The Commercial Speech Doctrine – Expository analysis of the constitutional conception within the Indian free speech paradigm

Shantanu Dey[*]

Abstract

Through this paper, I seek to examine the constitutional treatment of commercial speech, drawing illustrations in a cross-jurisdictional perspective. Primarily the paper seeks to direct attention towards the definitional barriers to the conceptualization of this particular doctrine in a cross-constitutional context, which has led the judiciary to treat commercial speech synonymously with advertisements. Subsequently I move on to the analysis of this doctrine within the Indian Constitutional Setup focussing on the rationale behind its constitutional protection and delve into the debate behind its contentious placement under Article 19(1)(a) or Article 19(1)(g). Furthermore, I engage in examining the possibility of gradation vis-à-vis the constitutional protection guaranteed to commercial speech in contrast to non-commercial speech drawing inspiration from the American approach. Ultimately, the penultimate chapter, sensitive to the risk of abuse of such speech, attempts to characterize the wide range of "reasonable restrictions" that have been imposed over the use of such commercial speech in the last few decades.

Thus, I seek to cull out the manner in which advertisements have assumed the dominant position in the discourse governing the constitutional placement of the commercial speech doctrine. The paper intends to initiate a discussion surrounding the possibility of the gradation approach in the Indian Constitutional Scheme against

[*] Shantanu Dey is a graduate of NALSAR University of Law, Hyderabad.

the backdrop of the criticism faced by the equal treatment of commercial and non-commercial speech. It highlights the manner in which the judicial treatment of this doctrine has contributed to the view of identifying commercial speech as a core component of the Right to Freedom of Speech and Expression as envisaged under Article 19(1)(a).

Introduction

The sacrosanct idea of the right to freedom of speech and expression within the contours of Article 19(1)(a) of the Indian Constitution has often assumed primacy within the judicial discourse in the last sixty-six years centralizing the value of free speech in the Indian democratic society. Tracing its genesis from the Vedic prayer of "*Let noble thoughts come to us from all sides*"[1], the constitutional provision has effectively culled out the emergence of the idea of free speech and expression within the Indian constitutional context as a means to attainment of ideals of individual fulfilment. It has been idealized as an instrument ensuring citizen participation in socio-political decision making based on informed consent and maintaining a balance between stability and change in society.[2] However, change has been a constant in Indian constitutional history and involves the judiciary as the frontrunner. Subsequently, the constitutional conception of free speech and expression has experienced progressive expansion giving birth to the commercial speech doctrine.

The judicially manufactured notion of commercial speech finds its first mentioning within the American constitutional

1 Naraindas v State of MP, AIR 1974 SC 1232.

2 M. HIDAYATULLAH, THE CONSTITUTIONAL LAW OF INDIA, 288 (1984).

jurisprudence in *Valentine v Chrestensen.*[3] In the present case, the court was grappling with the constitutionality of the restriction imposed by the Police Commissioner of New York City, Lewis Valentine prohibiting distribution of handbills alleged to contain commercial advertising material. Endorsing a conservative approach, the US Supreme Court held such commercial speech to be completely outside the ambit of the First Amendment protection.[4] However, the case marked the beginning of the discursive analysis revolving around the idea of providing constitutional protection to commercial speech.

Drawing from such a comparative constitutional narrative, the dialogue involving the constitutional dynamics developing between Article 19(1)(a) and commercial speech as a form of speech involving a commercial element[5] traces its origin in the Indian scheme of affairs with the 1959 case of *Hamdard Dawakhana v Union of India.*[6] Such expansive interpretation of the fundamental rights jurisprudence, specifically the right to freedom of speech and expression, can be explained as the judicial consolidation of the Constituent Assembly intent, which hailed such a right as the "very life of the Draft Constitution".[7]

In Part I of the paper, the focus is on the varying interpretive models utilized to limit the definition of commercial to advertisements in the US as well as India. Reflecting upon the conservative judicial sentiment characterizing its approach towards constitutionally protecting commercial speech, Part II explores the

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3 Valentine v Chrestensen, 316 U.S. 52 (1942).

4 Jonathan Weinberg, *Constitutional Protection of Commercial Speech*, Columbia Law Review, Volume 82, No. 4, 721 (May 1982).

5 Tata Press Ltd v Mahanagar Telephone Ltd., AIR 1995 SC 2438.

6 Hamdard Dawakhana v Union of India, 1960 SCR (2) 671.

7 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION, 222 (1968).

myriad of issues emerging out of such discourse. In this part, I examine the instrumentalist understanding of advertisements in a growing liberal economy employed to rationalize protection of certain forms of commercial speech. Furthermore, this part delves into the question of corporations bringing in fundamental rights claims under Article 19 and the academic debate surrounding the constitutional placement of commercial speech claims under Article 19(1)(a) and 19(1)(g).

Part III focuses on the manner in which Indian courts have gone a step ahead of their American counterparts by treating such speech as sacrosanct to protecting core constitutional values of free speech and expression. Finally, in part IV, I discuss the "reasonable restrictions" debate central to application of Article 19 and highlight the paternalistic undertone corrupting the judicial debate on this matter. The paper attempts to cull out the lack of consensus causing the unstable jurisprudential treatment of commercial speech as a subject of rising constitutional importance in our market-based economy. The doctrinal analysis demonstrates judicial innovation to reinvent constitutional principles as per changing circumstances. However, it is critical to broadly interpret commercial speech as a form of expression requiring fundamental rights protection and the Indian judiciary ought to address the future of the "underlying objective" standard articulated in *Hamdard Dawakhana.*

Part I. Scrutinizing the evolving idea of "Commercial Speech": A definitional analysis

The definition of commercial speech as provided in the Black's Law Dictionary is "communication (such as advertising and marketing) that involves only the commercial interests of the speaker

and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech."[8] It is evident that the definition though coming from an American Constitutional perspective does provide a theoretical foundation for substantive discussion in the Indian context.

In this chapter, I seek to undertake a trace-back approach examining the manner in which Indian courts have grappled with the issue of defining commercial speech as a constitutionally protected form of expression. Engaging in a cross-jurisdictional analysis, it reveals the converging jurisprudence of Indian and the US reducing the constitutional understanding of free speech to advertisements.

A. Traversing through the Indian Experience in reaching definitional certainty

It is interesting to note that the Indian judicial discourse determining the essence of the commercial speech doctrine in India has concentrated on the understanding of advertisements as the mode of such commercial speech. *Hamdard Dawakhana v Union of India*[9] marked the first attempt of the Indian courts towards articulating a unified definition of commercial speech. The case involved the court dealing with the constitutionality of Section 3 and 8 of the Drugs and Magical Remedies (Objectionable Advertisements) Act, 1954 aimed at curbing advertisement of prohibited drugs.[10]

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8 Emma K. Wertz, *A little clarity please: A lacklustre commercial speech definition leads to wishy-washy First Amendment protection and sporadic legal decision*, American Communication Journal, Volume 11, No. 4, 2-3,(2009).

9 Hamdard Dawakhana v Union of India, AIR 1960 SC 554.

10 *Id.*

The Supreme Court defined advertisements to be falling within the protected ambit of commercial speech by contextualizing the underlying objective of such advertisements. With the present case involving sale of prohibited drugs, the Court using the "underlying objective" assessment had no hesitation to keep such advertisements beyond fundamental rights protection.[11]

Unsurprisingly, the judiciary at its nascent stage then was reluctant to adduce an expansive interpretation to the concept of commercial speech vis-à-vis inclusion of advertisements. Such an approach during the 1950s has often been explained to be inevitable in light of the sparse possibility of the cross-constitutional borrowing from the American commercial speech jurisprudence, which had not progressed much beyond the conservative stance in *Valentine v Chrestensen.*[12]

Yet the Court in *Hamdard Dawakhana* brought out the "true character test" and the "public interest" justification for defining advertisement within the scope of commercial speech affording it constitutional protection but explicitly sought to exclude any form of a commercial advertisement mean to further business falling within the concept of trade/business. [13] Such rationality governing this judgment interestingly also finds reflection in Commercial Speech-Commercial Communication theory. Scholars such as Frederick Schauer utilizing this theory have propounded a similar justification

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11 UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT, 38-39 (2011).

12 Valentine v Chrestensen, 316 U.S. 52 (1942).

13 UDAI, *Supra* n. 11, at 38.

for disallowing protection for such advertisements explicitly concerning themselves to purely business activity.[14]

Subsequently, moving on from such judicial line of reasoning focussed on the socio-political-economic agenda of commercial speech, the apex court has substantially modified the determination of commercial speech protection for advertisements. The 1985 case of *Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India*[15] presented the court with another opportunity to examine the issue while discussing the validity of imposition of import duty on newsprint argued to have a chilling effect on free speech. Despite delving into the subject of commercial speech, the Apex court never really addressed the possibility of engaging in a definitional analysis.

In 1995, the Supreme Court in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd*[16] was asked to adjudicate on a matter wherein a government entity was claiming monopoly over publication of a list of telephone subscribers (yellow pages). However, the idea of free speech assumed relevance with the appellants utilizing this constitutional guarantee to claim the right to earn revenue by circulating their own telephone directory (white pages).[17]

While the Apex court did not utilize this dispute to fill in the definitional lacuna, it was in this case that the court altered its stance on defining advertising within the contours of the idea of commercial speech. Deviating from the position laid down in the *Hamdard*

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14 Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, The University of Cincinnati Law Review, Volume 56, 1185-1186, (1988). Also *see* Robert Post, *The Constitutional Status of Commercial Speech*, UCLA Law Review, Volume 48, No. 1, 21-22, (2000).

15 Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India, AIR 1986 SC 515.

16 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd., AIR 1995 SC 2438.

17 *Id.*

Dawakhana Case, the court in *Tata Press* characterized an advertisement as "*merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase*"[18]. This was yet another failure on the Supreme Court's part to define commercial speech in concrete terms, apart from merely recognizing advertisements as part of it.

B. Finding Parallels in the American Scheme of Affairs

The definitional barriers to commercial speech doctrine are not novel to the Indian context, and a similar trend has plagued the American constitutional jurisprudence. The judicial treatment of "commercial speech" has never reached settled shores as the case of *Ohralik v Ohio State Bar Association*[19] defined commercial speech to "occur in an area traditionally subject to government regulation".[20] Subsequently Justice John Paul Stevens in *Central Hudson Gas & Electric Corporation v Public Service Commission*[21] while assessing the constitutionality of a Public Services Commission regulation prohibiting promotional advertising, laid down two broad conditions for identifying commercial speech namely: "*expression related solely to the economic interests of the speaker and its audience*; and *speech proposing a commercial transaction*".[22]

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18 *Id.* Also *see* Ohn W. Rast v. Van Deman & Lewis Company, 1915 (60) Law Ed. 679.

19 Ohralik v Ohio State Bar Association, 436 U.S. 447 (1978).

20 *Id.*, at ¶455-456

21 Central Hudson Gas & Electric Corporation v Public Service Commission, 447 U.S. 557 (1980).

22 EMMA, *Supra* n. 8, at 4.

However, in *Bolger v Youngs Drugs Products Corporation*[23], the American courts went back to a reductionist understanding of commercial speech as implying something proposing no more than a commercial transaction. [24] Such desperation to eliminate the omnipresent definitional ambiguity surrounding the application and regulation was evident in the California Supreme Court case of *Kasky v Nike*[25] wherein commercial speech was comprehensively defined as covering *"everything said by anyone "engaged in commerce," to an "intended audience" of "potential . . . customers" or "persons (such as reporters . . .)" likely to influence actual or potential customers that conveys factual information about itself "likely to influence consumers in their commercial decisions"*. [26] Unfortunately, the US Supreme Court has deemed this definition to be problematic. The US Supreme Court, while rejecting such a move to achieve such determinacy, has been criticised for not availing such an opportunity to itself construe a positive definition for "commercial speech" rendering coherence to the doctrine.[27]

C. The inevitable dominance of the idea of advertisements

From the line of cases dealing with commercial speech, it can be discerned that the common pointe vis-à-vis the analysis of the idea of commercial speech is recognition of a transactional and inducement motive. The idealization of commercial speech in the Indian as well as the American contexts has paved way for the emergence of advertisements as classic examples of commercial

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23 Bolger v Youngs Drugs Products Corporation, 463 U.S. 60 (1983).

24 David Mcgowan, *A Critical Analysis of Commercial Speech*, California Law Review, Volume 78, 360-361, (1990).

25 Kasky v Nike, 539 U.S. 654 (2003).

26 *Id.*, at ¶939, 960.

27 Thomas C. Goldstein, *Nike v Kasky and the Definition of Commercial Speech*, CATO Supreme Court Review, 79, (2003).

speech.[28] This often makes it difficult to determine the scope of this doctrine vis-à-vis other possible modes of commercial speech. Cases such as *H.T. Annaji v The District Magistrate and the Deputy Commissioner*[29], involving the court recognizing information pamphlets published by a private company for their tourist buses to be brought within the idea of advertisements and commercial speech supports this observation.[30]

On the other hand, Indian High Courts in cases such as *Lakshmi Ganesh Films v Government of Andhra Pradesh*[31] have provided an illustration of the manner in which commercial speech has been utilized as a judicial instrument to add width to the idea of "freedom of speech and expression". The court sought to utilize the commercial speech logic and apply it to exhibition of films bringing it within the Article 19(1)(a) ambit.[32] Such judicial reasoning was in opposition to Allahabad High Court's judgment in *Star Videos v State of Uttar Pradesh*,[33] where the Court dismissed the claims of an exhibitor of video films for protection under Article 19(1)(a) as such exhibition did not involve propagation of views but mere earning of profits.[34]

Despite such occasional developments, in the absence of a single definition for commercial speech, the distinction drawn between commercial and non-commercial speech continues to remain uncertain. Drawing from the legislative and judicial

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28 NANCY LIND AND ERIK RANKIN, FIRST AMENDMENT RIGHTS: AN ENCYCLOPAEDIA, 76-77 (2012 ed.).

29 H.T. Annaji v The District Magistrate and the Deputy Commissioner, 1998 (4) KarLJ 75.

30 *Id.*

31 Lakshmi Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

32 *Id.*

33 Star Videos v State of Uttar Pradesh, AIR 1993 All 253.

34 MP JAIN, INDIAN CONSTITUTIONAL LAW, 1080 (6th ed.).

experience, the doctrinal analysis has particularly centred itself round the idea of advertisements. Such characterization of advertisement as falling under one of the species of commercial speech has been of contemporary relevance as illustrated in major corporate tussles witnessed in the High Court cases of *Dabur India v Colortek Meghalaya*[35] and *Hindustan Unilever Ltd. v Proctor and Gamble Home Products Limited and Anr.*[36] These cases involved the court dealing with the developing idea of comparative advertising discussed later in the chapter discussing "reasonable restrictions".

Part II. Doctrinal justification within the Indian constitutional setup and the progressive judicial approach

Moving on from the definitional examination of the commercial speech doctrine, it becomes necessary to address its placement as justified by the judiciary and scholars under the Indian Constitution and delve into the pertinent issues that arise. In this part, I seek to thematically discuss the debate that has centred round the constitutional positioning of the commercial speech as witnessed in the latter half of the twentieth century.

A. Rationalizing the guaranteed constitutional protection

Tracing the development of the doctrine in the Indian context from *Hamdard Dawakhana v Union of India*[37] to the present state of affairs, where commercial speech is often identified as a core element of free speech and expression, highlights the progressively changing landscape in favour of commercial speech.

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35 Dabur India v Colortek Meghalaya, 2010(42)PTC88.

36 Hindustan Unilever Ltd. v Proctor and Gamble Home Products Limited and Anr., 2011(1)CHN204.

37 Hamdard Dawakhana v Union of India, AIR 1960 SC 554.

The *Hamdard Dawakhana Case* illustrating judicial conservatism did not guarantee constitutional protection to the emerging doctrine of commercial speech unless certain stringent standards were met. The Court, while conceding advertisement as a form of speech, nevertheless held the view that the furtherance of the business interests of an individual by successfully bringing a free speech claim vis-à-vis publication of commercial advertisements was antithetical to the constitutional scheme of affairs as envisaged under Article 19.[38]

Attributing a restricted interpretation heavily drawing from premature American jurisprudence on the subject, the court ruled that Article 19(1)(a) was for propagation of ideas of socio-economic-political value or contributing to furtherance of literature or human thought.[39] Such emphasis attributed to the inherent value of speech was an unambiguous iteration of the instrumental theory of free speech,[40] which marked the beginning of the Commercial Doctrine Era in the Indian context. The judicial opinion has been reiterated by Richard Posner's views justifying special protection of speech owing to its social benefit frequently not captured by its producers, whereas such is not the case with commercial advertisements premised on the motive of reaping sale of a product and the benefit of the producer.[41]

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38 *Hierarchies of Expression: Commercial Speech, Hamdard Dawakhana and Tata Press*, Indian Constitutional Law and Philosophy, https://indconlawphil.wordpress.com/tag/commercial-speech-2/, (Last visited on: September 29, 2016).

39 DAVID M.O' BRIEN, CIVIL RIGHTS AND CIVIL LIBERITES, 485-486 (Volume 2, 1991 ed.)

40 MATTHEW BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY, 6-9 (2008 ed.).

41 Daniel Halberstam, *Commercial Speech, Professional Speech and the Constitutional Status of Social Institutions,* University of Pennsylvania Law Review Volume 147, 796-797, (1999).

The changing landscape began with the adoption of a progressive judicial stance in *Bennett Coleman v Union of India*[42] and *Sakal Papers v Union of India*[43] discussing the increased significance of advertisements in the developing economy.[44] Both the cases dealt with statutory restrictions [Newsprint Policy of 1972-73; Newsprint (Price and Page) Act, 1956 and allied orders/rules/regulations] imposed on the sale/acquisition/use of newsprint determining the price charges and space allocated for advertising.[45]

Such centrality accorded to the concept of advertisements as a mode of commercial speech acted as a prelude to the emerging phenomenon of free markets marked by the liberalization after 1991. During this era, advertisements as a marketing instrument occupied a pivotal position.[46] The cases of *Bennett Coleman* and *Sakal Papers* created a jurisprudential foundation for the proliferation of the commercial speech doctrine in the Indian context.

The 1985 case of *Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India*[47] contributed to the developments brought in by *Bennett Coleman* and *Sakal Papers*, as it modified the stance taken in *Hamdard Dawakhana* holding that, "*all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by business men.*"[48] The Court clarified that the *Hamdard Dawakhana*

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42 Benett Coleman v Union of India, AIR 1973 SC 106.

43 Sakal Papers v Union of India, AIR 1962 SC 305

44 M.P. JAIN, *Supra* n. 34, at 1085-1086.

45 *Id.*

46 Lawrence Liang, *How the Press Carved out Freedom of Speech in India,* The Hoot, (May 30, 2010), http://www.thehoot.org/free-speech/media-freedom/-how-the-press-carved-out-freedom-of-speech-in-india-8471, (Last visited on: September 30, 2016).

47 Indian Express Newspapers (Bombay) Pvt. Ltd v Union of India, AIR 1986 SC 515.

48 *Id.*, at ¶91.

judgment ought to be treated as limited to its fact situation dealing with misleading advertisements and the judicial intent was not to exclude commercial speech from constitutional protection as a general principle.[49]

Yet the contribution of this case was to cause a shift in the conceptualization of commercial speech within the scope of Article 19(1)(a) as primacy was attached to the benefits derived by the recipients of speech and the impact of advertisements as a form of commercial speech on the Indian economic system.[50] Such judicial construction of commercial speech culling out the importance of the rights of the listener within Article 19(1)(a) is a reflection of Alexander Meiklejohn's work supporting the rights of both the speaker and the listener. It prioritizes the virtue of providing access to people of information of the prevailing state of affairs in a truly democratic society. [51] Ultimately, in *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.*,[52] the court demonstrating sensitivity to the higher bench strength of its predecessor (*Hamdard Dawakhana*), reiterated that the judgment of the previous case should be treated as limited to its facts and could not be applied as a general proposition.[53]

Furthermore, the Court rebutted the principle that advertisements purely commercial in nature are devoid of any value of speech thereby. This can be argued to be an altered interpretation

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49 *Id.*, at ¶90.

50 *Id.*, at ¶91.

51 A.MEIKLEJOHN, POLITICAL FREEDOM, 33-34 (Harper and Row, 1960 ed.). *Also see* New York Times Co. v Sulivan 376 US 254 (1964) and *R. Rajagopalan v State of Tamilnadu* laying down the right to know as arising out of such freedom of speech and expression creating a theoretical foundation for constructive public discourse.

52 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438.

53 UDAI, *Supra* n. 11, at 39.

of the instrumental theory of free speech. Beginning with the conceptualization of advertising as commercial speech forming the "*cornerstone of our economic system*"[54], the court discussed the critical status of advertisements in enabling mass production and democratic availability of news and opinions by the free press.[55]

Additionally, the Court utilized the "free flow of commercial information" perspective to bring out the need for constitutional protection to be extended to commercial speech, couched in the idea of furthering general public interest. The perception that commercial motive would disentitle such speech from protection was sought to be countered by highlighting the dissemination of information leading to advancement of knowledge and discovery of truth[56] The emphasis upon the informational element is a replication of the judicial thought process in *Central Hudson Gas & Electric Corporation v Public Services Commission*[57] wherein it was explicitly held that: "*the First Amendment's concern for commercial speech is based on the informational function of advertising*".[58]

Utilizing the "public right to receive and interest in commercial speech" construct under Article 19(1)(a), the Court highlighted the role played by such commercial speech in guiding the private economic decisions determining the allocation of resources in the Indian Political economy. Such theorization of commercial speech evidenced its indispensability as an instrument to ensure such

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54 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶19.

55 *Supra* n. 38.

56 UDAI, *Supra* n. 11, at 41.

57 Central Hudson Gas & Electric Corporation v Public Services Commission, 447 U.S. 557 (1980).

58 ROBERT, *Supra* n. 14, at 14.

decision-making is carried out on the basis of informed opinions.[59] The Court thus, brought out the principles of "honest and economical marketing" critical to democratic distribution of commercial information and endorsed protection of commercial speech as a means to achieve the same.[60]

The approach taken in *Tata Press* and reiterated in the subsequent commercial speech cases in the 21st Century is strikingly similar to Ronald Coase's defense of commercial speech.[61] Using this approach, I contend that the justifications for the placement of commercial speech within the Indian Constitution can be found in economic rationality. Ronald Coase scrutinises the principles of individual autonomy and market competition leading to discovery of truth as the underlying values rationalizing the constitutional protection for commercial speech subject to governmental regulation. He makes a claim that the "*values of self-fulfillment, truth-discovery, public participation in decision making, and maintenance of a balance between stability and change would seem to apply with the same force to the market for goods as they do to the exchange of ideas making the economic system more competitive and efficient.*"[62] Such emphasis on economic efficiency for the constitutional protection of commercial speech demonstrates logical coherence with the judicial reasoning articulated by Justice Blackmun in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.*[63]. In the present case, Justice Blackmun justified the criticality of

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59 *Id.*

60 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶22.

61 DANIEL, *Supra* n. 41, at 794-795.

62 *Id.*

63 Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976). *Also see* ROBERT, *Supra* n. 14, at 7-8.

such speech vis-à-vis the efficient allocation of resources in a free enterprise system.[64]

Furthermore, the twin conceptions of "democratic availability" and "allocation of resources" brings out the reconciliation of the ideas of democracy with a market economy in the Indian Context. The judicial approach as demonstrated in *Tata Press* bears jurisprudential resemblance to the philosophies of John Milton and J.S. Mill. The court seeks to create a link between such commercial speech and the maintenance of democracy.[65] Therefore, Milton and Mill's characterization of commercial speech as creating a marketplace of ideas ensuring effective popular participation in government advancing the quality of democracy in a nation through such increased deliberation and better information culls out the idealization of commercial speech as *pre-condition for democratic politics.* [66]

B. Corporations and commercial speech: Where does Article 19 step in?

The issue that has often arisen involving the claim of commercial speech under Article 19 by corporations is the constitutional guarantee of fundamental right restricting itself to only the "citizens" thereby excluding corporations. Even though this position continues to be in a nebulous state,[67] yet in the cases of *Bennett Coleman v Union of India*[68] *and Sakal Papers v Union of India*[69] it

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64 *Id.*

65 *Supra* n. 38.

66 Jennifer M. Keighley, *Can you handle the truth? Compelled Commercial Speech and the First Amendment,* Journal of Constitutional Law, Volume 15, Issue 2, 550-552, (November 2012). *Also See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* Duke Law Journal, 3-4, (1984).

67 Delhi Cloth and General Mills Co. Ltd. v Union of India and Ors., 1986 SCR (1) 440.

68 Benett Coleman v Union of India, AIR 1972 SC 106.

was recognized that lifting of corporate veil was a means to provide protection to the corporate sector under Article 19. The Apex Court argued that it would otherwise lead to legal dogmatism as also discussed in the Law Commission of India's 101st Report under the leadership of Justice KK. Mathew.[70] The law commission created an image of the lives of natural persons being led through such organisations, which are sought to be excluded from the Article 19 on a plain reading. Recognizing such anomaly in the constitutional provisions[71], *Bennett Coleman* adopted a progressive stance following up from the liberal position adopted in *Sakal Papers* wherein the court accepted the writ petition filed by a company and the reader of the newspaper.[72]

The judicial opinion discerned from the above two cases has been to determine whether the contended violation of rights extends to cover the right of the members of such corporation. This would potentially join a natural person along with a company in the writ petition challenging violations under Article 19.[73] Such treatment of corporations in the abovementioned decisions led to further nuanced constitutional understanding of commercial speech.

Sensitive to such a developing judicial stance, the Supreme Court in cases involving advertisements as commercial speech,

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69 Sakal Papers v Union of India, [1962] 3 SCR 842.

70 Law Commission of India, *101st Report on Freedom of Speech and Expression under Article 19 of the Constitution: Extension to Corporations*, (1984), 7-8, http://lawcommissionofindia.nic.in/101-169/report101.pdf, (Last visited on: September 25, 2016).

71 *Id.*, at 4-5; There are a large number of organizations and corporations who exist as "artificial/juristic persons" whose functioning can lead to active involvement in the right to freedom of speech and expression under Article 19(1)(a) yet they are contended to be excluded from its ambit in light of the use of the word, "citizens" under the impugned constitutional provision.

72 MP JAIN, *Supra* n. 34, at 870-871.

73 *Id.*, at 868.

beginning from *Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India*[74] to *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.*,[75] has brought about the rights of the speaker as well as recipient of the commercial speech within the ambit of Article 19(1)(a). The right to commercial speech has often been theorized from the perspective of a speaker keeping the view of the "businessman" in mind attributing an individual's identity to the speaker rather than a corporate identity.[76]

I seek to argue that the conceptualization of commercial speech within the ambit of Article 19(1)(a) raises a corporation-citizen debate with cases involving use of advertisements by corporates. However, by referring to the rights of recipients of such speech including individuals and individualizing the economic interests of the speaker, the Courts have tried to avoid endorsing the judicial positions as found in *Sakal Papers and Bennett Coleman* trying to find a middle-way out.

C. Article 19(1)(a) or Article 19(1)(g): A constitutional overlap?

While scrutinising the constitutional placement of the commercial speech doctrine, I wish to discuss the overlap argument brought forth by scholars such as Udai Raj Rai. This section will also highlight the arguments raised in the of *Novas ADS v Secretary,*

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74 Indian Express Newspapers (Bombay) Pvt. Ltd. v Union of India, AIR 1986 SC 515

75 Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors.,AIR 1995 SC 2438.

76 *Id.*, at ¶23.

Department of Municipal Administration and Water Supply,[77] which add an interesting dimension to the scope of the debate.

The proposition laid down has been that commercial speech fits better into Article 19(1)(g) than under Article 19(1)(a) and the absence of a constitutional provision similar to Article 19(1)(g) in the American context has compelled the position of this doctrine within the free speech and expression kaleidoscope.[78] Such a mix-up of the speech and business element is an extension of the line of argumentation vis-à-vis freedom of press wherein the judiciary has often drawn a thin line between the speech and non-speech aspect of the media.[79] I seek to approach such an argument made for Article 19 overlap with respect to commercial speech with a sense of scepticism as the argument has often being placed on the judicial opinion expressed in the *Tata Press Case*. In this case, the Court supported the constitutional protection of the fundamental right to commercial speech of the appellants under Article 19(1)(a) holding that such right cannot be denied by creating a monopoly in favour of the State or any other authority as it does not fall within the ambit of Article 19(2) restrictions.[80]

Such reliance on the monopoly perspective has been used by *Udai Raj Rai* to further the overlap argument arguing that a similar conclusion could have been reached via reading Article 19(1)(g) along with Article 19(6) to hold that the restrictions provided under the

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77 Novas ADS v Secretary, Department of Municipal Administration and Water Supply, AIR 2008 SC 2941.

78 UDAI, *Supra* n. 11, at 41.

79 Anahita Mathai, *Media Freedom and Article 19*, Observer Research Foundation, (April 2013), 2-3, http://orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/issue53_1365505705338.pdf, (Last visited on: September 30, 2016).

80 UDAI, *Supra* n. 11, at 41.

latter do not envisage creation of a private monopoly couched in the idea of a State Monopoly.[81] However, I seek to contend that such a constitutional model governing the interpretive application of commercial speech though ambitious is largely based on a reversal of the logic governing Article 19.

It is necessary to examine the host of cases evidencing the interaction between Article 19 and commercial speech, which has involved the identification of right and subsequently corresponding restrictions. Relying upon the judicial approach in these cases, the logic governing Article 19 and its functioning within the Indian Constitutional Framework has been to locate the right being claimed within the range of freedoms listed from Article 19(1)(a)-(g) and then determine the need for corresponding reasonable restrictions.[82] Such enunciation has also been found in Justice Mukherjea's opinion in *AK Gopalan v State of Madras*[83] wherein he opined that - "*Article 19 of the Constitution gives a list of individual liberties and subsequently prescribes in the various clauses the restraints may be placed upon them by law so that they may not conflict with public welfare or general morality*"[84]

Furthermore, the substantive content of the idea of "commercial speech" also adds to my scepticism of the model suggested by Udai Raj Rai. The cases of *Lakshmi Ganesh Films v. Government of Andhra Pradesh*[85], *Mr. Mahesh Bhatt & Kasturi and Sons v.*

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81 *Id.*

82 When an enactment is found to infringe any of the fundamental rights guaranteed under Article 19(1), it is held to be invalid unless it falls under the corresponding protective provisions provided from Article 19(2)-(6). *See* L.M. SINGHVI, CONSTITUTION OF INDIA, 641-642 (Volume 1, 2nd ed.).

83 AK Gopalan v State of Madras, AIR 1950 SC 27.

84 *Id.*

85 Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

Union of India[86] and *Marico Ltd. v Adani Wilmar Ltd.*[87] have brought out the nature of judicial discourse centred round the constitutional idea of content-based limitations. The cases revolved around issues governing obscenity, public health vis-à-vis advertising tobaccos and disparagement of competitor's product through aggressive advertising.[88]

The court in all these cases focussed on restrictions to be imposed on the speech aspect and the business/trade element has been affected incidentally through the State action. Such judicial interpretation is symptomatic of the primacy attached to the idea of free speech leading to conjunct reading of Article 19(1)(a) with Article 19(2).[89] The fundamentality rendered to the propagation of views and reaching the masses serving the economic interests of the recipient as well as speaker goes well with the *instrumental justification* of free speech[90] validating the placement of "commercial speech" within Article 19(1)(a).

However, it is necessary to appreciate such judicial maneuvering as suggested by Udai Raj Rai, who seems to be endorsing the idea of *Liberal Constitutionalism*.[91]He intends to prioritize the conception of political liberty within the free speech and

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86 Mr. Mahesh Bhatt & Kasturi and Sons v. Union of India, 147 (2008) DLT 561

87 Marico Ltd. v Adani Wilmar Ltd.,199(2013)DLT663

88 DR. LILY SRIVASTAVA, LAW AND MEDICINE, 29-30 (2010 ed.).

89 *Id.*

90 LEE BOLLINGER AND GEOFFREY STONE, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, 122-123 (2002 ed.).

91 "*The two important defining features of liberal constitutionalism is an equally strong commitment both to a set of civil and political rights derived from justice and that democracy and the sovereignty of the people is a foundational aspect of a legitimate political order.*" *See* Harald Borgebund, *Liberal Constitutionalism: Re-thinking the Relationship between Justice and Democracy*, (2010), http://core.kmi.open.ac.uk/download/pdf/1145179.pdf, (Last visited on: October 1, 2016).

expression jurisprudence informing constitutional interpretation.[92] Yet, he demonstrates cognizance of the mechanical approach followed by courts in contextualising rights with their quadrating restrictions under Article 19 often disabling the state from imposing certain "reasonable restrictions".[93] He seems to be proposing a balancing act wherein the judiciary actively fights for the progressive expansion of the free speech idea in a liberal democratic society yet provides room for the government to impose reasonable restrictions within the broad idea of "interests of the general public".[94]

Therefore, the Article 19(1)(g) usage though appealing in light of the inevitable business element peculiar to the usage of commercial speech is an ambitious model still striving to find a place within the prevailing state of affairs.

Part III. Examining the possibility of gradation: Going the American way?

Marking the genesis of Commercial Speech Jurisprudence in India from *Hamdard Dawakhana v Union of India*[95], in this part, I attempt to understand the implications of this judgment vis-à-vis the treatment of the impugned speech under Article 19(1)(a). The conscious judicial effort to locate intrinsic value in speech has been used to construct a case for integrating the American Model of Gradation determining free speech protection under the First Amendment.

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92 *Id.*
93 UDAI, *Supra* n. 11, at 41.
94 *Id.*
95 Hamdard Dawakhana v Union of India, 1960 SCR (2) 671.

The Court in *Hamdard Dawakhana* accepted that advertisement constitutes one of the forms of speech warranting constitutional protection. However, such concession was subjected to a rider that advertisements coloured with a commercial motive possess no "*relationship with the essential concept of the freedom of speech*" as such commercial advertisements involve no propagation of ideas and thus, cannot be protected by Article 19(1)(a).[96] The judiciary in this case striving to locate certain values in speech before affording it Article 19(1)(a) protection seems to suggest the possibility of application of the idea of gradation. Such an idea is a product of American Constitutional jurisprudence as discussed in cases such as *US v Playboy*[97] and *Liquor Mart v Rhode Island*[98] creating a hierarchy among different forms of speech.

The Court creating the presence of such relational satisfaction acting as a pre-condition for affording constitutional protection has compelled me to scrutinise the possibility of attributing different forms of speech varying standards of protection under the Constitution. Such a model is premised on the idea that degree of protection will depend on the proximity of disputed speech to the central idea of freedom of speech and expression.[99]

However, the Indian Apex Court has taken a seemingly conflicting stance in *Tata Press Case* as it pushed for the Dworkinian idea of providing every citizen an equal chance to contribute to the societal development via such propagation of ideas promoting the

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96 *Id.*, at ¶17.

97 US v Playboy, 529 U.S. 803 (2000).

98 Liquor Mart v Rhode Island, 517 U.S. 484 (1996).

99 Akhil Deo and Joshita Pai, *Commercial Speech: A Variant or a Step Child of Free* Speech, Comparative and Administrative Law Quarterly, Volume II Issue I, 14-15, (September 2014).

true essence of democracy based on equal concern and respect for all.[100] The effect of such a position was that the case effectively excluded no form of speech from the ambit of protection of Article 19(1)(a). The Court however clarified that advertisements held to be deceptive/unfair/misleading/untruthful though protected by the impugned article will be subjected to the restrictions provided under Article 19(2).[101]

Demonstrating sensitivity to the fact that the case of *Hamdard Dawakhana* involved a constitutional bench,[102] the judicial rationality excluding certain forms of speech from Article 19(1)(a) protection and the "relational" concept continues to be a source for endless argumentative discourse. This has compelled me to delve into the possibility of the idea of gradation as found in the American Constitutional scheme of affairs.

The US Supreme Court moving on from the cautious stance in *Valentine v Chrestensen*[103] has come a long way in recognizing the constitutional protection for such speech. [104] Despite such developments, commercial speech does not enjoy "core" First Amendment protections and enjoys a sub-ordinate peripheral position compared to other constitutionally guaranteed non-commercial speech. [105] Such lower level of protection granted to

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100 *Supra* n. 38.

101 AKHIL, *Supra* n. 99, at 14.

102 The decision involving such exclusion of forms of speech not bearing a direct relation with the essential idea of freedom of speech disentitling them of the Article 19 protection was also affirmed by the Delhi High Court in Mahesh Bhatt and Kasturi Sons v Union of India and Anr., 147 (2008) DLT 561.

103 Valentine v Chrestensen, 316 U.S. 52 (1942).

104 ROBERT, *Supra* n. 14, at 2-3.

105 Victor Brudney, *The First Amendment and Commercial Speech,* Boston College Law Review, Volume 53, 1212-1213, (2012).

commercial speech evidences the element of gradation present in the American free speech jurisprudence.

Scholarly discourse carried out by jurists such as HM Seervai can be utilized for creating a jurisprudential foundation for the possibility of the application of such gradation in the Indian context. He stated that the granting of constitutional status to commercial speech at par with other forms of speech was *reduction ad absurdum*.[106]

The constitutional protection for free speech and expression has been usually premised on the grounds that it contributes to democratic governance and individual self-fulfillment. Using this construct, the judicially approved definition of commercial speech as "*speech proposing nothing more than a commercial transaction*"[107] has often failed to satisfy this metric.[108]

The judicial characterization of commercial speech has often led to its understanding in the Indian as well as American Context in the contemporary times as a marketing practice aimed at inducing profitable market transactions. The commercial speech has been argued by scholars such as Edwin Baker to involve an attempt to exercise power in an instrumental manner to effectuate commercial transactions via rearrangement of resources.[109] For Baker, a typical speech situation involves respect for other's autonomy leaving them

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[106] The author in his books seeks to describe the *Tata Press Case* Reasoning as the blind duplication of the American Commercial Speech Jurisprudence. *See* HM SEERVAI, CONSTITUTION OF INDIA: A CRITICAL COMMENTARY, (1983 ed.).

[107] Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. and Ors., AIR 1995 SC 2438, at ¶12-13.

[108] Nishant Kumar Singh, *Should lawyers be allowed to advertise?*, Student Advocate, Volume 11, 68-69, (1999).

[109] C. Edwin Baker, *The First Amendment and Commercial Speech*, Indiana Law Journal, Volume 84, 991-992, (2009).

with a possibility of choice referred to as communicative agreement by Habermas. On the other hand, commercial speech essentially involves a coercive attempt to create profits for the speaker placing primacy on such institutional exercise of power through constitutionally guaranteed autonomy. [110] Despite such criticisms, commercial speech cannot be deemed to be merely a commercial proposition. It would mean turning a blind eye to its social utility and pragmatism as has often been evidenced in the Indian context. Contextualising this sentiment, I find it hard to support the extreme model often put forth by Thomas Emerson as part of his "full protection" absolutist approach viewing commercial speech entirely outside the free speech paradigm. [111] The intermediate level of protection for commercial speech[112] via application of the gradation model is thus, a middle-way out of two positions demonstrating ideological polarity.

Thus, in this section, I have tried to build a case for the possibility of such a constitutional move in light of the judicial position and scholarly criticism faced by the "constitutional presence of commercial speech". However, it is essential to recognize that such creation of hierarchy under Article 19(1)(a) placing commercial speech at a lower pedestal is problematic within the existing constitutional framework in light of the specific restrictions provided on such speech in Article 19(2), which do not feature as part of the First Amendment. [113] Hence, the structural differences in the American and Indian prevailing models make such cross-

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[110] *Id.*, at 991. *Also see* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, (1996 ed.).

[111] *Id.*, at 994.

[112] UDAI, *Supra* n. 11, at 41.

[113] *Id.*

constitutional borrowing a risky proposition reflecting an aspirational sentiment more than a practical agenda.

Part IV. Striking a balance: Qualifying the reasonable restrictions

The constitutional conception of free speech and expression as enshrined under Article 19(1)(a) on a plain reading of the provision renders validity to the conclusion that the rights guaranteed under the impugned article are not absolute in nature. Hence, it becomes inevitable to discuss the constitutional limitations provided under Article 19(2) to be discussed as instruments justifying state regulation of such freedom and limitations on legislative power to curb free speech and expression.[114]

The application of such a constitutional principle of restrictions is not unqualified and subjected to the use of the term, "reasonable". This term has played a significant role in curtailing the political state's power and integrating the role of judiciary as an adjudicative mechanism within the constitutional setup.

In this part, I explore the "reasonable restrictions" discourse critical to the operation of Article 19 on a general and specific level. After streamlining the guiding principles determining judicial determination of restrictive government actions classified as reasonable, the discussion in this part particularly looks at the approach of Indian courts when it comes to curbing commercial speech.

Pursuant to such discussion, I have tried to highlight two points relevant to the "reasonable restrictions" jurisprudential

[114] MP JAIN, *Supra* n. 34, at 1072.

framework impacting the scope of right to commercial speech claims. Firstly, it reveals the legal paternalism illustrated by the concept of compelled speech mandating advertisers to abide by certain "must-carry provisions". Secondly, the judicial examination of validity of state actions in the US has recently demonstrated resemblance to the approach taken by Indian courts despite the divergent standards of constitutional protection afforded to commercial speech in these two jurisdictions opening up another Pandora's Box.

The discourse surrounding reasonability has never really reached settled shores as the judiciary has constantly struggled providing an exact definition of the word reasonable as recognized in *Gujarat Water Supply v Unique Electro (Gujarat) Pvt. Ltd.,*[115] in light of no definite test determining the reasonableness of a restriction. However, cautious of the excessive undesirable subjectivity causing the "reasonable restriction" clause to experience redundancy, the constitutional jurisprudence on the subject has experienced streamlining over the years especially in the cases of *Pathumma v State of Kerala*[116] and *Papnasam Labour Union v Madura Coats Ltd.*[117]

In these two cases, the Apex Court stated that the arbitrary or excessive threshold must not be crossed. This threshold is required to be measured vis-à-vis the requirement of the society and object sought to be achieved often engaging the *Effect v Subject Matter Test.*[118] Under this test, the effect of the state action imposing such a restriction has been given primacy. [119] Additionally, the court

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115 Gujarat Water Supply v Unique Electro (Gujarat) Pvt. Ltd., AIR 1989 SC 973.
116 Pathumma v State of Kerala, AIR 1978 SC 771.
117 Papnasam Labour Union v Madura Coats Ltd., AIR 1995 SC 2200.
118 MP Jain, *Supra* n. 34, at 1070.
119 *See* Maneka Gandhi v Union of India, 1978 SCR (2) 621; RC Cooper v Union of India, 1970 SCR (3) 530.

emphasized on the existence of a direct and proximate nexus between restriction and object coupled with sensitivity to the dynamic socio-political circumstances while engaging in such act of constitutional interpretation.

Engaging further in the "reasonable restrictions" constitutional examination, judicial discourse has culled out that procedural and substantive Reasonableness both form pre-requisites for such determination of reasonability under Article 19(2)-(6). It is to be noted that any judicial scrutiny ought to be carried out against the backdrop of Directive Principles of State Policy.[120]

Subsequently, as commercial speech has been time and again granted constitutional protection by the Indian Courts, it has also been subjected to the corresponding ambit of restrictions provided under Article 19(2) by virtue of its existence as a qualified right.[121] The reasonable restrictions debate has significantly adapted itself to the peculiarities of the commercial speech doctrine within the Indian Context with primary focus on advertisements. It is interesting to observe that for a period of 35 years since the *Hamdard Dawakhana* ruling, the judiciary never entered into a contextual reading of Article 19(1)(a) along with its corresponding restrictions under Article 19(2). The *Tata Press* case, in 1995, marked the first time this aspect of the doctrine was scrutinised. [122]

The Court opined that commercial speech which is "*deceptive, unfair, misleading and untruthful would be hit by Article 19(2) the Constitution*

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120 *See* MP JAIN, *Supra* n. 34, at 1075-1076; *Also see* UDAI, *Supra* n. 11, at 18.

121 VIKRAM RAGHAVAN, COMMUNICATION LAWS IN INDIA, 149-150 (2007 ed.).

122 SINGHVI, *Supra* n. 82, at 860.

and can be regulated/prohibited by the State",[123] thereby opening up the debate. It is critical to appreciate that the nature of commercial speech subjected to reasonable restrictions in this 1995 case never involved Justice Kuldip Singh bringing in such characterisation under any one of the specific grounds provided.[124] Such lacunae in judicial reasoning can be resolved by bringing in the category of advertisements within the constitutional field of immorality.

Furthermore, with the emergence of the concept of open competition in the neoliberal era, the phenomenon of comparative advertising has assumed unprecedented prominence compelling the Courts to adapt the application of the constitutional idea of "reasonable restrictions" in a dynamic environment.[125] Such an approach was illustrated when the Delhi High Court, in *Hindustan Unilever Ltd. v Cavincare Pvt. Ltd.,*[126] held that instrumentalization of commercial speech as a means to cause denigration of rival goods legitimizes state regulation.

Similarly, in the case of *Lakshmi Ganesh Films v Government of Andhra Pradesh*[127], the virtue of deception and promotion of an illegal activity were discussed as grounds legitimizing state regulation involving commercial speech. Hence, the judicial discourse has further pushed the analysis towards the realms of immorality centred round the idea of advertisements as a mode of communication.

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123 Also see HUL v Reckitt Benckiser, 2014(2) CHN 1, at ¶73, which reiterates the same judicial position vis-à-vis constitutionally provided reasonable restrictions on the conception of commercial speech.

124 UDAI, *Supra* n. 11, at 40.

125 JEREMY PHILIPS, TRADEMARKS AT THE LIMIT, 29-30 (2006 ed.).

126 Hindustan Unilever Ltd. v Cavincare Pvt. Ltd., (2010)ILR 5Delhi748.

127 Lakshmi Ganesh Films v Government of Andhra Pradesh, 2006 (4) ALD 374.

I seek to contend that the treatment of reasonable restrictions as part of the Commercial Speech Doctrine has been heavily advertisement-centric thereby often invoking the idea of consumer protection within the scope of affairs as evidenced by Madras High Court ruling in *Coalgate Palmolive (India) v Anchor Health and Beauty Care Pvt. Ltd.*[128] The use of puffery/bait advertising has often found place within the judicial dialogue as the courts owing to the peculiarity of disputes in a liberalised, privatised and globalised economy has expressed caution against the use of commercial speech as a marketing tactic in the name of exercise of free speech and expression. [129]

The judicial treatment of reasonable restrictions read in context of the Commercial Speech Doctrine exemplifies the manner in which legal paternalism plays a pivotal role in the realm of fundamental rights jurisprudence. [130] Such line of judicial thinking reveals the content-based application of restraints enabling the State to assume the status of a regulatory authority determining what kind of commercial speech can make individuals vulnerable to deception thus taking decisions for their own good.[131]

The idea of legal paternalism in relation to free speech and expression is furthered by the discussion carried out by scholars such as L.M. Singhvi as they discussed the idea of compelled speech in advertisements as a form of commercial speech within the scope of such restrictions.[132]

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128 Coalgate Palmolive (India) v Anchor Health and Beauty Care Pvt. Ltd., (2008) 7 MLJ 1119.

129 *Id.*

130 *Supra* n. 38.

131 Joel Feinberg, *Legal Paternalism,* Canadian Journal of Philosophy, Volume 1, No. 1, 105, (September 1971).

132 SINGHVI, *Supra* n. 82, at 861.

Compelled Speech essentially involves the use of "must carry provisions" in advertisements alleged to infringe the free speech and expression rights provided under Article 19(1)(a). Yet the presence of such statutory validation of compelled disclosures has been argued to be within the scope of the operation of reasonable restrictions as under Article 19(2) depending on the nature of the impugned "must carry" provision.[133]

Tracing its theoretical justification to the substantive content of free speech and expression, compelled commercial speech acquires validity if it leads to the promotion of speech which propels the cause of informed decision-making by the recipients of such commercial speech. Such an approach was also reflected in the case of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.*[134] wherein the court noted that- "*it may be appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.*"[135]

The 2010 case of *Dabur India v Colortek Meghalaya*[136] has however initiated a paradigm shift as the Delhi High Court held that the objective of commercial speech doctrine is to provide an advertisement with adequate leeway to deliver a message and display caution against judicial hyper-sensitivity and excessive state regulation. Marking a deviation from the line of paternalistic judicial reasoning, the Court cognizant of the market forces, prevailing economic climate and specific features of the advertised product

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133 *Id.* The author in his book discusses the examples of statutory warnings on cigarette packs as a classic example of such compelled commercial speech satisfying the Article 19(2) reasonability standards.

134 Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *Also see* ROBERT, *Supra* n. 14, at 7-8.

135 KEIGHLEY, *Supra* n. 66, at 547-548.

136 Dabur India v Colortek Meghalaya, 167(2010)DLT278.

placed reliance upon the informed decision-making of the consumers constituting the recipients of commercial speech.[137]

A. From Hudson to Sorrell: American Doctrine going the Indian Way?

In the American Constitutional Setup, the void created in light of the absence of a "reasonable restrictions" clause placing constraints upon the acts of state regulation on commercial speech has been often sought to be filled by the judiciary determining the validity of such state action. In this sub-section, I discuss the two landmark cases of *Central Hudson Gas & Electric Corp. v Public Service Commission of New York*[138] and *Sorrell v IMS Health*[139] in order to examine the manner in which the American courts have scrutinised government speech restrictions on commercial speech.

In 1980, the US Supreme Court in the *Central Hudson Case* developed a four-part doctrinal standard for the purposes of testing the validity of state restrictions on commercial speech eligible for the subordinate First Amendment protection. In *Central Hudson*, the court primarily went into the inquiry concerning the unlawful/misleading nature of the speech disentitling protection under the First Amendment.[140] Subsequently, if the speech falls within the scope of First Amendment protection, the US Supreme Court laid down three guiding principles to justify the contended speech regulation namely- "*(1) They have identified a substantial government interest; (2) The regulation*

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137 *Id*, at ¶18.

138 Central Hudson Gas & Electric Corp. v Public Service Commission of New York, 447 U.S. 557 (1980).

139 Sorrell v IMS Health, No. 10-779 131 S.Ct. 2653 (2011).

140 *Id.*

``directly advances'' the asserted interest; and (3) The regulation ``is no more extensive than is necessary to serve that interest''[141]

The test though often subjected to criticism continued to dominate the restriction standard of the commercial speech doctrine for a prolonged period of time[142] until *Sorrell* entered into the scheme of affairs. This case dealt with a 2007 Prescription Confidentiality legislation passed in Vermont requiring consent of doctors before publication of his/her prescribing practices for marketing purposes especially by pharmaceutical companies. The Hudson test represents the intermediate level of judicial scrutiny however, in *Sorrell*, the court espousing for the higher standard of "heightened scrutiny". It involved the court extending the ambit of judicial examination of state imposed restrictions to include content-based restraints on commercial speech.[143]

Such a judicial stance implied a conscious effort to expand the scope of First Amendment protection to place commercial and non-commercial speech at the same level. Such a conclusion can be drawn in light of the judicial practice to utilize the heightened scrutiny standard specifically in cases of non-commercial speech when the government regulated speech on disagreement with its content.[144]

This judicially initiated move for heightened scrutiny has caused the blurring of the constitutional distinctions existing between commercial speech and other forms of speech enjoying core First

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141 Richard Samp, *Sorrell v IMS Health: Protecting Free Speech or Resurrecting Lochner?* , CATO Supreme Court Review, 132-133, (2012).

142 Daniel A. Farber, *Commercial Speech and the First Amendment Theory,* Northwestern University Law Review, Volume 74, 373-374, (1979).

143 *Id.*

144 RICHARD, *Supra* n. 141, at 134.

Amendment protection. It has problematized the situation in hand compelling me to suggest that the American jurisprudence could be slowly going the Indian way as conservatives continue championing the cause of expansive commercial speech rights.[145] The increase in the level of scrutiny has imposed burden on the state while formulating regulations on commercial speech. *Sorrell* though not committing irrevocably to such scrutiny standards has initiated a discourse surrounding a shift in the American commercial speech model placing the doctrine within the core of the First Amendment.[146]

Conclusion

I have tried to demonstrate that the commercial speech doctrine, though finding place within the Article 19 framework, continues to experience constant interpretive alteration in light of its definitional ambiguity and advertisement-centric judicial discourse. The constitutional narrative regarding the commercial speech doctrine in the Indian and American context is an illustration of the relatively contemporary status of the concept.

The paper is an attempt to construct a case for a more expansive interpretation of commercial speech as a constitutional doctrine break free of the current single-minded advertisement-biased approach. Such interpretive reorientation will also provide the courts with an opportunity to move beyond the "free flow of

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145 *Id.*, at 148.

146 The court decided the case on the basis of the non-exact standards of the Central Hudson Test demonstrating its uncertainty concerning the constitutional ramifications of such a scrutiny standard. *See* Tamara R. Piety, *A Necessary Cost of Freedom? Incoherence of Sorrell v IMS*, Alabama Law Review, Volume 64, 5-6, (2012).

information" justification for justifying the constitutional status of this doctrine.

While the controversial subject of "corporation as a citizen" has been circumvented by several judicial decisions, the acceptance of right to commercial speech claims from press houses and corporates is a tacit acknowledgment of their capacity to raise Article 19 disputes. Despite the extensive debate and divergent viewpoints on this subject over the past few decades, the *Hamdard Dawakhana* rule still keeps open the possibility of implementation of a gradation model under Article 19 of the Constitution.

It is imperative that Indian courts conclusively decide the constitutional status of commercial speech within the fundamental rights framework. With the current architecture of Article 19 not supporting subordination of specific free speech claims, the question remains- Is granting of constitutional status to commercial speech at par with other forms of speech an absurd proposition?