements in the print media has been expressly recognized by the Supreme Court in the ***Tata Yellow Pages case***[90]**.** The Supreme Court speaking through Justice Kuldeep Singh in this case observed:

"The public at large has a right to receive the commercial speech. Article 19(l)(a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech. So far as the economic needs of a citizen arc concerned, their fulfillment has to be guided by the information disseminated through the advertisements. The protection of Article 19(1) (a) is available to the speaker as well as to the recipient of the speech. The recipient of commercial speech may be having much deeper interest in the advertisement than the businessman, who is behind the publication. An advertisement giving information regarding a life-saving drug may be of much more importance to general public than to the advertiser who may be having purely a trade consideration".[91]

The apex court while concluding held that the Mahanagar Telephone Nigam Limited cannot restrain the appellant from publishing "Tata Press Yellow Pages" comprising paid advertisements from businessmen, traders and professionals.

4.5. RAMIFICATION OF "MUST CARRY" PROVISION

It is interesting to note that sometimes a statute instead of imposing a restraint compels the publication of a particular matter through "must carry" provision. To give illustrations, at times a statute imposes an obligation to print

[89]*Supra* note 52 at 374.
[90](1995) 5 SCC 139.
[91](1995) 5 SCC 139 at p.156.

certain information just as a food product must carry on its package the list of ingredients used in its preparation or must print its weight, cigarettes cartons are required to carry statutory warning that cigarette smoking is harmful to health etc. The issue came before the Supreme Court in the case of ***Union of India* v. *Motion Picture Association*[92],** the Supreme Court held:

"Whether compelled speech will or will not amount to a violation of the freedom of speech and expression will depend on the nature of a "must carry" provision. If a "must carry" provision furthers informed decision-making which is the essence of the right to free speech and expression, it will not amount to any violation of the fundamental freedom of speech and expression. If however, such provision compels a person to carry out propaganda or project a partisan or distorted point of view contrary to his wish, it may amount to a restraint on his freedom of speech and expression".

Explaining its position the Apex Court opined that advertisement showing the list of ingredients on food package enables the public to decide on a correct basis whether a particular product should or should not be used. Statutory warning on cigarettes cartons enables a user to make a correct decision as to whether he should smoke a cigarette or not. Such mandatory provisions although they compel speech cannot be viewed as a restraint on the freedom of speech and expression.[93]

4.6. FREEDOM OF COMMERCIAL ADVERTISEMENT TO MANUFACTURES

Article 19(1) (a) of the Constitution declares: "All citizens shall have the right to freedom of speech and expression". The freedom guaranteed under Article 19(1) (a) is available only to Indian citizens[94]. 'Citizens' under this Article mean only natural persons, who have the status of citizenship under the law.[95] Therefore, a company or a corporation cannot claim a right under Article 19(1) (a) because they are not natural persons. Does it mean that the

[92]AIR 1999 (SC) 2334.
[93]*Supra* note 26 at 44-46.
[94]A.K.Gopalan v. State of Madras, AIR 1950 SC 27.
[95]Tata Engineering and Locomotive Co. v. State of Bihar, AIR 1965 SC 40.

manufacturing companies have no right to issue commercial advertisement? The decision of the Apex Court in ***R.C. Cooper v. Union of India***[96] ***(Bank Nationalization case)*** has established beyond all doubt that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When the fundamental rights of shareholders are impaired by State action their right as shareholders are protected. The reason is that the shareholder's rights are equally and necessarily affected if the rights of the company are affected. This view of the apex Court was also reiterated in ***Bennett Coleman and Co.*** **v.** ***Union of India***[97].The court observed:

"This can otherwise be said that though a company is a juristic person and has no right to freedom of speech and expression but after 'lifting of the corporation veil', the members (shareholders) who constitute it can't be denied of their right to freedom of speech and expression."

Thus, it can be said that though a manufacturing company has no right to freedom of commercial advertisement, still it can exercise this right through its shareholders.

4.7 REASONABLE RESTRICTIONS ON COMMERCIAL ADVERTISEMENT

It is now well established that the freedom of commercial advertisement is a part of freedom of speech and expression. This freedom is however, not absolute. The Government is free to impose reasonable restrictions on commercial advertisements on the grounds set forth in Article 19(2) of the Constitution. The Supreme Court of India in ***Tata Press Ltd.*** **v.** ***Mahanagar Telephone Nigam Ltd***[98]stressed this fact. In this regard the Supreme Court observed:

"Unlike the First Amendment under the United States Constitution our constitution itself lays down in Article 19(2) the restrictions which can be imposed on the fundamental right guaranteed under Article 19(1) (a) of the

[96](1970) 1 SCC 248.
[97](1972) 2 SCC 788.
[98](1995) 5 SCC 139.

Constitution. The "Commercial Speech" which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State".

The Apex Court however, did not clarify as to which restriction/restrictions under Article 19(2) would be attracted by a deceptive, unfair, misleading and untruthful commercial speech (advertisement). It may be noted here that Clause (2) of Article 19 contains the grounds on which restrictions on the freedom of speech and expression can be imposed: (a) Security of the State; (b) Friendly relations with foreign states; (c) Public Order; (d) Decency or Morality; (c) Contempt of Court; (f) Defamation (g) Incitement of an offence; and (h) Sovereignty and integrity of India. Thus, the state can prohibit or regulate such advertisements as may affect the security of the state or jeopardize its friendly relations with foreign states, the preservation of public order is another ground for imposing restrictions on freedom of speech and expression which also includes freedom of commercial speech.

The term public order is of broad import and synonymous with public peace, safety and tranquility.[99] The State may in the interest of public order, prohibit and punish (i) utterances tending to incite a breach of peace or riots; (ii) use of threatening, abusive, insulting words, behaviours in any public pace or meeting with intent to cause a breach of the peace; (iii) causing of loud and raucous noise in streets and public places by means of sound amplifying instruments etc.

Decency or morality is another permissible ground of restraint on commercial advertisements. This exception has been engrafted for the purpose of restricting speeches and publications which tend to undermine public morals[100]. The Indecent Representation of Women (Prohibition) Act, 1986, the Dramatic Performances Act, 1876, The Cinematograph Act, 1952 and The Press Act, 1951, etc. restrict the freedom guaranteed under Article 19(l)(a) on the basis of 'decency or morality' clause of Article 19(2). Apart from this Rule

[99]Supt. Central Prison v. Ram ManoharLohia, AIR 1960 SC 633.
[100]Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.

29 of the Press Council of India's Norms of Journalistic Conduct provides that newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste. Similarly, Rule 30 lays down that newspapers shall not display advertisement which are vulgar or which, through depiction of a women in nude or lewd posture provoke lecherous attention of males as if she herself was a commercial commodity for sale.

The maintenance of the dignity of court is the cardinal principle of the rule of law. The criticism which undermines the dignity of the court cannot be permitted under cloak of freedom of speech and expression. In the exercise of the right of freedom of speech and expression a person cannot be allowed to lower the prestige of the court in the eyes of the people by inserting an advertisement in a newspaper. Commercial advertising is also subject to the laws of obscenity and defamation. The laws penalizing the defamation are reasonable restriction on the freedom of speech and expression and hence, protected under Article 19(2).

It must be recognized that the freedom of speech and expression cannot confer a license to incite people to commit offence. The laws penalizing or preventing incitement to commit offences are therefore, protected under Article 19(2). The word 'offence' used here is not defined in the Constitution. It is however, defined in the General Clauses Act which mean 'any act or omission made punishable by any law for the time being in force'. In ***State of Bihar*** **v.** ***Shailabala*** **Devi**[101], the Supreme Court held that incitement to murder or other violent crimes would generally endanger the security of the State hence, a restriction against such incitement would be valid law under Article 19(2). This ruling is also applicable to the commercial speech.

The freedom under Article 19(1) (a) can be restricted in defense of integrity and sovereignty of India. This restriction enables the Parliament to make law so as to prevent any person from propagating secession of a state or any part of India from union or to prevent all activities aimed at disintegration

[101]AIR 1952 SC 329.

of the country. Though sedition is not mentioned as one of the restrictions on the freedom of speech and expression, publication of a seditious advertisement is punishable under Section 124A of Indian Penal Code.

4.8. CONSTITUTION PROTECTION TO RURAL CONSUMERS

Law gives sufficient protection to Indian consumers but the system of social and economic backwardness coupled with Illiteracy make these protections approximately inaccessible to a rural consumer. The Constitution 73rdAmendment) Act, 1992 provided a Constitutional sanction to democracy at a grass root level by inserting a new part relating to *Panchayat* in order to realize the objectives of *Gram Swaraj,* the idea cherished by Mahatma Gandhi and to ensure democratic function of the grass root democratic institutions. This amending Act added a new Schedule (11th Schedule) to the Constitution.

The Schedule contains a list of functions to performed by the *panchayat Raj* Institutions. Surprisingly, the Schedule contains no express provision on consumer protection. As the rural consumers are most vulnerable to false or misleading advertisements and other unfair trade practices in comparison to urban consumers so, there is in urgent need to make them aware of the consumer's rights and remedies liable against false or misleading advertisements and other unfair trade practices. This in turn requires the organization of mass awareness campaigning at the village, *taluka* and block levels to secure an active Involvement of *panchayati raj* institutions in consumer welfare programmes. So, it is suggested that Schedule 11 should be amended to include consumer affairs.[102]

4.9 CONCLUSION

It emerges from the foregoing discussion that though protection of the consumer against false or misleading advertisements and other unfair, deceptive, immoral and unethical trade practices is the need of the present hour, the Indian Constitution carries no express provision relating to consumer protection. But since consumer justice is an integral component social and

[102] *Supra* note 26 at 61.

economic justice which the state is duty bound to secure to citizens, the central and state government are mandated by the Constitution to recognize and protect the rights of the consumers in general and safeguard them and society at large from the negative effects of commercial advertisements in particular.

As we have seen above the idea of consumer protection is permeated through the Preamble, Fundamental Rights and Directive Principles of the State Policy of the Constitution. The discussion also reveals that though 'consumer affair' as a subject has not been mentioned in Union, Concurrent and State List, various items in the Union List or Concurrent List provide the legal basis for enactment of advertising laws. Regarding the protection of Commercial advertising under Article 19(1) (a) of the Constitution, the Supreme Court in *Hamdard Dawakhana case*[103], denied this protection on the basis of wrong presumption of facts and law. However, the same court in ***Tata Yellow Pages case***[104] extended this protection to commercial advertisements. The foregoing discussion also makes it clear that the 'must carry' provisions in different statute could not be viewed as a restraint on the freedom of speech and expression and further freedom of commercial advertisement is also available to manufacturing companies. Though the apex Court held that the deceptive, unfair, misleading and untruthful commercial advertisements would be hit by Article 19(2) of the Constitution for the purpose of being regulated/prohibited by the state[105], it has not clarified as to which restriction/restrictions under Article 19(2) would be attracted by such advertisements.

The Eleventh Schedule which has been introduced to the Constitution for the purpose of providing justice at the panchayat level should be suitably amended to secure the active involvement of panchayat Raj Institutions in consumer welfare activities.

To conclude, the Constitution of India while protecting commercial advertisement under the 'Freedom of speech and expression' clause allowed

[103]AIR I960 SC554
[104](1995) 5 SCC 139.
[105]*Ibid.*

the state to prohibit/regulate deceptive, unfair, misleading and untruthful or obscene or vulgar commercial advertisements. The commercial advertisements play a dual role- they are part of speech as well as they play a commercial part. They cannot be denied the protection of Article 19(1)(a) only on the ground that they were issued by a businessman or that they have a commercial aspect included with them. The commercial advertisements can be curtailed only on the restrictions imposed under Article 19(2) and none other. Thus, the commercial advertisements have the protection of Article 19(1)(a) and hence cannot be denied circulation.

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CHAPTER-V

REGULATORY FRAMEWORK OF ADVERTISEMENTS BY VARIOUS LEGISLATIONS AND INSTITUTIONS

CHAPTER-V

REGULATORY FRAMEWORK OF ADVERTISEMENTS BY VARIOUS LEGISLATIONS AND INSTITUTIONS

5.1 INTRODUCTION

With the increasing presence of large brands, sellers and service providers in India, the competition to sell one's goods or services has become stiff. Who reaches the customer better is the touchstone to determine the success of the enterprise; and the best way to achieve this is through the advertisements. Advertisements, also sometimes referred to as commercials have become the backbone of the Indian corporate setup. In our daily lives as Indian audience, we come across advertisements every few minutes or probably seconds. Whether on the television screen, on popular websites like YouTube or even on the roads in form of hoardings, we are surrounded by the efforts put in by sellers to lure the customers into buying their product.

Needless to mention, the domain of advertisement has grown leaps and bounds and so has the way they are presented. Sellers and service providers try their best to solicit huge number of customers and often end up indulging into practices which are detrimental to the interests of the customers, while others may result into inappropriate content being a part of the advertisement. The need of the hour has thus become, to regulate the domain in a bid to safeguard the customers and to ensure that the content of advertisements are in line with the law of the land as well as compliant to the Indian setting.

Ever since independence, legislative endeavours to provide protection to the consumers have been quite pronounced. A number of laws have been enacted to impose obligations of different nature on the producers as well as on all those who deal with marketable commodities with a view to ensuring that consumers get a fair deal. Some of these legislations impose an obligation on the advertisers not to issue obscene, vulgar, deceptive, unfair, misleading and untruthful advertisements. Advertising law in our country is spread through a number of legislations, judicial precedents and orders of quasi-judicial bodies like Monopolies and Restrictive Trade Practices Commission, Consumer Redressal Forums and various Governmental Codes. The aim of the chapter is to present a coherent picture of legal and statutory controls of commercial advertisements. To this end an attempt will be made here to provide an overview of all major advertising legislation except the Consumer Protection Act, 1986 and the Monopoly and Restrictive Trade Practices Act, 1969.

5.2 CIVIL LEGISLATIONS

5.2.1 Liability under Law of Torts

The law of torts[1] provides relief for misstatement. Under this law the liability for misstatement can arise under three situations (i) deceit or fraud, (ii) negligent misstatement and (iii) innocent misrepresentation. Like Indian Contract Act, 1872, the law of torts also does not provide adequate protection against false or misleading advertisement because of the following reasons: *First,* for fraud the impugned statement should be false. Mere non-disclosure of facts is not enough; *secondly,* to make the advertiser liable for fraud, it has to be proved that he either knew that the statement was false or did not believe in its truth. *Thirdly,* proof of an intention to deceive is necessary; *and lastly,* the consumer has to prove that he acted by relying on that statement and suffered damage. Similarly, the negligent misstatement cannot be actionable unless there is contractual or fiduciary relationship between parties. The law of torts also provides for individual liability of the manufacturer, advertising agency and media in relation to an impugned advertisement. This rule may be applicable for all electronic and print media.

In case of false and misleading advertisements published in print media/electronic media the respective advertising agency will be liable even though the copy of it was supplied by its client. The media will also be equally liable. But under the Consumer Protection Act, 1986 the media is not liable.

[1]R.K. Bangia, Law of Torts (Allahabad Law Agency, Faridabad, 1999); B.M. Gandhi, Law of Torts, (Eastern Book Company, Lucknow, 1987); S.K. Desai &Kumud Desai, The Law of Torts (HJML Tripathi Pvt. Ltd., Bombay, 1975).

Under the law of torts all parties to the impugned advertisement will be liable to legal action. They can be sued jointly or individually.

5.2.2 The Sale of Goods Act, 1930

The Sale of Goods Act attempts to define the position and liability of every manufacturer, dealer and seller of goods against the purchaser. Though the term ‘Advertisement’ is not used in this Act, still some of its provisions may have a bearing of varying degree on commercial advertisements. The first place is the recognition of the doctrine of *caveat emptor* in Section 16 of the Act which means “let the buyer beware”. The principle says that it is for the buyer to satisfy himself that the goods which he is purchasing one is of quality which he requires or, if he is buying them for specific purposes, that they are fit for that purpose[2]. It means that before buying any goods whether on the basis of advertisements in the print or electronic media he should assure himself about the quality or contents of those goods. This principle is however, subject to the following exceptions –

(i) fitness for buyers purpose;

(ii) sale under trade name;

(iii) merchantable quality;

(iv) conditions implied by trade usage; and

(v) sale by sample.

Most of these exceptions are hardly of any use where a purchase is made on the basis of a commercial advertisement. Section 15 of the Act lays down the condition that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. This vision can be of some relevance from the point of view of the regulation of commercial advertisement, if the sale is based on an advertisement were covered by the expression ‘sale by description’. But in the

[2]The rule probably originated at a time when goods were mostly sold in open market and the buyer therefore, had every opportunity to satisfy himself as to the quality of goods or their fitness for a particular purpose, and at common law it was presumed that where the buyer could examine the goods, even though he did not do so, he relied upon his own skill and judgment. For details see Pollock and Mulla, The Sale of Goods Act 124 (N. M Tripathi Private Limited, Bombay, 1990). See generally, Avtar Singh, Law of Sale of Goods and Hire Purchase (Eastern Book Company, Lucknow, 2005).

absence of any case law is difficult to say that such sale is covered under Section 15 of the Act. Thus, the Sale of Goods Act, 1930 is of very limited relevance in the context of the regulation of commercial advertisement. Even otherwise, the Act has become by and large obsolete and hence need to be replaced by a legislation which is in tune with the complexity of the commercial transactions and the market place. It should be remembered that this Act is only limited to goods and does not extend to services and unfair trade practices or restrictive trade practices.

5.2.3 The Indian Contract Act, 1872

The expressions 'false', 'misleading' and 'advertisement' are not found in Indian Contract Act, 1872, but it provides relief against 'false statement'. A 'false statement' may be a 'misrepresentation' or a 'fraud'. When a false statement is made with the knowledge that it is false and also with the intention to deceive the other party and make him enter into a contract on that *basis*, it is known as 'fraud'[3] but, when the person making a false statement believes the statement to be true and does not intend to mislead the other party to the contract, it is known as 'misrepresentation'[4]. When the consent of a party to the contract has been obtained either by the fraud or by misrepresentation, the

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[3] According to Section 17 of the Indian Contract Act, 1872: "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to deceive another party thereto or his agent, or to induce him to enter into the contract —

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
(2) the active concealment of a fact by one having knowledge or belief of the fact;
(3) a promise made without any intention of performing it;
(4) any other act fitted to deceive;
(5) any such act or omission as the law specially declares to be fraudulent.

Explanation: Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

[4]According to Section 18 of the Contract Act - "Misrepresentation means and includes

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to true;
(2) any breach of duty which ,without an intent to deceive, gains on advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

contract is voidable at the option of the party whose consent has been so obtained[5].

Law does not cast a duty on the sellers/manufacturers to disclose defects in his goods[6]. However, they must not make any false statement (fraud or misrepresentation) to induce the consumers through advertising. False statement allows three remedies to consumers: (a) a right to rescind the contract; (b) a right to damages in deceit, if the representation is fraudulent; and (c) a right to damages if the representation is negligent. Remedies which are available under the Indian Contract Act are limited so far as the protection of consumers against false or misleading advertising is concerned because of the following reasons. *Firstly*, the manufacturer who misrepresents is unlikely to be party to the contract with the consumer. The consumer's legal rights derive primarily from the contract he has entered into with the seller of goods or the supplier of services. It provides legal basis for remedies against the seller, if the latter does not fulfill his part of the contract. It is quite surprising that manufacturers, who determine quality, standard, potency etc. of products and decides, how product are to be advertised and what information should be attached is a stranger to the contract entered into between the consumer and retailer. So, due to doctrine of 'privity of contract' the consumer cannot sue the manufacturer. Contrary to the popular belief that manufacturers are liable for the false and misleading advertisement, it is the retailers who are responsible in law, although the retailer in turn may sue the manufacturer.

However, there are *three* instances where the consumer can directly sue the manufacturer: (i) The consumer can bring an action in tort against the manufacturer even though there was no contract between the manufacturer and

[5] Indian Contract Act, Section 19.

[6] The explanation attached to section 17 of the Indian Contract Act, 1872 says that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. For details see Avtar Singh, *Law of Contract and Specific Relief* 181 (Eastern Book Company, Lucknow 2002); For further detail see R.K. Bangia, *Contract* - I (Allahabad Law Agency, Faridabad, 2005); Singhal and Subrahmanyam, *The Indian Contract Act* (Law Book Agency, Allahabad, 1980); Choudhary and Salik, *et.al. The Indian Contract Act*, 1872 (Eastern Law House, New Delhi 1994).

the consumer[7], but this principle is limited to law of torts only; (ii) if the manufacturers advertisement about product quality is intended to create a contractual relation with consumers as in ***Carlil v. Carbolic Smoke Ball Co.***[8], where the manufacturer in an advertisement promised to pay £100 to a consumer who could disprove the claim made in the said advertisements. In that case the court found that manufacturer's advertisement gave rise to collateral contracts with the consumers who bought the product from the retailers. However, advertisements similar to one made in the instant case are rare; and (iii) another way to hold manufacturers liable is guarantees by which they are undertake to repair products. But the legal status of manufacturers guarantee is uncertain due to lack of consideration. Though there is an argument that when a consumer knows about a guarantee before hand, a collateral contract is formed with the manufacturer, but this argument fails where the consumer had no prior knowledge about the guarantee.

It is clear from the foregoing that the advertisers and manufacturers cannot generally be held liable for a breach of contract due to operation of the 'privity of contract' in such a situation. It is heartening however, to note that this deficiency in the law of contract has been remedied by the Consumer Protection Act, 1986.

Again, the law does not look upon a false opinion as a statement of fact which could be complained of as a misrepresentation. In other words, the law seems to allow a great deal of freedom from advertisers to indulge in sales talk popularly known as 'puffing' such as 'toofan ko piyeja' (drink the thunder) for 'Thums-up' and 'surakhya chakra' (security ring) for 'Colagate' toothpaste etc. Puffery is permissible under the existing law because laudatory statements about products or services would not influence any reasonable person. However, a statement of opinion may be held to be of fact if the person making it did not hold that opinion. The reason for the recognition of puffery as

[7]*Dongoghue*v. *Stevenson*, 1932 AC 562.
[8]1893 1 QB 256.

defence by the Court is that a significant number of consumers do not take such laudatory statements about products or services seriously.

A statement of future intention cannot be termed as misrepresentation. For example, a statement that the seller of a plot intends to keep the adjoining plot as an open field but later he changes his mind and builds on it, will not amount to misrepresentation. However, if the seller had before the sale received the building plan of the adjoining plot and also appointed a builder, he is guilty of misrepresentation. Further, in most cases the fraudulently induced purchase involves an article of such small cost that it makes practically no sense to pursue the claims before the civil courts. The procedural dice is loaded so heavily in favour of the defendant business man that only the most confident consumer will pursue his civil law rights in the court. Last but not the least; it is rare that business units will challenge deceptive advertisements. Apart from fear of triggering mutual disadvantageous competition the most important factor which may deter rival manufacturers from taking recourse to civil law remedies are the exorbitant cost of litigation and the inadequacy of the available remedies.

5.3 CRIMINAL LEGISLATIONS

5.3.1 Legal Control of Obscene and Indecent Advertisement

5.3.1.1 The Indian Penal Code

The Indian Penal Code, 1860 is the primary and the most important penal law in India. The Code defines and prescribes punishment for a myriad of acts which constitute crimes in India.

From the point of view of the advertisement ad media, the I.P.C is relevant as it bars the display and dissemination of certain content.[9] These can be mentioned under certain heads.

5.3.1.1.1. Advertisement of abortion

In the U.S.A., it has been held that though a State may prohibit the advertisement of abortion on grounds of health or the like, it cannot penalise

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[9]Rajiv Sarin, Advertising, Electronic Media and Telecom Laws 80 (ABC Press, Naraina, Delhi, edn. 1st, 2016).

such advertisement if the abortion is to be carried out in another State where is lawful.

In India, causing miscarriage in its various forms is an offence under various sections of the Indian Penal Code (Ss. 312-315), but an exception has been engrafted by enacting the Medical Termination of Pregnancy Act, 1971. This Act, however, makes an abortion lawful only if it is done by a registered medical practitioner at (i) a hospital established or maintained by the Government, or (b) a place for the time being approved for the purposes of this Act by the Government. In Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse Act), 1994, even the testing devices or performing diagnostic techniques have been prohibited and breach of the provisions to be visited with punishments.

Hence, a private advertiser cannot claim that an abortion to be carried out at a private place would be lawful. An advertisement of abortion by a private advertiser would either be an offence under the aforesaid sections of the I.P.C. or an abetment thereof.[10] Since both the I.P.C. and the Act of 1971 are all-India Acts, no complication is likely to arise as between different States as in the U.S.A.

5.3.1.1.2. Cheating by false advertisement.

The offence of cheating, as defined in S. 415, I.P.C. may be committed, if a person or group of persons publish false advertisements relating to a bogus scheme, and dishonestly induce the public to make deposits with them. Of course, in the absence of any fraudulent misrepresentation or dishonest suppression or inducement, a person cannot be liable merely because the scheme published by him was speculative.[11]

5.3.1.1.3. Advertisement of lottery other than a State lottery

Anybody who 'publishes' any proposal to pay any sum, to deliver any goods or to do or forbear from doing anything 'for the benefit of any person' in relation to any lottery other than a lottery run or authorised by the State

[10] D.D. Basu, Law of the Press 158 (butterworths Wadhwa, Nagpur, edn. 4th 2002).
[11] *Ibid.*

Government, is punishable under S. 294A of the Penal Code . The advertiser himself as well as the printer and publisher of a newspaper or of any circular for such purpose are all liable under this section.

5.3.1.1.4. Advertisement with intention to hurt religious sentiments.

The Indian Penal Code under Section 295A[12], seeks to penalize acts done with an intention to hurt religious sentiments. The Section in very clear terms has covered advertisements and related contents. In case of advertisements which insult a particular religion or segment by ways and means as enshrined under the statute, Section 295A shall be attracted. Therefore, it is necessary to scrutinize the content of the advertisement so as to ensure that no content which targets a particular religion is contained in the advertisement. The only exception to this section qua its applicability is that it protects only the citizens of India, i.e., their religious beliefs.

Similar provisions with respect to content in advertisements which are provocative enough to cause riots are contained in Section 153[13] of the Indian Penal Code. Section 153A also aids Section 153 by penalizing acts which promote enmity between different groups on grounds of race, religion, language etc. Both sections cover advertisements within their ambit which warrant careful scrutiny of the advertisement to screen out such content.[14]

5.3.1.1.5. Obscene advertisement.

Section 292(d) of the Indian Penal Code, 1860, makes it an offence ‘to advertise’ that “any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured

[12]The Section states that whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[13]The section states that whoever malignantly, or wantonly by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both, and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[14]*Supra* note 09 at 83-84.

from or through any person".[15] Obscenity in advertisement is prohibited because it leads to offend the public morals and public decency and the fundamental object and purpose of criminal law is not only to protect and conserve the safety and security of primary personal rights of individuals, such as right to life, right to body, right to property, right to habitation etc., but also to protect and guard the public morals and public decency and to conserve the moral fabric welfare of the state[16].

The keeper, printer or publisher[17] of a newspaper or author[18] or publisher of a book shall be liable, under Cl. (a) of the section for 'making' or 'putting into circulation' any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object. This Cl. (a) seems to be wide enough to make the publisher of a newspaper liable for publishing an obscene advertisement at the instance of an advertiser. In Madras and Orissa, any doubt on this point has been removed by enacting S. 292A, by Madras Act 25 of 1960 and Orissa Act 13 of 1962, which makes the printer or publisher liable, for 'printing or causing to be printed' any grossly indecent or scurrilous matter.

In *England*, not only the publication of an obscene matter, but the *sending* of unsolicited advertisement of obscene publications has been made a distinct offence, by the Unsolicited Goods and Services Act, 1971. The importance of the protection of such right can also be visualized from the resolution passed by the international convention for the Suppression and Circulation of and Traffic in, Obscene Publications at Geneva in 1923. India this signed Convention on 12th September, 1923[19].

The word 'obscene' is not defined in the Indian Penal Code or in the Indecent Representation of Women (Prohibition) Act, 1986. But the courts

[15] The Punjab Suppression of Indecent Advertisements Act, 1941.
[16] H.S.Gour, *Penal Law of India* [Delhi Law House, Delhi, 15th ed. (2014) Vol.1]. See generally, S.N. Mishra, *Indian Penal Code* (Central Law Publication, Allahabad, 2003).
[17] Kherode (1911) 39 Cal 377; P.P. v. Markondeyulu, A. 1918 Mad 1195; Hari Singh, (1905) 28 All 100.
[18] Kailaschandra.(1932) 60 Cal 201; Sukanta.(1959) 1 Cal 581.
[19] John Locke, Second Treatise of Civil Government, 1960 87-89 (Basil Blackwell, Oxford, 1946).

have adopted the "Hicklin Test" or its modified version in all these years for judging obscenity in relation to an impugned book or film etc. This test has been followed by the Supreme Court of India in ***Ranjit D. Udeshi*v. *State of Maharashtra***[20], Hidayatullah, J., speaking for the Constitution Bench observed:

"the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall. It is quite certain that it would suggest to the minds of the young of either sex, or even to persons or more advanced year, though of a most impure and lubricious character."

In ***Chandrakant* v. *State of Maharashtra,***[21]the Supreme Court adopted a liberal approach while laying down the following test:

"What the courts have to see is whether a class into whose hands the book falls suffers in their moral outlook or became depraved by reading it or might have impure and lecherous thoughts aroused in their minds."

The Apex court further added:

"In judging the question of obscenity the judge should place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to create in the minds of the readers. He should apply his judicial mind dispassionately to decide whether the publication in question can be said to be obscene within the meaning of Sections 292 of Indian Penal Code."

Again, the Kerala High Court in ***P.K. Somanath*v. *State of Kerala and others***[22]gave a new dimension to the term 'obscene'. In this case the issue of a cinema magazine by name 'Love' dated 15.11.1988 contained photograph which depicted as indecent representation of women. The petitioner was charged under Section 292 of the Indian Penal Code and Sections 3, 4 and 5 of

[20]AIR 1965 SC 881.
[21]AIR 1970 SC 1390.
[22](1990 - 96) CrLJ 0542 KER.

the Indecent Representations of Women Act. Although the Kerala High Court refused to quash criminal proceeding against the accused, it laid down a somewhat more realistic and pragmatic test of obscenity. The court through Justice Sreedharan observed:

"Among all the creatures of nature human beings are most refined ones. Male species of all types of animals and birds are considered more beautiful than their respective females. But, in literature, ladies are described as beautiful. A pretty damsel is beautiful to be hold. A thing of beauty is a joy forever. Are the bodies of female obscene? A brazenly nude body may evoke a feeling of disgust and revolution. If nudity is something more, that something more is to be found in the facial expression or pose in which it is photographed. The photograph of a female body cannot be considered as obscene or as an indecent representation of woman, if the above mentioned something more is absent."

Obscenity should be distinguished from vulgarity on the one hand and pornography on the other. A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendencies to deprive and corrupt those whose minds are open to such immoral influence[23]. There is difference between obscenity and pornography. The latter denotes writing, pictures etc., intended to arouse sexual desire, while obscenity includes writings etc. not intended to do so but which have that tendency. Both offend public decency and morals. In other words pornography is obscenity in a more aggravated form.

In the case of ***Chairman and Managing Director, Hindustan Latex Ltd. Thiruvananthpuram and Anothers* v. *State of Kerala and Another*[24]** there was a publication of an obscene advertisement, by Hindustan Latex Ltd., a company owned by Government of India engaged in mainly manufacturing and

[23]Samaresh Bose v. AmalMitra, AIR 1986 SC 967.
[24]1999 (105) CrLJ 808 Ker.

marketing of different varieties of condoms, in *'Malaya Manorama'* daily, dated 17.8.96. The Company published the impugned advertisement to promote the sale of one of their products 'Moods'. An interesting aspect of the case is that when the company came to know that the advertisement was resented by people, taking into consideration of the sentiments expressed by them about the advertisement they immediately withdrew the advertisement and the withdrawal of the advertisement was also published in the same daily. The Kerala Women's Commission as well as Advertising Standards Council of India after carefully examining the complaints made against the advertisement and the explanation offered by the petitioner decided not to proceed against the petitioners. For its part the Kerala High Court also decided to quash the criminal proceedings launched against the petitioners for the reason given below:

"Under such circumstances even if the above prosecution launched by the 2nd respondent again the petitioners is maintainable the interest of the 2nd respondent who is alleged to be a social worker should give way to the larger interest of society in not prosecuting the petitioners in this case, especially when the two very important public bodies have accepted the regrets expressed by the petitioners, immediate withdrawal of the advertisement and the explanations offered by them regarding the publication of the advertisement".

It is evident from the facts of the case that the petitioners committed the offence punishable under Section 292 IPC, as soon the advertisement in question appeared in the newspaper. Therefore, their plea should not have been accepted as a ground for quashing the criminal proceedings against them. Be that as if may the decision in the instant case has given a wrong message to the advertisers and the advertising agencies. It is more so because prosecutions for obscene advertisements are few and convictions are fewer.

5.3.1.2 The Young Persons (Harmful Publication) Act, 1956

After woman, the next vulnerable class who becomes the victims of objectionable advertisement is children or young persons[25]. To save the young persons from harmful publication The Indian Parliament has enacted young persons (Harmful Publication) Act, 1956. Section 3 of this Act provides penalty for a person who **-** (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, any harmful publication[26], or (b) for purpose of sale, hire, distribution, public exhibition or circulation, prints, makes or produces or has in his possession any harmful publication; or (c) advertises or makes known by any means whatsoever that any harmful publication can be procured form or through any person, such person shall be punishable with imprisonment which may extend to 6 months, or with or with both.

In ***Narayanan v. State of Kerala***[27], the question before the Kerala High Court was whether the proprietor and the manager of the printing press who had nothing to do with the authorship of certain obscene literature and the editing and circulation of it can be tried and convicted under Section 3(l)(a) and (b) of the Act. The Court answered it in the negative and discharged the proprietor and manager of the press.

On a conviction under Section 3, the court may order the destruction of all the copies of the harmful publication in respect of which the conviction was and which are in the custody of the court or remain in possession of power of the person convicted[28]. The State Government, if it is of opinion after consultation with principal law officer of the state, whether called the Advocate

[25] Young Persons (Harmful Publication) Act, 1956, Section 2(c) – "Young person" means a person under the age of twenty years.
[26]Section 2(a) – "Harmful publication" means any book, magazine, pamphlet, leaflet, newspaper, or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures, being stories portraying wholly or mainly—(i) the commission of offence; or (ii) acts of violence or cruelty ,or (iii) incident of repulsive or horrible nature; in such a way that the publication as a whole world tend to corrupt a young person in whose hands it might fall, whether by inciting or encouraging him to commit offences or ac of violence or cruelty or in any other manner whatsoever.
[27]1970 Kerala Law Times 605.
[28]Section 3(2).

General or by any other name, that any publication is harmful publication declare by order notified in the official Gazette, that every copy of such publication shall be forfeited to the government and every such notification shall state the ground for the order[29].

Any person aggrieved by an order of forfeiture passed by the State Government under Section 4 may, within 60 days of the date of such order, apply to the High Court to set aside such order[30]. Power to seize and destroy harmful publication has been entrusted to any police officer or other officer empowered in this behalf by the State Government[31]. Any First Class Magistrate may, by warrant, authorize any police officer not below the rank of sub-inspector to enter and search any place where any stock of harmful publication may or may be reasonably suspected to be[32]. Publication seized shall be produced, as soon as before magistrate of first class and if the opinion of Magistrate or court such publication is harmful publication, the Magistrate or court may cause it to be destroyed[33].

Undoubtedly, one of the more serious and certainly the most emotive of the criticisms made of advertising concerns the effect that it may have on children. It is felt by many scholars that children are great deal more susceptible to the appeals of advertisers than are adults and that as a consequence advertisement directed at them should be regulated strictly. Irrespective of the existence of this Act the harmful publication and advertisement against young persons is going on increasing day by day, particularly through television and internet. Some suggestions may be advanced in this regard:

Firstly, laws prohibiting the advertisement of tobacco products and liquor should be strictly implemented; *Secondly*, all television advertising be banned for any product that is directed to or seen by audiences composed of a

[29]Section *4*.
[30]Section 5.
[31]Section 6(1).
[32]Section 6(2).
[33]Section 6(3&4).

significant proportion of children who are too young to understand the selling purpose of the advertising; *Thirdly,* parents should have an unlinking about the subliminal persuasion directed at their children from the T.V. screen; *Fourthly,* television channels like M.T.V. should be more censored; and *finally,* a board in the name of "Young Persons Advertising Review Board" should be established under this Act to monitor harmful publications and advertisements particularly in press media as well as in electronic media.

5.3.1.3 The Immoral Traffic (Prevention) Act, 1956

Brothel[34] advertising is not very common in India, particularly on electronic media. However, some like instances are observed in press media. In 2004, the Hindustan Times published a classified ad. column named 'Health and Physical Fitness'. Given below are a few of the ads. published under this column:[35]

1) PALM BEACH: The affordable pleasure. Enjoy this summer of massage by smart and young boys only (May 08, 2004).

2) MALE jole only for men who is seeking men 24 hrs. massage for Home & Hotel (May 8, 2004).

3) MALE 2 MALE quick service gorgeous sweet hunks body massage (May 3, 2004).

4) Bombay Beach Body massages by neat and clean decent boy only male to male (May 1, 2004).

5) New boys in earlier Pls. Welcome full body message by trained male masseur only male to male 24 hrs (30 April, 2004).

Apart from the words 'message' or masseur these advertisements often uses several other ambiguous words like 'hot massage', complete satisfaction, 'Sensational Massage', 'hottest way', 'only male to male', 'with choice of your

[34]The term 'Brothel', According to the Immoral Traffic (Prevention) Act, 1956, indudes any house, room, conveyance or place, or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes [Sec. 2(a)].

[35]http://creative.sulekha.com/hindustan-times-doing-a-heinous-crime_124014_blog, (Visited on 26/07/2017).

own method body to body' massage etc. What does all this mean? All these advertisements seem to be the advertisements of homosexual brothel. In this way hundreds of male brothels are openly advertising themselves along with their telephone numbers and sometimes also their addresses. Do the laws of India allow brothel advertisements? Although there is no law which expressly imposes a ban on the publication of such advertisement, they are not protected under Article 19(1) (a) of the Constitution and reasonable restrictions can be imposed on them. This problem can be tackled either by enacting a suitable legislation on the subject or by inserting new provisions into The Immoral Traffic (Prevention) Act, 1956. Presently, Section 8 of Immoral Traffic (Prevention) Act, 1956 prohibits and penalizes the act of seducing or soliciting for the purpose of prostitution. The section reads:

"Whoever, in any public place or within sight of and in such manner as to be seen or heard from, any public place, whether from within any building or house or not: (a) by words, willful exposure of her person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavour to tempt or attract or endeavour to attract the attention of any person for the purpose of prostitution; or (b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency for the purpose of prostitution, shall be punished on first conviction with imprisonment for a term which may extend to six months, or with the fine which may extend to fine hundred rupees or with both and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year and also with fine which may extend to fine hundred rupees. Provided that where an offence under this section is committed by a man he shall be punishable with imprisonment for a period of not less than seven days but which may extend to three months."

Rule 7(1) of the Cable Television Network Rules, 1994 (amended in 2000) provides:

"Advertising carried in the Cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers."

Rule 7(2)stipulates:

"No advertisement shall be permitted which is against any provisions of the Constitution of India, and in its depiction of women violates the constitutional guarantees to all citizens. In particular, no advertisement shall be permitted which projects a derogatory image of women. The Cable operator shall ensure that the portrayal of the female from in the programmes carried in his cable service is tasteful and aesthetic and is within the well-established norms of good taste and decency."

Rule 8says:

"Indecent, vulgar, suggestive, repulsive or offensive themes or treatment shall be avoided in all advertisements."

5.3.1.4 The Indecent Representation of Women (Prohibition) Act, 1986

The Indecent Representation of Women (Prohibition) Act, 1986 came into force on 2nd October 1987.[36] The Act aims to prohibit indecent representation of women in advertisements or in publication, writings, paintings, figures or in any other manner. The term "indecent" is not defined under the Act. However, the phrase "indecent representation of women" is defined under this Act. According to section 2(c) of the Act "indecent representation of women" means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have effect of being indecent, or derogatory to or denigrating women or is likely to deprave, corrupt or injure the public morality or morals.

Section 3 of the Act prohibits advertisements containing indecent presentation of women which says:

[36]The Preamble of the Act says: An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.

"No person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form".

The term "advertisement" for the purpose of the Act includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas[37]. Though, it is doubtful whether this definition of advertisement includes within its ambit internet advertising (e-advertising), the phrase "any visible representation" appearing in it may be interpreted as to include e-advertising.

Section 4 of the Act prohibits publication or sending of boob, pamphlets, etc. carrying indecent representation of women. *In* ***Abhik Sarkar*** **v.** ***State,***[38] the Calcutta High Court refused to quash criminal proceedings launched against the petitioners for the publication of a nude photograph of Boris Becker along with a nude lady published on the second page of *Anand Bazaar Patrika*. One of the contentions of the petitioners in the instant case was that the said publications fill within the ambit of exception engrafted in Section 292 of IPC as well as exception in Section 4(1) of the Indecent Representation of Women (Prohibition) Act, 1986.

Section 5 of the Act empowers an authorized Gazetted Officer for entry and search and to seize any indecent advertisement, pamphlet etc. Section 6 makes provision for punishment for contravention of the provisions regarding prohibition of advertisements and publication of books, pamphlets etc. containing indecent representation of women.[39] Manufacturing companies can also be held liable under this Act for the contravention of Sec. 3 or Sec. 4 of this Act.[40]

[37]Indecent Representation of Women (Prohibition) Act, 1986, Sec. 2(a).
[38]2004-110-CrLJ-2937-Cal.
[39]Section 6.
[40]Section 7 (1):Where an offence under the Act has been committed by a company, every person, who, at the time the offence was committed was in-charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent

In practice this Act, is totally ignored and violated with impunity by most of the advertisers. A large number of advertisements exploit the voyeuristic properties of the female body to draw attention to their products. The female form is unclothed and projected *ad nauseaum.* For example, in the advertisements for a motor cycle in which each part of the vehicle is equated to some part of the woman's body to be ridden by the conquering male[41]. The advertisements for shaving cream, soaps or masculine scents fall under this category. In the advertisements namely *'Mantriji Pan Masala'*a bare chested semi-nude boy was shown being seduced by a group of semi-clad women. When social organization *'Chetna'* requested the then Delhi Police Commissioner to intervene and stop the airing of advertisements, which can spread wild thought in the fresh minds, the police said that the media, which has been airing or publishing such advertisements, should be more responsible to restrict such advertisements in the interest of the society rather than the police intervening in such matters[42]. This shows the attitude of the police towards indecent advertisement and their reluctance to take action against the advertisers. The situation can be changed only by awakening the conscience of the people, especially women, regarding their duty to become active partners in implementing the laws made for their benefits. Human Rights groups, women organizations, public spirited lawyers and media people should create public awareness against obscenity and vulgarity in advertisements, persuade advertising agencies and the media not to issue and publish such advertisement, file FIRs against culprit advertisers and put pressure on Gazetted Officers authorized under Section 5 of the Indecent Representation Act to take necessary steps for the enforcement of the Act. District administration should be very strict towards the exhibition of obscene and indecent advertisements at

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the commission of such offence. (2) Notwithstanding anything contained in sub-section(1), where any offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of ,or is attributable to any neglect on the part of, any director, manager, secretary or other officer shall be proceeded against and punished accordingly.

[41]V.T. Usha, "Gender, value, significance: Women Television in Kerala", available on: (http://krpcds.orglpublicationldownloadsl67.pdf). (Visited on 12/05.2017).

[42]J.T.Vishnu, "Indecent portrayal of women in media under Scanner," Tribune News Service, Available at: http://www.tnbuneindia.com/2005/20050312/delhi.htm#4i(Visited on 7/23/2017).

public places. In addition, State Governments should form 'Special task force' to combat the increasing menace of the indecent portrayal of women in advertisements.

5.3.2 Use of National Flag, Emblem and Symbols in Advertisements

India is a nation of patriots and nationalists. The countrymen are known for their love and utmost attachment to the nation. Needless to say, the national symbols are one of the most respected things in India. The national flag, national anthem and other national symbols like the Ashok Chakra are regarded no less than sacred.

The parliament has enacted statutes and codes with a view to protect national symbols and to regulate their use. Same holds good for other national symbols as well.

5.3.2.1 The Flag Code of India, 2002

To develop a better understanding of the aims and objects of the code, the preamble to the Flag Code of India can be readily referred to which provides a lucid and effective description. The preamble states there is universal affection and respect and loyalty to the National Flag. Yet, a perceptible lack of awareness is often noticed, not only amongst people but also the organisations/agencies of the government, in regard to laws, practices and conventions that apply to the display of the National Flag. Apart from non-statutory instructions issued the Government from time to time, display of the National flag is governed by the provisions of the Emblems and Names Prevention of Improper Use) Act, 1950 (No. 12 of 1950) and the Prevention of Insults to National Honour Act, 1971 (No. 69 of 1971).

The flag Code is divided into 3 Parts. Part I of the Code contains description of the National Flag. Part II of the Code is devoted to the display of the National Flag by members of public, private organizations, educational institutions, etc. Part III of the Code relates to display of the National Flag by Central and State governments and their organisations and agencies.[43]

[43] *Supra* note 09 at 64-65.

Restriction on Usage: There is per se no restriction on the use of national flag, however, there are certain specific restrictions posed by the Code in Section I, sub section 2.1 of Part II. Sub section 2.1 states that there is no restriction on the display the National Flag by members of general public, private organizations, educational institutions, etc., which is subject to the extent provided in the Emblems and Names (Prevention of proper Use) Act, 1950 or the Prevention of Insults to National Honour Act, 1971 and any other law legislated on the subject.

The Code has further imposed the following restrictions on the use of the National Flag[44]-

i. the Flag shall not be used for commercial purposes in Violation of the Emblem and Names (Prevention of Improper Use) Act, 1950;
ii. the Flag shall not be dipped in salute to any person or thing;
iii. the Flag shall not be flown at half-mast except on occasions on which the Flag is flown at half-mast on public buildings in accordance with the instructions issued by the Government;
iv. the Flag shall not be used as a drapery in any form whatsoever, including private funerals;
v. the Flag shall not be used as a portion of costume or uniform of any description nor shall it be embroidered or printed upon cushions, handkerchiefs, napkins or any dress material;
vi. lettering of any kind shall not be put upon the Flag;
vii. The Flag shall not be used as a receptacle for receiving, delivering, holding or carrying anything: Provided that there shall be no objection to keeping flower petals inside the Flag before it is unfurled as part of celebrations on special occasions and on National Days like the Republic Day and the Independence Day;

[44]*Ibid.*

viii. when used on occasions like unveiling of a statue, the Flag shall be displayed distinctly and separately and it shall not be used as a covering for the statue or monument;

ix. the Flag shall not be used to cover a speaker’s desk nor shall it be draped over a speaker’s platform;

x. The Flag shall not be intentionally allowed to touch the ground or the floor or trail in water;

xi. the Flag shall not be draped over the hood, top, sides or back of a vehicle, train, boat or an aircraft;

xii. the Flag shall not be used as a covering for a building; and

xiii. the Flag shall not be intentionally displayed with the ‘saffron’ down.

The first restriction itself makes it clear that the flag can in no circumstances be used for any commercial purpose, which also includes advertisements which are purely for commercial purposes.[45]

To have a better understanding of the restrictions qua advertisements, it would be relevant to refer to Part III of the Code which deals with hoisting/display of the national flag by central and state governments and their organisations and agencies. Section V at sub section 3.29 sets out that the Flag shall not be used in any form of advertisement nor shall an advertising sign be fastened to the pole from which the Flag is flown.

It leaves no shred of doubt that the use of national flag in advertisements is strictly prohibited, therefore, all care must be taken to scrutinize the content of an advertisement qua the same.

5.3.2.2 The Emblems and Names (Prevention of Improper Use) Act, 1950

The General Assembly of the United Nations Organisation recommended in 1946 that the members of United Nations should take necessary legislative or other measures to prevent the use, without proper authority, and in particular for commercial purposes, of the emblem, the official seal and the name of the United Nations and of the abbreviations of that

[45] *Ibid.*

name. Similar recommendation has since been received also from the World Health Organization. Instances have also come to light of the use in India (and abroad) of the Indian National Flag[46] and emblem and. of the names or pictorial representations of Mahatma Gandhi and other national leaders for commercial and trade purposes and in a manner likely to offend the sentiments of the people. As the provisions of the Indian Trade Marks Act, 1940, Indian Patents and Designs Act, 1911, Indian Merchandise Marks Act, 1889 and the Indian Companies Act, 1913, were not adequate to prevent these abuses, it became necessary for Parliament to enact the Emblems and Names (Prevention of Improper use) Act, 1950.

The Act prohibits the use of any name or emblem[47] specified in the following or any colourable imitation thereof for the purpose of any trade, business, calling or profession or in the title of any patent or in any trademark or design, without the previous permission of the Central Government[48]: (i) name, emblem or official seal of the United Nations, World Health Organization, International Civil Aviation, World Metrological Organisation, UNESCO, IAE; (ii) the Indian National Flag, the name, emblem or official seal of Government of India, Government of a State, Parliament, State Legislature, Supreme Court, High Court, Central Secretariat of the State Government, President of India, Governor of State; (iii) name or pictorial representation of Rashtrapati Bhavan, Raj Bhavan, name and pictorial of Shivaji Maharaj, Mahatma Gandhi, Jawaharlal Nehru or the Prime Minister of India, except the pictorial use thereof or calendars where only the name of manufacturers and printers of the calendar are given and the calendars are not used for advertising goods; Ashok Chakra, Dharam Chakra, medals, badges, or decorations

[46]A strict flag code announced in the year 1950 regulated the use and display of the national flag It barred the use of the flag in advertisements or for any other commercial activity. On 26x1 January 2002, the flag code was changed. After 52 years, the citizens of India are free to fly Indian flag over their homes, offices and factories on any day. Except some basic rules to follow while flying the flags, all other restrictions have been mannered. But restrictions under the Emblems and Names (Prevention of Improper use) Act, 1950, still continues.

[47]Emblem of Names (Prevention of Improper Use) Act, 1950, Section 2(a) – "emblem" means any emblem, sea flag, insignia, coat- of-arms or pictorial representation specified in the schedule.

[48]Section 3.

instituted by the Government of India from time to time; the emblem of St. John Ambulance Association (India) St. John Ambulance Brigade (India), Tuberculosis Association of India, any name which may suggest or be calculated to suggest the patronage of the Government of India or of a state. However, the Central Government is empowered to add to or alter the schedule and such addition and alternation shall have the effect as if it had been made by this Act[49].

In ***Sable Waghire and Co.*** **v.** ***Union of India & Others***[50], before the apex court was whether the prohibition under Section 3 violates the petitioner's right under Article 19(l)(f)[51] and 19(l)(g)[52] of the Indian Constitution. The Apex court answered it in the negative and held:

"The petitioner's right to trade in *bidis* is not at all interfered with by the legislation. Section 3 in terms provides for enabling the affected persons to adjust their business or affairs inasmuch as the central Government can permit some time to alter their emblems, design etc. to carry on with their trade. There is built-in safeguard in Section 3 itself for mitigating any hardship to persons or any rigor of the law. The provisions are accordingly regulatory in nature and impose only reasonable restrictions on the exercise of rights under Article 19(1) (f) and (g)".

The violator of Section 3 shall be punished with fine which may extend to five hundred rupees[53]. However, no prosecution for any offence punishable under this Act shall be instituted, except with the previous sanction of the Central Government or of any other officer authorised in this behalf by general or special order of the Central Government.[54]

[49]Section 8.
[50](1975) 1 SCC 763.
[51]Indian Constitution, Article 19(l)(f): Right to acquire, hold and dispose of property, omitted by constitution (Forty -fourth Amendment) Act, 1978, S.2 (w.e.f 20-6-1979).
[52]Article 19(l)(g): Right practice any profession or to carry on any occupation, trade or business.
[53]Section 5.
[54]Section 6.

5.3.3 Regulation of Advertising on the Grounds of Public Policy and Ethics

5.3.3.1The Prize Competitions Act, 1955

The Act provides for the control and regulation of prize competitions.[55]In U.K. similar provisions are found in the Enterprise Act, 2002, which ensures consumer protection by giving enforcers increased powers to obtain court orders against traders that breach a range of consumer legislation controlling activities such as misleading advertising, misleading price indications, lotteries etc. Similarly, the Lotteries and Amusements Act, 1976 of U.K., provides that all lotteries and raffles (except where specifically authorized by the Lotteries and Amusements Act, 1976 or the National Lottery etc. Act 1993) are unlawful and makes it an offence to be involved with their promotion. In India, similar provisions are also there in the Monopolies Restrictive Trade Practices Act, 1969[56] and Consumer Protection Act, 1986[57]. The various provisions of the Prize Competition Act are discussed below.

This Act prohibits the prize competition in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month exceeds one thousand rupees and in every prize competition, the number of entries shall not exceed two thousand[58]. Section 11 of the Act declares that if any person with a view to the promotion or conduct of any prize competition except in accordance with the provisions of a licence under this Act or in contravention of the provisions of this Act or in connection with any prize competition promoted or conducted except in accordance with such provision - (i) prints or publishes any ticket, coupon or other document or use in the prize competition; or (ii) sells or distributes or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution any ticket, coupon or other document for use in the prize competition; or (iii) prints,

[55]Prize Competition Act, 1955, Section 2(d):- “Prize competition” means any competition (whether called a crossword prize competition, a missing-word prize competition, a picture prize competition or by any other name) in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation, of letters, words or figures.
[56]Monopolies and Restrictive Trade Practices Act, Section. 36(A)(3)(a & b).
[57]Consumer Protection Act, 1986, Section 2(l)(r) (3) (a & b) and (3-A).
[58]Section 4.

publishes or distributes or has in his possession for the purpose of publication or distribution - any advertisement of the prize competition, any list (whether complete or not) of prize winners in the prize competition, any such matter descriptive of, or otherwise relating to, the prize competition as is calculated to act as an inducement to persons to participate in that prize competition or any other prize competition; or (iv) brings, or invites any person to send into the territories to which this Act extends, for the purpose of sale or distribution on, any ticket, coupon or other document for use in, or any advertisement of, the prize competition; or (v) sends, or attempts to send, out of the territories to which this act extends any money or valuable thing received in respect of the sale or distribution of any ticket, coupon or other document for use in the prize competition; or (vi) uses any premises, or causes or knowingly permits any premises to be used for purpose connected with the promotion or conduct of the prize competition; or (vii) causes, procures or attempts to procure any person to do any of the above mentioned acts, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees.

Section 15 of the Act provides for the forfeiture of newspapers and publications containing prize competition promoted or conducted in contravention of the provisions of the Act. It is worthy to note that corporations can be held liable under this Art. In this regard section 12 says:

“If any person guilty of an offence under this, Act is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company, as well as the company, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub- section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Where an offence under this Act has been committed with the consent or connivance of, or is attributable to gross neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

5.3.3.2 The Prize Chits and Money Circulation Schemes (Banning) Act, 1978

Parliament enacted this legislation on the recommendations of a study group under the Chairmanship of Shri James S. Raj, the then Chairman of Unit Trust of India.

The Act prohibits prize chits and money circulation scheme.[59] The violators of this provision shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both. This provision is subject to the caveat to in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees[60]. Section stipulates:

"Whoever, with a view to the promotion or conduct of any prize chit or money circulation scheme in contravention of the provisions of this Act or in connection with any chit or scheme promoted or conducted as aforesaid - (i) prints or publishes any ticket, coupon or other document for use in the prize chit or money circulation scheme; or (ii) sells or distributes or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution any ticket, coupon or other document for use in the prize or money circulation schemes; or (iii) prints, publishes or distributes or has in his possession for the purpose of publication or distribution - any advertisement of the prize chit or money circulation scheme; or, any list, whether complete or not of members in the prize chit or money circulation scheme; or any such matter descriptive of, or otherwise relating to the prize chit or money circulation scheme, as is calculated to act as an inducement to persons to

[59]Prize Chits and Money Circulation Scheme (Banning) Act, 1978, Section 3.
[60]Section 4.

participate in that prize chit or money circulation scheme or any other prize chit or money circulation scheme; or (iv) brings or invites any person to send for the purpose of sale or distribution any ticket, coupon or other document for use in a prize chit or money circulation scheme or any advertisement of such prize chit or, money circulation scheme; or (v) uses any premises, or causes or knowledge permits any premises to be used for purposes connected with the promotion or conduct of the prize chit or money circulation scheme; or (vi) causes or procures or attempts to procure any person to do any of the above mentioned acts, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to three thousand rupees, or with both: Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, the imprisonment shall not be less than one year and the fine shall not be less than one thousand rupees."

The Act empowers any police officer not below the rank of an officer charge of a police station to enter any premises to search and also to seize things found in the said premises which are intended to be used, or reasonably suspected to have been used in connection with any such prize chit or money circulation scheme[61]. Similarly, any officer authorised by the State Government may enter into any premises and order the production of any document, books or records in the possession or power of any person having the control of, or employed in connection with any such prize chit or money circulation scheme[62]. He may also inspect and seize any register, books of accounts, documents or any other literature found in the said premises[63].

The Act also provides for forfeiture of newspaper, advertisement etc. containing prize chit or money circulation scheme[64]. Just like the Prize Competition Act, Companies can also be held liable under this Act[65].

[61] Section 7(1)(d).
[62] Section 7(2) (c).
[63] Section 7(2)(d).
[64] Section 8.
[65] Section 6.

5.3.3.3 The Transplantation of Human Organs Act, 1994

This Act has been enacted by the Parliament to provide for the regulation of removal, storage and transportation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs including advertisements in this regard. Section 19(f) of the Act states that whoever, publishes or distributes or causes to be published or distributed any advertisement- (i) inviting persons to supply for payment of any human organ; or (ii) offering to supply any human organ for payment; or (iii) indicating that the advertiser is willing to initiate or negotiate any arrangement involving the making of any payment for the supply of, or for an offer to supply, any human organ, shall be punishable with imprisonment fora term which shall not be less than two years but which may extend to seven years and shall be liable to fine which shall not be less than ten thousand rupees but may extend to twenty thousand rupees. But the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees. Companies may also be held liable under this Act.[66]

5.3.3.4 The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

The phenomenon of female infanticide is as old as many cultures, and has likely accounted for millions of gender selective deaths throughout the history. It remains a critical concern in a number of “Third World” countries today including India. In all cases, specifically female infanticide reflects the low status accorded to women in most parts of the world; it is arguably the most brutal and destructive manifestation of the anti-female bias that pervades “patriarchal” societies. It is closely linked to the phenomena of sex-selective abortion by using pre-natal diagnostic techniques. Parliament enacted this Act to provide for the regulation of the pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal

[66]The Transplantation of Human Organs Act, 1994, Section 21.

abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide; and prohibition of advertisement relating to sex-determination.

Section 22 of this Act stipulates that : (i) no person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of the pre-natal determination of sex available at such centre, Laboratory, Clinic or any other place; or (ii) no person or organization shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place. The violators of these provisions shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees[67].

The appropriate authority is empowered under this Act to enter and search at all reasonable times such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize the same, if he has reason to believe that an offence under this Act as been or is being committed[68]. Companies can also be held liable under is Act.[69]

5.3.4 Legislations Prohibiting Advertisement of Drugs, Cigarettes, Liquor Etc.

5.3.4.1 The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

Before the passing of this Act there had been a great increase in the number of objectionable advertisements published in newspapers or magazines or otherwise relating to alleged cures of venereal diseases, sexual stimulants

[67]The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse Act) 1994, Section 12(3).
[68]Section 30.
[69]Section 26.

and alleged cures for diseases and conditions peculiar to women. These advertisements lead the ignorant and the unwary to resort to self-medication with harmful drugs and appliances or to resort to quacks who indulged in such advertisements for treatments which caused great harm. Regarding the popularity of the patent and proprietary medicines the Chopra Committee[70] observed:

"The credulity and gullibility of the masses, especially when certain cures are assured in utterly hopeless cases, can well be imagined. Perusal of the advertisements of cures produces a great effect on patients who have tried treatment by medical men without success. Such patients resort to any and every drug that comes in their way. The love of mystery and secrecy inherent in human nature , the natural disinclination and shiners to disclose details of one's illness especially those involving moral turpitude, the peculiar temperament of the people who, high and low, rich and poor, demand something in abottle[5] for the treatment of every ailment and poverty of the people who cannot afford to pay the doctor's bills or the high prices current for dispensed medicines, have all been enlarged upon attending to self-diagnosis and self-medication by patent and proprietary medicines."

Therefore, to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith, the Parliament enacted the Drug and Magic Remedies (Objectionable Advertisements) Act, 1954. Section 3 of the Act prohibits advertisement of drugs for treatment of diseases and disorders. It deals with procurement of miscarriage in women or prevention of conception; or with maintenance or improvement of capacity of human beings for sexual pleasure or with diagnosis and cure of venereal and other diseases. In ***State of Karanataka v. Dr. R.N.K. Sirasubramanya***[71]**,**the

[70]In August 1930 the Government of India appointed the Drugs Enquiry Committee with Sir R.N. Chopra as its Chairman to enquire into the extent of the quality and strength of drugs imported, manufactured or sold in India and to recommend steps for controlling such imports, manufacture and sale in the interest of the public.
[71]1978 CrLJ 853.

Karnataka High Court held that for publication of an advertisement to amount to an offence under Section 3, it should have reference to a drug and that drug should have been suggested as a cure for certain ailments mentioned in clauses (a) to (d) of Section 3. Again, in ***K.S. Saini and Another v. Union of India***[72]**,** the Punjab High Court held that for terming an advertisement as objectionable the necessary condition is that the advertisement must induce others into using the drug advertised. So where pamphlets claimed that treatment for certain diseases was given by scientific methods with aid of electricity, the advertisement was not held to be objectionable. In ***A.S.P. Kurup* v. *Union of India,***[73]the Kerala High Court held that the advertisement of 'Chloroquin' by short slogan printed on postcards and inlands released by Government of India in order to control malaria and to popularize use of 'Chloroquin' is not objectionable. As we have noted in the preceding Chapter the Court has upheld the validity of the Act in general and Section 3 in particular in the ***Hamdard Dawakhana case***[74].

Section 4 prohibits a misleading advertisements relating to drugs which directly or indirectly give a false impression regarding the true character of the drug; or make a false claim for the drug; or is otherwise false or misleading in any material particular. Section 5 of the Act prohibits advertisements of magic remedies[75] for purposes specified in Section 3.

In ***Smt. Kantirani Jaynarayan Mangal* v.*The State of Maharashtra***[76],the petitioner was prosecuted under Section 3 of the Act for selling the Article known as "Bust developer" along with a booklet containing instruction showing the use of "Bust developer" with another photograph showing the

[72]AIR 1967 Punj. 322; See also *Zaffar Mohammad* v. *The State of WB.***,** AIR 1976, SC 171, the apex Court held that "Machines of Science designed to confer on mankind the blessing of New Life, New Vigor, New Spirit, New Wave" advertisement by the appellant are most likely to trap the ignorant and the unwary. The articles of commerce which the appellant had banefully advertised must be brought within the mischief of the Act.
[73]AIR 1983 Ker.2
[74]AIR 1960 SC 554
[75]The term "magic remedy" includes a talisman *mantra kavacha***,** and any other charm of any kind which is alleged to possess miraculous powers for or in the diagnosis, cure, mitigation, treatment or prevention *of any*disease in human beings or animals or for affecting or influencing in any way the structure of any organic function of the body of human beings or animals.
[76]1982 CrLJ 1454.

instrument itself and the sketch of the supposed pump which is to be utilized in the process of using of this instrument. The submission of the petitioner was that the alleged instrument is only a device to improve the general body of female. The object and purpose of instrument was improving the beauty with regard to breast. So, the instrument and the advertisement in booklets were not offending and much within Section 3 of the Act. Affirming the contentions of the petitioner the High Court held that the pair of beautiful breasts is an essential part of the body of women. The contents of advertisement do not relate any of the so called magic cures. The advertisements about remedies provided for health, sociability or developing beauty are not hit by Section 3.

The Act also prohibits the import into and export from India, any document containing an advertisement of the nature referred to in Sections 3, 4 and 5. Section 14, however, excludes registered practitioners, treatises or books, advertisement sent confidentially to medical practitioners, wholesale or retail chemists for distribution among registered medical practitioners or to hospitals or to laboratories. It also excludes advertisements printed or published by Government or with the previous sanction of the Government. In ***Dr. Yash Pall Sahi* v. *Delhi Administration,***[77]the apex Court of India held that Section 3 is subject to the provision of Section 14 and if the appellants case falls under Section 14, Section 3 cannot be invoked against him. The prosecution has to show that the person to whom the list was sent is not a medical practitioner. Once this is established it is for the appellant to satisfy the court that his case falls under Section 14(c).

The violators of any of the provisions of the Act shall, on conviction, be punishable, in the case of a first conviction, with imprisonment which may extend to six months or with fine, or with both. In the case of subsequent conviction, they shall be punished with imprisonment which attend to one year, or with fine or with both[78]. The State Government also empowered to authorize any Gazetted Officer to enter and search at all reasonable times, and to seize

[77]AIR 1964 SC 784.
[78] The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, Section 7.

any advertisement which he has reason to believe contravenes any of the provisions of this Act[79]. Companies may also be held liable under this Act[80].

5.3.4.2 The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

Corol Bellamy, Executive Director UNICEF has aptly said:

"We should have no illusion about the seductive power of modern marketing techniques as a factor in which children and adolescents take up smoking. This is an area where government has an especially important role to play."

A resolution was passed by the 39th World Health Assembly, in its 14th plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from voluntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco. The 43rd World Health Assembly in its 14th plenary meeting held on 17th May, 1990 reiterated the concern expressed in the resolution passed in the 39th World Health Assembly and urged member *States to* consider in their tobacco control strategies plans for legislation and other effective measures to discourage the use of tobacco and impose progressive restriction and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco.

Recognizing the need, to enact comprehensive law on tobacco in the public interest and to protect public health by prohibiting the advertisement of, and providing for regulation of trade and commerce, production, supply and *distribution* of cigarettes and other tobacco products, and above all to achieve the goal mentioned under Article 47of the Constitution[81], the Parliament

[79]Section 8.
[80]Section 9.
[81]The Constitution of India, Article 47- "The State shall regard the raising of the level of notation and the standard of living of its people and the improvement of public health as among its primary duties

enacted the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, The Act prohibits smoking in the public places. It also prohibits the selling of cigarette or any other tobacco products to any person who is under eighteen years of age; and, in an area within a radius of one hundred yards of any educational institution.

The Act also prohibits the advertisements of Cigarettes and other Tobacco products. Section 5(1) declares that (i) no person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise; (ii) no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium; (iii) no person shall take part in any advertisement which directly or indirectly suggests or promotes the use of consumption of cigarettes or any other tobacco products.

Similarly, Section 5(2) says that, no person for any direct or indirect pecuniary benefit shall (i) display, cause to display or permit or authorize to display any advertisement of cigarettes or any other tobacco products; (ii) sell or cause to sell, or permit or authorize to sell a film or video tape containing advertisement of cigarettes or any other tobacco products; (iii) distribute, cause to distribute, or permit or authorize to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco products; or (iv) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco products: Provided that this sub-section shall not apply in relation to (a) advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco products; and (b) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and

and, in particular, the state shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

other tobacco products are offered for distribution or sale. Section 5(3) says: "No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of (a) cigarettes or any other tobacco products; or (b) any trade mark or brand name of cigarettes or any other tobacco products in exchange for a sponsorship gift, prize or scholarship given or agreed to be given by another person."

The violator of the provisions of Section 5 shall, on conviction be punishable, in the case of first conviction with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both; and in case of second or subsequent conviction with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees[82]. Again, where any person has been convicted under this Act for the contravention of the provision of section 5, the advertisement and the advertisement material for cigarettes etc. may be forfeited to the Government and the same shall be disposed of in such a manner as may be prescribed[83]. Any officer mentioned under Section 12 of the Act is empowered to enter and search at any place where any advertisement of cigarettes or any other tobacco products are produced, supplied or distributed[84] and to seize such advertisement[85].

The Act also describes the manner and language in which specified statutory warning shall be made on die packet containing cigarette and other tobacco products. The manner in which specific warning is to be given should be legible and prominent, conspicuous as to size and colour, conspicuous as to style or type of lettering, graphic material use on the package or its label etc., conform the rules made under this Act, and packed in such a manner, so as to visible to the consumer[86].

[82]The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, Section 22.
[83]Section 23.
[84]Section 12.
[85]Section 13.
[86]Section 8.

About the language,[87] the Act says that where the language used on a package containing cigarettes or *any other* tobacco products or on its label is English, the specified warning shall be in English; any Indian language/ languages; the specified warning shall be in such Indian language/languages; both English and one more Indian languages, the specified warning shall be in English as well as such Indian language/languages; partly English and partly any Indian Language, the specified warning shall be in English as well as in such Indian language/languages; any foreign language, the specified warning shall be in English; and partly foreign language and partly English or any Indian language/languages, the specified warning shall be in English as well as such Indian language/languages. The statement on the package of cigarettes or any other tobacco products shall not inconsistent with, or detracts from, the specified warning.

The violators of these warning provisions shall be punishable in the case of first conviction, with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees or with both, and for the second or subsequent conviction, with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees[88]. Regarding the warning relating to nicotine and far, the violator, in the case of first conviction, shall be punishable with imprisonment for a term, which may extend to one year or with fine which may extend to one thousand rupees, or with both, and, for the second or subsequent conviction, with imprisonment for a term which may extend to two years and with fine which may extend to three thousand rupees[89]. The Companies may also be held liable under this Act[90].

Despite the existence of stringent provisions under the Act, the problem of cigarette and other tobacco products consumption is increasing day by day. Therefore, the Government intervention in the sale and advertisement of

[87]Section 9.
[88]Section 20 (1).
[89]Section 20(2).
[90]Section 26.

tobacco products is essential. According to World Health Organization Framework Convention on Tobacco Control (WHO FCTC), tobacco kills approximately 6 million people and causes more than half a trillion dollars of economic damage each year. The Convention claims that tobacco will kill as many as 1 billion people this century if the WHO FCTC is not implemented rapidly[91]. There are approximately 275 million tobacco users in India. Tobacco use accounts for nearly half of all cancers among males and a quarter of all cancers among females and it is estimated that there will be 1.5 million tobacco-related deaths annually by 2020.[92]

Tobacco use continues to be the leading global cause of preventable death. The cigarette and tobacco advertising, promotion and sponsorship constitute the front line of the tobacco industry's to maintain and increase its customer base and normalize tobacco use. WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship claims that enforcing bans on tobacco advertising, promotion and sponsorship is a highly effective way to reduce or eliminate exposure to cues for tobacco use. The report provides a comprehensive overview of the base for establishing a ban on cigarette and tobacco advertising, promotion and sponsorship, as well as country-specific information on the status of complete bans and bans on individual tobacco advertising, promotion and sponsorship components.[93] Similarly, against a landscape of robust supporting data and evidence, the WHO FCTC asserts that meaningful tobacco control policy must

[91] WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship. Available at:http://apps,whoJnt/iris/bitstream, (Visited on 11/07/ 2017).

[92] For more details see https://uwaterloo.c/news/news/experts-predict-15-million-smoking-death-india-2020, (Visited on 10/08/2017).

[93]According to WHO Report on the Global Tobacco Epidemic. 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship: While there has been a steady increase in the number of countries that have established a complete tobacco advertising, promotion and sponsorship ban and the number of people worldwide protected by this type of ban, this measure has yet to be widely adopted. Only 24 countries (with 694 million people or just under 10% of the world's population) have put in place a complete ban on direct and indirect tobacco advertising activities, although this trend has accelerated since 2010. More than 100 countries are close to having a complete tobacco advertising ban, needing to strengthen existing laws to ban additional types of tobacco advertising, promotion and sponsorship activities to attain the highest level. However, 67 countries currently do not ban any tobacco advertising activities, ot have a ban that does not cover advertising in national broadcast and print media.

include the elimination of all forms of tobacco advertising, promotion and sponsorship. Tins goal is so critical that Article 13 of the Convention which deals with Tobacco advertising, promotion and sponsorship is one of only two provisions in the treaty that includes a mandatory time frame for implementation.

5.3.4.3 The Drugs and Cosmetics Act, 1940

In order to give effect to the recommendations of the Drugs Enquiry Committee, in so far as they relate to matters with which the Central Government is primarily concerned, a Bill to regulate the import of drugs into British India was introduced in the Legislative Assembly in 1937. The Select Committee appointed by the Legislative Assembly was the opinion that a more comprehensive measure, providing for the uniform control of manufacture and distribution of drugs as well as of import, was desirable. The Government of India accordingly asked Provincial Governments to invite the Provincial Legislatures to pass resolutions under section 103 of the Government of India Act, 1935, empowering the Central Legislature to pass an Act for relating such matters relating to the control of drugs as fall within the provincial Legislative list. Such resolutions have now been passed by all Provincial legislatures[94].

Section 29 of the Act imposes penalty for use of Government Analysis report for advertising which states: “Whoever uses any report of a test or analysis made by the Central Drugs Laboratory or by a Government analyst or any extract form such report for the purpose of advertising any drug (or *cosmetic) shall be* punishable with a fine which may extend to five hundred rupees”.

5.3.4.4 Food Safety and Standards Act, 2006

The Act came into force on 23rdAugust, 2006. The aim of this act is to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and

[94]Vijay Mallik, Drugs and Cosmetic Act (Eastern Books Publication, Lucknow, 1988).

import, to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto.

Section23 of the Act deals with the packaging and labeling of foods. It ensures that no person shall manufacture, distribute, sell or expose for sale or dispatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labeled. Further, the labels shall not contain any statement, claim, design or device which is; false or misleading in any particular concerning the food products contained in the package or concerning the quantity or the nutritive value implying medicinal or therapeutic claims or in relation to the place of origin of the said food products. A duty is being cast on every food business operator to ensure that the labeling and presentation of food, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium, does not mislead consumers.

Section 24 restricts certain types of advertisements and unfair trade practices for the purposes of promotion, sale and supply of foods. It ensures that no advertisement[95] shall be made of any food which is misleading or deceiving or contravenes the provisions of this Act, the rules and regulations made there under.[96] Further, no person shall engage himself in any unfair trade practice for purpose of promoting the sale, supply use and consumption of articles of food or adopt any unfair or deceptive practice including the practice of making any statement, whether orally or in writing or by visible representation which - (a) falsely represents that the foods are of a particular standard, quality, quantity or grade-composition; (b) makes a false or misleading representation concerning the need for, or the usefulness; (c) gives

[95] Section 3(b): “advertisement” means any audio or visual publicity, representation or pronouncement made by means of any light, sound, smoke, gas, print, electronic media internet or website and includes through any notice, circular, label, wrapper, invoice or other documents.

[96] Season 24(1).

to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof.[97]

The Act is also concerned about misbranded food. "Misbranded food" means an article of food, if it is purported, or is represented to be, or is being: (i) offered or promoted for sale with false, misleading or deceptive claims either- (a) upon the label of the package, or (b) through advertisement, or (ii) sold by a name which belongs to another article of food; or (iii) offered or promoted for sale under the name of a fictitious individual or company as the manufacturer or producer of the article as borne on the package or containing the article or the label on such; or if the article is sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer bearing his name and address but the article is an imitation of, or is a substitute for, or resembles in a manner likely to deceive another article of food under the name of which it is sold, and is not plainly and conspicuously labeled so as to indicate its true character; or the package containing the article or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular, or if the package is otherwise deceptive with respect to its contents; or the article is offered for sale as the product of any place or country which is false.

According to section 27, the manufacturer or packer of an article of food shall be liable for such article of food if it does not meet the requirements of this Act and the rules and regulations made there under. A person may render any article of food injurious to health by means of one or more of the operations enumerated under this Act including the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable,

[97] Section 24(2); Provided that where a defense is raised to the effect that such guarantee is based on adequate or scientific justification, the burden of proof of such defense shall lie on the person raising such defense.

immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on subsequent generations.[98]

Section 52 deals with the penalty for misbranded food. It says: "Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is misbranded, shall be liable to a penalty which may extend to three lakh rupees." Similarly, section 53 imposes penalty for misleading advertisement. It says: "Any person who publishes, or is a party to the publication of an advertisement, which- (a) falsely describes any food; or (b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees."[99] If a person, in connection with a requirement or direction under this Act, provides any information or produces any document that the person knows is false or misleading, he shall be punishable with imprisonment for a term which may extend to three months and also with fine which may extend to two lakh rupees.[100] If any person, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, he shall be liable to- (i) twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence; (ii) a further fine on daily basis which may extend up to one lakh rupees, where the offence is a continuing one; and (iii) his license shall be cancelled. The Court may also cause the offenders name and place of residence, the offence and the penalty imposed to be published at the offenders expense in such newspapers or in such other manner as the court may direct and the expenses of such publication shall be deemed to

[98]Section 48.

[99] In any proceeding the fact that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

[100]Section 61.

be part of the cost attending the conviction and shall be recoverable in the same manner as a fine.[101]

5.3.5Advertising and Intellectual Property Rights Law

5.3.5.1 The Copyright Act, 1957

The importance of copyright was recognized after the invention of the printing press which enabled the reproduction of books in large quantity. The Indian Copyright Act was thus passed in 1914.[102] But, during the last four decades, modern and advanced means of communication like broadcasting, litho-photography, television etc. made inroads in the Indian economy. It necessitated the fulfillment of international obligations in the field of Copyright. A comprehensive legislation had to be introduced to completely revise the Copyright law. This was achieved by the passing of a Copyright Act 1957 by the Parliament.

Section 13 of the Act states the work in, which copyright subsists. Sub-section (1) of Section 13 declares that subject to the provisions of this section and the other provisions of this Act, Copyright shall subsist throughout India in the following classes of works, that is to say, (a) original literary, dramatic, musical and artistic works; (b) cinematographic films; and (c) Sound recording.

Advertisements to be protected under the Act must be original, i.e. (a) must not be copied from another, or (b) must not have been common place that is in the public domain. It does not mean that the work must be the expression of original thought. It may exist in the information given by a list of advertisements or advertisement themselves.

5.3.5.2 The Trade Marks Act, 1999

The law relating to trade marks in India is contained in the Trade Marks Act, 1999[103]. A ‘trade mark’ is a sign which serves to distinguish the products of one enterprise from the products of the other enterprises. Apart from other functions, a trade mark has an advertising function. Through the power of

[101]Section 64.
[102]Iyengar, Copyright Act (Law Books Co., Allahabad, 1977).
[103]AswiniKumar Bansal, *Law of Trade Marks in India* (Commercial Law Publication Pvt. Ltd., 2003).

association created between a mark and a product or service, marks familiarize the public with such product or service. Thus, marks helps their owners stimulate and retain consumer demand. At the same time they also inform the consumer as to the products or services available on the market. Therefore, it is important that marks should not be confusing, deceptive, false and misleading and should not contribute in any other way to promote unfair competition.

Section 103 of the Act, prescribes the penalty for applying false trademarks, trade descriptions etc. According to it any person who (a) falsifies any trade mark; or (b) falsely applies to goods or services any trade mark; or (c) makes, disposes of, or has in his possession, any die, block, machine, plate or other instrument for the purpose of falsifying or of being used for falsifying a trade mark; or (d) applies any false trade description to goods or services; or (e) applies to any goods to which an indication of the country or place in which they were made or produced or the name and address of the manufacturer or person for whom the goods are manufactured is required to be applied under Section 139, a false indication of such country, place, name or address; or (f) tampers with, alters or effaces an indication of origin which has been applied to any goods to which it is required to be applied under section 139; or (g) causes any of things above-mentioned in this section to be done, shall, unless he proves that he acted, without intent to defraud, be punishable with imprisonment for a term which shall not be less than *six months* but which may extend to *three years* and with fine which shall not be less than *fifty thousand rupees* but which may extend to *two lakh* rupees provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than *six months* or a fine of less than *fifty thousand* rupees.

Section 104 imposes penalty for selling goods or providing services to which false trade mark or false trade description is applied. The Section declares that any person who sells, lets for hire or exposes for sale, or hires or has in his possession for sale, goods or things, or provides or hires services, to which any false trade mark or false trade description is applied or which, being required under section 139 to have applied to them an indication of the country or place in which they were made or produced or the name and address of the manufacturer, or person for whom the goods are manufactured or services provided, as the case may be, are without the indications so required, shall, unless he proves - (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of commission of the alleged offence no reason to suspect the genuineness of the trade mark or trade description or that any offence had been committed in respect of the goods or services; or (b) that, on demand or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things or services; or (c) that otherwise he had acted innocently, be punishable with imprisonment for a term which shall not be less than *six months* but which may extend to *three years* and with fine which shall not be less than *fifty thousand* rupees but which may extend to *two lakh* rupees provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than *six months* or a fine of less than *fifty thousand* rupees.

5.3.6 Internet Advertising (E-Advertising) and the Law

5.3.6.1 The Information Technology Act, 2000

The internet is an increasingly popular medium for advertising. Now, it is the latest craze of some advertisers. Till recently, websites were mushrooming in USA, Europe, South Korea, and many developing countries, including India, Malaysia, Indonesia, Sri Lanka and others. According to the Report of IAMAI and IMRB international, as of June 2017, there were between 450-465 million by June 2017, up from 432 million in December 2016 out of which 321million are active users (use internet at least once a month)[104]. In urban India, there were estimated 269 million internet users in December 2016, while in rural India,

[104] According to a report 'Internet in India 2016', jointly published by the Internet and Mobile Association of India & IMRB, Available at: https://telecom.economictimes.indiatimes.com/news/indias-internet-user-base-to-reach-450-465-million-by-june-2017-iamai-imrb-report/57410229, (Visited on 20/12/17).

there were 163 million Internet users.[105]The internet has been, till now, the fastest, most effective, enchanting and least expensive means of advertising, the craze of the trade, particularly for those seeking a global customers or global exposure. For the same cost as a single print insertion in a widely circulated city daily one can set up his own website with the possibility of being visited by clients from all over the world. In short it can be said that it permits low-cost advertising, of national and potentially worldwide reach, and the possibility of close and interactive communications with potential customers.

The rising marketing spends in the sectors like e-commerce, telecom, and consumer durables helped the growth of online advertising in India. The online market in India is projected to grow at 30%, to touch Rs. 220,330 crore by December, 2017[106]. According to above the study, the online advertising market has grown from Rs 1,140 Crore in 2010-11 to Rs 2,260 Crore in 2012-13 and was estimated; to be worth Rs 2,750 Crore in 2013-14. The online ad. segment was expected to grow at a compounded annual growth rate of 25 per cent between fy 2011 to fy 2013.[107]The overall ad. spend in the country across all media is Rs 38,598 Crore as of 2013 with a year-on-year growth rate is 12 per cent, with television accounting for 44 per cent of the spend.[108]

The Internet and Mobile Association of India (IAMAI) and XMRB International said:

"The gradual increase in adaptation of internet has opened the door to the marketers to go online and spend on digital advertisement. With mobile devices becoming a predominant mode of internet access among the users in India, this number is expected to increase (further)... Although traditional media still holds

[105]https://telecom.economictimes.indiatimes.com/news/indias-internet-user-base-to-reach-450-465-million-by-june-2017-iamai-imrb-report/57410229, (Visited on 20/12/17).

[106] A study made by IAMAI-IMRB, https://economictimes.indiatimes.com/small-biz/startups/digital-commerce-market-estimated-to-touch-rs-220330-crore-by-december-2017 iamai/articleshow/59255608.cms, (Visited on 20/12/17).

[107]http://articles.economictime.indiatimes.com/2014-09-03/news/53522706_1_digital-ad-e-commerce-industry-overall-ad**, (**Visitedon 29/07/2017).

[108]*Ibid.*

strong ground in the Indian ad. space, digital advertising is catching up fast and is expected to overtake traditional media within the next 5-10 years."[109]

It further added:

"The high growth can also be attributed to increasing advertisement measurability, which is both quick and effective."[110]

Tracing the reason of the growth of internet advertising in India, it observed[111]:

"In addition to the increasing adoption of mobile devices, the increasing connectivity and improvements in broadband infrastructure will lead to increased investments in more content rich advertisements viz. video and social media advertisements."

The report says that the digital ad. spend on mobile devices stood at 14 per cent, whereas on desktops and laptops at 86 per cent.

The growing popularity of Internet advertising or online advertising among the advertisers as well as internet users create an environment of demand for 'e-advertising' regulation in India. The Information Technology Act, 2000 which has been passed to provide legal recognition to e-commerce only prohibits the publishing of information which is obscene in electronic form.

The objective of the Information Technology Act, 2000 is to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.

Interestingly, the IT Act, 2000 does not create any civil liability for false and misleading advertisement in online medium unlike Consumer Protection

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[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*

Act, 1986, Indian Contract Act and Law of Torts etc. It creates a criminal liability in certain cases. Any person who sends, by means of a computer resource or a communication device any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device, shall be punishable with imprisonment for a term which may extend to *three years* and with fine.[112]This provision creates confusion as to whether it can be extended to include unfair trade practice including false and misleading advertisement because in order to constitute unfair trade practice, the false information is required to be given 'for the promotion of sale', but no such phrase is used in this provision.

The Act mainly focuses on publishing or transmitting obscene material in electronic form. According to *section 67* whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to two three years and with fine which may extend to *five lakh* rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to *five years* and also with fine which may extend to *ten lakh* rupees. Therefore, publishing or transmitting online advertising, which is obscene in nature attracts this provision.[113]

But the advertisings, which are transmitted in the digital medium for publishing or transmitting of material containing sexually explicit act, etc. carries more stringent punishment than the aforesaid provision. Accordingly,

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[112] Section 66A (b); Explanation: For the purposes of this section, terms "Electronic mail" and "Electronic Mail Message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

[113] Dr. Sukanta K. Nanda, Media Law 135 (Central Law Publications, Allahabad, 1st Ed., 2014).

whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to *five years* and with fine which may extend to *ten lakh* rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to *seven years* and also with fine which may extend to *ten lakh* rupees.[114]

The most rigorous punishment is provided for publishing or transmitting of material depicting children in sexually *explicit* act, etc. in electronic form. It mandates that Whoever,- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or (d) facilitates abusing children online or (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.[115]

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[114] Section 67(A); section 67 and section 67(A) do not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form- (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or (ii) which is kept or used bona fide for religious purposes.

[115]Section 67(B); It may be noted that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form- (i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or (ii) which is kept or used for

A liability is also imposed on the service provider or intermediary to preserve and retain information. In this regard section 67 C of the IT Act, 2000 provides that the intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe. Further, any intermediary who intentionally or knowingly contravenes this provision shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine. It is worthy to note that the provisions of this Act shall apply to any offence or contravention committed outside India by any person irrespective of his nationality. This Act shall also apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.[116]

The Act empowers any police officer, not below the rank of an Inspector or any other officer of the Central Government or a State Government authorized by the Central Government to enter any public place[117] and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act.[118] Where any person is arrested by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station. Abetting an offence punishable under this Act shall be punishable if the act abetted is committed in consequence of the abetment[119], and no express provision is made by this Act for the punishment of such abetment, with the punishment provided for the offence

bonafide heritage or religious purposes Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

[116]Section 75.

[117] The expression "Public Place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public

[118]Section 80.

[119] An Act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

under this Act.[120]Similarly, Whoever attempts to commit an offence punishable by this Act or causes such an offence to be committed, and in such an attempt does any act towards the commission of the offence, shall, where no express provision is made for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence or with both.[121] If an offence under this Act is committed by a Company[122], then every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of die contravention and shall be liable to be proceeded against and punished accordingly.[123]

Internet advertising has emerged not only as an effective means of advertising but also raise a number of legal issues trade mark and copyright issues of non-solicited pornography and marketing etc. Though it carries punishment for publishing and transmitting false information, but it is not dear whether it can be extended to include unfair trade practice including false and misleading advertisement. However, the Information Technology Act, 2000

[120]Section 84(b).
[121]Section 84(C).
[122]"Company" means any Body Corporate and includes a Firm or other Association of individuals. liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the pan of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. See generally, Nandan Kamath, *Law relating to Computers Internet and E-Commerce* (Universal Book Traders, New Delhi 2000); J.R Gray Smith, Internet Law and Regulation (Sweet and Maxwell, London, 2002).
[123]Section 85; Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the pan of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

prohibits the publication of information which is obscene in electronic form[124]. The Act is silent about the other aspects of unfair trade practice including false and misleading advertisement. Therefore, an urgent need to regulate internet advertising either by extending the provisions of existing advertising legislation to it or by enacting an e-advertising legislation.

5.4 OTHER LEGISLATIONS

5.4.1 Motor Vehicles Act, 1988

We often come across advertisements which actively involve the use of motor vehicles. Most of these advertisements are related to the motor vehicles themselves, which include both two wheelers and four wheelers. It goes without saying that advertisements must not depict contents which are in violation of various safety norms prescribed under Indian laws.

To start with, the most pertinent is the Motor Vehicles Act, 1988, which prescribes basic safety norms to be followed while using motor vehicles. In this regard, reference can be made to Sections 116(4), 128 and 129 of the Act.

Under the Motor Vehicles Act, 1988[125], the State Government may by notification in the Official Gezette, empower any police officer not below the rank of a Superintendent of Police to remove or cause to be removed any sign or advertisement which is in his opinion so similar in appearance to a traffic sign as to be misleading, or which, in his opinion, is likely to distract the attention or concentration of the driver.[126]

Section 128 prescribes norms to be followed by two wheelers, which are as follows:

i. No driver of a two-wheeled motor cycle (also includes a scooter and other similar vehicles) can carry more than one person in addition to himself on the motor cycle and
ii. No person can be carried on such motor vehicle unless the he is sitting on a seat securely fixed to the motor vehicle.

[124]Nandan Kamath, *Law relating to Computers Internet and E-Commerce* (Universal Book Traders, New Delhi 2000); J.R Gray Smith, Internet Law and Regulation (Sweet and Maxwell, London, 2002).
[125] The Motor Vehicles Act, 1988, Section 116(4).
[126]*Supra* note 113 at 134.

Section 129 on the other hand prescribes the use of a protective headgear while driving or riding a two wheeler. It lays down that every person driving or riding (otherwise than in a side car, on a motor cycle of any class or description) shall, while in a public place, wear a protective headgear. The exception is however given to Sikhs who wear a turban while driving such vehicles.

Insofar as four wheelers are concerned, reference can be made to the Central Motor Vehicles Rules, 1989. It is noteworthy that the Rules mandate that the manufacturers of motor vehicles must provide seat belts for the occupants and further prescribe that it is mandatory to wear seat belts.[127]

Rule 125 (1) requires the manufacturer of every motor vehicle other than motor cycles and three-wheelers of engine capacity not exceeding 500 cc, shall equip every such vehicle with a seat belt for the driver and for the person occupying the front seat.

Rule 125 (1 A) require the manufacturer of every motor vehicle that is used for carriage of passengers and their luggage and comprising no more than 8 seats in addition to the driver's seat, shall equip it with a seat belt for a person occupying the front facing rear seat.

The provisions in Sub-rule (1) of rule 125 of the Central Motor Vehicles Rules, 1989 stipulate that from 1994 onwards every manufacturer of Motor Vehicles other than Motor Cycles and 3-Wheelers of engine capacity not exceeding 500 cc shall equip every such vehicle with a seat belt for driver and the person occupying the front seat.

Further, as per sub-rule (2) of the 138 of Central Motor Vehicle Rules, the driver and the person seated on the front seat of the motor vehicle are by law required to wear the seat belts, while the vehicle is in motion.

The aforestated deliberations indicate that the advertisements which depict the use of motor vehicles, irrespective of the purpose for such depiction, are required to comply with the law relating to motor safety. Every actor or person who is shown using such motor vehicles must comply with the safety norms.

[127] *Supra* note 09 at 91-93.

The impact of non-compliance can be two fold. The person(s) involved in the usage of motor vehicles without following norms can be prosecuted under the relevant provisions of the Motor Vehicles Act and secondly, the advertisements shall also stand in contravention of the norms prescribed by ASCI qua the safety protocols that are to be kept in mind.[128]

It is often seen that in bid to make the advertisement more appealing and interesting, the producers employ dangerous actions or stunts. On most occasions, these stunts are performed on vehicles by trained professionals under expert supervision. However, this fact is not visible once the advertisement is broadcast to the viewers. Audience, especially youngsters and children are at the risk of attempting such stunts, which are risky and may prove fatal. Therefore, it is required that the advertisement depicts proper disclaimer stating that the stunts/ actions are performed by trained individuals under expert supervision and that the same must not be imitated. Such disclaimers are absolutely necessary to prevent untoward incident which may occur as a result of imitating such stunts.[129]

5.4.2 The Cable Television Networks (Regulation) Act, 1955.

Almost everybody in the country is familiar with the cable television. It has been spreading its wing from the initial urban cities, right to remote villages. There has been a haphazard mushrooming of cable television networks all over the country due to availability of signal of foreign television networks *via* satellites. To check the screening of undesirable programmes and advertisements which are screened on these channels and to regulate the operation of the cable television networks in the country so as to bring uniformity in their functioning the Parliament enacted the Cable Television Networks (Regulation) Act, 1995. Section 6 of the Act says:

> "No person shall transmit or re-transmit through a cable service any advertisement unless such advertisement is in conformity with the prescribed advertisement code".

[128] *Ibid.*
[129] *Ibid.*

Rule 7 of the Cable Television Network Rules, 1994 (Amended up to 2000) lays down the Advertising Code. The relevant part of the code is given below:

1) Advertising carried in the cable service shall be so designed as to conform to the laws of the country and should not offend morality, decency and religious susceptibilities of the subscribers.
2) No advertisement shall be permitted which promotes directly or indirectly production, sale or consumption of cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants; infant milk substitutes, feeding bottle or infant foods.
3) No advertisement shall be permitted, where the objects are wholly or mainly of a religious or political nature; advertisement must not be directed towards any religious or political end.

The violators of the provisions of this Act shall be punishable (a) for the first offence, with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or with both; (b) for every subsequent offence, with imprisonment for a term which may extend to five years and with fine which may extend to five thousand rupees[130].

Three points needed to be mentioned here: *Firstly*, advertising code is not applicable to the programme of foreign satellite channels which can be received without the use of any specialized gadgets or decode. *Secondly*, despite the imposition of a complete ban on the advertisement of cigarettes and other tobacco products by this Act, the cigarettes and other tobacco products advertisements is going on like anything. Prime tobacco brands are sponsoring the television programmes, film award ceremonies, contests, sporting tournament etc. *“PANPARAG”* advertisement is still airing in the small silver screen. Famous *“PAN MASALA”* manufacturer *“MANIKCHAND”* is sponsoring the 'Film Fare Award' ceremonies. To overcome the problem, it is humbly suggested that the provisions of the *Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and*

[130] The Cable Television Networks (Regulation) Acts, 1955, Section 16.

Commerce, Production, Supply and Distribution) Act, 2003 and the Cable Television Network (Regulation) Act, 1995 should be implemented in letter and in spirit Techniques and laws should also be developed to restrict the foreign channels airing cigarette and tobacco advertisements. *Thirdly*, Article 47 of the Indian Constitution provides that the State is required to take steps to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and drug which are injurious to health. In ***Ghaio Mall & Sons v. State of Delhi***[131] *it* has been held that no one has a legal right to *sell* liquor and from the *earliest times it* has been found expedient to control the use and traffic in liquor and this control embraces both regulatory and prohibitory measures, but the Government has not taken any meaningful initiative to prohibit the advertisement on electronic media. As the matter stands now, the Cable Television Network (Regulation) Act, 1995 is perhaps the only legislation which bans liquor advertising. But the law is being circumvented by the liquor industry by surrogate advertisement in which the line between products is intentionally blurred and the brand name of liquor is used along with a soft drink. For example, *Hum tum aur mera Bagpiper* (I, you and my Bagpiper). This Bagpiper Club Soda advertisement featuring cine celebrities is similar to the earlier one for Bagpiper whisky. The advertisement comes with the same musk and punch line as one for the popular liquor brand telecast before the ban on liquor advertisement.

It may be noted that the Trade Marks Act, 1999, denies the extension of registration of trademarks used for brand names of wine, alcohol liquor etc., but this denial did not affect the liquor companies as the companies did not need any approvals to advertise their products other than liquor. It is the other factor that encourages surrogate liquor advertising. It shows that irrespective of sufficient laws, implementing prohibition of liquor advertisement is not going to be an easy task. To overcome the problem, it is humbly submitted that the ban on liquor advertising under the Cable TV network (Regulation) Act, 1995

[131] The Cable Television Networks (Regulation) Acts, 1955, Section 16.

should be extended to cover the advertising of extended brands in order to prohibit the surrogate liquor advertising. No advertisement should be allowed which is in the guise or pretext of other drinks or products, promote tobacco products, liquor, wine or other intoxicants. In addition, the Trade Marks Act, 1999 should be amended to categorically deny products having liquor brand names for brand extensions to check surrogate liquor advertising. However, as of today, this seems to be quite impossible as any amendments that seek to prevent trade mark registration of industry specific brand names in other classes of products or services would be *ultra vires* of the Trade Marks Act.

5.4.3. The Representation of the People Act, 1951

Most of the political parties and their candidates resort to paid news and advertisements during election campaign to indirectly influence the mind of the voters[132].

The objective of the Act is to provide for the allocation of seats in, and the delimitation of constituencies for the purpose of elections to the House of the people and the Legislatures of States, the qualification of voter at such elections, the preparation of electoral rolls, the manner of filing seats in the Council of States to be filled by representatives of Union Territories, and matters connected therewith.[133]

Section 123(2) of the Representation of the People Act,1951 (RPA) bars undue influence on the part of the candidates or his agents which directly or indirectly interfere with the free exercise of any electoral right.

The consequence of violation of section 123(2) is the disqualification of the candidate. Many such paid news and political advertisements may tend to influence the voters. It is however a difficult task to prove that the paid news or political advertisement has directly or indirectly interfered or influenced the voters in exercise of their electoral rights.

Section 126 of the Act prohibits public meetings during period of forty-eight hours ending with the hour fixed for conclusion of the poll. Subsection (1)

[132]*Supra* note 09 at 64-67.

[133] The Representation of the People Act, 1951: Govt. of India, 1962 (Ministry of Law).

declares: No person shall (a) Convene, hold, attend, join address any public meeting or procession in connection with an election; or (b) display to the public any election matter[134] by means of cinematograph, television or other similar apparatus; or (c) propagate any election matter to the public by holding or by arranging the holding of, any musical concert or any theatrical performance or any other entertainment or amusement with a view to attracting the members of the public thereto. In any polling are during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area. Sub-section (2) says that any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to two years or with on with both.

Section 127(A) of the Act puts restrictions on the printing of pamphlets, posters etc. Sub-section (1) says: No person shall print or publish or cause to be printed on published, any election pamphlet or poster which does not bear on its face the names and address of the printer and publisher thereof. According to sub-section (2),No person shall print or cause to be printed any election pamphlet or poster- (a) unless a declaration as to *the* identity of the publisher thereof, *signed* by him, *and attested by* two persons to whom he is personally known, is delivered to the printer in supplicate; and (b)unless within a reasonable rime after the printing of the document one copy of the declaration is sent by the printer together with one copy of the document where it is printed in the Capital of the State to the Chief Electoral Officer; and in any other case to the District Magistrate of the district in which it is printed. Any person who contravenes any of the provisions of sub-section (1) on sub-section (2) shall be punishable with imprisonment for a term which may extend to six months or with a fine which may extend to two thousand rupees or with both.

There is no specific legislation to check the practice of paid news and political advertisement however the same has been indirectly tackled through certain sections of RPA. Under section 77 of RPA every candidate is mandated

[134] Section 126(3): the expression, “election matter” means any matter intended or calculated to influence the result of an election.

to keep account of expenses in connection with elections and any failure on the part of the candidate on this account can result in disqualification under section 10 A of RPA.

The paid news and political advertising are treated as part of their expenses towards election. As per the amended section 77 of RPA all expenditure incurred by even supporters and workers of the candidate is deemed to be expenditure incurred or authorised by the candidate. The paid news or political advertisements that are paid for by candidate himself or on his behalf with also fall within the expenditure sealing of candidate. Thus placing restriction on election expenses, contribute in checking excessive political advertising.

The Supreme Court in the case of ***Ministry of broadcasting Vs. Gemine TV Pvt.. Ltd.***[135], has held that all political advertisement proposed to be issued on TV channels and cable networks by any registered political party/any group or organization/ association/individual candidate shall be pre-certified by the designated certification committee at various level too be constituted by the Election Commission of India.

In its NBSA norms and guidelines in the year 2011, NBSA has provided that "Every news broadcasting organisation shall disclose conspicuously, in an appropriate manner during broadcast of a program, on their television channel/s and on their website/s, including during a news, current affairs, sports, entertainment or promotional broadcast, as to whether the content of such broadcast has been paid for by or on behalf of the entity that is subject matter of such broadcast in any manner whatsoever; and whether such broadcast is an 'advertorial' or other media marketing initiative."

It has also been recommended in the same guideline that where any footage/segment/program carried on a news channel has been paid for whether as an advertisement or advertorial or other promotion, this aspect is required to be disclosed, conspicuously during the broadcast with the aim and intend that

[135] SLP (Civil) 6679/2004 dated 13 April, 2004.

viewers are not mislead into believing that such content is part of a News reportage. As per the guidelines issued by NBSA in March 2014 the news channel are required to disclose any political affiliation either towards the candidate or a party.[136]

5.4.4 The Advocates Act, 1961

The Act[137] while guaranteeing the right to practice to advocates, denies the right to advertise. Rule 36 of the Bar Council of India Rules, which is framed under section 49(1) (C)[138] of the Advocates Act, 1961, restricts the advocates to advertise directly or indirectly. The rule reads as follows:

"An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, furnishing or inspiring newspaper comments or producing his photograph to be published in connection with cases in which he has been engaged or concerned. His signboard or nameplate should be of a reasonable size. The signboard or nameplate or stationery should not indicate that he is or has been president or member of a Bar Council or of any association, or that he has been associated with any person or organization or with any particular cause or matter, or that he specializes in any particular type of work or that he has been a judge or an Advocate General."

It is worthy to note that the Bar Council of India informed the Supreme Court that lawyers, like other professionals, are now free to advertise their services on Internet and that it has relaxed its rules on the issue in view of the changing global scenario. For this purpose it has amended Rule 36**,** Section IV of the BCI, which earlier prohibited the legal fraternity from advertising their services. Under the amended rule, advocates can mention in their chosen websites, their names, telephone numbers, e-mail ID, professional qualification

[136]*Supra* note 09 at 64-67.
[137] C.L. Anand, Professional Ethics of the Ban (Allahabad: The Law Book Company (P.) Ltd., 1987); Raju Ramchandran, Professional Ethics, Accountancy for Lawyers and Bench-Bar Relation (Allahabad: Central Law Agency, 2001).
[138] The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe the standard of professional conduct and etiquette to be observed by advocates.

and areas of specialisation. However, the BCI submitted that such advertisements can be issued only within the parameters fixed by it under the amended regulations, and any breach of the same would invite disciplinary action.[139]

The aforesaid amendment seems to be a minor relaxation in lawyers advertising. There is still a significant ban on lawyers advertising, the violation of which may attract disciplinary action against the advocate for which the punishment varies from 'reprimand' to 'removal of the advocate's name from the state roll'. Here a question arises as to whether the complete ban on lawyer advertising needs a fresh look. In order to answer this question let us have a look at the American and British positions on lawyers advertising.

5.4.4.1 Position in United Kingdom

Traditionally, lawyers in England were prohibited from advertising. However, with the advent of the European Union and various directives issued by the Union, traditional rules prohibiting lawyer advertising have been replaced by some form of advertising. However, the advertising is more strictly regulated. The solicitor's right to advertise is regulated by the Solicitors Code of Conduct, 2007 (Superseded Solicitors Practice Rules 1990) and the Solicitor's Publicity code 1990, whereas the advertising by barristers is regulated under the 'code of Conduct' of the Bar of England.

5.4.4.1.1 Code of Conduct of the bar of England and Wales

According to this Code, advertising or promotion must not: (a) be inaccurate or likely to mislead; (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute; (c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession); (d) include statements about the barristers success rate; (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted

[139] Available at: *http://www.manupatra.com/roundup/238/News.html*,(Visited on 30/07/2018).

otherwise than in accordance with this Code; and (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.[140]

Subject to paragraph 709.2, a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include: (a) photographs or other illustrations of the barrister; (b) statements of rates and methods of charging; (c) statements about the nature and extent of the barrister's services; (d) information about any case in which the barrister has appeared (including the name of any client for whom the barrister acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client.[141]

5.4.4.1.2 Solicitor's Publicity Code 2001[142]

Solicitor's Publicity Code 2001, amended Last time in 13 January 2003. Solicitor's publicity must not be misleading or inaccurate.[143] Any publicity as to charges or a basis of charging must be clearly expressed. It must be clear whether disbursements and VAT are included.[144] A private practice must not use a name or description which is misleading. It would be misleading for a name or description to include the word "solicitor's", if none of the principals or directors (or members in the case of a limited liability partnership) is a solicitor.[145] Practitioners must not publicize their practices by making unsolicited visits or telephone calls to a member of the public[146]. It is not proper for practitioners to distribute to the press, radio or television copies of a speech or address to any court, tribunal or inquiry, except at the time and place of the

[140]Paragraph 709.2.
[141]Paragraph 709.1.
[142] This Code replaces the Solicitors Publicity Code 1990.
[143]Section 1(a).
[144]Section 1(b).
[145]Section 1(c).
[146] Section l (d):"Member of the public" does not include: (A) a current or former client; (B) another lawyer; (C) an existing or potential professional or business connection; or (D) a commercial organization or public body.

hearing to persons attending the hearing to report the proceedings.[147]

Publicity intended for a jurisdiction outside England and Wales must comply with: (i) the provisions of this code; and (ii) the rules in force in that jurisdiction concerning lawyer's publicity.[148] Publicity intended for a jurisdiction where it is permitted will not breach this paragraph through being incidentally received in a jurisdiction where it is not permitted. A practitioner must not authorize any other person to conduct publicity for his practice in a way which would be contrary to this code.[149]

This section of the code applies to all forms of publicity including stationery, advertisements, brochures, directory entries, media appearances, press releases promoting a practice, and direct approaches to potential clients and other persons, and whether conducted in person, in writing, or in electronic form.[150]

5.4.4.1.3 Solicitor's Code of Conduct, 2007

Solicitors are generally free to publicize their practice as a solicitor subject to certain restrictions.[151] However, the Publicity must not be misleading or inaccurate.[152] Any publicity relating their charges must be clearly expressed.[153] In relation to practice from an office in England and Wales, it must be clear whether disbursements and VAT are included.[154] They must not publicize their practice by making unsolicited visits or telephone calls to a member of the public.[155] Publicity intended for a jurisdiction outside England and Wales must comply with: (a) the provisions of rule 7 (and 15.07, if applicable); and (b) the rules in force in that jurisdiction concerning lawyer's

[147]Section 1(e).
[148]Section 1(e).
[149]Section 1(g).
[150]Section 1(h).
[151]Rule 7.
[152] Rule 7.01,
[153]Rule 7.02.
[154]*Ibid.*
[155] Rule 7.03: "Members of the public does not include (a) a current or former client; (b) another Lawyer; (c) an existing or potential professional or business connection; or(d) a commercial organization or public body. Further, sub-rule 7.03 prohibits unsolicited visits or telephone calls to members of the public. E-mails do not fall within this prohibition. However, a solicitor should check the terms of his agreement with his internet service provider as to the use of unsolicited e-mail, and in some jurisdictions the law prohibits unsolicited e-mail.

publicity. Publicity intended for a jurisdiction where it is permitted will not breach 7.04 through being incidentally received in a jurisdiction where it is not permitted.[156] A solicitor cannot authorize any other person to conduct publicity of their practice in a way which would be contrary to rule 7 (and 15.07, if applicable).[157] Rules 7.01 to 7.05 apply to all forms of publicity including the name or description of firm, stationery, advertisements, brochures, websites, directory entries, media appearances, promotional press releases, and direct approaches to potential clients and other persons. The letterhead of a firm must bear the words regulated by the Solicitors Regulation Authority.[158]

Solicitors are also required to comply with the general law on advertising, including: (a) any regulations made under the Consumer Credit Act 1974, concerning the content of advertisements; (b) sections 20 and 21 of the Consumer Protection Act 1987, regarding misleading price indications; (c) the Business Names Act 1985, concerning lists of partners and an address for service on stationery, etc.; (d) chapter 1 of Part XI of the Companies Act 1985, regarding the appearance of the company name and other particulars on stationery, etc.; (e) the Consumer Credit (Advertisements) Regulations 1989 (SI 1989/1125), in relation to advertisements to arrange mortgages; (f) control of misleading Advertisements (Amendment) Regulations 2000 (SI 2000/914), in relation to comparative advertising; (g) the Data Protection ACT. 1998; (h) E-Commerce Directive 2000/31/EC and the Electronic Commerce (EQ Directive) Regulations 2002 (SI 2002/2013); and the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI2003/2426).

They should also comply the British Code of Advertising, Sales, Promotion and Direct Marketing ("the Advertising Code"). A breach of a statutory provision or the Advertising Code may also entail a breach of rule 7 or another rule of conduct, but would not necessarily do so. For example, an advert adjudged by the Advertising Standards Authority to be untruthful under the

[156]Rule 7.04.
[157].Rule 7.05
[158]Rule 7.07.

Advertising Code might also, in the context of a complaint, be found by the Solicitors Regulation Authority to breach 7.01 (which requires that publicity is not misleading or inaccurate).[159]

Where a solicitor become aware of breaches of rule 7 in publicity conducted on his behalf, he should take reasonable steps to have the publicity changed or withdrawn. Publicity relating to charges must not be misleading or inaccurate, and must be clearly expressed. Offers of discounts could be misleading, if there are no clear rates of charges included. Similarly, if a solicitor publishes a service or services as being "free", this should genuinely be the case and should not be conditional upon some other factor (e.g. receiving further instructions or some other benefit). Further, if a solicitor publishes work as being done on a *pro bono* basis there must be no fees charged to the-client, except where a conditional fee agreement is used and the only fees charged are those which he receive by way of costs from the client's opponent or other third party and which are paid to a charity under a fee sharing agreement.[160]

According to the Code, websites are publicity and should comply with 7.01 to 7.06. If the website or e-mails of a solicitor is to include any financial promotion as defined in the Financial Services and Markets Act 2000, his firm will need to be authorized by the Financial Services Authority.[161]

5.4.4.2 Position in United States

Lawyers have not been advertising for generations in America[162]. It was not until 1977, the U.S. Supreme Court opined that attorneys were given the green light to advertise their services. The impetus for changing the professional code of ethics in relation to right of the lawyers to advertise in the United States was provided by the decision of U.S. Supreme Court in ***Bates v. State Bar of Arizona***[163]. In this case, the court held that lawyers had the right to First Amendment protection of commercial free speech. Immediately after this

[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] Para 27 of the American Bar Associations 1908 canons of Professional Ethics was against direct or indirect advertisement.
[163] 433 US 350 (1977).

decision the American bar Association (ABA) amended the Model Code to permit lawyers to advertise under a set of constraint, which is discussed in the succeeding paragraph.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading, if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.[164] Similarly, a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a perspective client when a significant motive for the lawyer's doing so for his pecuniary gain, unless the person contacted:

1. is a lawyer;
2. has a family, close personal, or prior professional relationship with the lawyer.[165]

Again a lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph if:

1. the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
2. the solicitation involves coercion, duress or harassment.[166]

further, every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "advertising material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs:

1. is a lawyer; or

[164]Rule 7.1.
[165] Rule 7.3(a).
[166]Rule 7.3(b).

2. has a family, close personal, or prior professional relationship with the lawyer.[167]

however, notwithstanding this prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in –person or telephone contact to solicit membership or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.[168]

Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.[169] But a lawyer shall not give anything of value to a person for recommending the lawyer's services except that lawyer may-

1. pay the reasonable costs of advertisements or communications permitted by this rule;
2. pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.[170]; and
3. pay for a law practice in accordance with rule 1.17[171]; and
4. refer clients to another lawyer or a non-lawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if
   i. the reciprocal referral agreement is not exclusive, and

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[167]Rule 7.3(c).

[168]Rule 7.3(d).

[169]Rule 7.2(a).

[170] A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority.

[171] A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied: (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted; (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firm; (c) The seller gives written notice to each of the sellers clients regarding:
(1) the proposed sale; (2) the client's right to retain other counsel or to take possession of the file; and (3) the feet that the client's consent to the transfer of the client s files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction, "the seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file, (d) The fees charged clients shall not be increased by reason of the sale.

ii. the client is informed of the existence and nature of the agreement.[172]

Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.[173]

Regarding the communication of fields of practice and specialization, a lawyer may communicate the fact that he/she does or does not practice in particular fields or law.[174] A lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation “patent attorney” or substantially similar designation.[175] A lawyer engaged in admiralty practice may use the designation “admiralty”, “proctor in admiralty” or a substantially similar designation.[176] A lawyer shall not state or imply that he is certified as a specialist in a particular field of law, unless:

1. the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
2. the name of the certifying organization is clearly identified in the communication.[177]

A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.[178] A law firm with offices in more that one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdiction limitations on those not licensed to practice in the jurisdiction where the office is located.[179] The name of lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any

[172]Rule 7.2(b).
[173] Rule 7.2(c).
[174]Rule 7.4(a).
[175]Rule 7.4(c).
[176]Rule 7.4(b).
[177]Rule 7.4(d).
[178]Rule 7.5(a).
[179] Rule 7.5(b).

substantial period in which the lawyer is not actively and regularly practicing with the firm.[180] Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.[181]

Finally, a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.[182]

5.4.4.3 Indian Position

Legal profession is a noble profession of ancient origin. The nobility of the profession can be corroborated from the fact that in Greece there was a system to allow persons to appear gratuitously in the courts for litigants and speak on his behalf.[183] It appears from the writings of ***Naraada, Virihaspati, Katayana, Manu*** and ***Shukra*** that before a person could plead and argue for another in the court, he hadto establish either that he was a relative or appointed agent of the party[184]. For instance, ***Narada*** says:

"He deserves punishment, who speaks on the behalf of another, without being the brother, the rather the son or the appointed agent, and so does he who contradicts himself at the trial."[185]

Roscoe Pound in the *Lawyers* ***from Antiquity to Modern Times*** (1953) states:

"There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service-no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."[186]

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[180] Rule 7.5(c).
[181] Rule 7.5(d).
[182] Rule 7.6.
[183] N. Dharmadan, "Nobility of Legal Profession", KLT 24 (2001)
[184] C.L. Anand, *Professional Ethics of the Bar 03*(The Law Book Company Pvt. Ltd, Allahabad, 1987).
[185] *Ibid.*
[186] V.R. Krishna Iyer, "Professional for the people: A Third World Perspective", Indian Bar Review 219 (1988).

Similarly Justice Brand is of the US Supreme Court has applied three criteria to a profession.[187] *Firstly,* a profession is an occupation for which the necessary preliminary training is intellectual in character involving the *knowledge* and to some extent learning as distinguished from *skill; secondly,* it is an occupation which is pursued largely for others and not merely for one's *self,* and *thirdly,* it is an occupation in which the amount of financial return is not accepted measure of success. Therefore, public service motivation and intellectualized expertise for community goods are dominant, with a discipline and high ethics to guide their exercise and income for the practitioner and material success for one's client being lesser values in the scale.[188] Further, self interest versus public interest, exploitation *of* exclusive rights to practice by catering to the higher economic bracket, unconcern with third world clientele, untouchability and unapproachability of the legal professions vis-i-vis the *daridranarayans* of the society and principles and policies which sound sublime, read majestic and profoundly humanistic functional futilities, teasing illusions and promises of unreality.[189]

The Indian judiciary also in a plethora of cases has upheld the nobility and sanctity of the legal profession.[190] In ***Ramon Services Pvt. Ltd. V. Subhash Kapoor***[191],the apex court held that persons belonging to the legal profession are concededly the elite of the society, they have always be in the vanguard of progress of development of not only law but the polity as whole. Citizenry looks at them with hope and expectations for traversing on the new path and virgin fields to be marked on by the society.

In ***C. D. Sekkizhar v. Secretary, Bar Council of Madras***[192]**,** the Madras High Court while acknowledging the restriction held:

[187] *Id.* at p.221.
[188] *Id.* at p.222.
[189] Ibid.
[190] The Apex Court in *Tahil Ram Issardad Sadaranganai v. Ram Chand Issardas Sadarangani* (AIR 1993 SC 1182) held that while deprecating the decreasing trend of the service element and increasing trend of commercialization of legal profession, pointed out that it was for the members to act and take positive steps to remove such an impression before it is too late.
[191] AIR 2001 SC 207.
[192] AIR 1976 Mad 35.

"Advertising in any form by a member of the profession of law is and has been for ages considered as reprehensible conduct. This is as it ought to be because of the standard which the gentle man of this profession have jealously developed and set up for themselves as befitting die honor, dignity and high position of the noble profession as rightly regarded as a kind of misconduct from the point of view of professional ethics. On that matter profession cannot be judged in the same way as the trade or rest of the public."

The Supreme Court of India in ***Bar Council of Maharashtra v. M.V. Dabholkar***[193]ruled:

"Law is not a trade, nor briefs and not merchandise and so the heaven of commercial competition or procurement should not vulgarize the legal profession."[194]

The court further added:

"We wish to put beyond cavil the new call to the lawyer in the economic order. In the days ahead, legal aid to poor and the weak, public interest litigation and other rule of law responsibilities will demand a whole new range of responses from the bar or of organized social groups with lawyer members. Indeed, the hope of democracy is the dynamism of the new frontiersmen of the law in this developing area and what we have observed against solicitation and alleged profit-making vices are distant from such free service to the community in the jural sector as part of the professions tryst with the people of India".[195]

Commenting on this issue, the Chairman of the Law *Commission* of India and former Supreme Court Judge, M. Jagannadha Rao, J, said;

"I think it will be a sad day if advertising is permitted in our print

[193](1976)2 SCC 291.

[194] The Court further observed: "We wish to put beyond cavil the new call to the lawyers in the economic order. In the days ahead legal aid to the poor and the wick, public interest litigation and the other rule of law responsibilities will demand a new whole range of responsibilities from the bar or organized social groups with lawyers members".

[195] For case laws see generally, *Re Sanjiv Data, Deputy Secretary, Ministry of Information and Broadcasting,* New Delhi, (1995) 3 SCC 619; *Indian Council of Legal Aid and Advice V. Bar Council of India,* AIR 1995 SC 691.

media….”[196]

On the other hand, the supporters of lawyer advertising *claim that it* will serve the purpose of providing information to the public about fees and services and accessibility to a competent lawyer.

Thus, a ban is imposed on lawyers advertising in India on the ground that legal profession is a noble profession, the aim of which is different from that of trade, occupation and business. In England and USA it is noble too, but as discussed above the lawyers are being allowed there to publish their profession subject to strict legal sanction. Further, in India the right to advertise has been recognized as a fundamental right under Article 19(1) (a) of the Constitution and may be restricted only on the grounds mentioned in Article 19(2); and neither restriction under Article 19(2) seems to be a justifiable ground for curbing the lawyer’s advertisement. Similarly, Article 19(1) (g) of the Indian Constitution guarantees the right to practice any profession or to carry on any occupation, trade or business subject to restrictions under Article 19 (6). This Article also does not include any ground to curb lawyers advertising. From another angle prohibition on lawyers advertising cannot be sustained, as it restricts the availability of legal services to the persons who are in need of the same. Therefore, the ban on lawyer s advertisements surely violates the litigants' right to be informed about legal services. The right to free legal aid is another fundamental right which is affected by ban on lawyer advertising.

Therefore, it is humbly suggested that Rule 36 of the BCI Rules should be amended to allow the lawyers to advertise their profession like United States and United Kingdom. Suggestion is also being made not to allow solicitation of legal service or competitive or comparative advertising but only advertisement of the legal service which gives relevant information to the litigants. It should be remembered that advertising is not an evil; it is only, when it advertises evil things. There is in fact nothing intrinsically good or intrinsically bad about

[196]See, Speech by Justice M Jagannadha Rao, Chairman, Law Commission of India at the Conference is convened for appraisal and comment on the draft ‘Code of professional conduct’ for the Legal Profession in the 21 Century's under the auspices of the ‘Union International Des Advocates’ (UIA).

commercial advertising. It is a tool, an instrument, it can be used well, and it can be used badly. If it can have and sometimes does beneficial results, it also can and often does have negative harmful impact on individuals and society.

Therefore, restriction should also be imposed on lawyers advertising similar to that of USA and UK by amending Rule 36 of the BCI. Besides this, it should also be subject to the restrictions imposed under Article 19(2) and 19(6) of the Indian Constitution and law relating to advertisement in India. A balance has to be maintained between sanctity and nobility of legal profession on one the hand and right of lawyers to advertise their profession and right of consumer of justice to receive information on the other. Apart from this the advertising industry itself has its own norms, which should also be applicable to lawyers adverting. Notwithstanding this, the sense of self-regulation among the lawyers alone would enable the members of the profession to maintain the nobility of legal profession and law as a useful instrument or social order.

5.4.5 The Companies Act, 2013

The Act is passed to consolidate and amend the law relating to Companies, Section 30 provides that where an advertisement of any prospectus of a company is published in any manner, it shall be necessary to specify therein the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and the names of the signatories to the memorandum and the number of shafts subscribed for by them, and its capital structure. Further, while making private placement through issue of a private placement offer letter, no company offering securities shall release any public advertisements or utilize any media, marketing or distribution channels or agents to inform the public at large about such an offer.[197]

The Act also prescribes that where any notice, advertisement or other official publication, or any business letter, billhead or letter paper of a company contains a statement of the amount of the authorized capital of the company, such notice, advertisement or other official publication, or such letter, billhead

[197]Section 42(8).

or letter paper shall also contain a statement, in an equally prominent position and in equally conspicuous characters, of the amount of the capital which has been subscribed and the amount paid-up.[198] If any default is made in complying with the requirements of sub-section (1), the company shall be liable to pay a penalty of ten thousand rupees and every officer of the company who is in default shall be liable to pay a penalty of five thousand rupees, for each default.[199]

Another important provision relation to advertising is found in Schedule IV, which deals with the Code for Independent Directors. The Code is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfillment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.[200] Part III of this schedule deals with the Duties of Independent Directors. Under such duty an obligation is imposed on the independent directors not to disclose confidential information, including commercial secrets, technologies, advertising and sales promotion plans, unpublished price sensitive information, unless such disclosure is expressly approved by the Board or required by law.

5.5 REGULATORY BODIES OF ADVERTISEMENTS

Although certain legislations provide provisions for regulating advertisement with reference to the subject for which the law was made, the absence of a specific regulatory body for regulating advertisements in our country is being felt. There is a demand from several quarters that this is high time that such a mechanism is constituted, with the advent and progress of new technologies prescribing advertising norms has become essential. In this age, besides the newspapers, magazines and other related print media, the electronic

[198] Section 60(1).
[199] Section 60(2).
[200] The Code is a guide to professional conduct for independent directors. Adherence to these standards by independent directors and fulfillment of their responsibilities in a professional and faithful manner will promote confidence of the investment community, particularly minority shareholders, regulators and companies in the institution of independent directors.

media is also playing a major rule in contributing to the growth of advertising which to a great extent influences the minds of the consumers. Importance and necessity of advertisement cannot be ruled out because it is the best medium to market the products. But in order to reach out to a maximum number of consumers the media managers of advertising agencies are adopting various strategies for commercial publication of their products, which in turn may be responsible for higher sales. To achieve this, there is a bigger competition among the advertisers which at times affects the market through false and misleading advertisements thereby exploiting the ethics, norms and standards. The innocent consumers get swayed by such misleading advertisements and thus the advertisers take advantage of this consumer confidence.[201]

Besides the demand from various organs, it is also suggested that it is high time that the media should impose self-regulation while dealing with such sensitive issues which will certainly go a long-way in the realm of media freedom.

There is no single regulatory body in India for the regulation of advertisements. Depending on the nature of the case, the power to regulate advertisements may be exercised by a vast variety of authorities- the courts, the Central and the State Governments,[202] tribunals,[203] or the police authorities.[204] In addition to these authorities is the PCI established under the Press Council of India Act, 1978 which is empowered to regulate advertisements. The council is guided by its "Norms of Journalistic Conduct" in the regulation of advertisements. The Press Council has Regulation of advertisements the power to hold an enquiry into a complaint against a newspaper and if it finds that the newspaper has violated the standards prescribed by the Council, it may warn,

[201]*Supra* note 113 at 137.

[202]As for instance, under the Young Persons (Harmful Publications) Act, 1956; the Cable Television Networks (Regulation) Act, 1995.

[203] For instance, the Copyright Board for a violation under the Copyright Act, 1957 orthe consumer fora constituted under the Consumer Protection Act, 1986.

[204]Under the Cable Television Networks (Regulation), Act, 1995 or the IPC.

admonish or censure the newspaper, the editor or journalist, as the case may be.[205]

5.5.1 The Advertising Standards Council of India (ASCI)

Like other countries around the world, India too has a self-regulatory organization (SRO) for advertising content- The Advertising Standards Council of India (ASCI) which was founded in 1985, incorporated into a company under Section 25, Companies Act, 1956 and is headquartered in Mumbai. The three main constituents of advertising industry, viz., advertisers, advertising agencies and media came together to form this independent and self-regulatory organization.

The primary aim of ASCI isto maintain and enhance public’s confidence in advertising. The chief mandate of ASCI is that the advertising material that reaches the Indian population must be honest, truthful and legal besides being safe and mindful of the interest of the consumers- especially children. Other key factors which are taken care of by the organisation are the prevention of objectification of the fairer sex and last but not the least, fairness to the competitors.

After ASCI issues notice to a party violating its code of Advertising practice, the party concerned is afforded an opportunity of presenting its case. If the party is unable to satisfy ASCI, ASCI may direct it to withdraw the advertisement. In-so-far as these directions concern members of the ASCI, there is usually no difficulty with compliance. The problem arises when directions are issued against non-members, who are not bound by the code. On occasion, non-members have taken ASCI to courts, challenging its authority to pass directions that affect non-members. In ***Century-Plyboards (India) Ltd.* v. *Advertising Standards Council of India,***[206]A Single Judge of the Bombay High Court set aside an order ***of*** the ASCI holding that its actions were violative of the fundamental right of the plaintiff under Article 19(1)(g) and that a voluntary association of persons could not be allowed to usurp the jurisdiction of the

[205]S.14 of Press Council of India Act, 1978.
[206]*(1999)* 3 Mah LJ 543: (2000) *1* Bom CR 136.

courts.[207] This order was set aside in appeal, albeit, without recording any reasons.[208] There is no decision of the Supreme Court so far on the issue. The Cable Television Networks (Regulation) Act, 1995 also recognises the standards prescribed by self-regulatory bodies. The Advertisement Code under the Cable Television Networks Rules, 1994 provides that no advertisement, which violates the standards of practice approved by the Advertising Agencies Association of India, Bombay, shall be carried in the cable service.[209] In an age of consumerism, which has coincided with, and in fact, has been largely catalysed by the growth and spread of the media, self-regulation within the advertising industry is an effective method of ensuring ethical advertising practices.

The object and purpose of the Code is to control the content of advertisements, not to hamper the sale of products which may be found offensive, for whatever reason, by some people. Provided, therefore, that advertisements for such products are not themselves offensive, there will normally be no ground for objection to them in terms of the Code prescribed by the ASCI.

The Code of Self-Regulation has been constructed by people connected with advertising sector, in consultation with representatives of people affected by advertising. The Code has been readily accepted by individuals, corporate bodies and groups and organisations engaged in the practice of advertising.

Following are the basic guidelines, drawn with a view to put in place, best advertising practices in India:

i. To ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements.
ii. To ensure that advertisements are not offensive to generally accepted standards of public decency.

[207] A similar order was passed by the Calcutta High Court *in Emami Ltd.* v. *Advertising Standards Council of India,* CS No. 12.7 of 2000, decided on 15-4-2008 (Cal).

[208] *Advertising Standards Council of India v. Century Plyboards (India) Ltd.,*Appeal No. 1483 of 1999, decided on 7-3-2000 (Bom) in Notice of Motion No. 242.9 of 1999 in Suit No. 3677 of 1999, Bombay High Court (unreported)

[209] Rule 7(9), Cable Television Networks Rules, 1994.

iii. To safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type, which is unacceptable to society at large.

iv. To ensure that advertisement observe fairness in competition so that the consumer's need to be informed on choices in the market-place and the canons of generally accepted competitive behaviour in business are both served.

The rules embodied in the Code swing into action, whenever there are conflicts qua the acceptability of an advertisement. It is immaterial as to who challenges the advertisement. Both the general public and an advertiser's competitors have an equal right to expect the advertisements to be presented fairly, honestly and responsibly.

5.5.1.1 Disclaimers and Qualifications

Most of us have often come across with these terms while reading or watching an advertisement irrespective of the medium. It is crucial for an advertisement to include disclaimers and qualifications in order to avoid or repel litigious claims against the seller. The most common ones being "Terms and Conditions Apply" and "Actual Product May Vary", these depictions art not only for the benefit of the advertiser but also for the targeted audience or plainly, the consumer.

Disclaimers and Qualifications are usually presented by way of "Supers" which are nothing but text, superimposed on an image or frames of a motion picture. These texts carry disclaimers or qualifications. Pertaining to the vital nature of Supers, the ASCI has prescribed a few standards, which must be kept in mind while printing/ running Supers. "Supers" should be clearly legible and on TV ads should be held long enough for the full message to be read by average viewer on a standard domestic TV set. Therefore following minimum size of lettering of "Supers" and its holding time on screen for TV ads is required.

1. For Print Ads the font size of the “Supers” shall be minimum 6 and 7 points for 100 cc or less and more than 100 column centimeter or equivalent size ads respectively.
2. For TV Ads the size of the “Supers” shall be of minimum 12 pixel height and stay not less than 4 seconds duration cm the screen for up to 2 lines of “Supers”. For every additional line of “Super” additional 2 seconds of hold time would be required. Script of the “Supers” should be in the same language as the audio of the advertisement.

5.5.1.2 Guidelines for Qualification of Brand Extension Product or Service

In order to evaluate genuineness of unrestricted product or service brand extension of a product (e.g. liquor and tobacco) whose advertising is prohibited by law, the Advertising Standards Council of India (ASCI) has framed the following objective criteria to be used to qualify a correct Brand Extension product or service:

1. Brand Extension Product or Service should be registered with appropriate Government authority e.g. CENVAT/VAT/FDA/FSSAI/TM etc.,
    - In store, availability of the product must be at least 10% of the leading brand in category the product competes as measured in the Metro Cities where the product is advertised.
    - Sales Turnover of the product or Service should exceed 5 cr. per annum nationally or 1 crore per annum per state where distribution has been established.
2. A valid certificate from independent organization such as ACNielsen or category specific industry association (for distribution and sales turnover) would be required to prove the concerned criteria.

5.5.1.3 Political and Government Advertisements

Since the advent and development of print and electronic media in the country, not only brands, but even political parties have started to make extensive use of the platform to drive agendas across to millions of people at once. Not behind in the race are the Governments, which also make extensive use of print and electronic media to run advertisements, which are aimed at conveying the progress of the Government so far.

However, the scope of ASCI's standards and guidelines do not encompass such advertisements. The reasons for such exclusion are:

1. ASCI's self-regulation system is established as an industry initiative with the objective of regulating commercial communication i.e. advertising which, directly or indirectly, solicits exchange of money for goods and services. ASCI's code specifically states that "The code for self- regulation has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising in the best interest of the ultimate consumer". Therefore, political, and non-commercial government advertising attempting to influence voters does not come under the ambit of ASCI.

2. It is important to ASCI's integrity that it is seen as an impartial adjudicator free from the perception of political bias. It is not possible to make decisions about whether apolitical or non-commercial government advertisement breaches the Code without the potential for being seen as taking a political viewpoint.

3. ASCI has mandates from industry associations such as ISA, AAAI, INS, IBF, etc. representing India's advertisers, advertising agencies and media to self-regulate advertising content.

With respect to the advertisement of political parties, Election Commission of India is the appropriate forum and authority to entertain complaints. For complaints regarding Government advertisements, Ministry of Information and Broadcasting may be approached.

5.5.1.4 Complaint Mechanism: The Consumer Complaints Council (CCC)

It is needless to mention that without a complaint mechanism in place, ASCI cannot discharge its functions effectively, in letter as well as in spirit. There is a well defined complaint mechanism in place which facilitates complaints in relation to advertisements to reach ASCI.

There are 3 categories of complaints conceived in the scheme:

- Complaints from the general public including from government officials, consumer groups, etc.;
- SuoMotu and NAMS complaints;
- Intra industry complaints.

1. Complaints from the General Public

Complaints received from the general public should be in the prescribed format providing relevant particulars including clipping or copy of print Ad/promotion material/timing, date and channels of TVC broadcast. However, in order to facilitate the General Public making complaints, the Secretariat will not insist on accepting complaints in the prescribed format or requiring a copy of the clipping as long as details of product/service, publication/channel/location, date/time and nature of complaint is clearly stated. The Secretariat using services of ad tracking agency will obtain the ad, in case a person from General Public is not able to furnish clipping, etc. The Secretariat will accept telephonic complaints also as is done by SRO’s outside of India. It will confirm and verify the complaints by writing to the party concerned, when a complaint is made orally.

2. SUO MOTU and NAMS Complaint

When a member of the ASCI Board, CCC, or the Secretary makes a complaint then it is treated as a suo-moto complaint The Board member, CCC member or the Secretariat has to register a complaint in writing. Complaints received from the National Advertising Monitoring Service (NAMS) after verification will be processed by the Secretariat as per normal procedure. When a complaint is deliberated upon by the CCC, it can raise a suo-moto complaint on another matter against other claims made in the originally complained advertisement. Suo-moto complaint goes through the same process as other complaints, ensuring that the Advertiser is given an opportunity to explain view point. If a suo-moto complaint is raised by the Secretariat, it needs the approval of the CCC.

3. Intra Industry Complaint

When a competitor makes a complaint against Advertiser, it is considered to be an Intra Industry complaint. If the complainant in this case mentions or quotes any reference to technical literature or a test or study contradicting the claim made by the advertiser, then the complainant will be required to produce the same. Where there is an Intra Industry complaint and both parties give contradictory reports on a claim made in the ad, then the Secretary General shall forward both reports to the CCC's technical experts whose views shall be tabled before the CCC for further deliberation on the Complaint. In case a third party Independent Report is required even after that, the CCC shall ask the Advertiser for the same.

5.5.1.5 Processing of Complaints

On receipt of a complaint (should be complete with relevant particulars including clipping or copy of print Ad/promotion material provided by complainant), the Secretariat will acknowledge the complaint and request the advertiser/agency to provide comments/response in respect of the complaint Secretariat will send out these two letters within 3 working days of receipt of the complaint.

ASCI's letter to the advertiser will carry an annexure, which contains verbatim the entire complaint of the complainant (with annexures/attachments), but care will be taken to see that the identity of the complainant is not revealed. In case, if the attachments include laboratory test reports, the identity of the laboratory or the source of authentication will be concealed.

Complainants, who are advertisers themselves, are required to provide an additional copy of the complaint and annexures/attachments, if any, on plain paper so that the additional set may be forwarded to the advertiser for their comments.

1. ASCI will give the advertiser one week for response, from date of receipt of ASCI letter.

2. In the first instance, if the complaint appears extremely frivolous and there seems to be no basis for the complaint, then the Secretary General will not send out a letter to the advertiser but will put up the same at the next CCC meeting to decide whether the complaint should be processed or not. The CCC will direct further action.
3. Complaint with all supporting information provided by the complainant and the advertiser/agency complained against, along with CCC's technical expert's opinion, if any, will be placed on the agenda of the next CCC meeting.

If the matter requires deeper technical evaluation, the CCC should refer the complaint to independent expert(s), if available, chosen from a list of experts nominated by the Board as experts in certain areas like Home and Personal Care products, Drugs and Pharmaceuticals, Ayurvedic medicines, Lubricants, Consumer Durables, etc.

5.5.2 The Advertising Norms for Journalists

We have already discussed the Constitution of the Press Council of India and its powers and functions. The Press Council is to preserve the freedom of the Press and to maintain and improve the standards of newspaper and news agencies in India. For the purpose a code of conduct has been evolved for newspapers, news agencies and journalist. It also deals with advertising norms. Thus, "Norms of Journalistic Conduct" evolved by the Press Council guides the media persons in the regulation of advertisement. The norms as evolved by the Press Council are as follows—

1. Commercial advertisements are information as much as social, economic or political information. What is more, advertisements shape attitude and way of life at least as much, as other kinds of information and comment. Journalistic propriety demands advertisements must be clearly distinguishable from editorial matters carried in the newspaper.

2. Newspaper shall not publish anything which has a tendency to malign wholesale or hurt religious sentiments of any community or section of society.
3. Advertisements which offend the provisions of the Drugs and Magical Remedies (Objectionable Advertisement) Act, 1954, should be rejected.
4. Newspapers should not publish an advertisement containing anything which is unlawful or illegal or is contrary .to taste or journalistic ethics or proprieties.
5. Newspapers while publishing advertisements, shall specify the amount received by them. The rationale behind this is advertisements should be charged at rates usually chargeable by a newspaper since payment of more than the normal rates would amount to a subsidy to a paper.
6. Publication of dummy advertisements that have neither been paid for, nor authorised by advertisers, constitute breach of journalistic ethics.
7. Deliberate failure to publish an advertisement in all the copies of a newspaper offends against the standards of journalistic ethics and constitutes gross professional misconduct.
8. There should be no lack of vigilance or a communication gap between the advertisement department and the editorial department of a newspaper in the matter considering the propriety or otherwise of an advertisement received for publication.
9. Editors should insist on their right to have to say in the acceptance or rejection of advertisements, specifically those which border on or cross the line between decency and obscenity.
10. An Editor shall be responsible for all matters, including advertisements published in the newspaper. If responsibility is disclaimed, this shall be explicitly stated beforehand.[210]

[210] *Supra* note 113 at 137-138.

5.5.3 News Broadcasting Standards Authority (NBSA)

The News Broadcasters Association (NBA) represents the private television news & current affairs broadcasters. It is the collective voice of the news & current affairs broadcasters in India .It is an organization funded entirely by its members. The NBA has presently 25 leading news and current affairs broadcasters (comprising 65 news and current affairs channels) as its members. The NBA presents a unified and credible voice before the Government, on matters that affect the growing industry.[211]

The objects of NBSA is to lay-down and foster high standards, ethics and practices in news broadcasting, including entertaining and deciding complaints against or in respect of broadcasters in so far as these relate to the content of any broadcast. NBSA administers the Codes of Ethics & Broadcasting Standards, which has been voluntarily drawn by the News Broadcasters Association (NBA) for its member broadcasters to demonstrate their commitment to responsible broadcasting and to self-regulate themselves.[212]NBSA has no involvement in the day-to-day operations of the broadcasters. NBSA does not monitor programming, nor does it pre-clear or pre-censor programming. The broadcasters have complete creative and editorial independence.[213]

In discharging its functions as aforesaid the NBSA shall act consistently with the following precepts:

- Maintaining and improving the standards of broadcast, and maintaining the independence of broadcasters, television journalists and/or news agencies;
- Ensuring compliance by broadcasters, television journalists and news agencies with the Code of Conduct and adherence by the said persons to high professional standards;
- Ensuring the maintenance of high standards of public taste and fostering a due sense of both the rights and responsibilities of citizens;

[211]http://www.nbanewdelhi.com/about-nba(Visited on 20/12/2018).
[212]http://archive.indianexpress.com/news/news-broadcasting-standards-authority-lays-down-do-s-and-don-ts-for-covering-sexual-assault-cases/1056106/(Visited on 20/12/2017).
[213]http://www.nbanewdelhi.com/objects-and-functions-of-nbsa(Visited on 20/12/2017).

- Fostering and encouraging the growth of a sense of responsibility and public service among all those engaged in and associated with the profession of television journalism and business of broadcasting?
- Keeping under review and scrutiny any developments likely to or having the tendency to restrict the gathering, supply and dissemination of news of public interest and importance:
- Such other aspects as may be incidental, consequential, related and/or otherwise materially concerned with the above precepts.

Case 1- New Delhi Television Ltd's English and Hindi language news channels—NDTV 24x7 and NDTV India—have been asked by the News Broadcasting Standards Authority (NBSA) to apologize on air for a news report they aired in October 2015. The report related to the lynching of a man in Nahan, Shimla. The two channels had blamed the lynching on specific religious groups, naming them in their headlines. In January 2016, the information & broadcasting (I&B) ministry lodged a complaint against NDTV 24x7 and NDTV India for "the telecast of alleged objectionable news report" by them. A detailed order issued by justice R.V. Raveendran, chairperson of the authority, said, "NBSA decided that the broadcaster (both channels) be directed to air its regret/apology for attributing the lynching to some named religious groups, apparently without verification of facts." The channels have also been fined Rs.1 lakh each.[214]

Case 2- Hindi news channel Zee News has been asked by the News Broadcasting Standards Authority (NBSA) to pay a fine of Rs1 lakh and apologize on air for a news report it aired in March 2016. NBSA is the self-regulatory complaints redressal body of the News Broadcasters Association which represents private television news channels.

In the report titled *Afzal Premi Gang ka Mushaira* the channel had called Urdu poet and scientist Gauhar Raza anti-national and a supporter of Afzal Guru, the 2001 Parliament attack convict who was hanged in 2013. The Zee

[214]http://www.livemint.com/Consumer/14gwMNfWLem2k7FfgKWdpM/NBSA-issues-notices-to-erring-news-channels.html(Visited on 20/12/2017).

Media Corp. Ltd-owned news channel had aired one of the poetry recitals of Raza interspersed with the footage of the controversial Jawaharlal Nehru University or JNU protests of February 2016. Acting on two complaints—one filed by Raza himself in April 2016 and the other a joint complaint filed by actor Sharmila Tagore, singer Shubha Mudgal, poet Ashok Vajpeyi and writer Syeda Hameed—justice R.V. Raveendran, chairperson of the body, in a detailed order dated 31 August said that the channel had breached the NBSA guidelines relating to accuracy, impartiality and neutrality. The channel has been asked to air the apology on 8 September and also remove the video of the programme if it is hosted on the website of Zee News (or any other links).[215]

5.5 CONCLUSION

It is interesting to note that most of these legislations are criminal in nature and control commercial as well as non-commercial advertisements. The prime objectives of these legislations are to save the society from immoral and unethical practices rather than individuals. The individual who has been wronged probably will not benefit financially from the Court proceedings.

Despite the existence of a plethora of legislations prohibiting/regulating various aspects of commercial advertising, the standard of advertisements has deteriorated sharply in recent years. The electronic media which is considered to be a strong pillar of our democracy is primarily responsible for such deterioration. In order to get attention and compete with rival TV channels, advertisements are being issued at the cost of vulgarity, obscenity and at time immorality. There is a great competition in press media also. Indecent poses/scenes are published in the supplementary part of newspapers.

These facts not only expose the inadequacy of the existing legislations but also point to their poor implementation by the enforcement authorities. The survey of the relevant legislations reveals the lack of an integrated and holistic approach to the problem of regulation of advertising in India. Instead of directly focusing on commercial advertisement as a whole, Parliament has included

[215]http://www.livemint.com/Companies/mOW29scIUNql8IJ9qV0Z3K/News-broadcasters-authority-asks-Zee-News-to-pay-fine-air-a.html(Visited on 20/12/2017).

provisions on those aspects of advertising which fall within the subject matter of each legislation. In other words, these legislations are not advertisement centric but contain provisions aiming at regulation of certain aspects of advertising. The only legislation directly dealing with advertisements is the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, but its coverage is unduly restricted to the advertisement of a handful of drugs and magic remedy. Due to poor implementation of this Act, advertisements prohibited under it are appearing in the print media with impunity. The Indian Penal Code, the Indecent Representation of Women Act, 1986, the Information Technology Act, 2000, the Cable Television Networks (Regulation) Act, 1995 forbid obscenity, indecency or vulgarity in the advertisement, but their provisions are of general nature which are also applicable to materials other than advertisements.

Apart from overlapping of provisions which may inhabit the implementation of the relevant provisions of the Act, the attitude of the enforcement authorities particularly the Police, in respect of obscene and indecent advertisements appearing in the print and the electronic media, is responsible for very few prosecutions under these Acts. As we have seen, in most of the cases against the newspapers or advertisers, criminal proceedings were instituted not by the police but by the public spirited social workers. In the absence of any comprehensive legislation on the regulation of commercial advertising on the electronic media, regulating undesirable advertising and punishing those who indulge in such unfair practice, is not possible.

It is therefore high time that the country should move from a sporadic, haphazard, segmented or compartmentalized approach to an integrated and holistic approach in the matter of regulation of commercial advertisements and enact a comprehensive legislation on the commercial advertisements. The Commercial Advertisements on Electronic Media (Regulation) Bill 2005, a private bill introduced by Mr. Kalraj Mishra provides the necessary framework for the drafting of such legislation. So the Government should come forward to enact a legislation regulation of on commercial advertisement on electronic and print media. As the commercial advertising is the life blood of the press in our country, journalists and owners of the press should be consulted on this issue and a national consensus should be obtained before enacting a comprehensive legislation on the subject.

The proposed legislation should provide for a viewer's forum with a total legal backing to monitor the advertisement on cable TV and print media and also to lodge protest against it. If necessary, the proposed legislation may provide for some sort of censorship for certain categories of commercial advertisement just like in the case of commercial films. The proposed legislation should provide for the establishment of Regulatory Authority of India who will oversee the whole issue of adverting business in the country within the scope of this legislation.

E-advertising; presents a number of intractable legal issues which require practical solutions so that the culture and traditions may be saved from obscene or pornographic advertisements. The Information Technology Act,2000 deal with only one aspect of e-advertising i.e. obscenity but there are many other aspects of e-advertising which call for an immediate, normative and regulatory response. Though publishing or transmitting false information carries a punishment under this Act, but this creates confusion as to whether it can be extended to include unfair trade practice including false and misleading advertisement. To this end it is suggested that the Information Technology Act, 2000 should be suitably amended to include the following provisions on the lines of (CAN-SPAM) Controlling the Assault of Non solicited (Pornography and Marketing) Act, 2003 of USA.

CHAPTER-VI

PROTECTION OF CONSUMER INTERESTS FROM MISLEADING ADVERTISEMENTS UNDER CONSUMER PROTECTION ACT

CHAPTER-VI

PROTECTION OF CONSUMER INTERESTS FROM MISLEADING ADVERTISEMENTS UNDER CONSUMER PROTECTION ACT

"*A consumer is the most important visitor on our premises; he is not dependent upon us, we are on him; he is not interruption to our work, he is the purpose of it, We are not doing a favour to a consumer by giving him an opportunity; he is doing us a favour by giving an opportunity to serve him*".

-Mahatma Gandhi.

6.1 INTRODUCTION

The importance of the Consumer Protection Act lies in promoting welfare of the society by enabling the consumers to participate directly in the market economy. It attempts to remove the helplessness of a consumer against powerful business establishments described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of the public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous considerations leaving the common man helpless, be wildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting it, is accepting it as part of life. The enactment of the Consumer Protection Act in these incredible but harsh realities seems to be the silver lining, which can control rot over time[1].

However to enable the consumers to participate directly in market economy, the consumer must have full information regarding quality and potency of the goods and services. Even otherwise right to information leads to open and transparent government in a welfare democratic state. It leads citizens to make informed choices about purchase of consumer goods and services

[1]*Lucknow Development Authority* v. M.K. *Gupta,* AIR 1994 SC 787 (790): 1993 (III) CPJ 7 (SC): 1994 (I) CPR 569.

which finally lead to higher consumer satisfaction. On the other hand when there is 'misleading advertisement' qua quality, quantity, potency of any product or service, or there is any 'unfair trade practice' the same will certainly lead to wrong choice of the product or service, thereby leading to lesser consumer satisfaction and on such 'misleading advertisements' and 'unfair trade practices' have to be checked at all costs.[2] We should not forget that advertisement of the products is the backbone for higher sale of the products but at the same time to save the innocent, illiterate and poor consumers, it is necessary to regulate advertisements in such a manner that the advertisements depict true and honest legal position and are prepared with a sense of responsibility and, therefore, misleading, false and deceptive advertisements should be controlled. [3]

There are several developed countries like USA[4], UK[5] and Canada[6] have adopted the necessary legislation and administrative measure to minimize the practice of false or misleading advertising long ago. But in India, the matter was left to be regulated under the tort and law of contracts.[7] The Monopoly and Restricted Trade Practices Act,1969 (hereinafter mentioned as MRTP Act), as originally enacted contained no provision for the protection of consumers against false or misleading advertising or other unfair trade practices. The Act was then directed only against restricted and monopolistic trade practices. The Provisions of the Act were based on the assumption that, if dealers, manufacturers or producers could be prevented from distorting competition, the consumer obtaining an equitable treatment. The growing incidence of misleading and deceptive practices proved that the said assumption was wrong.

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[2] Dr. J. N. Barowalia, Commentary on The Consumer Protection Act 169-170 (Universal Law Publishing Co., New Delhi, 3rd edn. , 2008).

[3] *Ibid.*

[4] Federal Trade Commission Act of USA was passed in 1914 which created the federal agency for the regulation of advertising. Apart from the FTC Act, the Lanham Trade Marks Act controls the unfair disparagement among the competitors.

[5] Trade description Act, 1968 of UK prohibits false trade description. The office of Fair Trading (OFT) acts under the control of misleading Advertisements Regulation 1988, whose main role is to support and reinforce existing advertising controls but not to replace them.

[6] The Competition Act, 1985 of Canada prohibits deceptive or misleading advertising or representation. Section 52 of the Competition Act makes false or misleading representation an indictable offence.

[7] Rajeev Batra, John G Myers, et.al., Advertising Management, (PEARSON, 5thed,. 2002).

The absence of any special legislation to deal with such practices created a situation of a very safe haven for the suppliers, manufactures, distributors, businessmen and sellers and a position of frustration and uncertainty for consumers. Following the recommendations of the *Sachar committee*[8], it was considered necessary to amend the MRTP Act,1969 and Parliament in its wisdom inserted Section 36A to 36 E in 'Part B' of the Act by an amending Act of 1984, to provide specific legal provisions for regulating unfair trade practices.

It is noticeable point that after the enforcement of Competition Act, 2002, the MRTP Act was repealed and Commission established under it has become a thing of past. The justification of including a separate chapter on MRTP Act, 1969 lies in the fact that after the repealing of MRTP Act, 1969, the Consumer Protection Act, 1986 remain as the only regulation to control the unfair trade practices. Further, the definition of unfair trade practice under the MRTP Act, 1969 is more or the less similar to that of the definition under the consumer protection Act, 1986. So the jurisprudence of unfair trade practice developed by the MRTP Commission can be a beam of light for the Consumer Dispute Redressal Agencies for disposing unfair trade practice cases including false and misleading advertisings.

The Consumer Protection Act, 1986 (hereinafter called CP Act) is one of the benevolent laws designed to protect large numbers of consumers from exploitation. This legislation provides for the better protection and promotion of consumer rights[9] through the establishment of Consumer Councils[10] and

[8] "High Powered Expert Committee" set up by the Government resolution to review the Companies Act and MRTP Act.

[9] Section 2(9) CPA 2019 & Statement of Objects and Reasons of Consumer Protection Act, 1986 provides for the rights of consumers such as:

a) the right to be protected against marketing of goods which are hazardous to life and property;
b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practice;
c) the right to be assured, wherever possible, access to variety of goods at competitive prices;
d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
e) the right to seek redressal against unfair trade practice or unscrupulous exploitation of consumers; and
f) right to consumer awareness/education.

three-tier quasi-judicial machinery.

Under this Act, 1986, the Consumer Dispute Redressal Agencies have been set-up throughout the country with the District commission [11] at the District level, State Commission[12] at the State level and National Commission[13] at the National level, to provide simple inexpensive and speedy justice to the consumers with complaints against defective goods, deficient services and unfair and restrictive trade practices. The provisions of this Act are in addition to and do not revoke the provisions of any other law at this time.[14]. In other words, The Act establishes an alternative system of justice for the consumer by summary trial. The powers conferred by law exercise quasi-judicial powers for the settlement of consumer disputes and constitute one of the postulates of

[10] Sections 4, 7 and 8-A of CP Act, 1986 & Sections 3, 6 and 8 of CP Act, 2019 provide for the establishment of Central Consumer Protection Council, the State Consumer Protection Councils and the District Consumer Protection Council respectively. The object of the Consumer Protection Councils shall be to render advice on promotion and protection of the consumers' rights under this Act within their respective spheres.

[11]Sections 10 of CP Act, 1986 & Section 28 of CP Act, 2019: There shall be established in each district a consumer dispute redressal commission to be known as a 'District commision' by the state government. Each District Commission shall consist of— (*a*) a President; and (*b*) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.; *Section l1of CP Act, 1986 & Section 34 of CP Act, 2019*: Subject to the other provisions of this Act, the District Forum shall have jurisdiction to entertain complaints where the value of goods or services and the compensation, if any, churned does not exceed rupees twenty lakhs (amended one crore rupees under the Consumer Protection Act, 2019). A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction the opposite party or each of the opposite patties, where there are more than one, at the time of the institution of the complaint actually and voluntarily resides or carries on business or has a branch office or personally works for gain or any of the opposite parries, where there are more than one at the time of the institution of the complaint, actually and voluntarily resides or carries on business or have a branch office or personally works for gain, provided that in such case either the permission at the District Forum is given, or the opposite parties who do no reside, a carry an business as have a branch office or personally work for gain, as the case may be, agencies in such institution as the case of action, wholly or in part arises or (added "the Complainant resides or personally works for gain" under the Consumer Protection Act, 2019).

[12]Sections 16 of CP Act, 1986: Each State Commission shall consist of a president and not less than two ["not less than four" under section 42 of the Consumer Protection Act, 2019], and not more than such number of members, as may be prescribed, and one of who shall be a woman; Section 17: The State Commission shall have a jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, exceeds rupees twenty lakhs ("one crore" under section 47 of the Consumer Protection Act 2019) but does not exceed rupees one crore ("ten crore" under section 47 of the Consumer Protection Act 2019).

[13] Section 20of CP Act, 1986 & Section 54 of CP Act, 2019: The National Commission shall consist of a president and not less than four and not more than such of number of members, as may be prescribed, and one of whom shall be a woman; *section 21 of CP Act, 1986:* The National Commission shall have a jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore ("ten crore" under section 58 of the Consumer Protection Act 2019).

[14] Section 3 CPA 1986.

consumer forums that must succeed based on reason. The obligation to state reasons provides clarity, but also excludes, or at least minimizes the possibilities of arbitrariness. In the forum above, you can test the accuracy of these reasons.[15]

The Act as originally enacted did not provide for the adjudication of complaint relating to unfair and restrictive trade practices. It was only in the year 1993 that provisions relating to such practices were inserted in the Act and as a consequence of which the authorities under the Act became empowered to adjudicate complaints involving unfair and restrictive trade practices. These authorities are under an obligation to interpret the provisions of the Act in a rational manner keeping in view the objectives which this Act, seeks to achieve. A rational approach and not a technical approach is the mandate of law. It is therefore, tempting to see, how the District Forum, State Commissions and National Commission have interpreted the provisions of the Act relating to unfair trade practices including the practice of false or misleading advertisements in newspapers and on the electronic media. Against this background, an attempt has been made in this chapter to discuss and examine the scope of unfair trade practices as defined under the Act in the light of the decisions of State Commissions, National Commission and the Supreme Court of India. It will be followed by a brief but interesting discussion on the procedural aspects of the adjudication of the complaints against unfair trade practices. This chapter will show how the procedure for redressal of consumer grievances relating to unfair trade practices under the CP Act is better than one envisaged in the MRTP Act, 1969.[16]Consumer Protection Act is additional remedy available to the consumers. The provisions of this Act give the consumer an additional remedy besides those that may be available under the other existing laws. For example, co-operative society can also file complaint

[15] Manoj Kumar Padhy, Consumer Protection and Advertisement Laws 205-206 (Satyam Law International, New Delhi, edn. 1st , 2016).
[16]*Ibid.*

under the Consumer Protection Act.[17]

The new Act replaced the consumer protection law of 1986, which is more than three decades old. The Consumer Protection Act 2019 was passed by the Parliament on 6 August 2019 (2019 Act) with the objective of overhauling the earlier regime and replacing the Consumer Protection Act 1986 (1986 Act). The 2019 Act did not automatically come into force, and the Central Government was authorised to notify the 2019 Act and/or select provisions thereunder.[18]The Central Government has, on 15 July 2020[19], notified several provisions of the 2019 Act which have come into force from 20 July 2020.[20]

The landmark Consumer Protection Act 2019 aims to protect the rights of consumers by creating authorities to administer and resolve consumer disputes quickly and efficiently. The new Act provides the specific definition of misleading advertisement and extended the meaning of Unfair Trade practices. Apart from this, CCPA has been established to prevent the misleading advertisements which hamper the rights of the consumer.

6.2. MEANING AND DEFINITIONS

6.2.1 Meaning and Scope of the Expression "Consumer"

In the general perspective, it is to be understood that, every person in the country is a consumer. Any person who buys any goods for consideration is a consumer. Since the 'consumer' is the focal point of consumer protection legislation, it is necessary to understand the meaning of the term. The word 'consumer' is a comprehensive expression. It extends from a person who buys

[17]Rajyalakshmi Rao, Consumer is King!! 22 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2008).
[18]Section 1(3) of the CPA 2019.
[19] Notification No. S.O. 2351(E) dated 15 July 2020, available at: http://egazette.nic.in/WriteReadData/2020/220546.pdf (Visited on 01/10/2020).
[20]Saurajay Nanda and Akash Ray, "The Consumer Protection Act 2019: Key Highlights Of The Notified Provisions And Their Impact" 1 Tuli & Co., available at: https://www.mondaq.com/india/dodd-frank-consumer-protection-act/972500/the-consumer-protection-act-2019-key-highlights-of-the-notified-provisions-and-their impact#:~:text=The%202019%20Act%20did%20not,force%20from%2020%20July%202020.(Visited on September 5, 2020).

any commodity to consume either as eatable or otherwise from a soap, business house, corporation store, fair price shop to use of private or public services.[21]

According to the *Concise Oxford Dictionary*[22], 'consumer' means a person who consumes, especially one who uses a product; a purchaser of product with a relatively long useful life (e.g., a radio or washing machine).

'Consumer' as per Section 2(1)(d) of CP Act, 1986 means any of the following persons:

1. The goods or services must have been purchased or hired or availed of for consideration which has been paid in full or in part or under a system of deferred payment i.e.; in respect of hire-purpose transactions. The term includes any other user of such goods when such use is made with the approval of the buyer.

   The expression "consumer", however, does not include a person who obtains such goods for resale or for any commercial purpose.
2. A person who hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment. The term includes any other beneficiary or such services with the approval of the first-mentioned person. But, a consumer does not include a person who avails of such services for any commercial purpose.

'Commercial purpose' does not include use by a person of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood by means of self-employment [Explanation to section 2(l)(d)].

The new 2019 Consumer Protection Act has broadened the definition of "consumer" to include people who conduct offline or online transactions

[21] Dr. Shailesh K. Singh, Fundamental of Consumer Protection Jurisprudence 42-45 (Regal Publications, New Delhi, edn.1st, 2013).
[22]*Concise Oxford Dictionary* , p. 247, 8th Edn., 1990.

electronically or via teleshopping or direct selling or multi-level marketing.[23] Consumer is not confined in real world only but also virtual world.

In ***Western India State Motors v. Subhag Mai Meena and Others***[24], court held that a vehicle has been purchased for the purpose of running it as a taxi (except where purchased by a person to earn his livelihood), the purpose being commercial, and the buyer shall not be a consumer under the Act.

Any economic activity or transaction carried on with the motive of making profit would fall under the term commercial purpose, irrespective of the scale of operations. In ***S. Pattabhirame v. Sp. S.T. Palanippan***[25], the National Commission held that an X-ray machine purchased by a private company comprising of qualified medical practitioners amount to a purchase for a commercial purpose and hence the company cannot be regards as a consumer under the Consumer Protection Act. However, in ***Synco Textiles Pvt. Ltd v. Greaves Cotton & Co. Ltd.***[26], the National Commission observed that main determinants of the character of a transaction- weather it is for a 'commercial purpose' or not are the immediate purpose as distinct from the ultimate purpose or not are the immediate purpose as district from the ultimate purpose of purchase/sale in the same form or after conversion and direct nexus with profit or loss. Thus, buyers of goods or commodities for 'self-consumption' in economic activities in which they are engaged were held to be consumer under the Act. But, debenture if purchased for resale shall make transaction for commercial purpose.

6.2.2 Misleading Advertisements

Misleading advertisements are those advertisements that deceive or are

[23] A new explanation has been added to the definition of "Consumer" in section 2(7) of CPA 2019. Section 2(d) of CPA 1986 contained the earlier definition of "consumer".
[24] 1989 CPJ 10 (NC).
[25] 1994 CPJ (NC).
[26] 1991 CPJ (NC).

likely to deceive anyone who sees it. Misleading advertising may affect consumer's choices regarding what they buy. It's worth bearing in mind that it may be an offence for a trader to advertise goods or services if it is likely to delude and therefore cause loss, damage or injury to the consumer.

Earlier, there was no specific definition of misleading advertisement but consumer Protection Act, 2019 give specific definition of it.

"Misleading advertisement" in relation to any product or service, means an advertisement, which—

(i) falsely describes such product or service; or

(ii) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or

(iii) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or

(iv) deliberately conceals important information;[27]

An advertisement is misleading if it creates increases or exploits a false belief about expected product performance[28]. The following are some examples of how advertisements can be misleading:

- The conditions of delivery of the goods or services diverge to that advertised. (Example: 'free delivery' actually involves a fee or charge)
- Claims made about the characteristics of goods and services consisting a fake declaration of fact. (Example: A product weighs 800g instead of 1 Kg)
- The attributes of the advertiser, the advertiser's identity etc. are exhibited falsely. (Example: A made in India labeled product actually a product which is Made in China)

[27] Section 2(28) of CPA 2019.

[28] J. Edward Russo , Barbara L. Metcalf, Debra Stephens "Identifying Misleading Advertising" TJCR 128 (1981)

- The price or manner, in which the price is calculated, is altered. (Example: Goods are not offered at sale prices, but advertised as such)
- Advertisements can be illusory in other ways as well. For example, if the advertisement conceals some important facts. (Example: '60% Discount on everything' – really only applies to certain things).

Advertisements are also considered misleading if they create a false impression even if everything stated in the advertisement may be literally true. Misleading advertising occurs when a claim about a product or service is materially false or misleading, in an attempt to persuade the consumer to buy it. Misleading ads generally make claims that can generally be classified as puffery claims, data-based claims, and testimony claims. While puffery claims are made without involving any scientific basis, data-based claims are simply that a test / study / count or some sort of scientific effort was made to produce the basis for the claim. The use of a name, signature, photograph, etc. made false testimonial claims[29].

6.2.3 Unfair Trade Practices

Section 2(1)(r) of the Consumer Protection Act, 1986[30] gives a general cum enumerative definition of unfair trade practice. Though the definition is identical to one given in Section 36(A) for the MRTP Act, it represents an improvement over the latter in the sense that it also adds two additional categories of unfair trade practices[31].The Act contains a definition of unfair trade practice in the form of a list of categories prefaced with the words. It means that an unfair trade practice is a general concept. Anything which is an unfair method or a deceptive practice for the purpose of promoting sale etc. of goods or provisions of services may amount to an unfair trade practice whether

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[29] Mrs. Vaishali Kathuria Billa "Advertising Ethics and Law" Page 80, Available at:http://www.ddegjust.ac.in/studymaterial/pgdapr/pgdapr-103.pdf(Visited on April 5, 2017 7:36PM)

[30] The definition of "Unfair Trade Practice" in section 2(47) of CPA 2019 has added 3 new types of Unfair Trade Practices. Section 2(1)(r) of CPA 1986 contained the earlier 6 types of unfair trade practice.

[31]Section 2(l)(r)(3-A) and Section 2(l)(r)(6).

it falls in the list of categories or not. The listed categories of practices have now become a category of illustration. Again, under the CP Act, it is enough to show that a practice of the kind enumerated has been adopted, the proof of the loss or injury to the consumer is not necessary. “Unfair trade practice” should not be confused, with “defect in the goods” or “deficiency in service”. In ***Radhika Litho Press v. Fuser Graphic Equipments,***[32] the State Consumer Disputes Redressal Commission (SCDRC), Pondicherry held that, “Unfair trade practice” is defined very precisely under the Act and the specific Relief to be granted is also indicated in the Act. Therefore, wherever there is defect in the goods people should not use word “unfair trade practice” before the District Forum/State Commission. One of the objectives behind the law aiming to curb unfair Trade Practices is to protect the general public from false and misleading advertisements.

To know the working of the law on unfair trade practices, we need to examine specific provisions of the Section 36A of the MRTP Act. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36D, if the practice is ‘prejudicial to the interest of any consumer or public interest or consumers generally’. Specific unfair trade practices in Section 36 (A) fall under following broad heads:

1. False representation of products or services, including false description, guarantee, warranty or performance of a product or service.
2. Advertisement of false bargain price.
3. Contest, lotteries, game of chance or skill for promotion of sale.
4. non- compliance of product safety standards; and
5. Hoarding or destruction of goods.

In order to establish unfair trade practice the goods must be supplied or

[32](1998) IICPJ 400 (Pondicherry).

the service must be rendered. Meaning thereby without supplying goods or rendering services there shall be no unfair trade practice at all. In ***Philips Medical Systems (Cleveland) Inc. v. Indian MRI Diagnostic and Research Ltd. and Anr.***[33]***,*** the question was whether a party could be found guilty of unfair commercial practices when the goods were not supplied at all. It has been argued that the purpose of the MRTP is to ensure that people who buy certain goods are not deceived or deceived by a representation or advertisement claiming that the goods have certain characteristics or qualities which, in fact, do not have the law, nothing to do with a situation where the goods are not sold at all. Section 36A does not apply in a situation where the goods are not sold at all. It only applies when goods are actually sold.

Further, in ***General Motors (India) Private Limited*** Vs. ***Ashok Ramnik Lal Tolat***[34]***,*** an appeal filed against order whereby National Commission held that The respondent engaged in an unfair commercial practice which had misled the applicant to buy a vehicle and therefore ordered him to pay punitive damages, regardless of the absence of any conviction in the complaint and without evidence of loss suffered, the award of punitive damages was allowed. While dismissing the appeal, the Supreme Court concluded that the complaint did not contain any claims regarding punitive damages inflicted on other consumers, nor did the appellant know that this claim served on him. Punitive damages were normally awarded for irregularities committed unrelated to the actual loss suffered, and this claim had to be specially pleaded. The National Commission, in the exercise of its powers of revisional, was concerned only with the appropriateness or not of the order of the State Commission aiming to annul the relief granted by the District Forum and to approve the order that the State Commission should have passed. However, the National Commission

[33] AIR 2009 SC 1052.

[34] AIR 2015 SC 562; refer also *Ludhiana Improvement Trust* v. *Shakti Coop. House Building Society Ltd.,* (2009) 12 SCC 369; *Colgate Palmolive (India) Ltd.* v. *MRTP Commission,* (2003) 1 SCC 129; *Godfrey Phillips India Ltd. v. Ajay Kumar* (2008) 4 SCC 504.

went far beyond its competence by granting relief which were not requested in the complaint as well as before the State Commission. Therefore, impugned order in respect of deposit of amount towards punitive damages was set aside.

So, if you have been the victim of an unfair and deceptive trade practice, you must know that Consumer Protection act gives you the right to be protected from unscrupulous commercial conduct and practices.[35]

6.3 SPECIFIC CATEGORIES OF UNFAIR TRADE PRACTICES

The definition of 'unfair trade practice' consists of six categories and some categories have been further subdivided into sub-categories. Along with these, some more unfair trade practices are added under the new Consumer Protection Act, 2019.Following specific categories of unfair trade practices[36] have been recognized under the consumer protection Act:

6.3.1 Misleading Advertisement and False Representation

The first category of unfair trade practice has been laid down in clause (1) of section 2(1)(r) which relates to the practice of making false or misleading representation. All the sub-clauses (i) to *(x)* of this provision have a common element of factum of representation which must be false or misleading.[37] Misleading advertisement and false representation under this head[38] may be constituted either orally or in writing or by visible representation (including by way of electronic record). The 'Explanation' to clause (1) of Section 2(1) (r) clarifies as to when a statement is said to be made to the public and by whom it is said to be made. A statement would be 'misleading', when it is susceptible to two interpretations, one of which is false. In other words it means 'leading people into error'. It is wider in scope than the word 'false', which suggests that 'which is not true'. For the purpose of Section 2(l)(r)(l), it

[35]*Supra* note 17 at 265.
[36]Farooq Ahmed, "False and Misleading Advertisements - Legal Perspective", J.I.L.I., 168-183(1996).
[37] V.K. Agarwal, Consumer Protection (Law & Practice) 321-322 (B.L.H. Publisher's Distributors Pvt. Ltd., New Delhi, 2003).
[38] Section 2(1)(r)(1).

is not material that the person making the statement knows that the statement is false. Even where a person *bonafidely* makes a statement which later turns out to be false, it would also fall under this section[39]. Such an interpretation would be in consonance with the intention of the legislature that a seller shall not make any statement about the truth of which he is uncertain.

It may again be pointed out that the liability under Section 2(l)(r)(l) is imposed only on the person who caused the representation to be made and not on the person, who actually made the representation. Needless to say, this rule saves the advertisement media or service provider from the liability which is clear from the 'Explanation' attached to clause (1) of Section 2(1)(r).

6.3.1.1 False or Misleading

'False' means which is not true. The expression 'falsely represents' used in section 36A(1) indicates that the representation is contrary to facts. It is stated in *Halsbury's Laws of England*[40], that a representation, will be deemed to be false, if, it is false in substance and in fact, and the test by which the representation is to be judged is to see whether the discrepancy between the fact as represented and the actual fact is such as would be considered material by a reasonable representee.[41] Another way of stating the rule is to say that substantial falsity is, on the one hand necessary, and, on the other, adequate to establish a misrepresentation and that where the entire representation is a faithful picture or transcript of the essential facts, no falsity is established, and even though there may have been any number of inaccuracies in unimportant

[39] S. 15(a) of Federal Trade Commission Act, 1914 of U.SA : The term false advertisement means an advertisement other than labeling which is misleading in material respect; and in determining whether any advertisement is misleading there shall be taken into account (among other things) not only representation made or suggested by statement, word, design device sound or any consideration thereof but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions described in said advertisement, or under such conditions as are customary or usual.

[40](4th ed.), para.1044 & 1045.

[41] S. M. Dugar, Commentary on MRTP Law Competition Law & Consumer Protection Law (3 In 1) (Wadhwa, Nagpur, edn. 4th , 2006).

details. Conversely, if the general impression conveyed is false, the most punctilious and scrupulous accuracy in immaterial minutiae will not render the representation true.[42]

The term 'misleading' means capable of leading into error. There is an obligation on the seller that if he advertises or otherwise represents, he must speak the truth. This obligation also requires that the representation must avoid half-truths. Sometimes, a statement may be literally true and yet it may be false or misleading. An advertisement may be misleading because things are omitted that should be said or because advertisements are composed or purposefully printed in such a way as to mislead.[43] A representation that contains an apparently correct statement in the technical sense can have the effect of misleading the consumer by using complicated/tricky language. Consequently, it is necessary to determine whether the representation claimed involves the possibility of misleading the purchaser.[44]The meaning of advertisements or other representations to the public, and their tendency to mislead or deceive are question of facts to be determined by the Consumer Redressal Forums or the MRTP Commission. The main aim is to bring honesty and truth in the relationship between the seller and the consumer. The truth of the advertisement or representation must be proved if the same is challenged.[45]It is not material whether the facts have been falsely represented by the advertiser in good or bad faith.[46] The fact that the representation has been made in good faith is not material to determine whether it is deceptive or misleading. Mere good faith does not relieve the advertiser from the responsibility of misrepresentation since intent to deceive is not an essential element.[47] The important criterion, therefore, is to ascertain that what impression is likely to be created by the

[42]*Lakhanpal National Ltd.*, v. *MRTP Commission,* (1989) 66 Comp. Cas. 519 (SC).
[43]Sachar Committee Report, (1978), pp. 262-63.
[44]*Lakhanpal National Ltd.*, v. *MRTP Commission,* (1989) 66 Comp. Cas. 519 (SC).
[45]Sachar Committee Report, (1978), pp. 262-63.
[46] Koch v. F.T.C., 206 F 2d. 311.
[47]Chryster Corp. v. F.T.C., 561 F. 2D. 357.

representation/statement upon the consumers.[48]

In ***Lakhanpal National Ltd.* v. *M.R.T.P. Commission,***[49] the appellant company was a producer of 'Novino' batteries in collaboration with a Japanese Company, namely, 'Mitsushita Ltd.' The appellant-company advertised its batteries as being produced in collaboration with 'National' and 'Panasonic'. That was not the name of collaborator, but by these brand names of its products the collaborator was popularly known in India. In other words, instead of the name of the collaborator, the appellant-company represented the collaboration with the products of the collaborator. The Supreme Court held that this erroneous description did not attract section 36A of the MRTP Act, because it is the same company that manufactured products called 'National' and 'Panasonic'. Sharma, J. observed[50]:

Where the reference is being made to the standard or the quality, it is not material whether the manufacturing company is indicated by its correct name or by its description with reference to its products. We, therefore, hold that the incorrect description of the manufacturing company in the advertisements in question does not attract section 36A although we would hasten to add that it would be more proper for the appellant company to give the full facts by referring to 'Mitsushita Ltd.' by its correct name and further stating that its products are known by the names 'National' and 'Panasonic'.

In ***Hindustan Lever Ltd.* v. *Colgate Palmolive (I) Ltd. and Another,***[51] the Ist respondent, Colgate Palmolive (India) Ltd. was the manufacturer of 'Colgatate Dental Cream'. The appellant, the manufacture of the 'New Pepsodent' toothpaste had given advertisement in the print, visual and hoarding media, claiming that its tooth-paste 'New Pepsodent was 102% better than the

[48] V. K. Agarwal, Consumer Protection in India : with special reference to Restrictive and Unfair Trade Practices 398-99 (Deep & Deep. Publications, New Delhi 1989).
[49] (1989) 66 Comp. Cas. 519 (SC).
[50] Id., at 525.
[51] (1989) 1 CPJ 10 (SC).

leading toothpaste'. The respondents filed the complaint under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and alleged that the appellant was guilty of "unfair trade practice" under section 36A to the extent that the appellant adopted, for the purpose of promoting the sale, use or supply of its products, an unfair method or deceptive practice by making a representation as stated in section 36A(1)(viii) and giving false and misleading facts 'disparaging' the goods of the appellant as stated in section 36A(1)(x).The MRTP Commission noticed that so far as claims of 102% bacterial superiority was concerned, it was a matter which required highly scientific approach and should be decided by independent experts and it would be hazardous for the Commission to venture even a *prima facie* opinion. As to the 'Anti-bacterial' superiority, the Commission stated that the inference was that the appellant was not merely treating its toothpaste superior but was treating Colgate as 102% inferior. It was not necessary that there should be any direct reference about inferiority and it was sufficient if there was an allusion, hint, etc. to that effect and such a reference *prima facie* amounted to 'disparagement' for the purposes of section 36A(1)(x).

On the basis of the above reasoning, the MRTP Commission granted a temporary interim injunction against the appellant from making any reference directly or indirectly in the appellant's advertisement claiming anti-bacterial superiority and also from making any 'specific quantum' of anti-bacterial superiority – 'till its claim of such anti-bacterial superiority is fully established'. This would also be for protecting the consumer's interest. The Supreme Court, while dismissing the appeal, held that the order passed by the Commission was a purely discretionary order and was also an *interim* order pending the passing of a final order and is not liable to be interfered with in this appeal.[52]

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[52]*Colgate Palmolive (l) Ltd. And Another* v. *Hindustan Lever Ltd.*, (1999) II CPJ 19 (MRTPC), the MRTP Commission has held that mere laboratory test or study may not be Sufficient for the purpose. It

6.3.1.2. Statement Made to the Public

The *Explanation* given under clause (1) of section 2(l)(r) lays down the provision as to when a representation would amount to a statement made to the public. It provides, that a statement that is- (a) expressed on an article offered or displayed for sale or on its wrapper or container; or (b)expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained. Where a statement is made in any of these manners, it shall be deemed to be a statement made to the public. The statement may be expressed on the article, or on its wrapper or container or inserted in or accompanying the articles offered or displayed for sale. Thus, any advertisement, circular, [53] literature, etc. relating to an article whether issued separately or accompanied the article would be within the ambit of the provision. Further, a statement is considered to be a statement made to the public by and only by the person who caused the statement to be expressed, made or contained. It reveals that the liability will be only of that person who had caused the misrepresentation to be made and not of any other person through whom that representation is made. Thus, a person who owns, controls or manages the medium (e.g. newspaper, journal, magazine, radio or television) through which the representation is made will not be liable because he himself is not making the representation but following

would be quite proper that the test is carried out in the light of some clinical study in the context of long-term plaque and gingivitis. The Commission opined that the claimof*102%* superiority made by the respondent *qua* New Pepsodent over Colgate Dental Cream can be best examined if such tests are carried out.

[53]*Seven cases* v. U.S., 239 US510.

the instructions of his advertiser.[54]

6.3.1.3. Forms of False or Misleading Representation

The Representation may be made by making any statement, orally or in writing or by visible representation. It embraces not only words but also pictures associated there-with. The various forms of prohibition enumerated in clause (1) of section 2(1)(r) have been discussed as follows:

6.3.1.3.1. Falsely Representation as to Standard, Quality, Quantity, Grade, Composition, Style or Model of the Goods

False statements made with respect to goods about their standard, quality, grade, composition, style or model has been discussed under this clause.[55] These practices have been barred because they are deceptively misleading. The term 'quality' used in this clause is of wide meaning. Earlier production of TV, when compared with later production would be of lesser quality[56]. Similarly, the supply of remote control having three functions against the advertised 17 functions is an unfair trade practice.[57] In ***Hindustan Latex Ltd*** **v.** ***Neoplast Engineering Pt. Ltd***[58] the respondent had supplied 'High Speed Fluidizing Mixer' machine, which was below standard and not consistent with the representation made by him. The Kerala State Commission held it to be unfair trade practice. In the instant case, PVC resin hopper and DOP pipings were not included in the work order and were supplied later on approval basis. The whole machine had to be supplied inclusive of the said two items also. The Commission directed the opposite party to return the cost paid by the complainant. In ***Vivek Hatcheries (P) Ltd.*** **v.** ***Gurmail Singh and Anr.***[59],

[54] S. M. Dugar, Commentary on MRTP Law Competition Law & Consumer Protection Law (3 In 1) (Wadhwa, Nagpur, edn. 4th , 2006).
[55] Section 2(1)(r)(1)(i): The practice of making any statement, whether orally or in writing or If visible representation which, falsely represents that the goods are of a particular standard quality, quantity, grade, composition, style or model.
[56] Managing Partner Nandikth Fridge Centre v. KC. Sahil Kumar and Anr., (2003) 2 CPJ 657(Kerala).
[57] Philips India Ltd, v. Rakesh Bhatia, (2005) 1 CPJ 478 (Delhi).
[58] (2000) II CPJ 285 (Kerala).
[59] (2002) I CPJ 5 (Punjab).

where Cockerels were supplied instead of supplying Broiler chicks, the Punjab SCDRC held this practice as amounts to unfair trade practice. In ***Khanna Enterprises and Anr.*V. *Dr. Manjeet Singh***[60], there was an agreement *to* supply 'Confident Clinik Chair' between the appellants and the respondent but the appellants supplied some other chair which was not agreed to by the respondent, and in spite of various efforts being made the agreed chair was not supplied and even the appellants did not offer to return the amount accepted on 3.6.1992. The Punjab SCDRC held this Practice as amounts to unfair trade practice. In ***Aman Traders and Anr. V. Naveen Kumar***[61], where J. K. tyres supplied in place of CEAT. There was a promise to replace J.K. Tyres by CEAT after few days but was subsequently declined, The Punjab SCDRC held that the practice will not amount to unfair trade practice as there was no evidence of false representation.

In ***M.R. Ramesh* v. *M/s Prakash Moped House and others***[62], an advertisement was issued by the respondents in the daily 'Deccan Herald' dated 21.10.93, wherein he claimed that vehicle would give a mileage of 80 km/lit. But the actual performance was less. The standard conditions laid down in the advertisements also were not clear or intelligible. The National Commission, while restraining the manufacturer from giving misleading advertisements and also directing them to pay a sum of Rs. 25000 is compensation to the complainant observed:

> "Such an advertisement as put in by the respondents is misleading. It amounts to unfair trade practice. When the respondents claimed that motor cycle can give mileage of 80 Kms per litre, they cannot just be absolved of their responsibility not to clearly indicate that this would be so when the motor cycle is driven as a speed of 40 Kms per hour and the

[60](1997) I CPJ 116 (Punjab).
[61](2000) II CPJ 88 (Punjab).
[62] RP No. 831 of 2001.

load would be 130 Kg. Simply by putting an 'asterisk' and then indicating such condition in the small print at the bottom of the advertisement certainly deceptive. Moreover, when it is stated that this mileage can be obtained at a particular speed and load under standard conditions than those standard conditions must be indicated, so that the consumer is duly informed of the bargain he is in. Rather in our view any such advertisement should take into account the conditions of the roads in the cities".[63]

The supply of less number or less quantity of goods, which is less than the advertised number or quantity will amount to an unfair trade practice.

In ***Alkotack Power Industries Pvt. Ltd. V. K.N. Gopala Krishna Bhatt and Ors.***[64], the opposite party had published an advertisement: "using Jensher 2000 Petrol can be saved up to 22%". The complainant fitted Jensher 2000 in their two wheelers. There was a general reduction in mileage instead of increasing. It also affected the functioning of engine. The practice was held to be unfair trade practice.

In ***Tapasini Sinha and Ann* v. *The Imperical Match Works and Ors***[65]., the complainant purchased match boxes. It was found that the number of Sticks were less than 50. It was represented on the wrapper of the boxes that each box contains fifty match sticks, but the actual number was quite less, even less than the maximum permissible error permitted under Standards of Weights and Measures (Packaged Commodities) Rules, 1979- The Orissa SCDRC held the practice to be unfair trade practice.

The CP Act imposes an obligation on the manufacturer, seller or supplier not only to represent the truth but also to inform about change in technology, if any, which is not usually popular among the consumer. Failure on the part of

[63] *Id.*, p. 9175.
[64] (1996) III CPJ 204 (Karnataka).
[65] (1996) 3 CPJ 283 (Orissa).

the manufacturer to disclose a change in technology will amount to a deceptive practice. In ***Moti Dharaniv. Godrej G.E Appliances Ltd and Anr.,*** [66] the appellant purchased a Godrej refrigerator. The owner's manual as well as instruction leaflet which was supplied to the appellant did not inform that the back wall of the fridge was not made of steel, but was made of only 1 mm. thick aluminum foil. The Uttar Pradesh State Consumer Disputes Redressal Commission held the trade practice of the opposite party as unfair and directed it to pay sum of Rs. 5000/- and Rs. 2000/- as compensation and costs respectively.

Unfair trade practice can also be constituted, when a specific part which is claimed to be fitted in the Goods sold, is not actually fitted. In ***Maruti Suzuki India Ltd*** V. ***Rajiv Kumar Loomba & Anr.***[67]**,** the grievance of the complainant in the complaint was that although a catalytic converter was not fixed in the Maruti car which was sold to him by the appellant, yet he has been charged a sum of Rs.7,000/- for the same. The Complainant claimed that he should be refunded the sum of Rs.7,000/-. The claim of the complainant-respondent No. 1 was allowed by the District Consumer forum, Chandigarh vides order dated 3.12.1996. The Supreme Court held that in the present case the grievance of the complainant was that he was being overcharged for a catalytic converter which he neither demanded nor was it actually fitted in his car purchased from the appellant. Therefore, the Apex Court held:

> "In our opinion, the complaint filed by respondent No. 1 is justified as the aforesaid act constitutes an unfair commercial practice within the meaning of Article 2 (l) (r) of the Consumer Protection act, 1986. It is noticeable point that the definition in Section 2(1) (r) is an inclusive one, and is not exhaustive of sub-clauses (i) to (x) therein."

[66](2000) 3 CPJ 389.
[67] Civil Appeal No. 1841 of 2003, decided on 15 July, 2009.

6.3.1.3.2. False representation as to Standard etc. of the Services

The practice of malting any statement, which falsely indicates that the services are of a particular standard, the quality or grade is been covered under this clause.[68] In one case the brochure of the opposite party (State Bank of India) provided that the subscriber, if they deposit more than required for income tax purpose, would get tax-free interest. Subsequently, the complainant deposited Rs. 8, 50,000/- but the opposite party retained the amount for a year and after that returned it without interest. The Tamil Nadu State Commission held that practice amounted to an unfair trade practice.[69] In another case the Orissa State Commission held that giving incorrect information regarding the status of air ticket amount to unfair trade practice.[70] In ***Safron Marketing India Pvt. Ltd.*** v. ***Suknvir Singh***[71]***,*** the appellant who is engaged in marketing activity, floated a scheme for supply of various electric items for have delivery on deposit of the price of the concerned item. The respondent deposited Rs. 14,916/- towards the price of the inverter but kept on waiting for delivery of the inverter which never fructified. Having lost his patience he demanded refund of the amount. Instead of refunding the amount the appellant asked the respondent to accept a colour TV by paying the difference price. The respondent refused the offer and the appellant did not refund the money. The Delhi State Commission held this Practice was unfair.

In ***B. K. Aggarwal v. Haryana Officers and Public Enterprises Employees Welfare cooperative Group Housing Society***[72]***,*** a Group Housing Society to pay interest @ 12%. Subsequently, the complainant became member and paid principal amount with interest. The opposite party further decided to

[68] Section 2(1)(r)(1)(ii): The practice of making any statement, whether orally or in writing or by visible representation which, Falsely represents that the services are of a particular standard, quality or grade.
[69]State Bank of India and Anr.v, P.S. Krishnan (2004) 2 CPJ 579 {Tamil Nadu).
[70]SashikalaMohanti v. UrmilaDutta and Ors., 1 CPJ 217 (Orissa).
[71](2004) 4 CPJ 475 (Delhi).
[72](1997) 2 CPJ 266 (Chandigarh)

charge 24% from the new members. The Haryana SCDRC held this practice as unfair trade practice.

In ***Dr. Raghubir Singh Jain and Another* v. *Ansal Housing And Construction Ltd.***[73], where the complainant booked a flat measuring 872 Sq. ft. but he was asked by the opposite part to pay for 1120 Sq. ft., nothing has been brought on the record to show that a purchaser was bound to pay for about 25% additional area, called 'super area'. The Delhi SCDRC held this act of the opposite party as amounts to unfair trade practice.In ***Gwalior Development Authority (GDA) v. Manju Nayak and 4 Ors***[74]**.**, the appellant advertised for the allotment of plots but no plot was allotted to the appellant. The contention of the appellant was that the allotment could not be made because the Government had not so far acquired land and allotted the same to the appellant. It is pertinent to note that the appellant in his advertisement did not inform that the allotment would be subject to condition of contention of land. There was absolutely nothing on record to show that the respondent were made aware of the fact that they might have to wait for a number of years for allotment of land because the land acquisition proceedings usually take a long period Practice of the appellant was held to be unfair. Similarly, in ***Pushpanjali Farm Owners and Residents Association v. Ansal Properties and Industries Ltd.***[75], the National Consumer Dispute Redressal Commission held that the failure of the opposite party to provide the Country Club as mentioned in their advertisement tantamount to a deficiency of service as well as an unfair trade practice. The Commission further observed that if the Consumer Fora were to allow the service providers to benefit from such conduct, the latter will be encouraged to

[73](1995) II CPJ 95 (Delhi)

[74] (1998) 2 CPJ *64* (MP); But if due to extraneous reasons, like issuance of notification under Urban Land Ceiling and Regulation Act, 1973 for declaring land as surplus land, it has been rendered difficult and impossible for the opposite parties to register the sale deeds, there would be no unfair trade practice as was held in *V.G. R Housing (P) Ud. and Anr.* v. *Mrs. MadhuramBalasundaram,* (1996) 3 CPJ 84 (TN).

[75](2012) 4 CPJ 1 (NC).

renege on their commitments, without any fear of the law.

In ***Mrs. Neeru Misra v. Marudhar Services Ltd. and Anr.,***[76] respondent published fascinating and high profile advertisements: 'money grows on tree' and false promises were made to investors for allotting land and growing eucalyptus tree thereon by multiplying their money manifold. Respondent failed to honour his commitment. MRTP commission held this practice as amounts to unfair trade practice. In ***Kayne Constructions Pvt. Ltd. v. Printers India and Ors.***[77], the complainant paid Rs. 450/- to the opposite party for getting his advertisement published in the yellow page of the 1990 Patna Telephone Directory to be published by the Union of India. The Complainant suffered loss due to non-publication of the directory and in this way the opposite party failed to publish as per agreement. The Bihar SCDRC held this practice as amounts to unfair trade practice.

A false statement may be ruled as unfair or deceptive even if it does not misrepresent any product or its price or service. Typical of such practices is one in which a service is rendered by a person who is falsely represented to be a doctor held in ***Dr. Baleswar Prasad and another v. Firtu Das Mahant.***[78]

Section 2(1)(r)(l)(ii) is equally applicable to the educational institutions. When an educational institution fails to provide adequate and proper facilities, infrastructure, teaching staff, operation theatre and all other facilities required for an institute of this nature, there is no doubt that it is indulging in unfair trade practice. ***S. Ajitv. Dr. MX Sreedharan Nair and Ors***[79]*, the* opposite party issued a false advertisement in 'Mathrubhoomi' stating that, five candidates will be admitted to the M. Tech., in its issue dated 20th January 1990 and also stated that the course had a better career prospects. The opposite party also gave a wrong impression that, the course was recognized and affiliated by

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[76](2000) 2 CPJ 32 (MRTPC).
[77](1995) 3 CPJ 438 (Bihar)
[78](1986-2005) CONSUMER 9093 (NS).
[79](1998) 1 CPJ *644 (Kerala).*

university. Complainants had got very high 'GATE' score joined M.Tech in that institution and lost 2 and 1/2 years. Kerala SCDRC held this practice to be unfair. In ***Miss Sonika Tandon and Ors.*v. *Rauf Muslim Jamia Bahera and Ors*[80]*.***, the opposite party issued an advertisement in 'Daily Excelsior Jammu' inviting applications for admission to B.D.S. Course. Pursuant to this advertisement the complainant approached them and submitted an application, this was done on an assurance being extended by the opposite party that their college was duly recognized and registered by the 'Dental Council of India'. The opposite party thereafter failed to provide adequate and proper facilities in the college, the college was lacking in infrastructure, teaching staff, operation theatre and other facilities required for an institution of this nature. The institute was also not recognized by the 'Dental Council of India' and therefore, right from 1989 onwards it never took examination of students. The J&K SCDRC held that the opposite party was indulging in an unfair trade practice.[81]

This clause also applies to the service provided by the insurance companies. If the service of the insurer falls short of the claimed practice it may amount to unfair trade practice. In ***Smt. Asha Garg & Others*** v. ***United India Insurance Co. Ltd.***[82]**,** the National Commission held that before accepting proposals for huge amounts, it was the duty of the insured to find out the status, income and the means of the income of the assured, if at all required. After accepting the heavy premium when peril occurs to deny the policy amount on altogether made up ground would certainly amount to unfair trade practice on the part of the officers of the Insurance Company.

6.3.1.3.3. Old Goods described as 'New'

This clause comes into operation when any rebuilt, second-hand,

[80](1997) I CPJ 619 (J & K).
[81]Ajay Gautamv. Amrittar Eye Clink &Ors., IV (2012) CPJ 184 (NC).
[82]IV (2005) CPJ 269 (NC).

renovated, reconditioned or old goods have been described as new goods.[83]Thus, this provision comes into operation when the goods are falsely represented as new when, in fact, they are not new. The meaning of 'new' and 'old' is to be determined in the context of an individual case. The word 'new' does not have a fixed and rigid meaning and it depends upon the context in which the word has been used. Selling of 'old' vehicle representing it as a 'new' one is an unfair trade practice within the meaning of this clause[84]. Similarly, the publication of a newspaper practically same as published on previous day amounts to unfair trade practice[85].In the same manner, selling of an old inverter by charging the price of new inverter is an unfair trade practice under this clause.[86] In ***Anil Sehgal and Anr.*** v. ***Harmohinder Singh,***[87] the appellant purchased air-conditioner from the respondents. Trouble started. On checking it was found that the repaired compressor had been used. It was observed by the Delhi SCDRC:

> "The irresistible conclusion is that the opposite party withheld the material evidence which goes to establish that the compressors used in the two air conditioners were not original, un-used sealed units but were second-hand pieces having been repaired. In view of the categorical representation of the opposite party that the air conditioner contained original sealed units of Sri Ram Compressors and in fact repaired compressors had been used, amounts to unfair trade practice".

[83]Section 2(1) (r) (1) (iii): The practice of making any statement, whether orally or in writing or by visible representation which, falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods.

[84]*Sanmari Motors (P) Ltd.* v. *Chandra Sekhar*, (2005) 4 CPJ 373 (Delhi).

[85]*A.B.P. Pvt. Ltd* v. V. *Sundaram*(2005) 1 CPJ 490 (West Bengal).

[86]Hguard *Electronics* v. *Dhawan and Anr.*(2005) CPJ 104 (Delhi).

[87] 1996 3 CPJ 101 (New Delhi); See also, in *Shanti Seeds* v. *Hira Lai and others*, (1986-2005) CONSUMER 9690(NS), decided on 01-12-2004, the respondent purchased tractor from the petitioner on 16-04-2003. It was alleged that petitioner represented to respondent at the time of sale of tractor that it was 'new' one but it was revealed by the mechanic that the tractor was old as its diesel filter, oil filter were damaged and brake was not working. It was also revealed that tractor was manufactured on 12-05-2000 and not in 2003 and was sent from the factory to Bhopal on 15-05-2000. The National Commission held the petitioner guilty of unfair trade practice and accordingly upheld the decision given by the State Commission.

If the consumer was informed at the time of purchase that the goods were previously used or if the consumer has reason to believe at the time of purchase that the goods are previously used, it will not amount to unfair trade practice. In ***Sanjay Bafna*v. *Dr. Vijay P. Aher***[88] the respondent purchased a *Maruti* carry van on 27.2.93. At the time of delivery of the vehicle a temporary registration certificate issued in the name of one Sanjay bearing No. DMR 5227. The petitioner contended that he had narrated all the circumstances to the respondent and in spite of it the respondent went to purchase the said *Maruti* van. The National Commission allowed the revision petition of the petitioner and held:

> "Contention of the opposite party (petitioner) may or may not be correct but the complainant (respondent) has admitted in the complaint that at the time of delivery of the vehicle the documents he was handed over a temporary registration certificate issued in the name of one Mr. Sanjay bearing No. DMR 5227. Thus, the complainant must have come to know that some person or persons had used that vehicle. Hence in the light of above observations, the District Forum was not right in holding that the dealer was guilty of unfair trade practice".[89]

Again in ***The Yamuna Syndicate Limited v. Swam Kaur and Anr.***[90], the respondent had complained that an old tractor was sold in place of new. The argument of the complainant had been accepted by the lower Fora. The National Commission held that no evidence of a technical expert was led to prove that the tractor is old and whether the said tractor is defective. Considering the tractor has been used for 14 months without any complaint whatsoever clearly establishes that complainant has no problem in the working of the tractor during the warranty period. The Commission also held that

[88](1996) 2 CPJ 190 (NC).
[89]*Id.,* at p. 191-192.
[90](2006) CPJ 81 (NC).

District Forum came to the wrong conclusion that the tractor was old solely relying on a stock register and by not considering the entire evidence placed on record by the revision petitioner. The State Commission further upheld the order of the District Forum without considering the entire evidence which was placed before it. It is also apparent that although the revision petitioner has produced documentary evidence it was ignored and a mere complaint is considered as authentic evidence by the District Forum which is upheld by State Commission. The Commission accepted the clear evidence as shown by the revision petitioner regarding authenticity of the tractor being new. Finally the Commission held that there is no deficiency of service by the revision petitioner.

6.3.1.3.4 Claim of Sponsorship, Approval, Performance for Goods or Services

The use of false testimonials purporting to have been given by satisfied customers would fall under this clause.[91] Similarly, passing of inferior goods as that from a reputed organization would also come under this clause. False representation as to durability of goods or as to efficacy of services would be caught within the expression 'performance' and 'characteristics'. When goods are falsely represented as suitable for a particular purpose this clause would be attracted.

In ***M/s Girija Studio v. M/s. Koron Business System Ltd. and another***[92],the complainant (Petitioner) placed an order with the respondent for

[91]Section 2(l)(r)(l)(iv): The practice of making any statement, whether orally or in writing or by visible representation which, represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have.

[92] (1986-2005) Consumer 9274 (NS), decided on 2nd May 2003. See also, A. Balachandran v. M/s Sipani Automobiles Ltd. and On. (1995) 1 CPJ 234 (Kerala), where the complainant booked a Montana Diesel Car for which advance had been paid. At the time of delivery of the car the complainant took mechanic with him. It was found that local engine was used instead of Japanese against the claim made in brochure. The Kerala SCDRC held this practice amounts to unfair trade practice; In M.R. Ramesh v. M/S Prakash Moped House and other, (1986-2005) consumer 9173(NS), decided on 2nd may 2003, where the respondent advertised in the daily Deccan Herald that vehicle will give mileage of 80 kms per litre. The actual performance was less. The practice was held to be unfair.

purchase of ‘Kores Sharp KS 1101 Photo Copier’ machine. He alleged that at the time when he placed order he was told that the Photo Copier is manufactured in India in technical collaboration with Sharp Corporation Osaka, Japan, but he was supplied ‘Kores Winner -1101’instead of ‘Kores Sharp KS 1101. On a question in this regard the respondent replied that earlier they had collaboration with Sharp Corporation, Japan but under Government of India policy the collaboration ceased and further that the Kores Winner was being manufactured with the same technology as that of Kores Sharp and that it was only change in the name or the product. The National Commission held that:

> “A consumer goes to market to buy an article having particular brand name. It is the brand name which gives him the satisfaction and he pays the price for the same however, there may be difference in the price of the article bearing that brand name and the other having the same qualities... At the time when the photocopier was supplied to the complainant he was not informed that collaboration agreement of respondent with Sharp Corporation, Osaka has been terminated and that they are still manufacturing Photo Copier having the same technology. It was at that stage complainant could have made up his mind whether he would go with the ‘Winner’ or ‘Sharp’. It is his satisfaction and not of the seller or the manufacturer. The document placed on record nowhere shows termination of the collaboration agreement. This is in fact amounts to unfair trade practice[93].”

In ***Vinoo Bhagat v. General Motors (I) Ltd. & Anr.***,[94] the respondent advertised that the engine fitted in Opel Astra Car is manufactured by German

[93](1986-2005) Consumer 9274 at 9275. See also, in *A. Balachandran v. M/S Sipani Automobile Ltd. & others,* (1995)ICPJ 234(Kerala), an advertisement had been published in the hand book by the manufacturer of the Car named ‘Montana Diesel’ that, the Montana Diesel Car is fitted with a diesel engine of Japanese collaboration. The complainant on inspection of the Car found serious defects. The most serious thing was the Car was mounted with an engine locally manufactured, namely 'Jaya' instead of Diesel engine Mitsubishi K-3 as published in their hand book. Opposite party were held guilty of committing grave unfair trade practice.

[94](1998) 2 CPJ 565 (Delhi).

engineering and technology, but the engine used was manufactured at Holden company of Australia. According to the appellant it was incumbent on the manufacturer to disclose the fact that the engine fitted in Opel Astra car had been manufactured by Holden Company of Australia and thus an entirely misrepresentation had been made that the car was a marvelous example of German engineering and technology. The Delhi State Commission observed:

"The matter of substance was the engineering and technology being German. Holden Company was a subsidiary of General Motors and the engine in question had been manufactured by the said company according to German technology and engineering. It was well known that various multinational companies operate on a global scale. They bring their technology and engineering and produce and manufacture various goods in other countries. The place where the goods are manufactured is not material. What is material is the technology used."

From the material placed on record. The Commission concluded that there was no doubt that the car in question had been manufactured by German technology and accordingly held it not to be a case of "unfair trade practice".

6.3.1.3.5 Representation as to Sponsorship etc.

This clause is similar to the earlier one except that the sponsorship, approval etc., is not with reference to goods or services but with reference to the seller himself.[95] This clause aims to prevent false trading by using the goodwill of a reputed manufacturer or seller. The words 'sponsorship', 'approval', 'performance' and 'accessories' etc. are not defined in the CP Act, 1986. These expression should therefore, be given their ordinary dictionary meaning. The word 'sponsorship' connotes and presumes a certain amount of responsibility which the person sponsoring the goods or services takes.

[95] Section 2(l)(r)(l)(v): The practice of making any statement, whether orally or in writing or by visible representation which, represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have.

Similarly, the word 'approval' connotes implied or express sanction or confirmation of goods or services. A trade practice under which, a representation claiming the goods or services having the approval, while actually it is not so, is unfair.

In ***D.A.V. Institute of Physiotherapy*** v. ***Miss Navleen Kaur and Ors.,***[96] the appellant issued a number of advertisements in various newspapers all over India, one of such advertisement published in 'Hindustan Times' on 21-7-1994. The advertisement claimed that the D.A.V. Institute of Physiotherapy is approved by Indian Association of Physiotherapists (IAP) and the syllabus and curriculum is as per International Standard of Physiotherapy. But subsequently, it has become clear that the appellants Institution has neither been recognized by I .A. P. nor even the provisional recognition has been granted to the institution. The Punjab SCDRC held:

> "The facts referred above established clearly that there was unfair trade practice...towards the students who were deliberately admitted to the course, despite the fact that the institute is neither recognized nor approved. A legislation which is enacted to protect public interests from undesirable activities can not be construed in such a manner as to frustrate its objective. Public authorities acting oppressively are accountable for their behaviour. An institution for that purpose, even an education institution acting maliciously or oppressively or arbitrarily and capriciously cannot be allowed and the consumer fora cannot afford to become silent spectator."[97]

Similarly, in ***S. Ajit*****v. *Dr. M.R. Sreedharan Nair and others***[98], the opposite party had given a wrong impression that the course was recognized; and affiliated by university; the complainant took admission in the course and

[96](1998) 1 CPJ 430(Punjab).
[97] Id., at p. 434.
[98](1998) 1 CPJ 644 (Kerala).

lost two and half years. The Kerala State Commission held the practice to be unfair.

6.3.1.3.6 Artificial Need

There are many products now roaming about in the society which have been made popular and socially acceptable by the sheer force of superior advertisement. A bottle of cold drink is shown as filling a person with the power to wade through the air. A piece of chocolate is shown as filling a person with body power to race with a bus or to cross field barriers in the midst of a cricket match. Many products are being successfully marketed by making them status symbol irrespective of their merit of peoples need.[99] This clause is attracted when an advertisement creates an artificial need of product or services.[100] The expression ‘false’ as well as ‘misleading’ both are used in the sub-clause. The term ‘need’ here does not refer to' necessity' in the pure economics sense[101].

In ***Alkotach Power Industries Pvt. Ltd.*** v. ***K.N. Gopala Krishna Bhat and Ors.***[102]**,**the appellant advertised that the ‘Jensher-2000’ if fitted with two wheelers would increase the mileage. The respondents got fitted ‘Jensher-2000’ in their two wheelers, but there was general reduction in mileage; it also affected the functioning of engine. The Karnataka State Commission held this practice to be unfair.

A false statement may be unfair or deceptive even if it does not misrepresent any product or its price or service. Typical of such practices is one

[99]Avtar Singh, *Law of Consumer Protection Principles and Practice* 139 (Eastern Book Company, Lucknow, 2000); See also Rajendra Kumar Nayak, *Consumer Protection Law in India,* (N.M Tripathi Pvt. Ltd., Bombay 1991); Robert Lowe and Geoffrey Woodriffe, *Consumer Law and Practice* (Sweet and Maxwell, London 1995); S. Chesterfield, Oppenheim, *et.al, Unfair Trade Practices and Consumer Protection Cases and Comments* (West Publishing Company, Minnesota, 1977); P. Leelakrishnan (ed.) *Consumer Protection and Legal Control.* (Eastern Book Co., Lucknow).
[100]S. M. Dugar, *Unfair Trade Practices Under MRTP ACT: Injunction and Compensation* 15 (Taxation Publishers (P) Ltd. New Delhi. 1985).
[101]Section 2(l)(r)(l)(vi): The practice of making any statement, whether orally or in writing or by visible representation which, makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services.
[102](1996) 3 CPJ 204 (Karnataka).

in which a service is rendered by a person who is falsely represented to be a doctor or a scientific expert. In ***Dr. Baleshwar Prasad and Another*** v. ***Firtu Das Mahant***[103]**,** the respondent's minor son complained of severe headache along with high fever. He was taken to the dispensary of the 1st petitioner, Dr. Baleshwar Prasad Yadav, where he was administered two dose of injections by the 2nd petitioner (brother of the 1stpetitioner). When there was no improvement in the condition of the boy, he was brought to the Bhuli Central Hospital but, the doctor declared the minor boy had brought dead. Both the District Forum and State Commission noticed that the Istpetitioner was not having any medical qualification either in Allopath or in Homeopath system of medicine. Though he produced a copy of the certificate issued by the Council of R.M.P. (Rural Medical Practitioner), Bihar District Forum has doubted the genuineness and correctness of the certificates. The National Commission held:

> "Both the Forums have found that while the petitioner did not possess even valid RMP license, it was certainly an unfair trade practice. The second petitioner being compounder certainly could not give injection without any technique or prescription by qualified doctor. He works as a compounder under the first petitioner. There is no doubt that they are indulging in an unfair trade practice in as much as they did not possess any medical qualification and prescribing medicines which they could not do".[104]

6.3.1.3.7 Warranty or Guarantee of the Performance of a Product/ Goods

This clause covers cases of unfounded claims, wherein the manufacturers or sellers give false assurances regarding the result of the use of their product.[105] This clause is to ensure that guarantees/ warranties of the seller or

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[103](1986-2005) CONSUMER 9093 (NC).
[104]*Id.*, at p. 9094.
[105] Section 2(1)(r)(1)(vii): The practice of making any statement, whether orally or in writing or by visible representation which, gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

manufacturer must be based on adequate or proper test. [106] The guarantee should not deprive a consumer from his statutory rights. Where there is not so, a guarantee would be a worthless show-piece.[107] A warranty or guarantee is an express assurance by the manufacturers/sellers regarding the performance, efficacy or the length of life of the goods or products. It should, therefore, be based on proper tests and if it is not so, then it will amount to unfair trade practice. But no standards or guidelines have been laid down under the CP Act to determine the nature of the adequate or proper test.

The proviso to clause (vii) provides that where a defense is raised to the effect that this warranty or guarantee is based on sufficient or adequate evidence, the burden of proof for this defense will rest with the person invoking the defense. Thus, the burden of proving that adequate or proper tests were conducted lies on the person making the representation.

An advertisement which guarantees loss of weight within a specified period without being supported by adequate or proper test will be unfair trade practice under the above provision. Similarly, where a manufacturer of drinks advertises for promotion of sale of their products by highlighting the use or benefit of these drinks, unsupported by adequate or proper test, it would be unfair trade practice.

6.3.1.3.8 Misleading Warranties or Guarantees in respect of Goods or Services

This clause[108] has a wider ambit than that of the previous clause. This

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Provided that where a defense is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defense shall lie on the person raising such defense.

[106] For guarantee/warranty see generally Carlil v. Carbolic Smoke Ball Co., (1893) 1 Q.B. 256.

[107] Avtar Singh, Law of Consumer Protection Principles and Practice 139 (Eastern Book Company, Lucknow, 2000).

[108] Section 2(1) (r)(1)(viii): The practice of making any statement, whether orally or in writing or by visible representation which, makes to the public a representation in a form that purports to be-

(i) a warranty or guarantee of a product or of any goods or services; or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out.

clause is attracted when promises and guarantees are given with an intention of not fulfilling them. This clause cover three situations; (a) making misleading warranties or guarantees; (b) making misleading promise to replace, maintain or repair an article, etc.; (c) making promises whichhave no reasonable prospect of being carried out. This clause relates *to* after service contracts where the dealer or the manufacturer undertakes to maintain and provide service periodically for certain specific period and does not comply with such terms of contract. The seller may not intend even at the time of sale to comply with the warranty or he may subsequent to the deal place himself at a situation which would render him impossible to carry out the promise. In ***Optonica Kalyani Sharp India Ltd.* v. *Gopal Lakhotia***[109], the opposite parties advertised that the Optonica colour TV is the product of a joint venture of Sharp Corporation, a Japanese concern, and is having in-built stabilizer system. The Complainant purchased the TV. Subsequently, the TV burnt due to voltage fluctuation. The Andhra Pradesh State Commission held that since the truth of advertisement could not be proved, it was a case of unfair trade practice. Mere promise to replace the goods of a make by another make and subsequently declining to do so will not amount to unfair trade practice as defined under Section 2(1)(r)(l)(vii) of Consumer Protection Act, 1986. In one case the complainant approached the opposite party for purchase of CEAT tyre on payment of the required price. A receipt was also issued in this regard, but due to unavailability on CEAT tyres the opposite party supplied JK tyres, with a promise to replace the same after few days, which was never carried out. Necessary amendments were also done in the receipt. The District Forum accepted the stand of the complainant and declared the practice to be unfair trade practice. But, the State Commission while allowing the appeal of the opposite party held otherwise. The State Commission observed;

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[109](2003) *3CPJ* 435 (Andhra Pradesh).

"Promise to replace has to be read along with maintain or repair of such article or part thereof in order to achieve a specified result. Merely a promise to replace the goods of a make by another make and subsequently declining to do so will not amount to unfair trade practice".[110]

It is worthy to note that often the warranties are written in a highly technical writing. Though it seems to be full warranty, but upon careful examination of the actual language there may be usually substantial limitations on the extent of the warranty. This clause requires that warranties on goods or services must disclose the terms in simple or readily understood language. Another point which should be remembered under this clause is that the consumer can avail the remedy under this clause only during the continuation of the guarantee or warranty period and not after its expiry.[111]Where warranty period had expired and no service contract was entered thereafter for providing service, the consumer could not claim any free service.[112]

Sometimes the advertisers in order to promote sales, advertises promises which have no reasonable prospect of being carried out. This part of the clause deals with the intention of the advertisers which can be gathered from the act or omission on the part of the advertiser.

6.3.1.3.9 False or Misleading Statements as to Price

This clause would be attracted when a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified that it is the price at which the product has been sold or the services have been provided by the person for whom or on behalf of whom the representation is made.[113]

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[110] *Aman Traders and Am.* **v.** *Naveen Kumar,* (2000) 2 CPJ 88 (Punjab).
[111] *Rational Radio and Electronics Co. Ltd.: In re,* UTPE No. 18 of 1986.
[112] *Choklingam, Proprietor, Malandu Printers* v. M. *Amba Shankar and Ors.,*(1975) 5 CTJ 23 (CP) (NCDRC); see also, M/s Godrej Ge *appliances Ltd.* v. *Satinder Singh Sobti* (2000) 1 CPJ 52 (NC).
[113] Sec. 2(1)(r)(1)(ix): The practice of making any statement, whether orally or in writing or by visible representation which, materially misleads the public concerning the price at which, product or like

This clause will not be attracted where the price claim is specifically stated to be that of the person making the representation or on his behalf. Even in that case, the seller has to prove that his earlier selling price was more than the one now represented to be. This clause also covers the cases when goods are being sold through ‘clearance sales’. The prices depicted on the items show lucrative rebates and lure the consumers. The practice of ‘off season discounts’ is also covered under this clause. Though such advertisement makes tall claims, in fact the consumers do not get benefit in such sales. The problem however, lies in establishing the fact that the price mentioned in the advertisement is misleading. This is only possible where the seller has been negligent to safeguard his position by omitting to erase the proper price marked upon the item.[114]

The word ‘materially’ has been used only in this clause. This word covers situation like, where a seller for instance claims — “Khaitan fans once sold at Rs. 700/- now available at Rs 600/-” or “Our price is Rs. 600/-, elsewhere Rs. 700/-.” This sub-clause would be attracted in this case only when (a) Seller were not charging Rs. 700/- ordinarily; (b) the price must be so in the relevant markets; (market to which average consumer would go and search their product); and (c) If the fan is not offered at reduced price as represented.

In ***Hotel Nyay Mandir* v. *Ishwarlal Jirabhai Desai***[115], the opposite party sold ‘Mirinda’ soft drink for Rs. 18/- per bottle, against MRP of Rs. 12.50/-. There was no board displaying that consumers had to pay service charges if soft drinks were consumed by occupying space in hotel. The Menu Card also showed charges of Rs. 18/- for soft drinks. Gujarat State Commission held the

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products or goods or services, have been or 'are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at winds the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose! behalf the representation is made.

[114] RakeshKhanna, *Consumer Protection Laws* 138 (Central Law Agency, Allahabad 2002).

[115] 2006 1 CPJ 521 (Gujarat).

practice to be unfair.

6.3.1.3.10 Disparagement of the Goods and Services or Trade of other Persons through False or Misleading Facts

There is no specific definition of disparagement of goods available in any statue but in the *New International Webster's Comprehensive Dictionary*,[116] it implies dishonor or degrading, depreciating or disvaluing of the goods and bringing discredit to the company. In an electronic media, the disparaging concept is shown by the repeated advertisements of various commercials so as to make a lasting impression in the minds of the consumers.

According to Black's Law Dictionary the word 'disparage' means to connect unequally; or to dishonour (something or someone) by comparison; or to unjustly discredit or detract from the reputation of(another's property, product or business); or a false and injurious statement that discredits or detracts from the reputation of another's property, product or business[117].

Once Cornish, W said "Comparison lies at the root of modern advertising"[118]. In ***McDonalds* v. *Burgerking***[119], Whitford J., warned that "advertisements are not to be read as if they are testamentary provision in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared". Yet, comparative advertisements have led to a lot of litigation and the case on hand is one.

Comparative Advertisement is the concept which helps in comparing the advertisements of the goods and services of one seller from another which mostly focuses upon the price, quality, value, durability. The advertisers employ this technique to increase their visibility in the market and to generate higher profits and better sales. Prevalence of competition in the market has come to be realized as a means to provide better place to the consumer in the

[116] http://www.legalserviceindia.com/article/l182-Comparative-Advertising-laws.html (Visited on April 2, 2017).
[117] Garner Bryan, A Black's Law Dictionary, 7th edn (West Group, Minnesota) 1999.
[118] Cornish, W, "Intellectual Property"(4th Edn., Page 656).
[119] (1986) FSR 45.

seller's market.[120] This has brought into practice the concept of competitive advertising. In this process most of the tradesmen in their advertisement instead of representing the facts supporting their promotion of their own brand represent the lacunae of the brands of their rival trade practitioners directly or indirectly (innuendo). Sometimes this benefit the consumers, but at other times he gets confused in making purchases and aptly moves for the purchase of a new, better claimed cheap for trial. Under this sub-clause the aforesaid practice is unfair trade practice as it also confuses the market, hence, unfair to the market.[121] The disparaging statements may be patent or subtle play of semantics i.e. an innuendo. Whether there is any disparagement or not would depend upon facts and circumstances of each case.[122]

The governing of the concept of CA takes shape after the cordial association of the MRTP Amendment Act 1984 and the TM Act of 1999[123].

1. Section 29 of the TM Act 1999 speaks about the Infringement of registered TM where in, section 29(8)[124] specifically indicates that a registered TM is infringed by any advertising of that TM if the advertising takes unfair benefit and is against the honest practice, if this advertising will be hazardous to the unique character of the TM or is against the reputation of the TM.
2. Section 30(1)[125] also supplements that nothing under section 29 will prevent

[120] Uphar Shukla, "Comparative Advertising and Product Disparagement vis-à-vis Trademark Law" 11 MJIPR 409-414 (November 2006).

[121] Sec. 2(1)(r)(1)(x): The practice of making any statement, whether orally or in writing or by visible representation which, gives false or misleading facts disparaging the goods, services or trade of another person. Explanation.-For the purposes of clause (1), a statement that is-

a) expressed on an article offered or displayed for sale, or on its wrapper or container; or
b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained.

[122] Semila Fernandes, "Comparative Advertisement And It's Relation To Trademark Violation – An Analysis Of The Indian Statute" 2 JBM&SSR 6 (June 2013).

[123] *Ibid.*

[124] *Ibid.*

[125] *Ibid.*

any advertiser or company using another's TM provided it is used in honest and fait practice in industrial and commercial matters and should not affect the distinctive character of the repute of the TM.

Under the definition of honest practices for CA, it implies that CA focuses on objectively keeping the customer informed about the product, helps in promoting market transparency by lowering prices and improving the goods by stimulating competition in a fair manner. Hence in certain cases so as to protect the interests of such competitors CA should not be allowed which otherwise would mislead, create confusion or create discredit to a competitor.

CA has certain limitations with respect to the practice of Unfair Trade Practice. Under the MRTP Amendment Act of 1984[126], a new chapter on unfair trade practices was amended where in section 36A indicates that any defective or unfair method or practice which depicts false or misleading information of another product will result in disparaging the goods and products of the competitors. This in turn will directly affect the trade of another person.

Any such disparagement of CA is reviewed and evaluated based on three parameters viz.

1. Whether the advertisement contains a false statement which could result in influencing and provoking or inducing the consumer to buy or use the goods and products.
2. Whether the advertisement is misleading
3. Finally the effect of such a depiction on the end users or common man.

In the case of ***Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd. (India)***[127],the plaintiff Reckitt & Colman manufactures and markets liquid shoe polish under the brand name Cherry Blossom Premium Liquid Wax Polish. Defendant KIWI is also engaged in the manufacturing and marketing KIWI liquid polish which it claims in its advertisement to be superior than the

[126]http://www.legalserviceindia.com/article/l182-Comparative-Advertising-laws.html (Visited on April 2, 2017).
[127]63 (1996) D.L.T. 19.

plaintiff as alleged that cherry blossom has less wax and more acrylic content which in due course will crack and cause damage to the footwear. This is promoted on the website of the defendant showing a bottle of KIWI which does not drip and placing another bottle of polish marked as brand X which drips.

Brand X is shown with a red blob on its surface representing cherry which looks similar to the cherry which appears on the plaintiff's bottle. The defendant also circulated posters with a bottle shown as brand X having a faulty applicator similar to that of the plaintiff's applicator.

The Court held that the defendant was disparaging the goods of the plaintiff and was told to restrain from advertising the competitors product in a disparaging manner[128]. The Delhi High Court also added that the advertiser can puff the goods or make statements that his goods are of superior quality but this should not disparage of defame the repute of the competitor.

In this case ***Reckitt & Colman of India Ltd. v. M.P. Ramachandran and Anr.***[129], the plaintiff manufacturers blue whitener under the brand name Robin Blue having a particular styling and have a registered TM and a registered design. The defendant also starts manufacturing blue whitener (Ujala) and started promoting their product by disparaging the goods of the plaintiff. The advertisement showed a container similar to that of the plaintiff's and was indicated that it was priced at Rs. 10. As no other blue whitener products in the market were priced at Rs. 10, it was obvious that it was the plaintiff's product Robin Blue. Further the defendant alleged that the plaintiff's goods were uneconomical and was an expensive product to whiten the clothes. It was also promoted in a manner that the plaintiff's product was shown upside-down with the liquid gushing out indicating that the liquid doesn't drip slowly instead gushes and thus becomes expensive.

[128] Priya Bansal, "Use of Trademark in Comparative Advertising: Situation in India", Intellectual Property Law.
[129](1999) PTC (19) 741 (Cal.).

The Calcutta High Court held that the defendant was disparaging the goods and was liable for infringement and was granted an injunction and laid down five principles to guide future cases of infringement.

In the case of ***Pepsi Co. Inc. and Ors.v. Hindustan Coca Cola Ltd. and Anr.***[130], Pepsi filed a suit against Coca-Cola for wrongful use of their TM in a commercial where in a lead actor asks a kid to his favorite drink for which he says that he likes Pepsi which was obvious from his lip movement as it was muted. Then the lead actor asks the kid to taste the two samples of drinks after hiding their identity and questions the kid as to "Bacchon Ko Kon si pasand aayegi"?. The kid points to one drink and says that children would prefer it because it is sweeter and says that he does not like that drink. He likes the taste of the other drink and says that it is a stronger drink and has to be consumed by grownups. After the lead actor opens the lid of both the bottles, it is revealed that the bottle which the kid likes was "Thumps-Up" while the other had PAPPI written on it which deceptively resembles PEPSI. The kid feels embarrassed as he had earlier liked the Pepsi taste and hence keeps his hands on his hand as a matter of disappointment.

In some other advertisements the commercials read the slogan as "Wrong choice baby", and that the "Thums Up" is a right choice, and "Kyo Dil Maange No More" which amounts to damaging the repute of Pepsi.

Held: The court held Coca-Cola on the grounds of disparagement and depreciating the goodwill of the plaintiff's products under TM and Copyright Act as the registered TM was been infringed by the use of a Globe Device or the word PAPPI which is deceptively resembling to the TM PEPSI. ***Dabur India Ltd. v. Colgate Palmolive India Limited***[131], In this case Colgate promoted an advertisement on the visual media where in a cinema start was seen stopping the purchasers from purchasing the tooth powder which was

[130]2003 (27) PTC 305 Del.
[131]2004 (29) PTC 1.

similar to that of Dabur by explaining the ill effects of the plaintiff's products. In addition to this Colgate advertised that their tooth powder was 16 times less abrasive and non-damaging. As per the TM Act 1994, section 29(8) clearly indicates that there should not be any unfair advantage taken by the competitor which will harm the reputation of the TM and be detrimental to its distinctive character. Although the rival can make untrue statements that his goods are the best, he cannot degrade the quality of others products. Hence Colgate disparaged the goods and was granted injunction by the Court.

A significant departure from the above traditional approach on commercial puffery was taken by the Madras High Court in the case of ***Colgate-Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd.***[132] .This case was unique as this was the first time Court took into consideration 'consumer interest' while deciding a dispute related to comparative advertising.

In ***Annamalayar Agencies v VVS and Sons Pvt. Ltd.***[133], it was held that the following factors that are to be kept in mind while dealing with a case of disparagement-

- Intent of the commercial;
- Manner of the commercial;
- Storyline of the commercial;
- Message sought to be conveyed by the commercial.

It was also reiterated in ***Godrej Consumer product limited vs. Initiative media advertising***[134].

To provide some clarity, in the recent case of ***Havells India Ltd & anr.v. Amritanshu Khaitan***[135],Hon'ble Delhi High Court laid down certain tests that are to be applied for the purpose of comparative advertising. The test

[132](2008)7MLJ 1119.
[133]2008 (38) PTC 37 (mad) para 29.
[134]2012(52) PTC 260 (Bom).
[135]CS(OS) 107/2015, disposed off on 20 November 2015.

include, standard used in deciding a case of comparative advertisement, test of 'honest' advertising[136] and test of a misleading advertisement. It held that the standard used in deciding a case of comparative advertisement is different from the strict standards used in interpreting a will or a clause of an agreement. The court also dealt with the issue relating to whether for an advertisement to an 'honest' one and held that if an advertisement is highlighting only a special feature of his product/services which makes it distinct from that of his competitor's, he is allowed to do so as long as the comparison is true and failure to compare all features of a product while comparing will not amount to disparagement.

Recently, in ***the Hindustan Unilever Limited v. Gujarat Co-Operative Milk Marketing Federation and Others***[137], the Bombay High Court has restrained airing of Amul's advertisement on ice cream. The issue was two television commercials by Amul suggesting "use real milk amul ice cream and not frozen desserts which has vanaspati". The advertisement also used the tagline "Amul is real milk, Real ice cream" on the top left corner. The nature of the comparative advertising in this suit was of "generic disparagement/slander of goods" for the product referred as "frozen desserts". Justice S J Kathawalla, while granting an injunction to applicant, held that the advertising was disparaging the entire category of frozen desserts including applicant's product. Court further held that, the advertisement is disseminating wrong information and thereby creating confusion amongst the viewers. Though, the defendant contended that the advertisement was in the pretense of educating the public, as viewers/consumer's need to know that frozen desserts contain vegetable/ vanaspati oil. Court noted that advertisement is not fair; as totally different

[136] As per Section 29(8) and 30(1) of the Act. The court held that his is an objective test which depends on audience who are reasonable. Honesty must be evaluated vis-à-vis kind of goods or services in question. In this regard the Court used an example to elucidate: an advertisement for second hand cars may not be honest if used to encourage the use of 'powerful medicines'.

[137] In Notice of Motion (L) No. 690 of 2017 in Suit (L) no. 204 of 2017, Judgment pronounced on 16 June 2017.

features were compared in the advertisement i.e. milk content of one product is compared with the fat content of the other product. Hon'ble High Court while disposing the interim application reiterated that a fundamental right to free speech cannot be abused to malign, discredit or belittle a rival manufacturer's product by a negative campaign. Indulging in vicious, false and misleading statements against any competitors are not tenable and cannot be allowed. The court also noted that the ASCI was being used selectively by the plaintiff as it initially filed complaints before the ASCI while subsequently referred to the ASCI as a "kangaroo Court in its pleadings. The suit is pending before the Court.[138]

6.3.2. Bait Advertising and Bargain Price

The bait advertisement is a false or misleading representation whereby the goods or services are offered at attractive bargain price, when in reality the advertiser knows that the people would have very little chance of obtaining supplies at that price.[139] The prospective buyer with the expectation of bargain, is often induced to spend time and money in attending the premises of the seller and is set in a mood to buy. The salesman then has to switch his focus to a different and usually more expensive (and to the seller more profitable) product.[140]The sale resistance of such a customer is weakened, he may then be more vulnerable to high pressure salesmanship and likely to make an imprudent purchase. Such purchase is a diversion of customer's funds that might have gone to his more legitimate buying and it operates to the detriment of legitimate customers. Such types of practices are covered by clause (2) of section 2(l) (r). This provision prohibits the trade practice which permits the publication of any advertisement for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the

[138] Biplab Kumar Lenin and Arun Babu, "Comparative Advertising and the Consumer- Changing Dynamics" 22 JIPR 113-120 (May 2017).
[139] V,K. Agarwal, "*Bait Advertising, the Law and the Indian Consumer"*3 Comp. LJ 2 (1991).
[140] Terence G. Ison. Credit Marketing and Consumer Protection (1979), pp. 59-61.

bargain price, or for a period that is, and in quantities that are reasonable, having regard to the nature of the market in which the business, is carried on and size of business, and the nature of the advertisement.[141] The provision expressly applies in respect of goods as well as services.[142]

6.3.2.1. Advertisement

It may be noted that neither MRTP Act nor the Consume Protection Act contain any definition of 'advertisement'. It, however, seems clear that the wording is one of wide ambit. It would clearly include any sale promotional message published by a supplier through any mass media. Any outdoor advertising on billboards and the like will be covered within the scope of the above provision. The distribution of documents of sale promotional activity such as circulars, handbills, etc. would clearly be an advertisement.[143] In fact, the purpose of making the issue of an advertisement is an essential factor to attract the operation of the provision. The notices displayed in a store, and possibly even labels attached to goods and stating a bargain price, would presumably suffice. Thus, a door-to-door salesman who offers sale of product at bargain price which in fact proves to be unsatisfactory in operation, may also fall within the scope of the above provision.[144]

6.3.2.2.Bargain Price

The provision of clause (2) of section 2(l)(r) will apply where the goods or services are advertised as being available 'at a bargain price'. 'Bargain price' has been defined to have two alternative meanings.[145] In the first place, a bargain price means "a price indicated in any advertisement as a bargain price, by reference to an ordinary price or otherwise". A price which is stated in the

[141] This provision seems to be similar to the provision of sec. 56(1) of the *Trade Practices Act 1974*of Australia and sec 37(2) of the *Combines Investigation Act* of Canada.
[142]*Supra* note 37 at 314.
[143]*R.* v. *Delmayne*, (1969) 2 All *ER* 980; *Mutual Home Loans Fund of Australia Ltd.* v. *Attorney general*,(1973) 2ALR 214.
[144]G. Q. Toperell, R.B. Vermeesch et.al, *Trade Practices and Consumer Protection 690-99*(Sydney: Butterworths, 1983).
[145]Consumer Protection Act, Explanation to clause (2) of sec. 2(1)(r).

form 'Normal Price - Rs. 2,000, reduced Price - Rs. 1500' is clearly a bargain price. The representation of the bargain price in the advertisement is essential and not whether it is in fact such. It is also not necessary that a reference of the ordinary price be made in the advertisement. The claim made in general terms that the prices advertised represent 'bargain', 'discount', 'reduced', 'cut', etc. will be suffice. Thus, 'two for the price of one' claims would be within the scope of the above definition.[146]

Alternatively, a 'bargain price' means a price that a person who hears, sees or reads the advertisement, would reasonably understand that it is a bargain price taking into account the price at which the advertised or similar product is sold. Thus, an advertisement which makes no specific claim to be offering a reduced or bargain price may yet be caught if the price stated is one which a member of the public could reasonably understand to be a bargain price because it is lower than price normally charged for the similar goods or service.

6.3.2.3. Intention

Once it is established that goods or services have been advertised for supply at a bargain price, then it is necessary under clause (2) of section 2(1)(r), to show that it was not intended to be offered at a bargain price for a reasonable period of time and in reasonable quantities. To determine these issues, the nature of the market in which the business operates, the nature and size of the business and the advertising are relevant considerations. The question of reasonableness is one which must be evaluated in the light of all the circumstances of each case.[147] The intention is a vital element of clause (2) of section 2(l)(r). The intention which must be established is that at the time of advertising it was not intended to offer the goods or services for supply at the

[146] G. Q. Toperell, R.B. Vermeesch et.al, *Trade Practices and Consumer Protection 690-99*(Sydney: Butterworths, 1983).
[147] *Ibid.*

bargain price for a reasonable period of time or in reasonable quantity.

It will be quite difficult to prove the necessary intention. The mere fact that the goods or services were not made available for a reasonable period or in reasonable quantities will not itself be sufficient, for the failure to supply could well be due to factors beyond the advertisers control (e.g. failure of his own supplier to meet their commitments, unforeseen transportation difficulties) rather than to any intention on his part not to honour the terms of his advertisement. Sometimes, such factors may no doubt be manifested by some unscrupulous traders. To overcome this difficulty of proof of the specific intention required by clause (2) of section 2(l)(r), it is submitted that we should incorporate an alternative provision to the effect that when it is a failure in fact to supply advertised goods or services for a reasonable period and in reasonable quantity, it should be presumed that the specific intention to contravene the provision of clause (2) of section 2(1)(r) existed (in the absence of any plausible explanation for failure to supply).

Whenever, advertised goods are not in fact available, or are not available for a reasonable period and in reasonable quantities at bargain price, it will *prima facie* be bait advertising contravening the provision of clause (2) of section 2(1)(r). It is now particularly important for advertisers to exercise special care in advance before advertising the sale at bargain price. They must ensure before such an advertisement is issued that the advertised goods or services shall be available for a reasonable period and in reasonable quantity.

In ***re. Smt. Bharati Devi,***[148] the advertisement announcing the sale of goods at throwaway prices was held to be an unfair trade practice under section 36A(2) of the MRTP Act as unverifiable market prices were given without mentioning the quality of the goods offered and the duration of the sale period.

In ***re. Inter-Shoppe***[149] an advertisement describing the sale as 'High

[148] UTPE 80 of 1985, decision on 18-11-1968 (MRTPC).
[149](1988) 63 Comp. Cas. 286 (MRTPC).

Fashion at Half price' was published. But, the discount between 10% and 50% on the list price was offered. It was held that issuing of advertisement offering bargain price but in actual practice, the bargain price is either not given or the customer has to pay more than the price outwardly indicated, is primarily an unfair trade practice under the provision of section 36A(2) of the MRTP Act.

In ***Consumer Unity and Trust Society* v. *Bal Krishna Khurana*[150],** the respondent was publishing the advertisement in the newspapers offering the sale of hosiery goods of export quality at ridiculously low rates. In order to tempt the intending buyers to flock to his business premises, the sales were said to remain in operation only for an unreasonably short period 2/3 days. The MRTP Commission held it to be an unfair trade practice prejudicial to public interest.

In the case of ***Snowhite Clothiers,*** [151] the respondent issued an advertisement declaring that a discount upto 50% would be available on 'snow white sale for the whole family'. It was found that the company had manipulated the prices by adding high mark-up on the cost price of the goods. The MRTP Commission passed the cease and desist order and laid down the following guidelines to be kept in view while issuing the advertisement on bargain sales:

i. The period of discount sale should invariably be mentioned which should be reasonable. The period of discount sale may not be less than ten days.
ii. The normal price of the items broadly categorised shall be indicated so that the customers may be aware of the original and the bargain price at which articles of particular categories would be available.
iii. The quality of the articles at which the maximum and minimum discount would be available shall also be mentioned as far as possible. If the sale is during off season, it may be so indicated.

[150] (1985) 1 comp. LJ 371 (MRTPC).
[151] Snowhite Clothiers, New Delhi, (1987) Tax.LR 1601 (MRTPC).

However, a genuine offer advertised under the caption 'Grand Annual Sale, 10-50 per cent off' is not misleading and therefore, not an unfair trade practice.[152]

6.3.2.4. Exception to clause (2) of section 2(1)(r)

It is to be noted that no exception has been provided to clause (2) of section 2(1)(r). Although some exceptions to this clause were recommended by the Sachar Committee, but it is not understandable why the same have not been incorporated in the Act. It is submitted that these exceptions should be incorporated in the Act. The exceptions are:[153]

(a) he took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated; or

(b) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefore, because that demand surpassed his reasonable expectations; or

(c) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.[154]

[152] In re Sunder Jute House, UPTE 32 of 1984, decision on: 6-12-1985 (MRTPC).
[153] Sachar Committee Report (1978), p. 272 Such exceptions also exist in the legislation in Canada as well as in Australia.
[154] *Supra* note 37 at 316-17.

6.3.3. Offering Gifts and Prizes and Conducting Promotional Contests

6.3.3.1. Offering Gifts and Prizes, etc.[155]

The offering of 'free' gifts, prizes or other items is promotional device frequently used to attract the customers. Such schemes provide opportunity for deception. In such cases, generally the cost of the item offered as a gift, prize, etc. is recovered, in whole or in part, from the selling price charged in transaction although the consumer is being given or offered free of charge. Where an offer of a 'free' gift or prize is being made without the intention of performing it (as offered), it will amount as an unfair trade practice covered by sub-clause *(a)*of clause (3) of section 2(1)(r).[156]

The use of the expression 'offering of gifts, prizes or other items' in sub-clause (a)of clause (3) of section 2(1)(r) reveals that the phrase 'other items' is intended not to limit the scope of the words 'gifts' and 'prizes'. The phrase 'other items' seems to frustrate the attempts of the traders to evade the above provision by using phrases as 'without further charge' or 'bonus' instead of 'gift' or 'prize'.

- **Free-** It is frequently found that consumers have been misled into thinking that a genuine free gift has been offered, whereas the price of such gift has been charged with the cost of the item purchased. For example, in the case of ***Khaitan Electricals Ltd.,*** [157] the company advertised a scheme of 'Great Fans, Great Gifts', for limited period, in which the buyers of its fans in order to obtain their gift coupon carrying a wide range of gifts of unequal value was expected to pay Rs. 13 ***extra.*** This was clearly held to be an unfair trade practice under section 36A(3)(a)of the MRTP Act.

[155] *Ibid.*
[156] This provision seems to be similar to sec. 54 of the *Trade Practices Act, 1974*(Australia).
[157] *The Director General (I & R)* v. *Khaitan Electrical Ltd***.,** UTPE 15 of 1986, decision on 13-11-1986 (MRTPC); see also in re. *United Finance Corporation***,** (1991) 70 Comp, Cas. 2 (MRTPC).

Where a purchaser is told that an article is 'free' as a gift or prize to him another article is purchased, the word 'free' indicates that he is paying nothing for the article and no more than the regular price for the other. Thus, a buyer has a right to believe that the seller will not directly and immediately recover, in whole or in part, the cost of the free article by marking up the price of the article, by the substitution of inferior article or otherwise. Further, a gift scheme which does not cause any loss or injury to the consumers cannot be regarded as an unfair trade practice. In a case,[158] the stocks of gifts were available in sufficient quantity and had been distributed promptly. Since the prices came down during the operation of the gift scheme, in spite of the fact that there was an element of chance in getting the gifts of higher value, it can be said that the consumers did not suffer any loss or injury in the transaction and, therefore, there is hardly any scope of prejudice being caused to the consumer.

When making 'free' gift, prize or similar offers all the terms, conditions and obligations upon which receipt and retention of the 'free' item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. In other words, all the terms, conditions and obligations should appear in close conjunction with the offer of 'free' item. For example, disclosure of the term of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset.

- **Intention -** Under clause (3) of section 2(l)(r), it is necessary to establish that the offer was made 'with the intention of not providing them as offered'. Where a promise is made in reckless disregard of the likelihood of the promisor's being able to perform it, it may be possible to draw an inference

[158] In *re. KPM Oil Industries Ltd.,* UTPE 73 of 1985, decision on: 19-3-1986 (MRTPC).

that he did not in fact intended to perform.[159] **A** seller advertising a gift offer and intending to make available only a limited number of gifts, he must make it clear in the advertisement, otherwise he may be held liable for contravention of clause (3) of section 2(1)(r).

In ***K.MohammedRafi* v. *Wilkinson Sword India Ltd*** [160] ,an advertisement was issued by the opposite party offering certain prizes. The amount paid as prizes was to be realized by the sale of their products to the purchasers. It means whatever prize money that was offered would be realized by the sale of products manufactured by the opposite parties. Therefore, whatever prize was offered was included in the sale price. Karnataka State Commission held this practice to be unfair.

In ***Maruti Udyog Limited*** v. ***Brijinder Kumar Arora and Anr.***[161]**,**the opposite party issued advertisement to invite the public to book 'Maruti Omni' up to 30-9-1999 and to avail the gift cheque scheme, in case the whole money was paid till 30th September, 1999. The complainant lured by scheme, booked the vehicle and paid full cost before the last date. But the opposite party deliberately delayed the delivery of the vehicle in order to extract escalated price. Practice of the opposite party was held to be unfair by the State Commission.

6.3.3.2. Conducting Promotional Contests[162]

Sub-clause (b)of clause (3) of section 2(1)(r) prohibits the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting directly or indirectly, the sale, use or supply of any product or any business interest. The provision reveals that even if conducting any contest, lottery etc. is without any reference to promoting sale, use or supply of any product, it may be to promote some business interest which may ultimately result in promotion of

[159] R v. *Harrison,* (1957) WLR 117.
[160] 2006 CPJ 314 (Karnataka).
[161] 2005 1 CPJ 193 (Jammu & Kashmir).
[162] *Supra* note 37 at 318-20.

sale, etc. Thus, the use of the expression 'any business interest' has widen the scope of the above provision.

It has been found that some of the traders issue advertisements announcing offer or prizes on die basis of lucky draw or contest. In the case of ***Messers Colgate Palmolive (India) Ltd.***, the respondent by an advertisement announced the 'Colgate Trigard Family Good Habits Contest'. It was alleged by the petitioner (Society for Civil Rights) that the company had raised the cost of the tooth-brush from Rs. 2.00to Rs. 2.10and that the contest had many 'anti-consumer features'. It was held that the contest conducted by the respondent was an unfair trade practice under the expression of section 36A(3)(b) of the MRTP Act.[163]

In the case, ***Avon Cycles Pvt. Ltd.***[164] the company advertised a scheme offering 42 prizes on the basis of a lucky draw. The company attempted to justify the scheme on the basis that it was financed out of the profits of the company and not by increasing the prices. The scheme was held to be an unfair trade practice prejudicial to public interest for the several reasons:

- The conduct of lotteries, contests, etc. tends to induce consumers to buy products on consideration other than quality and price. When the essential considerations of quality and prices are lost sight of, consumer and public interest suffers.
- The award of prizes, benefits only a mini scale number of consumers. Discriminatory benefit of this kind to a select few without any corresponding benefit to or, as often happens at the expense of the bulk of the consumers is obviously not in the overall interest of the consumers. On the other hand, the same amount, if utilised for the purpose of reducing prices or providing better services to the consumers, in general will enhance consumer satisfaction.

[163]Hindustan *Times, Oct. 10, 1984,* p. 7.
[164]*In re. Avon Cycle Pvt. Ltd. UTPE*43 of 1984, decision on: 10-9-1986 (MRTPC).

- The practice of offering prizes by lottery tends to encourage the gambling instinct leading to unnecessary, avoidable and excessive purchases by consumers for the purpose of gaining entry into the lottery. Such available and excessive purchases are a real loss to the consumer. Instead of protecting consumer interest, lotteries and contests, therefore, clearly act in a prejudicial manner in regard to consumer and public interest.
- It has a deleterious impact on competition in as much as extraneous considerations other than quality and price tend to determine consumer preferences and purchases and thereby distorting competition. Better products tend to be obscured and inferior products gain preference in consumer choice merely because the opportunity the latter provide to enter a contest. Interfering with healthy competition, contests and lotteries ultimately result in loss to the consumer.

Again in ***M/S. Coca-Cola India Limited*** v. ***Dr. Amarjit Singh***[165], the National Commission held that where large number of unidentifiable consumers to the extent that these consumers had no demonstrated means of knowing where and how to send their entries likely prima facie to win prizes and were thus victims of discrimination *vis-à-vis* those who participated in the scheme on or after 3rd October 1998. The admitted criterion to determine the inter se chronological order of valid entries received in the designated post box on any given date, and hence their eligibility for any prize, was the order in which these entries were picked out of the bag containing all the entries received in the designated post box on that date and taken out there from. The Commission held that this was undoubtedly a method of drawing lots out of a bag, i.e., lottery as contemplated in the provisions of section 2(l)(r)(3)(b) of the Consumer Protection Act. The Commission concluded that the scheme thus violated the

[165]FIRST APPEAL No. 419 of 2002, decided on 9 August. 2010 *by* the National Consumer Disputes Redressal Commission.

provisions of that section and constituted an unfair trade practice on the part of the appellant.

6.3.3.3. *Exceptions to clause (3) of section 2(1)(r)*

It is to be noted that no exception has been laid down to clause (3)of section 2(1)(r). Some exceptions were recommended by the Sachar Committee for their incorporation in the MRTP Act. But, it is not clear why these exceptions have been ignored while inserting clause (3)to section 36Ain the MRTP Act. It is submitted that to start with the new experiment of controlling unfair trade practice relating to conducting of any contest, lottery, game of chance, or skill or offering of gifts, prizes, etc., these should have been incorporated in the Act as a safety valve in favour of the trader, particularly, when he is making an honest offer by adequate and fair disclosure for the benefit of the consumer. The exceptions are:[166]

(a) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning;

(b) distribution of the prizes is not unduly delayed; and

(c) selection of participants or distribution of prizes is made on the basis of skill or on a random basis in any area to which prizes have been allocated.

6.3.3.4. Withholding information about final results of scheme

The Amendment Act, 2002 has inserted a new sub-clause (3 A) in section 2(1)(r) of the Act to enlarge the definition of 'unfair trade practice' to include withholding of information about final results of any scheme offering gifts, prizes, or other items free of charge. The sub-clause provides as follows:

(3A)Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

[166]Sachar Committee Report (1978), p. 272.

Explanation- For the purpose of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised.

The above provision makes it mandatory to inform about the final results of any scheme offering gifts, prizes or other items free of charge. The result of such schemes may be published within a reasonable time in the newspapers in which the scheme was originally advertised. Withholding of the information about the final results of the scheme will amount to an unfair trade practice within the ambit of the Consumer Protection Act.

6.3.4. Product Safety Standards

One of the most important right available to the consumers is to assure that goods purchased will be reasonably safe in use. There is an urgent need for effective action in the field of consumer product safety. Increasing affluence and he increasing range of complex nature of products have led to the prevalent situation in which unsafe products may cause death or serious injury. Sometimes the danger arises from defective design, or sub-standard material or poor workmanship.

Clause (4) of section 2(1)(r) of the Act deals with the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, construction, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods.[167] The purpose of the provision is to protect the interest of the consumers against unreasonable risk of injury associated with the consumer products. Thus, a non-compliance with the standards prescribed by competent

[167] In Australia, there is a similar provision under section 62 of the *Trade Practices Act. 1974.*

authority relating to the performance, composition, contest, design etc. as are necessary to prevent or reduce the risk of injury to the person using the goods is an unfair trade practice under this clause. The requirement that the goods supplied to a consumer should comply with the standards prescribed by a competent authority presupposes that there are competent authorities available for all such goods. However, such authorities as may be available might lay down the specifications and designs (such as I.S.I specification) but do not generally prescribe standards of performance, composition, which could be judicially accepted as a norm. For most of the consumer goods it can be said that there are no such competent authorities presumably set-up, recognised or controlled by the Government. Thus, there is a need to set up an independent competent authority, say, Consumer Product Safety Commission to formulate the safety standards for all consumer products to prevent any risk of injury associated with such products. The Commission so established should also be empowered to ban manufacture and sale of hazardous products and to seize item from the market if it deems necessary. The members of the Commission should be drawn from different fields, e.g. Law, Engineering, Science, Medicines, etc.[168]

The question as to the applicability of section 36A(4) of the MRTP Act (same as clause (4) of section 2(1)(r) of the Consumer Protection Act) arose in the case of ***Food Specialities Ltd.***[169] In this case, the respondent was the manufacturer of 'Maggi Tomato Ketchup' marked packages of 400 gms. amongst various other packings. It was alleged that marking of packages of 400 gms. was contrary to the provisions of the Weights and Measures (Packaged Commodities) Rules, 1977, in as much as it is likely to mislead the customer for a package of 500 gms. that this would cause loss or injury to him and that

[168] *Supra* note 37 at 321-322.
[169] The Director General (I & R) v. Food Specialities Ltd., 16 of 1986, decision on: 6-10-1986 (MRTPC); (1987) 62 Camp. Cas. 122 (MRTPC); see also In re. Food Specialities Ltd., (1991) 71 Comp. Cas. 564 (MRTPC).

this would attract the provisions of section 36A(4) of the Act. The MRTP Commission held that packing of Tomato Ketchup in quantities of 400 gms, cannot attract the provisions of section 36A(4). The wording of the provision is plain, unambiguous and clearly points to the object behind it. It is a provision to deal with unfair trade practice and not just to add to the penalty or liability or to impose an additional supervisory authority for the enforcement of Weights and Measures Act. The object is clear enough that a consumer using particular goods should not suffer any injury or risk of injury by reason of being supplied any product or commodity in a quantity not allowed. The Commission pointed out that it would be stretching the language to bring infringement of packaging rules within the purview of section 36A (4). This reasoning may come in handy where a particular packaging quantity has been prescribed from the standpoint of a requirable dose to be administered to a person of particular age or in any particular condition of health, as a lesser or greater quantity may either be inefficacious or injurious.[170]

6.3.5. Hoarding or Destruction of goods

The practice of hoarding or destruction of goods with a view to create artificial scarcity and thus to force up prices are quite common in our country. To control such practices, clause (5) of section 2(1)(r) prohibits hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale, or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.[171]This practice causes much prejudice to the consumer both at war and normal times. Practices of these kinds are also being covered under the provisions of Essential Commodities Act, 1955, but only with respect to commodities declared essential under this Act. However, the hoarding of other goods is not covered under the Essential, Commodities Act, 1955. Very strong

[170] Ibid.
[171]*Supra* note 37 at 322.

and stringent measures have been provided against economic offenders under Essential Commodities (Special Provisions) Act, 1991. Further Prevention of Black Marketing and Maintenance of Supply of Essential Commodities Act, 1980 also provides for the detention of offenders.[172]

Clause (iv) of the "FICCI 10 points Norms of Business Ethics" provides for the free distribution of goods and avert creation of the artificial scarcity.[173]The factors to attract the provision of Sec.2 (l)(r)(5) are:

(a) Permitting the hoarding or destruction of goods;

(b) Refusal to sell the goods or make them available for sale; and

(c) Refusal to provide any service.

The intention of such practice must be to raise or tend to raise the cost of those goods or services or other similar goods or services. 'Refusal to sell' may take various forms, overt and covert. Intention to bring about the results envisaged need not necessarily be present.[174]

However, the scope of the clause can further be widen by extending it to the cornering of goods also.[175]

6.3.6. Spurious goods

The Amendment Act, 2002 inserted a new sub-clause (6) in section 2(1)(r) of the Act to further enlarge the scope of the definition of 'unfair trade practice' to include manufacture of spurious goods or sale of spurious goods or adoption of deceptive practices in the provision of services. According to this provision, manufacture of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services will amount to an unfair trade practice. Clause (oo) of section 2(1) of the Act defines spurious

[172]*Supra* note 15 at 243-244.

[173] FICCI (Federation of Indian Chambers of Commerce and Industry) set up its '10 point norms of Business Ethics' in January 1995 as a measure of self regulation and laid down its code conduct, (1995) 2 CPJ (JS). 27.

[174]*Ibid.*

[175]*See also 9th Annual Report Pertaining to the Execution of the provisions of the MRTP Act, 1969,* (for the year ending 1979) p. 149.

goods and services to mean such goods and services which are claimed to be genuine but they are not actually so.[176]

The 'Code for Self-Regulation' prescribed by the 'Advertising standards Council of India'[177] also seeks to safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large.[178]

To a manufacturer, a spurious product may represent a cut in his market share, but to a consumer the threat from such a product is grave. A counterfeit automobile part, for example could mean loss of life if it were to cause a major accident. Similarly, a house built with spurious cement may well come down like a pack of cards; sub standards GI pipes could lead to contamination of drinking water; a spurious LPG cylinder could burst, killing and injuring those around and also damaging property; fake electrical gadgets and accessories could cause a major fire or destroy valuable electronic equipment.[179]

FICCI has constituted a 'brand protection Committee' to eliminate fake products and sought the cooperation of consumers and the Government in this effect; Clause (v) of the '10 point Norms of Business Ethics' set up by FICCI also require "not to deal knowingly in smuggled a spurious products".[180]

Since manufacturing or offering of spurious goods has grave consequence for the life and the health of the consumers. Government should tackle the problem and combat this wrong by forming task force consisting of representatives of Central and State Government. Enforcement agencies, trade, industry and

[176] *Supra* note 37 at 323.
[177] The Advertising Standards Council of India (ASCI) - a body of advertisers, advertising agencies, the press and others involved in any form of advertising - was incorporated in October 1985, for further detail see Chapter VII of this work. (1995) 2 CPJ 27 QS).
[178] Clause (iii) of "Code for Self- regulation" prescribed by the ASCI.
[179] Pushpa Girimaji, "Spurious Brands: Grave threat to Consumers", Available at: *http://www.tribuneindia.com/2001/20010715/biz.htm,*(Visitedon 8/8/2017).
[180] FICCI (Federation of Indian Chambers of Commerce and Industry) set up its '10 point norms of Business Ethics' in January 1995 as a measure of self regulation and laid down in code or conduct, (1995) 2 CPJ OS). 27.

consumer organizations should also come forward to eradicate the trading of spurious goods. Violators should be made to pay huge amount as fine. Manufacturers should use packaging in such a manner that it can neither be duplicated nor be reused.[181]

6.4 Enforcement of Protection against Unfair Trade Practice

To provide simple speedy and inexpensive redressed of consumer grievances relating unfair trade practices, the Consumer Protection Act, 1986 envisages three-tier quasi-judicial machinery at the District, State and National levels. At the district level, there are to be district for as the redressed Fora. The state government can, at its discretion, set up more than one district forum in a district. At the state level there are to be similar Redressal Commission to be non as State Commission and at the national level, there is a National Consumer Disputes Redressal Commission to be known as National Commission.[182]

The Consumer Forum is exercising inquisitorial jurisdiction and rendering justice on the basis of equity, de-hors technicalities evolved under the procedural laws. This means, in case you have not placed certain document in the complaint or you have not claimed initially, the bench can ask you for these details during the course of arguments and allow if it feels is justifiable. This again means that the doors are not closed for complaint on the basis of technicalities but on enquiry, the bench can take inquisitorial jurisdiction and give relief. The same is applicable to the opposite party also. The only requirement is to follow the principles of 'Natural Justice'. Proceeding before Consumer Fora are inquisitorial in nature and not adversary in nature. Finally, it is not bound by the procedural technicalities developed under the substantive law.[183]

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[181] *Supra* note 15 at 243-244.
[182] *Supra* note 21 at 258.
[183] *Supra* note 17 at 22-23.

It is authoritatively settled that the arbitration clause is not a bar to the entertainment of the complaint by the redressal agency under the Act, even if the arbitration provision has been laid down in statute.[184]

6.4.1 Manner of filling Complaints and Procedure

A complaint[185], includes any written claim by a complainant[186]that a trader has adopted as an unfair trade or restrictive trade practice, may be submitted to a district forum, a state commission, and a national commission.

6.4.1.1 Who can file a Complaint?

Any of the following persons may file a complaint under the Act by:

a. The consumer himself;
b. Any recognized consumer association registered under the companies association
c. one or more consumers, where there are numerous consumers having the same interest; and
d. the Central or the State Government.[187]

A voluntary organization which is also registered is competent to file the complaint.[188] In ***ASPVPC & Co.* v. *President Srivilliputhor Taluk Consumer Protection Council***[189], it was held that when the voluntary organization files a complaint on behalf of an individual, the individual must also be impleaded as a party, but in ***Consumer Unity and Trust Society* v. *Bank of Baroda***[190], the Supreme Court held that even when the actual consumer is not joined there is no impediment in the complaint. Section 12 (2) of the CP Act provides that every complaint filed[191] with the District Forum shall be accompanied with

[184]*Ibid.*
[185] Section 2(l)(c) CPA 1986 & section 2(5) CPA 2019.
[186] Section 2(1)(b) CPA 1986 & section 2(6) CPA 2019.
[187]Section 12.
[188]Consumer Unity and Trust Society v. Bank of Baroda, (1995) 1 CPR 420 SC.
[189](1994) 2 CPJ 252.
[190](1995) 1 CPR 420 SC.
[191] "A complaint may be filed, including by way of electronic mode."- inserted under the Consumer Protection Act, 2019.

such amount or fee as may be prescribed. Section 12 (3) seeks to provide that The admissibility of the complaint is normally decided within 21 days from the date of receipt of the complaint [192] and that once admitted a complaint, it will not be transferred to another court.. This will help to quicken disposal of complaints.

6.4.1.2 Where to File a Complaint?

The complaint can be filed by any person mentioned under section 12 of CP Act any the Forum mentioned below that-

1. If the value claimed of goods or services and any compensation does not exceed 20 lakh rupees., then the complaint can be filed in the District Forum within the local limits of whose jurisdiction the opposite party actually resides or carries on business or has a branch office or personally works for gain or where the cause of action, wholly or in part, arises[193].
2. If the value of goods or services and compensation, if any, claimed exceeds rupees twenty lakh but does not exceed rupees one crore, the complaint can be filed before the State Commission.[194] Where joint petition is filed on behalf of a large number of victims, it is the total amount of compensation claimed in the petition (and not the individual claims) that will determine the question. In case the total compensation claimed exceeds, presently, Rs. 20 lakh but does not exceed Rs. 1 crore, the matter can be heared by the State Commission [***Public Health Engineering Department v. Upbhokta Sanrankshan Samiti***[195]]. The State Commission is also entitled for hearing complaints from the orders of a district forum within the state.[196]
3. If the value of goods or services and the compensation, if any claimed exceeds rupees one crore, complaint can be filed before the National

[192] The term "filed" is inserted in place of received under the Consumer Protection Act, 2019.
[193] Section 11.
[194] Section 17.
[195] 1992 (1) CPR 569.
[196] Section 17.

Commission.[197]

The National Commission shall also have the jurisdiction to entertain appeals against the orders of any State Commission[198].

6.4.2 Procedure on Receipt of the Complaint

After receiving the complaint, the District Forum disposes off the dispute as per the procedure laid down in under Section 13 of the Act.[199]Where the District Forum, the State Commission or the National Commission as the case may be of the opinion that a defect in the goods cannot be determined without proper analysis or test of the goods, refer the sealed sample of the goods to the appropriate laboratory,[200] the cost of which is borne by the complainant[201]. The District Forum, the State Commission or the National Commission as the case may be thereafter gives a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also to the objection made in relation thereto[202]. On the basis of evidence brought to its notice by the complainant and the opposite party, the District Forum the State Commission or the National Commission decide the complaint.[203] However, every complaint shall be heard as expeditiously as possible and endeavor shall be made to decide the complaint within a period of 3 months from the date of the receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within 5 months if requires analysis or testing of commodities.[204]

As we know the basic purpose of the CP Act, 1986 is to provide speedy,

[197]Section 21.
[198]*Ibid.*
[199] The State Commission and the National Commission follow the same procedure as that of District Forum with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission or National Commission (Sections 18 to 22).
[200] Section 13(l)(c).
[201] Section 13(l)(d).
[202] Section 13(l)(g).
[203] Section 13(2)(b) (i).
[204]Section 13(3-A).

efficient and inexpensive justice to the consumers. It is being observed that the purpose is being defeated because of predominance of advocates in Consumer Fora. To achieve the above basic purpose, under the Consumer Protection Act 2019 a monetary limit has been proposed up to which advocates shall not be allowed to be engaged. This will enable the consumer to get inexpensive justice. The proposed provision runs:

> "The Court shall not allow the engagement of an advocate by either party to the complaint, unless the value of the goods and services, exceeds rupees two lakh, provided that the complainant may engage an expert if the complaint requires technical expertise."

6.4.3 Findings of the Consumer Dispute Redressal Agencies

After the completion of above proceeding if the District Forum, the State Commission or the National Commission satisfied that the goods suffer from any of the defects specified in the complaint or the allegations contained in the complaint about the services as proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely: (i) to remove the defects pointed out by the appropriate laboratory from the goods in question; (b) to replace the goods with new goods of similar description which shall be free from any defect; (c) to return the complainant the price, or, as the case may be, the charges paid by the complainant[205]; (d) to pay such amount as may be awarded by it as compensation to the consumer for loss or injury suffered by the consumer due to negligence of the opposite party: provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit[206]; (e) to remove the defects in

[205] The Consumer Protection Act 2019 has added under section 39- "along with such interest on such price or charges as may be decided" after the term "complaint".

[206] To make the punitive damages awarded under this provision deterrent enough to discourage the other party to repeat the offence and to deter the companies to go in for appeal against the order of the District Forum, The Consumer Protection Act 2019 has added under section 39- "Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit, which shall not be less than ten times, the value of the goods or service or 25% of the profit from the total sale of the said goods or service, whichever is higher."

goods or deficiencies in services in question; (f) to discontinue the unfair trade practice or the restrictive trade practice; (g) not to offer the hazardous goods for sale; (h) to withdraw the hazardous goods and to desist from offering services which are hazardous in nature[207]; (i) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature; (j) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently, provided that the minimum amount of sum so payable shall not be less than five percent[208] of the value of such defective goods sold or service provided, as the case may be to such consumers; (k) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement; and (1) to provide adequate cost to parties.

5.4.4 Time Limit for Filing a Complaint and Deciding Complaint/Appeal

The District Forum, the State commission or the National commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.[209] However, the delay may be condoned, if the complainant satisfies the District Forum, the State Commission or the National Commission as the case may be, that he had sufficient cause for not filing the complaint within such period, for which the reasons shall be recorded by the concerned Forum or Commission. This provision was inserted by Act 50 of 1993, S.19 (w.e.f. 18.06.1993); still it would have only prospective effect.[210]

As far as possible the district forums, state commissions and the National commission are required to decide the cases speedily. However, as a rule there are time limits laid down for the decision on consumer complaints.[211]

[207] It is interesting to note that this provision is silent about unsafe goods. Therefore, The Consumer Protection Act 2019 has added “or unsafe” after hazardous.
[208] “Twenty five percent” under the Consumer Protection Act 2019.
[209] Section 24-A of CPA 1986 & section 69 of CPA 2019.
[210] United India Ass.Co. Ltd. v. Asha Golden Transport Co. (1995) 2 CPJ 39 (Gujarat).
[211] *Supra* note 21 at 258.

1. Where the complaint does not require analysis or testing, the case must be decided within a period of *three months* from the date of receipt of notice by the opposite party.
2. Where the complaint requires analysis or testing, the case must be decided within a period of *five months* from the date of receipt of notice by the opposite party.

The National Commission and the state commission are required to decide the appeal as far as possible within 90 days from the first date of hearing. Other important provisions are:

a) *Finality of orders:* Every order of a consumer forum is final unless any appeal is preferred against such order.
b) *Limitation period: A* complaint may not be admitted unless it is filed within 2 years from the date on which cause of action has arisen.
c) *Enforcement of order:* Consumer courts may enforce their own orders or send the order to a civil court with competent jurisdiction for enforcement in the event of its inability to execute the order.
d) *Dismissal of frivolous or vexatious complaints:* Complainant may be ordered to pay up to Rs. 10,000 as costs to the opposite party apart from the dismissal of a frivolous/vexatious complaint.
e) *Penalties against non-compliance of the order:* The penalty in case of non-compliance with an order would lead to imprisonment for a period not less than one month but may extend up to three years or with a fine of up to Rs. 10,000 or with both.

6.4.5 Enforcement of Orders of Consumer Forums

Where an interim order made under this Act is not complied with, the District Forum, or the State Commission or the National Commission may order the attachment of the property of the person, not complying with such order. Such attachment shall remain in force for not more than *three months*.

After the expiry of the said period if the non-compliance continues, the property attached may be sold and out of such proceeds the damages may be awarded to the complainant. A due from any person under an order made by any consumer forum shall be recovered by the collector in the same manner as arrears of land revenue.

6.4.6 Dismissal of Frivolous or Vexatious Complaints[212]

Where a complaint instituted before the District Forum, the State Commission or as the case may be, the National Commission constituted under the Act is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and may make an order that the complainant shall pay to the opposite party such cost not exceeding ten thousand rupees, as may be specified in the order.[213] In ***Marine Container Services (India) Pvt. Ltd.*** **v.** ***Mercedes Benz India Ltd and the Tata Engineering and Locomotive Co. Ltd***[214], the National Commission held:

> "We have, therefore, no hesitation to hold that complainant has miserably failed to establish any unfair trade practice on the part of the opposite parties. It appears to us that the present complaint was nothing but an unfair device on the part of the complainant company to exert pressure on the opposite parties to accede to its unjustified demand to replace the car with a new model launched by the opposite parties in the year 1998. In our view, complaint is wholly misconceived and can also be termed as vexatious. The opposite parties have been unnecessarily dragged in this long drawn litigation for over 12 years. In the result, complaint fails and is hereby dismissed with cost of Rs. 20000/- which will go to the "Consumer Legal Aid Account –NCDRC" of this Commission."

[212] *Supra* note 17 at 19.
[213] Section 26 of CPA 1986 & Section 93 of CPA 2019.
[214] (2011) CP) 86 (NC).

6.4.7 Penalties

Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees ["Twenty Five thousand" under Consumer Protection Act, 2019] but which may extend to ten thousand rupees ["One lakh rupees" under the Consumer Protection Act, 2019] or with both[215].

In order to exercise the aforesaid power the District Forum, the State Commission or the National Commission as the case may be, shall have the power of a Judicial Magistrate of the first class and shall be deemed to be a judicial magistrate of the first class for the purpose of the Code of Criminal Procedure. [216] Notwithstanding anything contained in Code of Criminal Procedure an appeal under Section 27, both on facts and on law, shall lie within 30 days from the date of an order. From the order passed by the District Forum to the State Commission; from State Commission to the National Commission; and from National Commission to theSupreme Court. However, no appeal shall lie to any court from any order of a District Forum or a State Commission or the National Commission.[217]

6.4.8 Appeal

Any person aggrieved by an order passed by the District Forum or the State Commission or the National commission may prefer an appeal against such order to the State Commission, National Commission or the Supreme Court respectively within a period of thirty days from the date of the order:

[215]Section 27 (1) of CPA 1986 vis-a-vs Section 72(1) CPA 2019.
[216]Section 27(2) of CPA 1986 vis-a-vs Section 72 (2) CPA 2019.
[217] Section 27-A of CPA 1986 vis-a-vs Section 73 CPA 2019.

Provided that the State Commission or the National Commission or the Supreme Court as the case may be, may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.[218] Every order of a District Forum, the State Commission or National Commission shall, if no appeal has been preferred against such order under the provision of this Act, be final.[219]

6.4.9 Review

The National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record.[220] It is a special jurisdiction only conferred to National Commission. In ***Indian Bank* vs. *Satyam Fibers (India) Pvt. Ltd.*** [221], the Supreme Court held that the Commission has the inherent power to recall its judgment and order if it is found afterwards to have been obtained by fraud or forgery as this amounts to abuse of the process of the Commission.

6.5 ANALYSING NEW CONSUMER PROTECTION ACT 2019

After receiving the assent of the President of India, The Consumer Protection Act, 2019 was published in the Official gazette on August 9, 2019. The new law will come into force on the day the central government will be able to notify. The law has retained certain old provisions, but also shows the brilliance of certain new perceptions. The Ministry of Law and Justice has meticulously elaborated the 2019 Consumer Protection Act, which covers all possible failures that may arise in the new era.

6.5.1 Scope of the CP Act 2019

Although the law contains certain old provisions, Parliament has introduced certain new clauses on consumer complaints attributed to modernized society to create a comprehensive consumer protection law. As Compared to the previous CP Act 1986, which had only 31 sections divided

[218]Sections 15, 19 & 23 of CPA 1986 and sections 41, 51& 67.
[219] Section 24 of CPA 1986 and s. 68 of CPA 2019.
[220] Section 22(2) of CPA 1986 and section 60 of CPA 2019.
[221]AIR 1996 SC 2593.

into 4 chapters, the CP Law, 2019 enumerates 107 sections that are divided into 8 chapters. The CP Law of 2019 also includes new words for the definition such as “Advertisement”, “Misleading Advertisement”, “Central Authority”, Mediation”, “Mediator”, “Consumer Rights”, “Regulator and Unfair Contract”, “Design”, “Direct Selling”, “Director General”, “E-Commerce”, “Electronic Server Provider”, “Endorsement”, “Establishment”, “Harm”, “Injury”, “Express Warranty”, “Product and Product Liability”, “Product Manufacturer”, “Product Manufacturer”, “Product Liability Action”, “Product Seller”and “Product Service Provider”.

This hotline is intended to provide an overview of the newly introduced provisions, to analyze the scope, scope and impact of the newly introduced provisions, and to provide a comparative analysis of some of the most important provisions of the CPA 2019 compared to the CPA of 1986.These are the detailed analysis on the key provisions of CPA 2019.

6.5.2 Salient Features of CPA 2019

6.5.2.1 Inserting new definitions

1. “advertisement” means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents;[222]

2. “endorsement”, in relation to an advertisement, means—

- **i.** any message, verbal statement, demonstration; or
- **ii.** depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or
- **iii.** depiction of the name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement;[223]

[222]Section 2(1) of New Consumer Protection Act 2019.
[223]Section 2(18) of New Consumer Protection Act 2019.

3. "mediation" means the process by which a mediator mediates the consumer disputes;[224]

4. "mediator" means a mediator referred to in section 75;[225]

5. "misleading advertisement" in relation to any product or service, means an advertisement, which—

   i. falsely describes such product or service; or

   ii. gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or

   iii. conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or

   iv. deliberately conceals important information;[226]

6.5.2.2 Broadening the definition of "*consumer*"

The definition of "consumer" has been extended to include people who trade offline or online electronically or through teleshopping or direct sales or multi-level marketing for our transactions in all media in all cases covered by CPA 1986.

The definition now offers consumers a remedy for multi-level marketing. Thus, the seller can be exposed to multiple levels of liability under the CPA 2019 at each marketing level and is not limited to the manufacturer of the product, but also entities that operate in different phases of production and marketing.

If services are provided free of charge, the person receiving the service is not considered a consumer. The service provided is free of charge is a factual question and must be checked on a case-by-case basis.

[224]Section 2(25) of CPA 2019.
[225]Section 2(26) of CPA 2019.
[226]Section 2(28) of CPA 2019.

6.5.2.3 E-commerce

E-commerce has been defined as buying or selling of goods or services including digital products over digital or electronic network.[227] The central government has been authorized to take measures and make rules to prevent unfair trade practices in e-commerce.[228] In case of products being sold through online platforms, without charging any fees separately amounts to providing services needs to be ascertained. It is not clear whether off-shore e-commerce would also get covered and eventual enforcement of CPA 2019 qua such entities.

6.5.2.4 New grounds to file complaints

While the provisions of CPA 1986 prescribed six (6) major grounds to file complaints[229], CPA 2019 has increased the count to seven (7)[230], and also substantially modified one of the existing grounds to file complaints as provided under Section 2(c)(i) of CPA 1986. The two key changes are:

1. *Introduction of Unfair Contracts & expansion of Unfair Trade Practices*

In the previous legislation, a complaint could be filed only if *an unfair trade practice or a restrictive trade practice was adopted by any trader or service provider.*[231] Now "*unfair contract*" has also been added which further broadens the ground to file complaints and allows consumers to challenge contracts which are unfair, unilateral and unreasonable.[232] Unfair contract has been defined to include contracts between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:—

1. *requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or*

[227] Section 2(16) of CPA 2019.
[228] Sections 94 & 101(2)(zg) of CPA 2019.
[229] As per Section 2(c) of CPA 1986.
[230] Section 2(6) of CPA 2019.
[231] Section 2(c)(i) of CPA 1986.
[232] Section 2(6)(i) of CPA 2019.

2. *imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or*
3. *refusing to accept early repayment of debts on payment of applicable penalty; or entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or*
4. *permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or*
5. *imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage.*

The above provisions would directly impact the financial institutions such as banks, as the apex court has already stated that the Banks also get covered under the Act.[233] This would specifically take into account contracts entered with banks, e-commerce platforms where parties are not left with any option but to agree to the standard terms to avail the services. With such a broad subjective definition, it remains to be seen how courts would interpret in case of online contracts.

2. *Expanding definition of "unfair trade practice*"[234]

While CPA 1986 had listed six (6) types of unfair trade practices, three (3) types of additional unfair trade practices have now been added to the list which are as follows:

1. *failure or non-issuance of a bill or a cash memo;*
2. *refusal to take back or withdraw defective goods or withdrawal or discontinuance of deficient services or refusal to refund the consideration amount paid within the period as stipulated in the bill or cash memo or receipt or in the absence of such stipulation, refusal to withdraw or refund goods or services within thirty (30) days; and*

[233]Vimal Chandra Grover v Bank of India, AIR 2000 SC 2181.
[234] Section 2(47) of CPA 2019

Before ascertaining whether it amounts to unfair trade practice, it become relevant to determine whether the goods or deficient services have been provided. The section as drafted in its current form pre-determines existence of defective product or deficient service. Separately, even if withdrawn or discontinued, companies could still be held liable under 'product liability' or for 'deficiency of services'.

3. *disclosure of consumer's personal information to any other person unless such disclosure is made in accordance with the provisions of any law for the time being in force or in public interest.*

The provision fails to give any clarity whether information can be shared if consent is taken from the consumers. The reliance will have to be placed on prevalent data protection law. The current data protection law in India does not require any specific compliance for data sharing in case the information is not in the nature of sensitive information i.e. relating to (i) passwords; (ii) financial information; (iii) physical, physiological and mental health conditions; (iv) sexual orientation; (v) medical records and history; (vi) biometric information; (vii) any detail relating to the above, as provided to a body corporate for providing services; and (viii) any of the information received under the above by a body corporate, for processing or storing data under lawful contract, or otherwise.

6.5.2.5 Product Liability[235]

There was no separate legislation governing 'product liability' in India, though it was addressed under CPA 1986, if parties were included within the ambit of '*consumer*'. Insertion of "*Product Liability*" as a separate chapter in CPA 2019 and a new ground for filing a complaint has been one of the most significant additions to the act.

Section 2(35) of CPA 2019 allows a person to make a claim of product liability against such manufacturer, seller or service provider for such defective products. Product liability means the responsibility of a product manufacturer

[235] Sections 82-87 of CPA 2019, Chapter VI

or product seller, of any product or service, related to the product to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating to the product.[236]

Who can be made liable:

CPA 2019 has gone a step forward and defined a product manufacturer[237], product seller[238] and product service provider[239] to provide clarity on who can be made liable for an action under Chapter VI of CPA 2019.

Ingredients to initiate product liability action:

1. Product manufacturer will be liable if product contains a manufacturing defect, or defective in design; or there is a deviation from manufacturing specifications; or does not conform to the express warranty; or fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage. Absence of negligence or fraud in making express warranty of a product cannot be pleaded as a defence.[240]

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[236] Section 2 (34) of CPA 2019

[237] Section 2 (36) of CPA 2019- "product manufacturer" means a person who—
(i) makes any product or parts thereof; or
(ii) assembles parts thereof made by others; or
(iii) puts or causes to be put his own mark on any products made by any other person; or
(iv) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or
(v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or
(vi) being a product seller of a product, is also a manufacturer of such product;

[238] Section 2 (37) of CPA2019- "product seller", in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes—
(i) a manufacturer who is also a product seller; or (ii) a service provider, but does not include—
(a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats;
(b) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction;
(c) a person who— (I) acts only in a financial capacity with respect to the sale of the product;
(II) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider;
(III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

[239] Section 2 (38) of CPA 2019- product service provider", in relation to a product, means a person who provides any service in respect of such product.

[240] Section 85 of CPA 2019.

2. Product seller who is not a product manufacturer may be held liable if (a) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or (b) he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or (c) he has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or (d) the product has been sold by him and the identity of product manufacturer of such product is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or (e) he failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product.[241]
3. Product service provider may be liable if (a) the service provided was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or (b) there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or (c) the service provider did not issue adequate instructions or warnings to prevent any harm; or (d) the service did not conform to express warranty or the terms and conditions of the contract.[242]

CPA 2019 while defining a 'product'[243] has specifically excluded human tissues, blood, blood products and organs. CPA 2019 also lists down certain

[241] Section 86 of CPA 2019.
[242]Section 85 of CPA 2019.
[243] Section 2(33) of CPA 2019- "product" means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic

exceptions[244] to '*product liability*' action, in circumstances where the products have been misused, or if the product being purchased by the employer for use at the workplace did not adhere to installation warnings or instructions, or if the nature of the product is such that the user should have known the associated dangers, etc.

6.5.2.6 Introduction of Central Consumer Protection Authority as the new regulator

Section 10 of CPA 2019 seeks to establish a central authority, the Central Consumer Protection Authority (CCPA) to promote, protect, and enforce the rights of consumers qua misleading advertisements and unfair trade practices as a class. One of the primary reasons for establishing CCPA is to fill an institutional void in the existing regulatory regime.[245] An investigative wing is envisaged to be formed under the aegis of CCPA, which shall carry out inquiries and investigations in matters relating to consumer rights, unfair trade practices and misleading advertisements.[246] The CCPA has been granted wide powers to take suo-moto actions, recall products, order reimbursement of the price of goods/services, cancel licenses and file class action suits, if a consumer complaint affects more than 1 (one) individual.[247]

Under the provisions of CPA 2019, CCPA is mandated to carry out the following functions[248]:

1. inquiring into violations of consumer rights, investigating and launching prosecution at the appropriate forum;

value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs.

[244] Section 87 of CPA 2019.

[245] Statement of Objects and Reasons of the Consumer Protection Bill, 2019.

[246] Section 15 of CPA 2019.

[247] https://www.lexology.com/library/detail.aspx?g=442106a6-90a9-4a5e-9cf0-89fdcbba03d7(Visited on 22/01/2020).

[248] Section 18 of CPA 2019.

2. passing orders to recall goods or withdraw services that are hazardous, reimbursement of the price paid, and discontinuation of the unfair trade practices, as defined under the relevant provisions of CPA 2019;
3. issuance of directions to the concerned trader/ manufacturer/ endorser/ advertiser/ publisher to either discontinue a false or misleading advertisement, or modify it;
4. imposition of penalties, and;
5. issuance of safety notices to consumers against unsafe goods and services and guidelines to prevent unfair trade practices
6. spread and promote awareness and research on consumer rights and
7. recommend adoption of international covenants and best international practices on consumer rights to ensure effective enforcement of consumer rights

The district collectors have also been empowered to conduct such investigations that affect interests of consumer as a class under CPA 2019.[249] They can investigate or inquire at the instance of a complaint or on a reference made by CCPA. The district collectors have also been provided powers akin to CCPA's but unlike CCPA they cannot initiate action *suomoto*. The establishment of a central authority and initiating action as a class comes as an additional mode of relief which can be exercised along with individual consumers filing complaints to address their grievances thereby having two parallel proceedings.

6.5.2.7 False or misleading advertisements

The CCPA may impose a penalty of up to INR 1,000,000 (Indian Rupees One Million) on a manufacturer or an endorser, for a false or misleading advertisement. The CCPA may also sentence them to imprisonment for up to 2 (two) years for the same. In case of a subsequent offence, the fine

[249]Section 16 of CPA 2019.

may extend to INR 5,000,000 (Indian Rupees Five Million) and imprisonment of up to 5 (five) years. The CCPA can also prohibit the endorser of a misleading advertisement from endorsing that particular product or service for a period of up to 1 (one) year. For every subsequent offence, the period of prohibition may extend to 3 (three) years.[250]

The New Act fixes liability on endorsers considering that there have been numerous instances in the recent past where consumers have fallen prey to unfair trade practices under the influence of celebrities acting as brand ambassadors. . It is important to note that such penalty can be imposed on endorsers too, thereby bringing actors/actresses in the scope of penalty. However, the endorser would be exempted from any liability if she/he establishes that they undertook due diligence to verify the veracity of the claims before endorsing the same. Therefore, endorsers/actors/celebrities will also have to conduct a thorough due diligence/ research before signing up for any advertisements.

6.5.2.7 Deletion of Healthcare from definition of services

The CPA 2019 in its current form does not explicitly specify healthcare in the list of services listed in the definition of 'service', even though the earlier version of the consumer protection bill as passed by the Lok Sabha had included it. An amendment was recently introduced in the Parliament to remove healthcare from the list of services (Healthcare Amendment) following stiff opposition from the medical fraternity which expressed apprehension that the CPA 2019 would be misused against them.

Due to the Healthcare Amendment, it is unclear whether healthcare as a service is included in the ambit of the CPA 2019. On the one hand, the Government has reportedly stated that the Healthcare Amendment will not exempt healthcare services from the purview of the CPA 2019.[251] On the other

[250] https://www.lexology.com/library/detail.aspx?g=442106a6-90a9-4a5e-9cf0-89fdcbba03d7 (Visited on 22/01/2020).

[251] https://timesofindia.indiatimes.com/india/consumer-bill-draft-removes-healthcare-from-services/ articleshow/ 69935129.cms(Visited on 20/02/2020).

hand, if healthcare is not excluded from the list of services covered by the CPA 2019, there was no need to remove it from the definition of services. The Supreme Court in case of ***Indian Medical Association v. VP Shantha*** ("VP Shantha Case"),[252] had read healthcare into the definition of services under the CPA 1986. As a result, under the current consumer protection framework, a claim can be brought against doctors in case of deficiency of service.

However, it is unclear whether the VP Shantha Case will continue to apply once the CPA 2019 comes into force. The Parliament certainly has the power to overturn a judgement by passing a law that alters the basis of the judgment, as long as such law is applied with prospective effect.[253] Once such a law is passed, the judgement ceases to apply in all future cases. The confusion arises with respect to whether the CPA 2019 takes away the basis of the judgement in VP Shantha Case. The Supreme Court in the VP Shantha case held that patients are consumers as long as they are making some form of payment for the medical service rendered. The CPA 2019 does not contradict this finding of the Supreme Court, but has consciously excluded healthcare from the definition of services. Nonetheless, it is yet to be seen which way the courts will decide in the event they are asked to consider the question of whether a healthcare services are covered by the CPA 2019 and whether the intent of the Parliament in explicitly removing healthcare from the list of services under the CPA 2019 will have any bearing on their decision.

6.5.2.8 Increase in the pecuniary jurisdiction of the commissions

The new CP Act, 2019 has protracted the jurisdiction of the District Consumer Forum up to 1 crore, State Consumer Forum from 1 crore to 10 crore and the National Consumer Forum above 10 crore. The new CP Act, 2019 initiates modernized rules for the credit of consumers. By making numerous favourable changes and implementing the important new measures in relation to various types of consumer grievances, the Act is creating a new

[252]Indian Medical Association v. VP Shantha&Ors.1996 AIR 550.

[253] State of Karnataka v. Karnataka Pawn Brokers Association, SLP(C) Nos. 8652-8656 of 2012.

structure for the credit of consumers and ensues the obligations to the traders, product manufacturer, service provider, and product seller. The regulation further imposes mandatory content and format for the parties to undergo mediation in order to sort out the issues before proceeding with the complaint and at any time if there appear the elements of settlement.

The CP Act, 2019 also includes the framework for digital marketing and online purchasing which has opened wider room for the consumers for approaching the forums for the deficiency in goods or services even bought online or service availed online.

Now, the property buyer exclusively has the advantage of approaching either NCLT against the Developer as financial creditor after Amendments[254] upheld by the Supreme Court on August 09, 2019 which was approved by the Parliament on August 01, 2019, or RERA Authorities or District Consumer Forum or State Consumer Forum as per the extension of pecuniary jurisdiction up to 1 crore for District Consumer Forum and up to 10 crore for State Consumer Forum for their grievance with the builders and developers unlike the decision in *Ambrish Kumar Shukla Case*[255]where it was decided that the consideration shall include compensation and interest claimed by the complainant which was exceeding the pecuniary jurisdiction of both District Consumer Forum and State Consumer Forum and since the jurisdiction of the complainants seeking relief in property-related matters were to approach National Consumer Forum only, but that is not the scenario now as the CP Act, 2019 has extended the jurisdiction level. The pecuniary jurisdiction of all three commissions have been raised under CPA 2019. The changes are reflected in the table below:

[254]Insolvency and Bankruptcy Code (Amendment) Act, 2019.

[255] Ambrish Kumar Shukla&Ors.Vs Ferrous infrastructure Pvt Ltd (07.10.2016–NCDRC):MANU/CF/0499/2016.

Sr. No.	Commissions	CPA 1986	CPA 2019
1.	District	Upto INR 20 lakhs	Upto 1 crore
2.	State	INR 20 lakhs to 1 crore	Uptocrore to 10 crore
3.	Central	Above INR 1 crore	Above above 10 crore

The increase in the pecuniary jurisdiction of all three commissions is an encouraging step as it should attract lesser number of claims in appellate commissions to an extent, thereby ensuring swifter disposal of cases.

6.5.2.9 Mediation

The CPA 2019 now provides for settlement of disputes by way of mediation in case there is a possibility of settlement at the stage of admission of complaint or at any later stage, if acceptable to both parties. A mediation cell will be attached to each district, state and National Commission and its regional Benches for quick resolution.[256]

6.5.2.10 Penalties

The quantum of monetary penalty, in case of defiance of any order of commissions, have also been raised under the provisions of CPA 2019.[257] The commissions can now impose fines ranging from INR 25 Thousand to 1lakhs, whereas earlier they could have only imposed fines in the range of INR 2 thousand- Ten thousand.[258]

6.5.2.11 Review

Earlier, The National Commission had the power to review any order made by it, when there is an error apparent on the face of record, either on its own motion or on an application made by any of the party within 30 days.

Now, District and state commission also shall have power to review its own order when there is an error apparent on the face of record. The time limit (30 days) for review is the same for all three bodies.

[256] Section 74-81 of CPA 2019 (Chapter V).
[257]Section 72 of CPA 2019.
[258] Section 27 of CPA 1986 vis-a-vs Section 72 CPA 2019

6.5.2.12 Miscellaneous Provisions

In addition to the changes mentioned above, CPA 2019 introduced ADR dispute resolution mechanisms. Mediation cells were assigned to all the three commissions.[259] Matters shall be forwarded to mediation cells if the parties so agree. If the dispute is not resolved, the respective commissions will continue to settle the dispute.[260]

Under CPA 2019, consumers can now submit complaints to the district commission where they *reside or work for gain*.[261] Consumers can also submit complaints electronically.[262] However, the process will have to be notified by the government in the future.[263] There was no embargo on the persecution of foreign parties under the 1986 CPA, and the situation remains the same till date. Therefore, it remains to be seen whether offshore online platforms that offer services could also be included in the scope of the CPA 2019, since electronic business (e-commerce) is now specifically included in the legislation.

A comparative chart of the substantive changes in the provisions of CPA 1986 and CPA 2019[264] are listed below:

S. No.	Consumer Protection Act, 1986	Consumer Protection Act, 2019
1	No separate regulator	CCPA to be formed.
2	All goods and services for consideration. Free and personal services are excluded.	All goods and services, including telecom and housing construction, and all modes of transactions (online, teleshopping, etc.) for consideration. Free and personal services are excluded.
3	Compliant could be filed in a	Compliant can be filed in a

[259]Section 74 of CPA 2019.
[260]Section 81 of CPA 2019.
[261] Section 34(2)(d) of CPA 2019.
[262]Section 35(1) of CPA 2019.
[263] Section 101(2)(p) of CPA 2019.
[264]*Here's how consumers will benefit under the new Consumer Protection Act*, ET Bureau. August 19, 2019

	consumer court basis the site of the defendant/seller's office.	consumer court where the complainant either resides or works
4	No specific provision of product liability existed earlier.	Consumer can now seek compensation for harm caused by a defective product or a deficient service.
5	Jurisdiction District: up to INR 2 million State: INR 2 million to INR 10 million National: above INR 10 million	Jurisdiction District: up to INR 10 million State: INR 10 million to INR 100 million National: above INR 100 million
6	No legal provisions for mediation existed earlier	Courts can now refer settlement through mediation.
7	If a person does not comply with orders of the Commissions, he may face imprisonment between one month and three years or fine between Rs 2,000 to Rs10,000, or both.	If a person does not comply with orders of the Commissions, he may face imprisonment up to three years, or a fine not less than Rs 25,000 extendable to Rs one lakh, or both.

6.6 CONCLUSION

A consumer should pay the price of the commodity to the extent of satisfaction or utility he derives from that commodity and, therefore, why a consumer should pay more price on account of large expenses incurred on the advertisement of the commodity, disproportionate to the cost of production? It is necessary that the Government exercises a thorough check on the amount spent on advertisements so that prices are not arbitrarily inflated.

It is equally important that there must be complete check on misleading advertisement and for this purpose clause (hc) was inserted in sub clause (1) of section 14 of the Consumer Protection Act by the Consumer Protection (Amendment) Act, 2002, which came into force with effect from 15th March, 2003 providing that the District Consumer Forum can issue an order to the opposite party directing him to publish corrective advertising to neutralize the impact of misleading advertising at the expense of the party responsible for issuing such misleading advertising.

There can be no difference of opinion that every consumer must have access to market information including a right to be informed of the quality, quantity, effectiveness, purity, standard and price of goods or services in order to protect the consumer from unfair trade practices. When the question of interpretation of the term ‘unfair trade practice’ arises, it is noticeable point that the main purpose of this provision is to bring honesty and truth in the relationship between the manufacturer and the consumer. If a problem arises as to whether a particular act can be condemned as “unfair trade practice” or not, the key to solving it is to check whether it contains a false statement and is misleading and what is the effect of such representation of the manufacturer to the simple man? Does a sensible person in the position of a buyer lead to a wrong conclusion? The problem cannot be solved simply by checking whether the representation is literally correct or incorrect. A representation that contains an apparently correct statement in the technical sense can mislead the buyer by using a delicate language. Likewise, a statement that can be inaccurate in the literal technical sense can be the real condition and sometimes more effective than a literally correct statement. It must therefore be checked whether the complaint complained of contains the misleading element of the buyer. Does a sensible man reading the ad have a belief other than the truth? The position should be viewed objectively and impartially.

As it is apparent, CPA 2019 has rolled out a few changes to the past CPA 1986. CPA 2019 has widened the scope of consumer protection regime in India. The changes made under the 2019 CPA appear to further empower consumers by not just helping their peers by imposing responsibilities on sellers, manufacturers, service providers, but also on endorsers of such products. It also endeavors to address the issues that were not thoroughly addressed by CPA 1986, such interests of consumers as a class, and so forth.

CPA 2019 has also attempted to fasten the process of consumer disputes resolution by increasing the pecuniary limits of the commissions, establishing mediation cells, increasing the number of the members of the commissions and imposing higher penalties on the violators.

The impact of CPA 2019 cannot be accurately measured in advance as many new concepts have been introduced. However, it can definitely be said that whosoever involved in the transaction, other than the consumer, will have to be more careful and cautious than earlier.

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CHAPTER-VII

CONCLUSION AND SUGGESTIONS

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7.1 CONCLUSION

From this it can be concluded that in this era of globalisation, advertisement and misleading advertisement are the sides of same coin. Though there is a provision of publishing corrective advertisement, it is not sufficient and at the same time advertisement must adhere to ethics, morals and Self- regulation Code. Advertisements serve a useful purpose of providing information to the consumers to enable them make an informed choice. They provide information, education and to some extent entertainment. They stimulate production, income and employment and thereby ensure the maximum utilization of physical and manpower resources. With the help of increased income, standards of living become high. As advertising facilitates quick acceptance of new products and consumers reap the fruits of innovative products, reduction in all costs enables corresponding reduction in prices. Informative advertising also helps consumers in getting promptly relevant and adequate information about all competing brands and merits. Advertising transforms culture of a nation. Consumer’s attitudes, tastes, preference, habits, likings and disliking and fashion are also influenced by advertising. In fact, the present world is moving on the wheel of advertisement.

The main criticism of advertising is that it leads the consumer to purchase goods that he has no wish to purchase, by making misleading and false statements or by creating wants, needs and desires in his mind that might not otherwise have existed. The criticism though not always justified is the result of malpractices indulged in by some manufacturers, traders and caterers of service. Advertisements of harmful products, overexposure of female form in some advertisements, an over emphasis on sex appeals, exaggerated claims and excessive repetition of claims in advertisements have created a negative image of advertising. Advertising is also accused of promoting materialism by inducing people to attach too much importance to the material aspects of life.

Advertising, it is alleged, promotes that divine discontent which makes people strive to improve their economic status. It plays on human weaknesses, hope, anxiety, insecurity and aspiration.

In view of the foregoing discussion the need for regulation of advertising is self-evident. Control of advertising in Britain, USA and India is through varying mixes of self-regulation and legislations. It is recognized in all democratic societies that unfair advertising i.e. which harms other traders or the public by exploiting public susceptibilities and advertising which offends public policy or which is immoral, unethical, or unscrupulous should be regulated. There is also a need to prohibit advertisements for products which are dangerous and hazardous for health.

As already discussed in the earlier chapters, in India we have a number of laws to curb false and misleading advertisements and protect consumer interest, however, consumers are still victims of false advertising for two reasons:

a) The bad application of the laws and
b) Gaps or shortcomings in existing laws.

A misleading advertisement remains difficult and controversial. Naturally, advertisers and consumer advocates rarely agree on whether a particular ad is misleading. The manufacturer who identifies misleading advertising is presented solely based on the measured beliefs of consumers. Advertising is misleading if an exposed group has more false beliefs than a comparison group. When ten allegedly misleading advertisements were examined, two were classified as misleading and four others as exploitive misleading. Thus a misleading advertisement has adverse effect on consumer welfare and must be regulated by the legal provisions and institutional framework that regulate misleading advertisements in our country. There by Consumer should be rational in thinking and the packaging of words illustrations while view in; and for a purchase goods or services. Maggie is a classic example where even the presence of words of eminent movie stars could not hide the deficiencies of the product that they had to review and correct the content.

In India, The rupture of the Monopolies and Restrictive Trade Practices (MRTP) Commission was the right decision because through dissolution of MRTP Commission only, Competition Commission of India could be setup, and has also left a huge bare in so far as consumer protection, if we particularly talks about false and misleading advertisements is concerned. Especially the government has excluded unfair business practices from the jurisdiction of the Competition Commission because consumer courts could deal with unfair trade practices.

False or misleading advertising is recognized as an unfair trade practice under the Monopoly and Restrictive Trade Practices Act, 1969 and the Consumer Protection Act, 1986. Before the insertion of chapter on unfair trade practice commencing from Sections 36 A to 36E of the MRTP Act, the remedy was available to an aggrieved consumer under the Indian Contract Act, 1872 and the law of torts. But as the present study clearly shows, legal protection against such advertisements under these laws were inadequate. The MRTP Commission armed with the new provisions regarding unfair trade practice under the MRTP Act has played an important role in discouraging such advertisements.

In the beginning the definition of unfair trade practice under the MRTP Act, 1969 was in the form of a list of categories of unfair trade practices, but after 1991 amendment it became a general concept and the listed practices became a category of illustrations. It means that an unfair method or deceptive practice for the purpose of promoting sale will be an unfair trade practice for the purpose of this Act, whether it falls in the list of categories or not. But the study reveals the fact that the MRTP Commission constituted under this Act has failed to utilize this opportunity of recognizing new forms of unfair trade practices and rather has confined itself to the list of categories of unfair trade practices given in Sections 36A of the Act. There are other instances also where the Commission has restricted the definition of unfair trade practices-

Firstly, a consumer needs to be protected not only from the false advertisements, but also from the advertisements which are misleading, but the Commission generally read these two terms conjointly and in the process had curtailed the scope of the provisions relating to unfair trade practice and *Secondly,* while deciding complaints on unfair trade practice it had relied on the requirement of loss or injury despite the fact that it had already been dropped from the definition by Parliament.

The present study shows that the success of the MRTP Commission in discouraging false or misleading advertisements had not been to the desired extent. Several reasons may be attributed for this. *Firstly,* it was the lack of courage and imagination on the part of the Commission to provide remedies permissible under the statutory provisions of the MRTP Act; *secondly,* there were many problems in the enforcement of its orders; *thirdly,* there was lack of adequate number of staff and other infrastructure; and *finally,* the Commission operated under certain statutory limitations.

Where the MRTP Commission had the power to grant relief in the form of 'temporary injunction', 'Cease and desist order', award or compensation, it lacked the power to grant relief like "Affirmative Disclosure", "Corrective Advertising", "Competitor Law Suit", "Fencing In" , "Advertising Substantiation" and "Counter Advertising". Even "Cease and desist" orders were not effective in curbing the practice of false or misleading advertising because such orders could protect the consumers in future, as these were granted when the damage had already been done. Further, entrepreneurs, advertisers and advertising agents by making small changes in the earlier advertisement could overcome the negative effect of 'Cease and desist orders' passed by the Commission. The problem got further complicated by the absence of any suitable mechanism to monitor the compliance of undertakings given by any business entity not to commit unfair trade practice in future. So far as orders under Section 12(b) of the MRTP Act were concerned, the Commission had granted adequate compensation to aggrieved consumers in very few cases. It had also been reluctant in deciding what is known in the American jurisprudence as 'class actions'.

As we have seen earlier, not only the procedure for the enforcement of the Commissions orders was time-consuming and complicated, even the procedure for inquiry also was far from satisfactory. Thus, it was not necessary that every complaint filed be referred to Director General for preliminary investigation. In fact, there were a number of complaints that could be resolved through documentary evidence. Despite the procedural constraints and practical difficulties, the Commission had not only given relief to a number of victims of false or misleading advertisements and other unfair and restrictive trade practices, but had also developed a very rich *corpus* of unfair trade practice jurisprudence.

To mention some of the highlights of this jurisprudence which the Commission has developed- it had held that the quality, standard etc. of the products is a matter for the subjective judgment of the producer and all that law expects from him is that the facts on the basis of which a subjective judgment is pronounced must be true and must not be misleading. In the view of the Commission, anti-competition and anti-consumers features make an advertisement unfair and not the "loss or injury" to the consumers. The Commission further held that the advertisement is a subject matter to be decided by the advertiser rather than the Commission. The Commissions decision on sponsorship, approval, artificial need, warranty or guarantee etc. show the ingenuity of the manufacturers/sellers to dupe the ordinary consumer with an attractive but deceptive or fraudulent advertising. The Commission had also taken the view that the practices involving contests lotteries, games of chance or skill were unlawful and condemned those practices as unfair trade practices which make prospective buyers to believe that they would be getting a great deal in term of price, if they buy the product in question.

With the enforcement of the Competition Act, 2002, the MRTP Act, 1969 has repealed and the Commission established under the Act is also dissolved. Therefore, at present the Consumer Protection Act, 1986 has remained the only legislation to control and regulate unfair trade practices including false and misleading advertisements. The study clearly reveals that there is a substantial overlap in the coverage of MRTP Act and the Act Consumer Protection Act along with several distinctive features in regard to constitution of the adjudicatory machinery, jurisdiction, types of person who can seek relief, nature and scope of relief and administrative procedure etc There is also a significant overlap in the definition of unfair trade practice, which is literally the same in both the enactments, as a result, there was a total overlap in the jurisdiction of MRTP Commission and Consumer Fora established under CP Act, in regard to controlling false or misleading advertisements and other unfair trade practices. This is further supplemented by Section 3 of the CP Act which says the provisions of Consumer Protection Act are in addition to and not in derogation of the provision of any other legislation for the time being in force. It means that a victim of unfair trade practice could approach the MRTP Commission or the Consumer Fora established under CP Act for redressal of his/her grievances. This system however, ceased with the repeal of the MRTP Act, 1969.

Unlike the solitary MRTP Commission which was located at New Delhi, the CP Act provides for 3-tier redressal machinery with the District Forum at District Headquarters proximate to consumers' place of residence. Now, for the individual consumer it is inexpensive and more convenient to knock at the doors of the District Forum or even the State Commission. With regard to power of granting relief against false or misleading advertisements and other unfair trade practices, the Consumer Dispute Redressal Agencies enjoy a wide range of powers in comparison to MRTP Commission including "Corrective Advertisement". They are authorized to compensate a consumer in the event of a "loss or damage" caused by the negligence of the other party. But it is interesting to note that these Agencies have not allowed this requirement to come in their way while awarding compensation in the cases of unfair trade practice. This shows the liberal, progressive, humanistic and consumer friendly attitude of these Agencies. Further, the enforcement procedure envisaged under

CP Act is more consumer friendly and practical than that of the MRTP Act. They have the power to enforce their interim order by attaching the property of the defaulter and also have the powers of a Judicial Magistrate of First Class for the purposes of trial of the offences under the Act.

As it is well known, India is a welfare State i.e. a state which renders social service to the people and promotes their general welfare. Consumer protection and consumer welfare is therefore, a Constitutional duty of the State. This view is further strengthened by the Preamble Fundamental Rights and the Directive Principles of State Policy. In fact consumer justice is an integral component of social and economic justice which the Indian Constitution mandates the State to secure to its citizens. The concepts of 'consumer protection' and consumer justice involve the idea of promotion of fair commercial advertising and curbing of vulgar, obscene, indecent or deceptive and fraudulent advertising. It is pursuant to the Constitutional mandate to protect the consumer and society at large from the evils of modern advertising, a number of legislations have been enacted from time to time. The clause consumer protection is nowhere used in the Indian Constitution. Interestingly, the absence of consumer affairs as an item in either of the three lists namely, Union List, State List and Concurrent List has never proved as an obstacle to enact any legislation seeking to regulate advertising in this country.

Advertising is not only a speech, but it is an effective speech and as such is protected under the 'freedom of speech and expression' clause of Article 19 of the Constitution. In *Hamdard Dawakhana,* the Supreme Court denied this protection to a commercial advertisement on the ground that it has an element of trade and commerce and does not propagate any idea-social, political or economic or further literature or human thought which is the object of freedom of speech. But subsequently, the same court had modified its view and extended the protection of Article 19(1)(a) to commercial advertisements. Advertising as a commercial speech has two facets- *first,* it disseminates information regarding the product advertised and the public at large is benefited by such information and *secondly,* the public at large has also a right to receive the commercial information. Since free flow of information is a *sine qua non* in a democratic economy, the right of manufacturer/producers to advertise their products has come to be recognized as a fundamental right implicit in Article 19(l)(a) of the Constitution. As the right to commercial information is an integral part of the right to information which is again a judicially recognized fundamental right and is a condition precedent to the exercise of other basic rights of the consumers, there is a valid justification for extending the protection of Article19(l)(a) to include commercial advertising. If advertising is the life of trade, it is also the lifeline of a free press in a democratic society like India. Therefore, any curtailment of advertisements would affect the fundamental right under Article 19(l)(a) because it would reduce the revenues forcing the newspapers to raise their price which is also bound to affect circulation. This will directly affect the freedom of speech and expression because inherent in this freedom is the right to publish and circulate the publication.

While it is necessary to maintain and preserve the freedom of commercial speech in a democracy, so also it is equal necessary to place some curbs on this freedom for the maintenance of social order. Like other freedoms, this freedom is also not absolute or completely unrestricted and the state may make law imposing reasonable restriction on the exercise of the right to issue commercial advertisements in the interests of the security of the state, friendly relations with the foreign states, public order, decency, morality, sovereignty and integrity of India, or in relation to contempt of court, defamation or incitement to an offence. For this reason, "the provisions on the obligation to disseminate information in various laws cannot be viewed as a restriction of freedom of expression and expression. As we saw in Chapter IV, Article 19 (1) (a) applies only to citizens and a non-citizen who runs a newspaper cannot apply for the guarantee of this protection of the constitution. But the study reveals that though a company is not a citizen, still it can exercise the right to freedom of commercial advertisements through its shareholders.

Advertising law in our country is spread through a number of legislations and judicial decisions. These legislations reveals that there is a lack of an integrated and holistic approach of advertising and instead of directly focusing on commercial advertisements as a whole they reflect a piecemeal, segmented or object oriented approach in the matter of regulation of advertising. Except the Drugs and Magic Remedies Act, 1954, they lack direct focus on advertisements and regulate certain aspects of advertising as incidental matters or in an ancillary manner. While some of these legislations aim to save the society from immoral and unethical practices, others are concerned with the prohibition of advertisement of harmful products. Due to multiplicity of legislations and multiplicity of authorities the standards of advertisement have deteriorated sharply in recent years.

Television screens and newspaper pages are flooded with obscene and indecent poses/scenes. All these advertisements are destroying the priceless culture and traditions of our country. Children are being exposed to harmful publications, cigarettes and other tobacco product advertisements. Many advertisements are claiming a lot of things from weight loss to hair growth without any proof of their efficacy. Advertisements of chit fund, prize-competition, and sex-determination are going on. Though cigarette, and other tobacco products and liquor advertising is banned, their advertising is going on. Alcoholic beverages are advertised indirectly by replacing the alcoholic beverage with mineral water, soda or apple juice. These facts not only expose the inadequacy of the existing legislations but also point out their poor implementation by enforcement authorities.

It is therefore, high time that the country should move from a sporadic, haphazard, segmented, object oriented approach to an integrated and holistic approach in the matter of regulation of commercial advertisements. It is heartening to note that the Government is also aware of the need of a comprehensive legislation on advertising on the Electronic media. It is humbly submitted that the proposed legislation should cover all forms of advertising media including television, radio, newspapers, magazines, business publications, billboards, posters, pamphlets and even the Internet.

In Conclusion, the Consumer Protection Act is a better legislation to deal with the cases of unfair trade practice including false or misleading advertisements. But as this study reveals it is an under-utilized legislation for curbing such advertising.

Though the CP Act provides a better forum for redressal of consumer grievances against false or misleading advertisement and other unfair trade practices, but one should not take it for granted that everything is possible with CP Act, as we have noted in the concerned chapter the Act still suffers from a number of limitations and gaps which need to be remedied and rectified at the earliest available opportunity.

The efficacy of legislation depends on its implementation and CP Act is no exception in this regard. While the Consumer Forum have provided relief to a number of consumers and their disposal rate is by and large satisfactory, still there is a scope for further improvement particularly in three different areas, namely (i) amendment of the law to overcome several lacunae during its enforcement, (ii) provisions of adequate infrastructure by the State Governments to ensure the smooth functioning of the District Forum and State Commission; and (iii) attitudinal change in members of the consumer forum and the lawyer who appear in these forum.

Now, the Consumer Protection Act, 2019 has replaced the earlier Consumer Protection Act, 1986. The new Act incorporates many changes in the Act in the light of changed scenario in consumer transactions, particularly the emergence of e-commerce. The new Act, 2019 has added three new forms of unfair trade practices-*one* relating to failure to issue bill or cash memo or receipt; *second,* refusal to take back or withdraw the goods or withdraw or discontinue services and to refund consideration thereof; and *thirdly,* disclosure of any personal information given in confidence by the consumer. The Consumer Protection Act, 2019 added a New Chapter (Chapter —III) to establish a Consumer Protection Authority to perform various functions under this Act including the prevention of unfair trade practice and ensuring that no advertisement is made of any goods or services which is misleading or deceiving or contravenes the provisions of the Act and the rules and regulations made there under and further to ensure that no persons engages himself in unfair trade practices or takes part in the publication of any advertisement which is false or misleading. The Consumer Protection Authority is empowered under this Act to inquire into unfair trade practices and misleading advertisements. A New Chapter is inserted under the name of “Product Liability”. Apart from these major changes, some other changes are also made to facilitate the inexpensive and speedy disposal of consumer complaints and to make this Act more effective than earlier.

Advertisements are also controlled by self-regulation mechanisms. Advertising self-regulation means the strict adherence by the advertising industry to standards drawn up by and on behalf of all advertising stakeholders. The present study shows that advertising codes in India are of two kinds, (i) Advertising self-regulation codes prescribed by advertisers, advertising agencies and the media, and (ii) codes formulated by the Government or statutory authority. The first category of Codes includes the Code of Advertising Practice prescribed by the Advertising Standard Council of India, the Code for Fair Business Practices, Norms of Ethics prescribed by the Federation of Indian Chambers of Commerce and Industry and the Consumer Code prescribed by the Association of Indian Engineering Industry etc. On the other hand the government codes include the Press Council of India’s Norms of Journalistic Conduct, Code for Commercial Advertising on Doordarshan, All India Radio Code for Commercial Broadcasting and the Advertising Code prescribed under Cable Television Network (Regulation) Act, 1995 however the voluntary Codes is different from these codes in terms of legal sanctions and binding force.

In spite of a large number of benefits and wide coverage, self-regulation has some drawbacks and limitations. *Firstly,* it operates on a voluntary compliance basis. It tends to breakdown when a small number of firms in the industry find it in their interest to depart from the joint standard; *Secondly,* due to the casual attitude of the trade associations towards the codes the enforcement of voluntary standards is very slow; *Thirdly,* consumers have not much confidence in business self-regulation; *Fourthly,* media codes seem to be orthodox and traditional; *Fifthly,* there is no independent machinery to monitor the implementation of these Codes; and *Lastly,* these codes are without any legal backing. To overcome these problems given in this chapter deserves serious consideration by the government, advertising agencies, Media and the trade and business.

So, at a quick glance at the discussion above, it can be said that false and misleading advertising posed a serious threat to consumers in general and to society as a whole. However, we need to take the following precautions to control and stop this bad practice:

1) Before buying a product, ask us: why, when, where, how, how much, how often, how long, etc.
2) Consumer-oriented advertising must be truthful and ethical.
3) It must not mislead the consumer.
4) Make honest and truthful statements that are essential to prevent misleading advertising.
5) Don’t violate public decency or morality.
6) The main demand, the motives for buying, the hidden features, the different advantages and the money in each marketing situation must be carefully analyzed to determine the advertising capacity of a product.
7) Not to promote products which are hazardous or harmful to the society or individuals, particularly minors and observe fairness in competition keeping in mind consumer’s interests.

Advertising is an important element for the development of a communication strategy in the marketing mix. It is an external stimulus that arouses dormant needs. This creates “internal tensions” among buyers and it is very easy to promote corruption through such advertising in entertainment companies in a country like India if it is not properly checked. If incorrect advertising is not properly checked and prevented, this can jeopardize and mislead our right to choice and our freedom to buy products. However, measures should be taken to raise government and NGO awareness among common consumers. Law enforcement agencies should not be apathetic and should not insensible to the implementation of existing consumer law. Special precautions must be taken to protect children, young people and patients from the damage caused by false and misleading advertisements.

7.2 SUGGESTIONS AND RECOMMENDATIONS

Although appropriate suggestions for strengthening the legal control of commercial advertisements have been offered throughout this work, some important suggestions which are pre-requisites for better control of commercial advertisements are recapitulated below:

1. **Need for codified law:** A comprehensive legislation should be enacted by Parliament by amending and consolidating the laws relating to commercial advertisements in the print as well as the electronic media. The proposed legislation should provide for the establishment of Advertising Regulatory Authority to oversee the entire issue of advertising business in the country within its scope. The proposed legislation should also provide for a viewer’s forum with a total legal backing to monitor the advertisements in the print and the electronic media and to lodge protest against undesirable advertisements.
2. **Required express provision in the Indian Constitution**: There must have express provisions in the Constitution of India regarding consumer welfare and consumer protection. It is also necessary to include “consumer affairs” as one item on the Concurrent List of the seventh schedule of the Indian Constitution. Schedule 11 should also be amended as necessary to ensure the active involvement of the Panchayati Raj institutions in the implementation of consumer welfare programs and activities.
3. **Amendment in IT Act, 2000:** The Information Technology Act, 2000 need to be amended to include the provisions against all menaces of present e-

advertising in the lines of CAN-SPAM (controlling the Assault of Non-Solicited Pornography and Marketing) Act, 2003 of USA. In particular, the IT Act should impose a ban on false or misleading header information including the originating domain name and e-mail address of the person who initiated the e-mail; and should prohibit deceptive subject lines i.e. the subject line should not mislead the recipient about the contents or subject matter of the message. The person who initiates the e-mail should provide a return e-mail address or another interest based response mechanisms that allow a recipient to ask him not to send feature e-mail messages to that e-mail address and the initiator should honor the request. The initiator's message should contain clear and conspicuous notice that the message is an advertisement or solicitation and should include his valid postal address.

4. **Labelling of Products-** it is the responsibility of the producers & service providers that they should clearly mention in the label, price, including information, its benefits and side effects. The producer or the service provider should not indulge in misleading advertisements to lure customers. This is cheating and makes the producer or the service provider liable for punishment.
5. **Misleading claims and advertisements-** very often cosmetic product manufacturers make tall claim about the capabilities of their products. But, all of them are not true in reality. So it is needed that the claims in the advertisement must be true in its applications and results. Where any footage/segment/ program carried on a news channel has been paid for whether as an advertisement or advertorial or other promotion, this aspect is required to be disclosed, during the broadcast intention should be that viewers are not mislead into believing that such content is part of a News reportage. As per the guidelines issued by NBSA in March 2014 the news channel are required to disclose any political affiliation either towards the candidate or a party.

6. **Role of ethics, morals for protection of public interest-** the advertisement should adhere to ethics and morals. So, that the interest of general public will be protected at larger extent.
7. **Use of ADRM and ODRM-** the consumer dispute resolution essentially requires use of "Alternative Dispute Resolution Mechanism" (ADRM) as well as "Online Dispute Resolution Mechanism" (ODRM).
8. **Encouragement to consumers-** there is need of encouragement to consumers to come forward against violation of their rights. And also safeguarding their interests can be done by providing them justice in speedy manner.
9. **Need of statutory power to ASCI or self-regulatory bodies-** To improve the efficacy of the self- regulation following measures may be adopted:

- There is need to confer statutory powers on the Advertising Standards Council of India, which is a self-regulatory body. It can prove to be effective check on misleading advertisements.
- The advertisement must follow the code of self- regulation which itself will prohibit the publication of misleading advertisement.
- The procedure and implementation machinery under self-regulation scheme should be clearly defined.
- In order to strengthen the enforcement mechanism, compliance figures should be published from time to time in addition to this adverse publication should be done in case on non-compliance of the voluntary codes. This will damage the good-will of the non complaint party as well as warn the public. And finally, warning messages ('Ad Alerts') should be issued to other members advising them to withhold their services to non-compliant marketers or deny the later's access to advertising space.
- To check the practice of departing the joint standard by the members of the advertising organizations and associates, statutory recognition should be given to these voluntary codes like the Codes of Medical Council of India or the Bar Council of India.

- The Government should work more closely with ASCI, one of the major self-regulatory advertising bodies of the country.
- Any unreasonable delay in the responding the decision given under self-regulation system should be considered a breach of the code.
- The business community should make efforts to raise the standards of self-regulation scheme up to consumer's satisfaction.
- The Television and radio codes should be suitably amended to enable the Doordarshan and the All India Radio to compete with the national and international players in these fields.
- The Press Council of India should be armed with more power to secure the compliance of its Norms of Journalistic Conduct.
- The media voluntary codes should be amended to provide an international outlook but within the existing legal framework.

10. After repealing the old Consumer Protection Act, 1986, the new consumer Protection Act, 2019 has been enforced in India which has removed some lacuna's of old Act. In spite of this, new Act should be amended to insert the following provisions:

a) Section 2 (47) of the Consumer Protection Act should be suitably amended to accommodate following types of unfair trade practices:
    - Making false or misleading representations concerning the place of origin of good.
    - Mislead those persons looking for a job regarding availability, nature, general conditions, or other questions related to the job.
    - False represent that goods had a particular history or particular previous use.
    - Falsely represent that the particular portion has agreed to acquire goods or services.

b) The shortcoming of the new CP Act, 2019 is that the Act does not give provision for the consumers to approach a forum for the medical negligence which was present under the old Act.

c) The Consumer Dispute Redressal Agencies established under the CP Act should be conferred the power to take suomoto cognizance of cases relating to false or misleading advertisements and other unfair trade practices. Under the new Consumer Protection Act, 2019, this power is not given to the Consumer Protection Authority, only inquiry or investigation can be made into violations of consumer rights or unfair trade practices, either *suomotu* or on a complaint received or on the directions from the Central Government ..

d) There is also a need to tackle the problems of arrears of cases, frequent adjournments, non-appearance of parties, lawyer's strikes, practice of Peshi and tendency of the lawyers to prolong the litigation.

e) If necessary, the appropriate State Commissions and the National Commission should be conferred the power of contempt in order to create a deterrent effect among the violators of their orders.

f) Consumer Dispute Redressal Agencies need to be armed with the power to direct a businessman to divest itself of unjust enrichment reaped by false and misleading advertisements.

In order to improve the implementation of the CP Act, 2019 following steps may be taken:

a) Vacancies in District Forums and State Commissions must be filled as earliest as possible to increase the disposal rate.

b) Adequate and essential infrastructure should be provided to the consumer forums.

c) The government should constitute a Committee to look into the infrastructure requirements of the District Forum and the State Commissions.

d) Lawyers should be allowed only in rare cases, particularly when it will be difficult for the forum to dispose of the cases without the assistance of the lawyers. It is worthy to note that under the proposed Consumer Protection Act, 2019, the engagement of an advocate shall not be allowed in District Forum or State Commission by either party to the complaint, unless the value of the good and services, exceeds rupees 2 lakh provided that the complainant may engage an expert if the complaint requires technical expertise.

e) Number of adjournments in the disposal of the consumer complaints should be statutory limited.

f) Appropriate steps should be taken to ensure that funds disbursed by the Central Govt. for the purpose of strengthening of the Consumer Grievance Redressal Form is utilized expeditiously and utilized only for the purpose for which they have been sanctioned.

g) Filing of frivolous or vexatious in the disposal of the consumer complaints should be statutorily limited.

h) Filing of frivolous or vexatious litigations before the Consumer Dispute Redressal Agencies at all levels should be discouraged by inflicting heavy cost.

There are some recommendations which need to be followed- [18]

1. Formulation of a National Consumer Protection Comprehensive Policy in conformity with the CP Act; BIS Act, Weights and Measures Act and related laws with thrust on aggressive promotion of consumer rights protection and special focus on rural areas and deprived sections of consumers in active partnership with all actors and stakeholders.
2. Recognition of the existing consumer awareness campaign as a National Campaign in the Five Year Plan (along the lines of e-governance campaign) since it cuts across all sectors and needs to be seen both at Central and State/UT level through convergence of skills and resources drawn from all government departments.
3. National System for Standardisation to provide a rational framework for development of unambiguous and reliable market/society driven standards in areas of economic and social activities especially in areas affecting health, safety and environment and to notify national standards for the country.

4. National system for Conformity Assessment and Compliance to bring in complete synergy at the national level in areas of certification of products and services, accreditation and enforcement of standards will be adopted.
5. **New Legislations and Institutions:** The recommendations in relation to New Legislations and Institutions are:

(a) New Legislations

1. National Consumer Protection Authority Act: It is proposed that a National Consumer Protection Authority (NCPA) be established to fill in the impending gap in legislation to be caused by winding up of the MRTPC as the Competition Commission of India is not being empowered to deal with unfair trade practices, being hitherto dealt by the MRTPC.
2. National Quality and Standardization Authority Act: This Act would cover all operational provisions to achieve uniformity in approach for setting up standards and ensuring compliance thereof.
3. A Central Legislation governing the spot markets across the country will be enacted to enable and streamline traders in all commodities from all over the country;

(b) New Institutions

1. Nation Quality and Standardization Authority
2. National Consumer Protection Authority
3. National Electronic Spot Market
4. National Enforcement Authority
5. Internal Grievance Redressal System
6. Ombudsman
7. Special Verification Agents
8. Standing Committee

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APPENDICES

Appendix

THE CONSUMER PROTECTION ACT, 2019

NO. 35 OF 2019

[*9th August*, 2019.]

An Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent, commencement and application.

1. (*1*) This Act may be called the Consumer Protection Act, 2019.

(*2*) It extends to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

(*4*) Save as otherwise expressly provided by the Central Government, by notification, this Act shall apply to all goods and services.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*1*) "advertisement" means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents;

(*2*) "appropriate laboratory" means a laboratory or an organisation—

(*i*) recognised by the Central Government; or

(*ii*) recognised by a State Government, subject to such guidelines as may be issued by the Central Government in this behalf; or

(*iii*) established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect;

(*3*) "branch office" means—

(*i*) any office or place of work described as a branch by the establishment; or

(*ii*) any establishment carrying on either the same or substantially the same activity carried on by the head office of the establishment;

(*4*) "Central Authority" means the Central Consumer Protection Authority established under section 10;

(*5*) "complainant" means—

(*i*) a consumer; or

(*ii*) any voluntary consumer association registered under any law for the time being in force; or

(*iii*) the Central Government or any State Government; or

(*iv*) the Central Authority; or

(*v*) one or more consumers, where there are numerous consumers having the same interest; or

(*vi*) in case of death of a consumer, his legal heir or legal representative; or

(*vii*) in case of a consumer being a minor, his parent or legal guardian;

(*6*) "complaint" means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that—

(*i*) an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(*ii*) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(*iii*) the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency;

(*iv*) a trader or a service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price—

(*a*) fixed by or under any law for the time being in force; or (*b*) displayed on the goods or any package containing such goods; or

(*c*) displayed on the price list exhibited by him by or under any law for the time being in force; or

(*d*) agreed between the parties;

(*v*) the goods, which are hazardous to life and safety when used, are being offered for sale to the public—

(*a*) in contravention of standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

(*b*) where the trader knows that the goods so offered are unsafe to the public;

(*vi*) the services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by a person who provides any service and who knows it to be injurious to life and safety;

(*vii*) a claim for product liability action lies against the product manufacturer, product seller or product service provider, as the case may be;

(*7*) "consumer" means any person who—

(*i*) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(*ii*) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation.—For the purposes of this clause,—

(*a*) the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

(*b*) the expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;

(*8*) "consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;

(*9*) "consumer rights" includes,—

(*i*) the right to be protected against the marketing of goods, products or services which are hazardous to life and property;

(*ii*) the right to be informed about the quality, quantity, potency, purity, standard and price of goods, products or services, as the case may be, so as to protect the consumer against unfair trade practices;

(*iii*) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;

(*iv*) the right to be heard and to be assured that consumer's interests will receive due consideration at appropriate fora;

(*v*) the right to seek redressal against unfair trade practice or restrictive trade practices or unscrupulous exploitation of consumers; and

(*vi*) the right to consumer awareness;

(*10*) "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly;

(*11*) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes—

(*i*) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

(*ii*) deliberate withholding of relevant information by such person to the consumer;

(*12*) "design", in relation to a product, means the intended or known physical and material characteristics of such product and includes any intended or known formulation or content of such product and the usual result of the intended manufacturing or other process used to produce such product;

(*13*) "direct selling" means marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location;

(*14*) "Director-General" means the Director-General appointed under sub-section (*2*) of section 15;

(*15*) "District Commission" means a District Consumer Disputes Redressal Commission established under sub-section (*1*) of section 28;

(*16*) "e-commerce" means buying or selling of goods or services including digital products over digital or electronic network;

(*17*) "electronic service provider" means a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites;

(*18*) "endorsement", in relation to an advertisement, means—

(*i*) any message, verbal statement, demonstration; or

(*ii*) depiction of the name, signature, likeness or other identifiable personal characteristics of an individual; or

(*iii*) depiction of the name or seal of any institution or organisation,

which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement;

(*19*) "establishment" includes an advertising agency, commission agent, manufacturing, trading or any other commercial agency which carries on any business, trade or profession or any work in connection with or incidental or ancillary to any commercial activity, trade or profession, or such other class or classes of persons including public utility entities in the manner as may be prescribed;

(*20*) "express warranty" means any material statement, affirmation of fact, promise or description relating to a product or service warranting that it conforms to such material statement, affirmation, promise or description and includes any sample or model of a product warranting that the whole of such product conforms to such sample or model;

(*21*) "goods" means every kind of movable property and includes "food" as defined in clause (*j*) of sub-section (*1*) of section 3 of the Food Safety and Standards Act, 2006;

34 of 2006.

(*22*) "harm", in relation to a product liability, includes—

(*i*) damage to any property, other than the product itself;

(*ii*) personal injury, illness or death;

(*iii*) mental agony or emotional distress attendant to personal injury or illness or damage to property; or

(*iv*) any loss of consortium or services or other loss resulting from a harm referred to in sub-clause (*i*) or sub-clause (*ii*) or sub-clause (*iii*),

but shall not include any harm caused to a product itself or any damage to the property on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto;

(*23*) "injury" means any harm whatever illegally caused to any person, in body, mind or property;

(*24*) "manufacturer" means a person who—

(*i*) makes any goods or parts thereof; or

(*ii*) assembles any goods or parts thereof made by others; or

(*iii*) puts or causes to be put his own mark on any goods made by any other person;

(*25*) "mediation" means the process by which a mediator mediates the consumer disputes;

(*26*) "mediator" means a mediator referred to in section 75;

(*27*) "member" includes the President and a member of the National Commission or a State Commission or a District Commission, as the case may be;

(*28*) "misleading advertisement" in relation to any product or service, means an advertisement, which—

(*i*) falsely describes such product or service; or

(*ii*) gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or

(*iii*) conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or

(*iv*) deliberately conceals important information;

(*29*) "National Commission" means the National Consumer Disputes Redressal Commission established under sub-section (*1*) of section 53;

(*30*) "notification" means a notification published in the Official Gazette and the term "notify" shall be construed accordingly;

(*31*) "person" includes—

(*i*) an individual;

(*ii*) a firm whether registered or not;

(*iii*) a Hindu undivided family;

(*iv*) a co-operative society;

(*v*) an association of persons whether registered under the Societies Registration Act, 1860 or not; 21 of 1860.

(*vi*) any corporation, company or a body of individuals whether incorporated or not;

(*vii*) any artificial juridical person, not falling within any of the preceding sub-clauses;

(*32*) "prescribed" means prescribed by rules made by the Central Government, or, as the case may be, the State Government;

(*33*) "product" means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs;

(*34*) "product liability" means the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto;

(*35*) "product liability action" means a complaint filed by a person before a District Commission or State Commission or National Commission, as the case may be, for claiming compensation for the harm caused to him;

(*36*) "product manufacturer" means a person who—

(*i*) makes any product or parts thereof; or

(*ii*) assembles parts thereof made by others; or

(*iii*) puts or causes to be put his own mark on any products made by any other person; or

(*iv*) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or

(*v*) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or

(*vi*) being a product seller of a product, is also a manufacturer of such product;

(*37*) "product seller", in relation to a product, means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes—

(*i*) a manufacturer who is also a product seller; or (*ii*) a service provider,

but does not include—

(*a*) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats;

(*b*) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction;

(*c*) a person who—

(*I*) acts only in a financial capacity with respect to the sale of the product;

(*II*) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider;

(*III*) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

(*38*) "product service provider", in relation to a product, means a person who provides any service in respect of such product;

(*39*) "regulations" means the regulations made by the National Commission, or as the case may be, the Central Authority;

(*40*) "Regulator" means a body or any authority established under any other law for the time being in force;

(*41*) "restrictive trade practice" means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

(*i*) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

(*ii*) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent for buying, hiring or availing of other goods or services;

(*42*) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

(*43*) "spurious goods" means such goods which are falsely claimed to be genuine;

(*44*) "State Commission" means a State Consumer Disputes Redressal Commission established under sub-section (*1*) of section 42;

(*45*) "trader", in relation to any goods, means a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof;

(*46*) "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:—

(*i*) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or

(*ii*) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or

(*iii*) refusing to accept early repayment of debts on payment of applicable penalty; or

(*iv*) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause; or

(*v*) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or

(*vi*) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage;

(*47*) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(*i*) making any statement, whether orally or in writing or by visible representation including by means of electronic record, which—

(*a*) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(*b*) falsely represents that the services are of a particular standard, quality or grade;

(*c*) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(*d*) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(*e*) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(*f*) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(*g*) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

(*h*) makes to the public a representation in a form that purports to be—

(*A*) a warranty or guarantee of a product or of any goods or services; or

(*B*) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

(*i*) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(*j*) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation.—For the purposes of this sub-clause, a statement that is,—

(*A*) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(*B*) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(*C*) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

(*ii*) permitting the publication of any advertisement, whether in any newspaper or otherwise, including by way of electronic record, for the sale or supply at a bargain price of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation.—For the purpose of this sub-clause, "bargain price" means,—

(*A*) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or

(*B*) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

(*iii*) permitting—

(*a*) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged, in the transaction as a whole;

(*b*) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest, except such contest, lottery, game of chance or skill as may be prescribed;

(*c*) withholding from the participants of any scheme offering gifts, prizes or other items free of charge on its closure, the information about final results of the scheme.

Explanation.—For the purpose of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time published, prominently in the same newspaper in which the scheme was originally advertised;

(*iv*) permitting the sale or supply of goods intended to be used, or are of a kind likely to be used by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by the competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(*v*) permitting the hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services;

(*vi*) manufacturing of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services;

(*vii*) not issuing bill or cash memo or receipt for the goods sold or services rendered in such manner as may be prescribed;

(*viii*) refusing, after selling goods or rendering services, to take back or withdraw defective goods or to withdraw or discontinue deficient services and to refund the consideration thereof, if paid, within the period stipulated in the bill or cash memo or receipt or in the absence of such stipulation, within a period of thirty days;

(*ix*) disclosing to other person any personal information given in confidence by the consumer unless such disclosure is made in accordance with the provisions of any law for the time being in force.

CHAPTER II

CONSUMER PROTECTION COUNCILS

Central Consumer Protection Council.

3. (*1*) The Central Government shall, by notification, establish with effect from such date as it may specify in that notification, the Central Consumer Protection Council to be known as the Central Council.

(*2*) The Central Council shall be an advisory council and consist of the following members, namely:—

(*a*) the Minister-in-charge of the Department of Consumer Affairs in the Central Government, who shall be the Chairperson; and

(*b*) such number of other official or non-official members representing such interests as may be prescribed.

Procedure for meetings of Central Council.

4. (*1*) The Central Council shall meet as and when necessary, but at least one meeting of the Council shall be held every year.

(*2*) The Central Council shall meet at such time and place as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

Objects of Central Council.

5. The objects of the Central Council shall be to render advice on promotion and protection of the consumers' rights under this Act.

6. (*1*) Every State Government shall, by notification, establish with effect from such date as it may specify in such notification, a State Consumer Protection Council for such State to be known as the State Council. State Consumer Protection Councils.

(*2*) The State Council shall be an advisory council and consist of the following members, namely:—

(*a*) the Minister-in-charge of Consumer Affairs in the State Government who shall be the Chairperson;

(*b*) such number of other official or non-official members representing such interests as may be prescribed;

(*c*) such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.

(*3*) The State Council shall meet as and when necessary but not less than two meetings shall be held every year.

(*4*) The State Council shall meet at such time and place as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business, as may be prescribed.

7. The objects of every State Council shall be to render advice on promotion and protection of consumer rights under this Act within the State. Objects of State Council.

8. (*1*) The State Government shall, by notification, establish for every District with effect from such date as it may specify in such notification, a District Consumer Protection Council to be known as the District Council. District Consumer Protection Council.

(*2*) The District Council shall be an advisory council and consist of the following members, namely:—

(*a*) the Collector of the district (by whatever name called), who shall be the Chairperson; and

(*b*) such number of other official and non-official members representing such interests as may be prescribed.

(*3*) The District Council shall meet as and when necessary but not less than two meetings shall be held every year.

(*4*) The District Council shall meet at such time and place within the district as the Chairperson may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

9. The objects of every District Council shall be to render advice on promotion and protection of consumer rights under this Act within the district. Objects of District Council.

CHAPTER III

CENTRAL CONSUMER PROTECTION AUTHORITY

10. (*1*) The Central Government shall, by notification, establish with effect from such date as it may specify in that notification, a Central Consumer Protection Authority to be known as the Central Authority to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class. Establishment of Central Consumer Protection Authority.

(*2*) The Central Authority shall consist of a Chief Commissioner and such number of other Commissioners as may be prescribed, to be appointed by the Central Government to exercise the powers and discharge the functions under this Act.

(*3*) The headquarters of the Central Authority shall be at such place in the National Capital Region of Delhi, and it shall have regional and other offices in any other place in India as the Central Government may decide.

Qualifications, method of recruitment, etc., of Chief Commissioner and Commissioners.

11. The Central Government may, by notification, make rules to provide for the qualifications for appointment, method of recruitment, procedure for appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of the service of the Chief Commissioner and Commissioners of the Central Authority.

Vacancy, etc., not to invalidate proceedings of Central Authority.

12. No act or proceeding of the Central Authority shall be invalid merely by reason of—

(*a*) any vacancy in, or any defect in the constitution of, the Central Authority; or

(*b*) any defect in the appointment of a person acting as the Chief Commissioner or as a Commissioner; or

(*c*) any irregularity in the procedure of the Central Authority not affecting the merits of the case.

Appointment of officers, experts, professionals and other employees of Central Authority.

13. (*1*) The Central Government shall provide the Central Authority such number of officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

(2) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority appointed under this Act shall be such as may be prescribed.

(*3*) The Central Authority may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and ability, who have special knowledge and experience in the areas of consumer rights and welfare, consumer policy, law, medicine, food safety, health, engineering, product safety, commerce, economics, public affairs or administration, as it deems necessary to assist it in the discharge of its functions under this Act.

Procedure of Central Authority.

14. (*1*) The Central Authority shall regulate the procedure for transaction of its business and allocation of its business amongst the Chief Commissioner and Commissioners as may be specified by regulations.

(*2*) The Chief Commissioner shall have the powers of general superintendence, direction and control in respect of all administrative matters of the Central Authority:

Provided that the Chief Commissioner may delegate such of his powers relating to administrative matters of the Central Authority, as he may think fit, to any Commissioner (including Commissioner of a regional office) or any other officer of the Central Authority.

Investigation Wing.

15. (*1*) The Central Authority shall have an Investigation Wing headed by a Director-General for the purpose of conducting inquiry or investigation under this Act as may be directed by the Central Authority.

(*2*) The Central Government may appoint a Director-General and such number of Additional Director-General, Director, Joint Director, Deputy Director and Assistant Director, from amongst persons who have experience in investigation and possess such qualifications, in such manner, as may be prescribed.

(*3*) Every Additional Director-General, Director, Joint Director, Deputy Director and Assistant Director shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director-General.

(*4*) The Director-General may delegate all or any of his powers to the Additional Director-General or Director, Joint Director or Deputy Director or Assistant Director, as the case may be, while conducting inquiries or investigations under this Act.

(*5*) The inquiries or the investigations made by the Director- General shall be submitted to the Central Authority in such form, in such manner and within such time, as may be specified by regulations.

Power of District Collector.

16. The District Collector (by whatever name called) may, on a complaint or on a reference made to him by the Central Authority or the Commissioner of a regional office, inquire into or investigate complaints regarding violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements, within his jurisdiction and submit his report to the Central Authority or to the Commissioner of a regional office, as the case may be.

Complaints to authorities.

17. A complaint relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, may be forwarded either in writing or in electronic mode, to any one of the authorities, namely, the District Collector or the Commissioner of regional office or the Central Authority.

Powers and functions of Central Authority.

18. (*1*) The Central Authority shall—

(*a*) protect, promote and enforce the rights of consumers as a class, and prevent violation of consumers rights under this Act;

(*b*) prevent unfair trade practices and ensure that no person engages himself in unfair trade practices;

(*c*) ensure that no false or misleading advertisement is made of any goods or services which contravenes the provisions of this Act or the rules or regulations made thereunder;

(*d*) ensure that no person takes part in the publication of any advertisement which is false or misleading.

(*2*) Without prejudice to the generality of the provisions contained in sub-section (*1*), the Central Authority may, for any of the purposes aforesaid,—

(*a*) inquire or cause an inquiry or investigation to be made into violations of consumer rights or unfair trade practices, either *suo motu* or on a complaint received or on the directions from the Central Government;

(*b*) file complaints before the District Commission, the State Commission or the National Commission, as the case may be, under this Act;

(*c*) intervene in any proceedings before the District Commission or the State Commission or the National Commission, as the case may be, in respect of any allegation of violation of consumer rights or unfair trade practices;

(*d*) review the matters relating to, and the factors inhibiting enjoyment of, consumer rights, including safeguards provided for the protection of consumers under any other law for the time being in force and recommend appropriate remedial measures for their effective implementation;

(*e*) recommend adoption of international covenants and best international practices on consumer rights to ensure effective enforcement of consumer rights;

(*f*) undertake and promote research in the field of consumer rights;

(*g*) spread and promote awareness on consumer rights;

(*h*) encourage non-Governmental organisations and other institutions working in the field of consumer rights to co-operate and work with consumer protection agencies;

(*i*) mandate the use of unique and universal goods identifiers in such goods, as may be necessary, to prevent unfair trade practices and to protect consumers' interest;

(*j*) issue safety notices to alert consumers against dangerous or hazardous or unsafe goods or services;

(*k*) advise the Ministries and Departments of the Central and State Governments on consumer welfare measures;

(*l*) issue necessary guidelines to prevent unfair trade practices and protect consumers' interest.

Power of Central Authority to refer matter for investigation or to other Regulator.

19. (*1*) The Central Authority may, after receiving any information or complaint or directions from the Central Government or of its own motion, conduct or cause to be conducted a preliminary inquiry as to whether there exists a *prima facie* case of violation of consumer rights or any unfair trade practice or any false or misleading advertisement, by any person, which is prejudicial to the public interest or to the interests of consumers and if it is satisfied that there exists a *prima facie* case, it shall cause investigation to be made by the Director-General or by the District Collector.

(*2*) Where, after preliminary inquiry, the Central Authority is of the opinion that the matter is to be dealt with by a Regulator established under any other law for the time being in force, it may refer such matter to the concerned Regulator along with its report.

(*3*) For the purposes of investigation under sub-section (*1*), the Central Authority, the Director General or the District Collector may call upon a person referred to in sub-section (*1*) and also direct him to produce any document or record in his possession.

Power of Central Authority to recall goods, etc.

20. Where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order as may be necessary, including—

(*a*) recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe;

(*b*) reimbursement of the prices of goods or services so recalled to purchasers of such goods or services; and

(*c*) discontinuation of practices which are unfair and prejudicial to consumers' interest:

Provided that the Central Authority shall give the person an opportunity of being heard before passing an order under this section.

Power of Central Authority to issue directions and penalties against false or misleading advertisements.

21. (*1*) Where the Central Authority is satisfied after investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may, by order, issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher, as the case may be, to discontinue such advertisement or to modify the same in such manner and within such time as may be specified in that order.

(*2*) Notwithstanding the order passed under sub-section (*1*), if the Central Authority is of the opinion that it is necessary to impose a penalty in respect of such false or misleading advertisement, by a manufacturer or an endorser, it may, by order, impose on manufacturer or endorser a penalty which may extend to ten lakh rupees:

Provided that the Central Authority may, for every subsequent contravention by a manufacturer or endorser, impose a penalty, which may extend to fifty lakh rupees.

(*3*) Notwithstanding any order under sub-sections (*1*) and (*2*), where the Central Authority deems it necessary, it may, by order, prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service for a period which may extend to one year:

Provided that the Central Authority may, for every subsequent contravention, prohibit such endorser from making endorsement in respect of any product or service for a period which may extend to three years.

(*4*) Where the Central Authority is satisfied after investigation that any person is found to publish, or is a party to the publication of, a misleading advertisement, it may impose on such person a penalty which may extend to ten lakh rupees.

(*5*) No endorser shall be liable to a penalty under sub-sections (*2*) and (*3*) if he has exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by him.

(*6*) No person shall be liable to such penalty if he proves that he had published or arranged for the publication of such advertisement in the ordinary course of his business:

Provided that no such defence shall be available to such person if he had previous knowledge of the order passed by the Central Authority for withdrawal or modification of such advertisement.

(*7*) While determining the penalty under this section, regard shall be had to the following, namely:—

(*a*) the population and the area impacted or affected by such offence;

(*b*) the frequency and duration of such offence;

(*c*) the vulnerability of the class of persons likely to be adversely affected by such offence; and

(*d*) the gross revenue from the sales effected by virtue of such offence.

(*8*) The Central Authority shall give the person an opportunity of being heard before an order under this section is passed.

Search and seizure.

22. (*1*) For the purpose of conducting an investigation after preliminary inquiry under sub-section (*1*) of section 19, the Director-General or any other officer authorised by him in this behalf, or the District Collector, as the case may be, may, if he has any reason to believe that any person has violated any consumer rights or committed unfair trade practice or causes any false or misleading advertisement to be made, shall,—

(*a*) enter at any reasonable time into any such premises and search for any document or record or article or any other form of evidence and seize such document, record, article or such evidence;

(*b*) make a note or an inventory of such record or article; or

(*c*) require any person to produce any record, register or other document or article.

2 of 1974.

(*2*) The provisions of the Code of Criminal Procedure, 1973, relating to search and seizure shall apply, as far as may be, for search and seizure under this Act.

(*3*) Every document, record or article seized under clause (*a*) of sub-section (*1*) or produced under clause (*c*) of that sub-section shall be returned to the person, from whom they were seized or who produced the same, within a period of twenty days of the date of such seizure or production, as the case may be, after copies thereof or extracts therefrom certified by that person, in such manner as may be prescribed, have been taken.

(*4*) Where any article seized under sub-section (*1*) are subject to speedy or natural decay, the Director-General or such other officer may dispose of the article in such manner as may be prescribed.

(*5*) In the case of articles other than the articles referred to in sub-section (*4*), provisions contained in clause (*c*) of sub-section (*2*) of section 38 shall *mutatis mutandis* apply in relation to analysis or tests.

Designation of any statutory authority or body to function as Central Authority.

23. The Central Government may, if it considers necessary, by notification, designate any statutory authority or body to exercise the powers and perform the functions of the Central Authority referred to in section 10.

Appeal.

24. A person aggrieved by any order passed by the Central Authority under sections 20 and 21 may file an appeal to the National Commission within a period of thirty days from the date of receipt of such order.

Grants by Central Government.

25. The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Central Authority grants of such sums of money as that Government may think fit for being utilised for the purposes of this Act.

Accounts and audit.

26. (*1*) The Central Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form and manner as may be prescribed in consultation with the Comptroller and Auditor-General of India.

(*2*) The accounts of the Central Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Central Authority to the Comptroller and Auditor-General of India.

(*3*) The Comptroller and Auditor-General of India or any other person appointed by him in connection with the audit of the accounts of the Central Authority shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has, in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Central Authority.

(*4*) The accounts of the Central Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government which shall cause the same to be laid before each House of Parliament.

Furnishing of annual reports, etc.

27. (*1*) The Central Authority shall prepare once in every year, in such form, manner and at such time as may be prescribed, an annual report giving full account of its activities during the previous year and such other reports and returns, as may be directed, and copies of such report and returns shall be forwarded to the Central Government.

(*2*) A copy of the annual report received under sub-section (*1*) shall be laid, as soon as may be after it is received, before each House of Parliament.

CHAPTER IV

CONSUMER DISPUTES REDRESSAL COMMISSION

Establishment of District Consumer Disputes Redressal Commission.

28. (*1*) The State Government shall, by notification, establish a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State:

Provided that the State Government may, if it deems fit, establish more than one District Commission in a district.

(*2*) Each District Commission shall consist of—

(*a*) a President; and

(*b*) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.

29. The Central Government may, by notification, make rules to provide for the qualifications, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the District Commission.

Qualifications, etc., of President and members of District Commission.

30. The State Government may, by notification, make rules to provide for salaries and allowances and other terms and conditions of service of the President, and members of the District Commission.

Salaries, allowances and other terms and conditions of service of President and members of District Commission.

31. Any person appointed as President or, as the case may be, a member of the District Commission immediately before the commencement of this Act shall hold office as such as President or, as the case may be, as member till the completion of his term for which he has been appointed.

Transitional provision.

32. If, at any time, there is a vacancy in the office of the President or member of a District Commission, the State Government may, by notification, direct—

Vacancy in office of member of District Commission.

(*a*) any other District Commission specified in that notification to exercise the jurisdiction in respect of that district also; or

(*b*) the President or a member of any other District Commission specified in that notification to exercise the powers and discharge the functions of the President or member of that District Commission also.

33. (*1*) The State Government shall provide the District Commission with such officers and other employees as may be required to assist the District Commission in the discharge of its functions.

Officers and other employees of District Commission.

(*2*) The officers and other employees of the District Commission shall discharge their functions under the general superintendence of the President of the District Commission.

(*3*) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the District Commission shall be such as may be prescribed.

34. (*1*) Subject to the other provisions of this Act, the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees:

Jurisdiction of District Commission.

Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit.

(*2*) A complaint shall be instituted in a District Commission within the local limits of whose jurisdiction,—

(*a*) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or

(*b*) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case the permission of the District Commission is given; or

(*c*) the cause of action, wholly or in part, arises; or

(*d*) the complainant resides or personally works for gain.

(*3*) The District Commission shall ordinarily function in the district headquarters and may perform its functions at such other place in the district, as the State Government may, in consultation with the State Commission, notify in the Official Gazette from time to time.

Manner in which complaint shall be made.

35. (*1*) A complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be filed with a District Commission by—

(*a*) the consumer,—

(*i*) to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided; or

(*ii*) who alleges unfair trade practice in respect of such goods or service;

(*b*) any recognised consumer association, whether the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service is provided or agreed to be provided, or who alleges unfair trade practice in respect of such goods or service, is a member of such association or not;

(*c*) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested; or

(*d*) the Central Government, the Central Authority or the State Government, as the case may be:

Provided that the complaint under this sub-section may be filed electronically in such manner as may be prescribed.

Explanation.—For the purposes of this sub-section, "recognised consumer association" means any voluntary consumer association registered under any law for the time being in force.

(*2*) Every complaint filed under sub-section (*1*) shall be accompanied with such fee and payable in such manner, including electronic form, as may be prescribed.

Proceedings before District Commission.

36. (*1*) Every proceeding before the District Commission shall be conducted by the President of that Commission and atleast one member thereof, sitting together:

Provided that where a member, for any reason, is unable to conduct a proceeding till it is completed, the President and the other member shall continue the proceeding from the stage at which it was last heard by the previous member.

(*2*) On receipt of a complaint made under section 35, the District Commission may, by order, admit the complaint for being proceeded with or reject the same:

Provided that a complaint shall not be rejected under this section unless an opportunity of being heard has been given to the complainant:

Provided further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was filed.

(*3*) Where the District Commission does not decide the issue of admissibility of the complaint within the period so specified, it shall be deemed to have been admitted.

Reference to mediation.

37. (*1*) At the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation in accordance with the provisions of Chapter V.

(*2*) Where the parties agree for settlement by mediation and give their consent in writing, the District Commission shall, within five days of receipt of such consent, refer the matter for mediation, and in such case, the provisions of Chapter V, relating to mediation, shall apply.

Procedure on admission of complaint.

38. (*1*) The District Commission shall, on admission of a complaint, or in respect of cases referred for mediation on failure of settlement by mediation, proceed with such complaint.

(*2*) Where the complaint relates to any goods, the District Commission shall,—

(*a*) refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by it;

(*b*) if the opposite party on receipt of a complaint referred to him under clause (*a*) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Commission, proceed to settle the consumer dispute in the manner specified in clauses (*c*) to (*g*);

(*c*) if the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, obtain a sample of the goods from the complainant, seal it and authenticate it in the manner as may be prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory to make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Commission within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by it;

(*d*) before any sample of the goods is referred to any appropriate laboratory under clause (*c*), require the complainant to deposit to the credit of the Commission such fees as may be specified, for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question;

(*e*) remit the amount deposited to its credit under clause (*d*) to the appropriate laboratory to enable it to carry out the analysis or test mentioned in clause (*c*) and on receipt of the report from the appropriate laboratory, it shall forward a copy of the report along with such remarks as it may feel appropriate to the opposite party;

(*f*) if any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, require the opposite party or the complainant to submit in writing his objections with regard to the report made by the appropriate laboratory;

(*g*) give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto under clause (*f*) and issue an appropriate order under section 39.

(*3*) The District Commission shall, if the complaint admitted by it under sub-section (*2*) of section 36 relates to goods in respect of which the procedure specified in sub-section (*2*) cannot be followed, or if the complaint relates to any services,—

(*a*) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Commission;

(*b*) if the opposite party, on receipt of a copy of the complaint, referred to him under clause (*a*) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Commission, it shall proceed to settle the consumer dispute—

(*i*) on the basis of evidence brought to its notice by the complainant and the opposite party, if the opposite party denies or disputes the allegations contained in the complaint, or

(*ii*) *ex parte* on the basis of evidence brought to its notice by the complainant, where the opposite party omits or fails to take any action to represent his case within the time given by the Commission;

(*c*) decide the complaint on merits if the complainant fails to appear on the date of hearing.

(*4*) For the purposes of sub-sections (*2*) and (*3*), the District Commission may, by order, require an electronic service provider to provide such information, documents or records, as may be specified in that order.

(*5*) No proceedings complying with the procedure laid down in sub-sections (*1*) and (*2*) shall be called in question in any court on the ground that the principles of natural justice have not been complied with.

(*6*) Every complaint shall be heard by the District Commission on the basis of affidavit and documentary evidence placed on record:

Provided that where an application is made for hearing or for examination of parties in person or through video conferencing, the District Commission may, on sufficient cause being shown, and after recording its reasons in writing, allow the same.

(*7*) Every complaint shall be disposed of as expeditiously as possible and endeavour shall be made to decide the complaint within a period of three months from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within five months if it requires analysis or testing of commodities:

Provided that no adjournment shall ordinarily be granted by the District Commission unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by the Commission:

Provided further that the District Commission shall make such orders as to the costs occasioned by the adjournment as may be specified by regulations:

Provided also that in the event of a complaint being disposed of after the period so specified, the District Commission shall record in writing, the reasons for the same at the time of disposing of the said complaint.

(*8*) Where during the pendency of any proceeding before the District Commission, if it appears necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.

(*9*) For the purposes of this section, the District Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:— 5 of 1908.

(*a*) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;

(*b*) requiring the discovery and production of any document or other material object as evidence;

(*c*) receiving of evidence on affidavits;

(*d*) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(*e*) issuing of commissions for the examination of any witness, or document; and (*f*) any other matter which may be prescribed by the Central Government.

(*10*) Every proceeding before the District Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, and the District Commission shall be deemed to be a criminal court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

45 of 1860.

2 of 1974.

(*11*) Where the complainant is a consumer referred to in sub-clause (*v*) of clause (*5*) of section 2, the provisions of Order I Rule 8 of the First Schedule to the Code of Civil Procedure, 1908 shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Commission thereon.

5 of 1908.

(*12*) In the event of death of a complainant who is a consumer or of the opposite party against whom the complaint has been filed, the provisions of Order XXII of the First Schedule to the Code of Civil Procedure, 1908 shall apply subject to the modification that every reference therein to the plaintiff and the defendant shall be construed as reference to a complainant or the opposite party, as the case may be.

5 of 1908.

Findings of District Commission.

39. (*1*) Where the District Commission is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services or any unfair trade practices, or claims for compensation under product liability are proved, it shall issue an order to the opposite party directing him to do one or more of the following, namely:—

(*a*) to remove the defect pointed out by the appropriate laboratory from the goods in question;

(*b*) to replace the goods with new goods of similar description which shall be free from any defect;

(*c*) to return to the complainant the price, or, as the case may be, the charges paid by the complainant along with such interest on such price or charges as may be decided;

(*d*) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party:

Provided that the District Commission shall have the power to grant punitive damages in such circumstances as it deems fit;

(*e*) to pay such amount as may be awarded by it as compensation in a product liability action under Chapter VI;

(*f*) to remove the defects in goods or deficiencies in the services in question;

(*g*) to discontinue the unfair trade practice or restrictive trade practice and not to repeat them;

(*h*) not to offer the hazardous or unsafe goods for sale;

(*i*) to withdraw the hazardous goods from being offered for sale;

(*j*) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(*k*) to pay such sum as may be determined by it, if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less than twenty-five per cent. of the value of such defective goods sold or service provided, as the case may be, to such consumers;

(*l*) to issue corrective advertisement to neutralise the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

(*m*) to provide for adequate costs to parties; and

(*n*) to cease and desist from issuing any misleading advertisement.

(*2*) Any amount obtained under sub-section (*1*) shall be credited to such fund and utilised in such manner as may be prescribed.

(*3*) In any proceeding conducted by the President and a member and if they differ on any point or points, they shall state the point or points on which they differ and refer the same to another member for hearing on such point or points and the opinion of the majority shall be the order of the District Commission:

Provided that the other member shall give his opinion on such point or points referred to him within a period of one month from the date of such reference.

(*4*) Every order made by the District Commission under sub-section (*1*) shall be signed by the President and the member who conducted the proceeding:

Provided that where the order is made as per majority opinion under sub-section (*3*), such order shall also be signed by the other member.

Review by District Commission in certain cases.

40. The District Commission shall have the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

Appeal against order of District Commission.

41. Any person aggrieved by an order made by the District Commission may prefer an appeal against such order to the State Commission on the grounds of facts or law within a period of forty-five days from the date of the order, in such form and manner, as may be prescribed:

Provided that the State Commission may entertain an appeal after the expiry of the said period of forty-five days, if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Commission, shall be entertained by the State Commission unless the appellant has deposited fifty per cent. of that amount in the manner as may be prescribed:

Provided also that no appeal shall lie from any order passed under sub-section (*1*) of section 81 by the District Commission pursuant to a settlement by mediation under section 80.

Establishment of State Consumer Disputes Redressal Commission.

42. (*1*) The State Government shall, by notification, establish a State Consumer Disputes Redressal Commission, to be known as the State Commission, in the State.

(*2*) The State Commission shall ordinarily function at the State capital and perform its functions at such other places as the State Government may in consultation with the State Commission notify in the Official Gazette:

Provided that the State Government may, by notification, establish regional benches of the State Commission, at such places, as it deems fit.

(*3*) Each State Commission shall consist of—

(*a*) a President; and

(*b*) not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.

43. The Central Government may, by notification, make rules to provide for the qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission.

Qualifications, etc., of President and members of State Commission.

44. The State Government may, by notification, make rules to provide for salaries and allowances and other terms and conditions of service of the President and members of the State Commission.

Salaries, allowances and other terms and conditions of service of President and members of State Commission.

45. Any person appointed as President or, as the case may be, a member of the State Commission immediately before the commencement of this Act shall hold office as such, as President or member, as the case may be, till the completion of his term.

Transitional provision.

46. (*1*) The State Government shall determine the nature and categories of the officers and other employees required to assist the State Commission in the discharge of its functions and provide the Commission with such officers and other employees as it may think fit.

Officers and employees of State Commission.

(*2*) The officers and other employees of the State Commission shall discharge their functions under the general superintendence of the President.

(*3*) The salaries and allowances payable to and the other terms and conditions of service of, the officers and other employees of the State Commission shall be such as may be prescribed.

47. (*1*) Subject to the other provisions of this Act, the State Commission shall have jurisdiction—

Jurisdiction of State Commission.

(*a*) to entertain—

(*i*) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:

Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;

(*ii*) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;

(*iii*) appeals against the orders of any District Commission within the State; and

(*b*) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Commission within the State, where it appears to the State Commission that such District Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

(*2*) The jurisdiction, powers and authority of the State Commission may be exercised by Benches thereof, and a Bench may be constituted by the President with one or more members as the President may deem fit:

Provided that the senior-most member shall preside over the Bench.

(*3*) Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

Provided that the President or the other members, as the case may be, shall give opinion on the point or points so referred within a period of one month from the date of such reference.

(*4*) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,—

(*a*) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or

(*b*) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided in such case, the permission of the State Commission is given; or

(*c*) the cause of action, wholly or in part, arises; or

(*d*) the complainant resides or personally works for gain.

Transfer of cases.

48. On the application of the complainant or of its own motion, the State Commission may, at any stage of the proceeding, transfer any complaint pending before a District Commission to another District Commission within the State if the interest of justice so requires.

Procedure applicable to State Commission.

49. (*1*) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be necessary, be applicable to the disposal of complaints by the State Commission.

(*2*) Without prejudice to the provisions of sub-section (*1*), the State Commission may also declare any terms of contract, which is unfair to any consumer, to be null and void.

Review by State Commission in certain cases.

50. The State Commission shall have the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order.

Appeal to National Commission.

51. (*1*) Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (*i*) or (*ii*) of clause (*a*) of sub-section (*1*) of section 47 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission shall not entertain the appeal after the expiry of the said period of thirty days unless it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited fifty per cent. of that amount in the manner as may be prescribed.

(*2*) Save as otherwise expressly provided under this Act or by any other law for the time being in force, an appeal shall lie to the National Commission from any order passed in appeal by any State Commission, if the National Commission is satisfied that the case involves a substantial question of law.

(*3*) In an appeal involving a question of law, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(*4*) Where the National Commission is satisfied that a substantial question of law is involved in any case, it shall formulate that question and hear the appeal on that question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the National Commission to hear, for reasons to be recorded in writing, the appeal on any other substantial question of law, if it is satisfied that the case involves such question of law.

(*5*) An appeal may lie to the National Commission under this section from an order passed *ex parte* by the State Commission.

Hearing of appeal.

52. An appeal filed before the State Commission or the National Commission, as the case may be, shall be heard as expeditiously as possible and every endeavour shall be made to dispose of the appeal within a period of ninety days from the date of its admission:

Provided that no adjournment shall ordinarily be granted by the State Commission or the National Commission, as the case may be, unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by such Commission:

Provided further that the State Commission or the National Commission, as the case may be, shall make such orders as to the costs occasioned by the adjournment, as may be specified by regulations:

Provided also that in the event of an appeal being disposed of after the period so specified, the State Commission or the National Commission, as the case may be, shall record in writing the reasons for the same at the time of disposing of the said appeal.

Establishment of National Consumer Disputes Redressal Commission.

53. (*1*) The Central Government shall, by notification, establish a National Consumer Disputes Redressal Commission, to be known as the National Commission.

(*2*) The National Commission shall ordinarily function at the National Capital Region and perform its functions at such other places as the Central Government may in consultation with the National Commission notify in the Official Gazette:

Provided that the Central Government may, by notification, establish regional Benches of the National Commission, at such places, as it deems fit.

Composition of National Commission.

54. The National Commission shall consist of—

(*a*) a President; and

(*b*) not less than four and not more than such number of members as may be prescribed.

Qualifications, etc., of President and members of National Commission.

55. (*1*) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission:

Provided that the President and members of the National Commission shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for re-appointment:

Provided further that no President or members shall hold office as such after he has attained such age as specified in the rules made by the Central Government which shall not exceed,—

(*a*) in the case of the President, the age of seventy years;

(*b*) in the case of any other member, the age of sixty-seven years.

(*2*) Neither the salary and allowances nor the other terms and conditions of service of President and members of the National Commission shall be varied to his disadvantage after his appointment.

Transitional provision.

56. The President and every other member appointed immediately before the commencement of section 177 of the Finance Act, 2017 shall continue to be governed by the provisions of the Consumer Protection Act, 1986 and the rules made thereunder as if this Act had not come into force.

7 of 2017.
68 of 1986.

Other officers and employees of National Commission.

57. (*1*) The Central Government shall provide, in consultation with the President of the National Commission, such number of officers and other employees to assist the National Commission in the discharge of its functions as it may think fit.

(*2*) The officers and other employees of the National Commission shall discharge their functions under the general superintendence of the President of the National Commission.

(*3*) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the National Commission shall be such as may be prescribed.

Jurisdiction of National Commission.

58. (*1*) Subject to the other provisions of this Act, the National Commission shall have jurisdiction—

(*a*) to entertain—

(*i*) complaints where the value of the goods or services paid as consideration exceeds rupees ten crore:

Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;

(*ii*) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;

(*iii*) appeals against the orders of any State Commission;

(*iv*) appeals against the orders of the Central Authority; and

(*b*) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

(*2*) The jurisdiction, powers and authority of the National Commission may be exercised by Benches thereof and a Bench may be constituted by the President with one or more members as he may deem fit:

Provided that the senior-most member of the Bench shall preside over the Bench.

(*3*) Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it:

Provided that the President or the other member, as the case may be, shall give opinion on the point or points so referred within a period of two months from the date of such reference.

Procedure applicable to National Commission.

59. (*1*) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be considered necessary, be applicable to the disposal of complaints by the National Commission.

(*2*) Without prejudice to sub-section (*1*), the National Commission may also declare any terms of contract, which is unfair to any consumer to be null and void.

60. The National Commission shall have the power to review any of the order passed by it if there is an error apparent on the face of the record, either of its own motion or on an application made by any of the parties within thirty days of such order. Review by National Commission in certain cases.

61. Where an order is passed by the National Commission *ex parte*, the aggrieved party may make an application to the Commission for setting aside such order. Power to set aside *ex parte* orders.

62. On the application of the complainant or of its own motion, the National Commission may, at any stage of the proceeding, in the interest of justice, transfer any complaint pending before the District Commission of one State to a District Commission of another State or before one State Commission to another State Commission. Transfer of cases.

63. When the office of President of the National Commission is vacant or a person occupying such office is, by reason of absence or otherwise, unable to perform the duties of his office, these shall be performed by the senior-most member of the National Commission: Vacancy in office of President of National Commission.

Provided that where a retired Judge of a High Court or a person who has been a Judicial Member is a member of the National Commission, such member or where the number of such members is more than one, the senior-most person amongst such members, shall preside over the National Commission in the absence of President of that Commission.

64. No act or proceeding of the District Commission, the State Commission or the National Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof. Vacancies or defects in appointment not to invalidate orders.

65. (*1*) All notices, required by this Act to be served, shall be served by delivering or transmitting a copy thereof by registered post acknowledgment due addressed to opposite party against whom complaint is made or to the complainant by speed post or by such courier service, approved by the District Commission, the State Commission or the National Commission, as the case may be, or by any other mode of transmission of documents including electronic means. Service of notice, etc.

(*2*) Without prejudice to the provisions contained in sub-section (*1*), the notice required by this Act may be served on an electronic service provider at the address provided by it on the electronic platform from where it provides its services as such and for this purpose, the electronic service provider shall designate a nodal officer to accept and process such notices.

(*3*) When an acknowledgment or any other receipt purporting to be signed by the opposite party or his agent or, as the case may be, by the complainant is received by the District Commission, the State Commission or the National Commission, as the case may be, or postal article containing the notice is received back by such District Commission, State Commission or the National Commission, with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the opposite party or his agent or complainant had refused to take delivery of the postal article containing the notice or had refused to accept the notice by any other means specified in sub-section (*1*) when tendered or transmitted to him, the District Commission or the State Commission or the National Commission, as the case may be, shall declare that the notice has been duly served on the opposite party or to the complainant, as the case may be:

Provided that where the notice was properly addressed, pre-paid and duly sent by registered post acknowledgment due, a declaration referred to in this sub-section shall be made notwithstanding the fact that the acknowledgment has been lost or misplaced, or for any other reason, has not been received by the District Commission, the State Commission or the National Commission, as the case may be, within thirty days from the date of issue of notice.

(*4*) All notices required to be served on an opposite party or to complainant, as the case may be, shall be deemed to be sufficiently served, if addressed in the case of the opposite party, to the place where business or profession is carried on, and in case of the complainant, the place where such person actually and voluntarily resides.

Experts to assist National Commission or State Commission.

66. Where the National Commission or the State Commission, as the case may be, on an application by a complainant or otherwise, is of the opinion that it involves the larger interest of consumers, it may direct any individual or organisation or expert to assist the National Commission or the State Commission, as the case may be.

Appeal against order of National Commission.

67. Any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by sub-clause (*i*) or (*ii*) of clause (*a*) of sub-section (*1*) of section 58, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person who is required to pay any amount in terms of an order of the National Commission shall be entertained by the Supreme Court unless that person has deposited fifty per cent. of that amount in the manner as may be prescribed.

Finality of orders.

68. Every order of a District Commission or the State Commission or the National Commission, as the case may be, shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

Limitation period.

69. (*1*) The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(*2*) Notwithstanding anything contained in sub-section (*1*), a complaint may be entertained after the period specified in sub-section (*1*), if the complainant satisfies the District Commission, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the District Commission or the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.

Administrative control.

70. (*1*) The National Commission shall have the authority to lay down such adequate standards in consultation with the Central Government from time to time, for better protection of the interests of consumers and for that purpose, shall have administrative control over all the State Commissions in the following matters, namely:—

(*a*) monitoring performance of the State Commissions in terms of their disposal by calling for periodical returns regarding the institution, disposal and pendency of cases;

(*b*) investigating into any allegations against the President and members of a State Commission and submitting inquiry report to the State Government concerned along with copy endorsed to the Central Government for necessary action;

(*c*) issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of english translation of judgments written in any language, speedy grant of copies of documents;

(*d*) overseeing the functioning of the State Commission or the District Commission either by way of inspection or by any other means, as the National Commission may like to order from time to time, to ensure that the objects and purposes of the Act are best served and the standards set by the National Commission are implemented without interfering with their quasi-judicial freedom.

(*2*) There shall be a monitoring cell to be constituted by the President of the National Commission to oversee the functioning of the State Commissions from the administrative point of view.

(*3*) The State Commission shall have administrative control over all the District Commissions within its jurisdiction in all matters referred to in sub-section (*1*).

(*4*) The National Commission and the State Commissions shall furnish to the Central Government periodically or as and when required, any information including the pendency of cases in such form and manner as may be prescribed.

(*5*) The State Commission shall furnish, periodically or as and when required to the State Government any information including pendency of cases in such form and manner as may be prescribed.

Enforcement of orders of District Commission, State Commission and National Commission.

71. Every order made by a District Commission, State Commission or the National Commission shall be enforced by it in the same manner as if it were a decree made by a Court in a suit before it and the provisions of Order XXI of the First Schedule to the Code of Civil
5 of 1908. Procedure, 1908 shall, as far as may be, applicable, subject to the modification that every reference therein to the decree shall be construed as reference to the order made under this Act.

Penalty for non-compliance of order.

72. (*1*) Whoever fails to comply with any order made by the District Commission or the State Commission or the National Commission, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one month, but which may extend to three years, or with fine, which shall not be less than twenty-five thousand rupees, but which may extend to one lakh rupees, or with both.

2 of 1974. (*2*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the District Commission, the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of first class for the trial of offences under sub-section (*1*), and on conferment of such powers, the District Commission or the State Commission or the National Commission, as the case may be, shall be deemed to be a Judicial Magistrate of first class for the purposes of the Code of Criminal Procedure, 1973.

(*3*) Save as otherwise provided, the offences under sub-section (*1*) shall be tried summarily by the District Commission or the State Commission or the National Commission, as the case may be.

Appeal against order passed under section 72.

2 of 1974. **73.** (*1*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, where an order is passed under sub-section (*1*) of section 72, an appeal shall lie, both on facts and on law from—

(*a*) the order made by the District Commission to the State Commission;

(*b*) the order made by the State Commission to the National Commission; and

(*c*) the order made by the National Commission to the Supreme Court.

(*2*) Except as provided in sub-section (*1*), no appeal shall lie before any court, from any order of a District Commission or a State Commission or the National Commission, as the case may be.

(*3*) Every appeal under this section shall be preferred within a period of thirty days from the date of order of a District Commission or a State Commission or the National Commission, as the case may be:

Provided that the State Commission or the National Commission or the Supreme Court, as the case may be, may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period of thirty days.

CHAPTER V

MEDIATION

Establishment of consumer mediation cell.

74. (*1*) The State Government shall establish, by notification, a consumer mediation cell to be attached to each of the District Commissions and the State Commissions of that State.

(*2*) The Central Government shall establish, by notification, a consumer mediation cell to be attached to the National Commission and each of the regional Benches.

(*3*) A consumer mediation cell shall consist of such persons as may be prescribed.

(*4*) Every consumer mediation cell shall maintain—

(*a*) a list of empanelled mediators;

(*b*) a list of cases handled by the cell;

(*c*) record of proceeding; and

(*d*) any other information as may be specified by regulations.

(*5*) Every consumer mediation cell shall submit a quarterly report to the District Commission, State Commission or the National Commission to which it is attached, in the manner specified by regulations.

Empanelment of mediators.

75. (*1*) For the purpose of mediation, the National Commission or the State Commission or the District Commission, as the case may be, shall prepare a panel of the mediators to be maintained by the consumer mediation cell attached to it, on the recommendation of a selection committee consisting of the President and a member of that Commission.

(*2*) The qualifications and experience required for empanelment as mediator, the procedure for empanelment, the manner of training empanelled mediators, the fee payable to empanelled mediator, the terms and conditions for empanelment, the code of conduct for empanelled mediators, the grounds on which, and the manner in which, empanelled mediators shall be removed or empanelment shall be cancelled and other matters relating thereto, shall be such as may be specified by regulations.

(*3*) The panel of mediators prepared under sub-section (*1*) shall be valid for a period of five years, and the empanelled mediators shall be eligible to be considered for re-empanelment for another term, subject to such conditions as may be specified by regulations.

Nomination of mediators from panel.

76. The District Commission, the State Commission or the National Commission shall, while nominating any person from the panel of mediators referred to in section 75, consider his suitability for resolving the consumer dispute involved.

Duty of mediator to disclose certain facts.

77. It shall be the duty of the mediator to disclose—

(*a*) any personal, professional or financial interest in the outcome of the consumer dispute;

(*b*) the circumstances which may give rise to a justifiable doubt as to his independence or impartiality; and

(*c*) such other facts as may be specified by regulations.

Replacement of mediator in certain cases.

78. Where the District Commission or the State Commission or the National Commission, as the case may be, is satisfied, on the information furnished by the mediator or on the information received from any other person including parties to the complaint and after hearing the mediator, it shall replace such mediator by another mediator.

79. (*1*) The mediation shall be held in the consumer mediation cell attached to the District Commission, the State Commission or the National Commission, as the case may be.

Procedure for mediation.

(*2*) Where a consumer dispute is referred for mediation by the District Commission or the State Commission or the National Commission, as the case may be, the mediator nominated by such Commission shall have regard to the rights and obligations of the parties, the usages of trade, if any, the circumstances giving rise to the consumer dispute and such other relevant factors, as he may deem necessary and shall be guided by the principles of natural justice while carrying out mediation.

(*3*) The mediator so nominated shall conduct mediation within such time and in such manner as may be specified by regulations.

80. (*1*) Pursuant to mediation, if an agreement is reached between the parties with respect to all of the issues involved in the consumer dispute or with respect to only some of the issues, the terms of such agreement shall be reduced to writing accordingly, and signed by the parties to such dispute or their authorised representatives.

Settlement through mediation.

(*2*) The mediator shall prepare a settlement report of the settlement and forward the signed agreement along with such report to the concerned Commission.

(*3*) Where no agreement is reached between the parties within the specified time or the mediator is of the opinion that settlement is not possible, he shall prepare his report accordingly and submit the same to the concerned Commission.

81. (*1*) The District Commission or the State Commission or the National Commission, as the case may be, shall, within seven days of the receipt of the settlement report, pass suitable order recording such settlement of consumer dispute and dispose of the matter accordingly.

Recording settlement and passing of order.

(*2*) Where the consumer dispute is settled only in part, the District Commission or the State Commission or the National Commission, as the case may be, shall record settlement of the issues which have been so settled and continue to hear other issues involved in such consumer dispute.

(*3*) Where the consumer dispute could not be settled by mediation, the District Commission or the State Commission or the National Commission, as the case may be, shall continue to hear all the issues involved in such consumer dispute.

CHAPTER VI

PRODUCT LIABILITY

82. This Chapter shall apply to every claim for compensation under a product liability action by a complainant for any harm caused by a defective product manufactured by a product manufacturer or serviced by a product service provider or sold by a product seller.

Application of Chapter.

83. A product liability action may be brought by a complainant against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm caused to him on account of a defective product.

Product liability action.

84. (*1*) A product manufacturer shall be liable in a product liability action, if—

Liability of product manufacturer.

(*a*) the product contains a manufacturing defect; or

(*b*) the product is defective in design; or

(*c*) there is a deviation from manufacturing specifications; or

(*d*) the product does not conform to the express warranty; or

(*e*) the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage.

(*2*) A product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product.

Liability of product service provider.

85. A product service provider shall be liable in a product liability action, if—

(*a*) the service provided by him was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or

(*b*) there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or

(*c*) the service provider did not issue adequate instructions or warnings to prevent any harm; or

(*d*) the service did not conform to express warranty or the terms and conditions of the contract.

Liability of product sellers.

86. A product seller who is not a product manufacturer shall be liable in a product liability action, if—

(*a*) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or

(*b*) he has altered or modified the product and such alteration or modification was the substantial factor in causing the harm; or

(*c*) he has made an express warranty of a product independent of any express warranty made by a manufacturer and such product failed to conform to the express warranty made by the product seller which caused the harm; or

(*d*) the product has been sold by him and the identity of product manufacturer of such product is not known, or if known, the service of notice or process or warrant cannot be effected on him or he is not subject to the law which is in force in India or the order, if any, passed or to be passed cannot be enforced against him; or

(*e*) he failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the product manufacturer regarding the dangers involved or proper usage of the product while selling such product and such failure was the proximate cause of the harm.

Exceptions to product liability action.

87. (*1*) A product liability action cannot be brought against the product seller if, at the time of harm, the product was misused, altered, or modified.

(*2*) In any product liability action based on the failure to provide adequate warnings or instructions, the product manufacturer shall not be liable, if—

(*a*) the product was purchased by an employer for use at the workplace and the product manufacturer had provided warnings or instructions to such employer;

(*b*) the product was sold as a component or material to be used in another product and necessary warnings or instructions were given by the product manufacturer to the purchaser of such component or material, but the harm was caused to the complainant by use of the end product in which such component or material was used;

(*c*) the product was one which was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the warnings or instructions for usage of such product to such expert or class of experts; or

(*d*) the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner.

(*3*) A product manufacturer shall not be liable for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product.

CHAPTER VII

OFFENCES AND PENALTIES

Penalty for non-compliance of direction of Central Authority.

88. Whoever, fails to comply with any direction of the Central Authority under sections 20 and 21, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to twenty lakh rupees, or with both.

Punishment for false or misleading advertisement.

89. Any manufacturer or service provider who causes a false or misleading advertisement to be made which is prejudicial to the interest of consumers shall be punished with imprisonment for a term which may extend to two years and with fine which may extend to ten lakh rupees; and for every subsequent offence, be punished with imprisonment for a term which may extend to five years and with fine which may extend to fifty lakh rupees.

Punishment for manufacturing for sale or storing, selling or distributing or importing products containing adulterant.

90. (*1*) Whoever, by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any product containing an adulterant shall be punished, if such act—

(*a*) does not result in any injury to the consumer, with imprisonment for a term which may extend to six months and with fine which may extend to one lakh rupees;

(*b*) causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees;

(*c*) causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees; and

(*d*) results in the death of a consumer, with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.

(*2*) The offences under clauses (*c*) and (*d*) of sub-section (*1*) shall be cognizable and non-bailable.

(*3*) Notwithstanding the punishment under sub-section (*1*), the court may, in case of first conviction, suspend any licence issued to the person referred to in that sub-section, under any law for the time being in force, for a period up to two years, and in case of second or subsequent conviction, cancel the licence.

Explanation.—For the purposes of this section,—

(*a*) "adulterant" means any material including extraneous matter which is employed or used for making a product unsafe;

(*b*) "grievous hurt" shall have the same meaning as assigned to it in section 320 of the Indian Penal Code. 45 of 1860.

Punishment for manufacturing for sale or for storing or selling or distributing or importing spurious goods.

91. (*1*) Whoever, by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any spurious goods shall be punished, if such act—

(*a*) causing injury not amounting to grievous hurt to the consumer, with imprisonment for a term which may extend to one year and with fine which may extend to three lakh rupees;

(*b*) causing injury resulting in grievous hurt to the consumer, with imprisonment for a term which may extend to seven years and with fine which may extend to five lakh rupees;

(*c*) results in the death of a consumer, with imprisonment for a term which shall not be less than seven years, but may extend to imprisonment for life and with fine which shall not be less than ten lakh rupees.

(*2*) The offences under clauses (*b*) and (*c*) of sub-section (*1*) shall be cognizable and non-bailable.

(*3*) Notwithstanding the punishment under sub-section (*1*), the court may, in case of first conviction, suspend any licence issued to the person referred to in that sub-section, under any law for the time being in force, for a period up to two years, and in case of second or subsequent conviction, cancel the licence.

Cognizance of offence by court.

92. No cognizance shall be taken by a competent court of any offence under sections 88 and 89 except on a complaint filed by the Central Authority or any officer authorised by it in this behalf.

Vexatious search.

93. The Director General or any other officer, exercising powers under section 22, who knows that there are no reasonable grounds for so doing, and yet—

(*a*) searches, or causes to be searched any premises; or

(*b*) seizes any record, register or other document or article,

shall, for every such offence, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both.

CHAPTER VIII

MISCELLANEOUS

Measures to prevent unfair trade practices in e-commerce, direct selling, etc.

94. For the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the Central Government may take such measures in the manner as may be prescribed.

Presidents, members, Chief Commissioner, Commissioner and certain officers to be public servants.

95. The Presidents and members of the District Commission, the State Commission and the National Commission, and officers and other employees thereof, the Chief Commissioner and the Commissioner of the Central Authority, the Director General, the Additional Director General, the Director, the Joint Director, the Deputy Director and the Assistant Director and all other officers and employees of the Central Authority and other persons performing any duty under this Act, while acting or purporting to act in pursuance of any of the provisions of this Act, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. 45 of 1860.

Compounding of offences.

96. (*1*) Any offence punishable under sections 88 and 89, may, either before or after the institution of the prosecution, be compounded, on payment of such amount as may be prescribed:

Provided that no compounding of such offence shall be made without the leave of the court before which a complaint has been filed under section 92:

Provided further that such sum shall not, in any case, exceed the maximum amount of the fine, which may be imposed under this Act for the offence so compounded.

(*2*) The Central Authority or any officer as may be specially authorised by him in this behalf, may compound offences under sub-section (*1*).

(*3*) Nothing in sub-section (*1*) shall apply to person who commits the same or similar offence, within a period of three years from the date on which the first offence, committed by him, was compounded.

Explanation.—For the purposes of this sub-section, any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence.

(*4*) Where an offence has been compounded under sub-section (*1*), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded.

(*5*) The acceptance of the sum of money for compounding an offence in accordance with sub-section (*1*) by the Central Authority or an officer of the Central Authority empowered in this behalf shall be deemed to amount to an acquittal within the meaning of the Code of Criminal Procedure, 1973. 2 of 1974.

Manner of crediting penalty.

97. The penalty collected under section 21 and the amount collected under section 96 shall be credited to such fund as may be prescribed.

Protection of action taken in good faith.

98. No suit, prosecution or other legal proceeding shall lie against the Presidents and members of the District Commission, the State Commission and the National Commission, the Chief Commissioner, the Commissioner, any officer or employee and other person performing any duty under this Act, for any act which is in good faith done or intended to be done in pursuance of this Act or under any rule or order made thereunder.

Power to give directions by Central Government.

99. (*1*) Without prejudice to the foregoing provisions of this Act, the Central Authority, shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, as the Central Government may give in writing to it from time to time:

Provided that the Central Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(*2*) The decision of the Central Government whether a question is one of policy or not shall be final.

Act not in derogation of any other law.

100. The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

Power of Central Government to make rules.

101. (*1*) The Central Government may, by notification, make rules for carrying out any of the provisions contained in this Act.

(*2*) Without prejudice to the generality of the foregoing power, such rules may provide for, —

(*a*) the other class or classes of persons including public utility entities under clause (*19*) of section 2;

(*b*) the contest, lottery, game of chance or skill which are to be exempted under item (*b*) of sub-clause (*iii*) of clause (*47*) of section 2;

(*c*) the manner of issuing bill or cash memo or receipt for goods sold or services rendered under sub-clause (*vii*) of clause (*47*) of section 2;

(*d*) the number of other official or non-official members of the Central Council under clause (*b*) of sub-section (*2*) of section 3;

(*e*) the time and place of meeting of Central Council and the procedure for the transaction of its business under sub-section (*2*) of section 4;

(*f*) the number of Commissioners in the Central Authority under sub-section (*2*) of section 10;

(*g*) the qualifications for appointment, method of recruitment, procedure of appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the Chief Commissioner and other Commissioners of the Central Authority under section 11;

(*h*) the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Central Authority under sub-section (*2*) of section 13;

(*i*) the qualifications for appointment of Director General, Additional Director General, Director, Joint Director, Deputy Director and Assistant Director and the manner of appointment under sub-section (*2*) of section 15;

(*j*) the manner of taking copies or extracts of document, record or article seized or produced before returning to the person under sub-section (*3*) of section 22;

(*k*) the officer and the manner of disposing of articles which are subject to speedy or natural decay under sub-section (*4*) of section 22;

(*l*) the form and manner for preparing annual statement of accounts by the Central Authority in consultation with the Comptroller and Auditor-General of India under sub-section (*1*) of section 26;

(*m*) the form in which, and the time within which, an annual report, other reports and returns may be prepared by the Central Authority under sub-section (*1*) of section 27;

(*n*) the qualifications for appointment, method of recruitment, procedure for appointment, term of office, resignation and removal of President and members of the District Commission under section 29;

(*o*) the other value of goods and services in respect of which the District Commission shall have jurisdiction to entertain complaints under proviso to sub-section (*1*) of section 34;

(*p*) the manner of electronically filing complaint under the proviso to sub-section (*1*) of section 35;

(*q*) the fee, electronic form and the manner of payment of fee for filing complaint under sub-section (*2*) of section 35;

(*r*) the cases which may not be referred for settlement by mediation under sub-section (*1*) of section 37;

(*s*) the manner of authentication of goods sampled in case of the National Commission under clause (*c*) of sub-section (*2*) of section 38;

(*t*) any other matter which may be prescribed under clause (*f*) of sub-section (*9*) of section 38;

(*u*) the fund where the amount obtained may be credited and the manner of utilisation of such amount under sub-section (*2*) of section 39;

(*v*) the form and the manner in which appeal may be preferred to the State Commission under section 41;

(*w*) the qualifications for appointment, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the State Commission under section 43;

(*x*) the other value of goods and services in respect of which the State Commission shall have jurisdiction under the proviso to sub-clause (*i*) of clause (*a*) of sub-section (*1*) of section 47;

(*y*) the form and manner of filing appeal to the National Commission, and the manner of depositing fifty per cent. of the amount before filing appeal, under sub-section (*1*) of section 51;

(*z*) the number of members of the National Commission under clause (*b*) of section 54;

(*za*) the qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission under sub-section (*1*) of section 55;

(*zb*) the salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the National Commission under sub-section (*3*) of section 57;

(*zc*) the other value of goods and services in respect of which the National Commission shall have jurisdiction under the proviso to sub-clause (*i*) of clause (*a*) of sub-section (*1*) of section 58;

(*zd*) the manner of depositing fifty per cent. of the amount under the second proviso to section 67;

(*ze*) the form in which the National Commission and the State Commission shall furnish information to the Central Government under sub-section (*4*) of section 70;

(*zf*) the persons in the consumer mediation cell under sub-section (*3*) of section 74;

(*zg*) the measures to be taken by the Central Government to prevent unfair trade practices in e-commerce, direct selling under section 94;

(*zh*) the amount for compounding offences under sub-section (*1*) of section 96;

(*zi*) the fund to which the penalty and amount collected shall be credited under section 97; and

(*zj)* any other matter which is to be, or may be, prescribed, or in respect of which provisions are to be, or may be, made by rules.

Power of State Government to make rules.

102. (*1*) The State Governments may, by notification, make rules for carrying out the provisions of this Act:

Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter is made by the State Government and while making any such rules, so far as is practicable, they shall conform to such model rules.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the other class or classes of persons including public utility entities under clause (*19*) of section 2;

(*b*) the contest, lottery, game of chance or skill which are to be exempted under item (*b*) of sub-clause (*iii*) of clause (*47*) of section 2;

(*c*) the number of other official or non-official members of the State Council under clause (*b*) of sub-section (*2*) of section 6;

(*d*) the time and place of meeting of the State Council and the procedure for the transaction of its business under sub-section (*4*) of section 6;

(*e*) the number of other official and non-official members of District Council under clause (*b*) of sub-section (*2*) of section 8;

(*f*) the time and place of meeting of the District Council and procedure for the transaction of its business under sub-section (*4*) of section 8;

(*g*) the number of members of the District Commission under clause (*b*) of sub-section (*2*) of section 28;

(*h*) the salaries and allowances payable to, and other terms and conditions of service of, the President and members of the District Commission under section 30;

(*i*) the salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the District Commission under sub-section (*3*) of section 33;

(*j*) the manner of authentication of goods sampled by the State Commission and the District Commission under clause (*c*) of sub-section (*2*) of section 38;

(*k*) the manner of depositing fifty per cent. of the amount before filing appeal under second proviso to section 41;

(*l*) the number of members of the State Commission under sub-section (*3*) of section 42;

(*m*) the salaries and allowances payable to, and other terms and conditions of service of, the President and members of the State Commission under section 44;

(*n*) the salaries and allowances payable to, and other terms and conditions of service of, the officers and other employees of the State Commission under sub-section (*3*) of section 46;

(*o*) the form in which the State Commission shall furnish information to the State Government under sub-section (*5*) of section 70;

(*p*) the persons in the consumer mediation cell under sub-section (*3*) of section 74;

(*q*) any other matter which is to be, or may be prescribed, or in respect of which provisions are to be, or may be, made by rules.

Power of National Commission to make regulations.

103. (*1*) The National Commission may, with the previous approval of the Central Government, by notification, make regulations not inconsistent with this Act to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such regulations may make provisions for—

(*a*) the costs for adjournment to be imposed by the District Commission under the second proviso to sub-section (*7*) of section 38;

(*b*) the costs for adjournment to be imposed by the State Commission or the National Commission, as the case may be, under the second proviso to section 52;

(*c*) the maintenance of any other information by the consumer mediation cell under sub-section (*4*) of section 74;

(*d*) the manner of submission of quarterly report by consumer mediation cell to the District Commission, the State Commission or the National Commission under sub-section (*5*) of section 74;

(*e*) the qualifications and experience required for empanelment as mediator, the procedure for empanelment, the manner of training empanelled mediators, the fee payable to empanelled mediator, the terms and conditions for empanelment, the code of conduct for empanelled mediators, the grounds on which, and the manner in which, empanelled mediators shall be removed or empanelment shall be cancelled and the other matters relating thereto under sub-section (*2*) of section 75;

(*f*) the conditions for re-empanelment of mediators for another term under sub-section (*3*) of section 75;

(*g*) the other facts to be disclosed by mediators under clause (*c*) of section 77;

(*h*) the time within which, and the manner in which, mediation may be conducted under sub-section (*3*) of section 79; and

(*i*) such other matter for which provision is to be, or may be, made by regulation.

Power of Central Authority to make regulations.

104. (*1*) The Central Authority may, with the previous approval of the Central Government, by notification, make regulations not inconsistent with this Act, for the purpose of giving effect to the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(*a*) the procedure for engaging experts and professionals and the number of such experts and professionals under sub-section (*3*) of section 13;

(*b*) the procedure for transaction of business and the allocation of business of the Chief Commissioner and Commissioner under sub-section (*1*) of section 14;

(*c*) the form, manner and time within which, inquiries or investigation made by the Director-General shall be submitted to the Central Authority under sub-section (*5*) of section 15; and

(*d*) such other matter for which provision is to be, or may be, made by regulation.

Rules and regulations to be laid before each House of Parliament.

105. (*1*) Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

(*2*) Every rule made by a State Government under this Act shall be laid as soon as may be after it is made, before the State Legislature.

Power to remove difficulties.

106. If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act.

Repeal and savings.

68 of 1986. **107.** (*1*) The Consumer Protection Act, 1986 is hereby repealed.

(*2*) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(*3*) The mention of particular matters in sub-section (*2*) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal. 10 of 1897.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.