Chapter - III
Public Health And Trade Under The Constitution Of India

ABSTRACT
Eminent scholar Frank Grad observed that public health law does not come in a neat legislative package, but consists of many types of legislations which have little in common except for the benign purpose of advancing public health. The preservation of public health is among the most important goals of governments and law can serve as an effective tool not only at the individual level but also at a larger community level.
PUBLIC HEALTH AND TRADE UNDER THE CONSTITUTION OF INDIA

The legal framework for health in India draws its mandate from the Constitution of India. Several Articles under the Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) of the Constitution provide for the basic framework for health rights and thereby for protection, promotion advancing of public health in the country. The catena of legislation having impact on public health emanate from this constitutional mandate. However, several pre-constitution public health legislation continue to be implemented in the country. Even the legislative framework under the Seventh Schedule of the Constitution of India reflects a similarity from the Seventh Schedule of the Government of India Act, 1935, wherein Entry 14 of List-II (Provincial Legislative List) gives the provinces the power to make laws on “Public health and sanitation; hospitals and dispensaries; registration of births and deaths”. Though, “health insurance” was mentioned in Entry 27 of List-III (Concurrent Legislative List); there is no reference to ‘health’ in the Government of India Act, 1935 except on these two occasions in the Seventh Schedule of the Act.

3.1. MADRAS PUBLIC HEALTH ACT, 1939

One of the very early legislation in India that was dedicated to public health was the Madras Public Health Act, 1939. The act envisioned to make provision for advancing the Public Health of the State of Madras. The Act was pioneered by, the then Minister of Public Health and
Religious Endowments in the Madras Presidency (1937 to 1939). This is the first law on public health in India. The Act, which continues to be implemented in the State of Tamil Nadu, focus on Environmental Health, Communicable Disease Control, Food Hygiene, Maternity & Child Health measures, Water, Drainage, Housing, Rats, Mice and Mosquito control, Nuisance and Sanitation. It provides for constitution of the Public Health Board, regulations for construction of new buildings, powers of the Police Officers to arrest offenders and powers of the Executive Officers and Public Health Staff to arrest Offenders. Another state to use the same legislation was Andhra Pradesh.¹ The Madras (now Tamil Nadu) Public Health Act 1939 remains as a model legislation for all the other states in the country to legislate on public health as provided under List-II of the Seventh Schedule of the Constitution of India.

There are several other pre-constitution legislation that have direct or indirect bearing on public health, however the key legislation that continue to be used for the prevention, protection and advancement of public health include the Indian Penal Code and the Criminal Procedure Code.

### 3.2. INDIAN PENAL CODE 1860

Besides mentioning health under a few provisions the Indian Penal Code (IPC) dedicates a chapter (Chapter XIV) on “offences affecting the public health, safety, convenience, decency and morals”.²

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¹ Andhra Pradesh (Andhra Area) Public Health Act 1939  
² Sections 268-294A of IPC
Section 21 defines the term "Public servant" to *inter alia* to denote, “Every officer of the Government whose duty it is to protect the public health, safety or convenience”.

Section 188 provides for punishment for disobedience to order duly promulgated by public servant. The provision makes it clear that no person shall disobey an order promulgated by a public servant directing certain person to abstain from certain act or to act in certain manner. In case of disobedience the person may be punished with imprisonment for up to one month or with fine up to two hundred rupees, or with both. However if such disobedience tends to cause danger to human life, health or safety the punishment is imprisonment for up to six months or with fine up to one thousand rupees, or with both.³

The provision can be used to take action against smokers who smoke in public places or owner or in-charge of the premises who allow or do not stop such smoking on their premises.⁴ It is established that the second hand smoke causes serious health hazards and puts human health and

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³ Section 188: *Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both: and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*

⁴ Violation of Section 4 of COTPA
safety in danger.\(^5\) Offence under Section 188, IPC is cognizable as per first schedule of the Criminal Procedure Code 1973 (Cr.P.C) Therefore, after the promulgation of an order under Section 133(a). Cr.P.C. if any person is found smoking in a public place, the police can arrest him without a warrant. The only condition is that the order is duly promulgated by the Executive Magistrate.\(^6\) Considering that the punishment under IPC is greater than that provided under the tobacco control law\(^7\), the public servant responsible for implementation of COTPA could promulgate a public order against smoking in all public places and take action against violators under IPC section 188. Similar action can also be taken against the vendors who sell tobacco to minors and sell tobacco within 100 yards of educational institutions.\(^8\)

The provision provides an effective tool at the hands of public servant responsible for prevention, protection and advancement of public health, who could promulgate prohibitory order to prevent a public health menace from occurring within his jurisdiction.

\(^5\) M.B. Shah and R.P. Sethi, JJ. In Murli S. Deora vs. Union of India and Ors (Writ Petition (civil) 316 of 1999) (2001)8 SCC 765: “Fundamental right guaranteed under Article 21 of Constitution of India, inter alia, provides that none shall be deprived of his life without due process of law. Then-why a non-smoker should be afflicted by various diseases including lung cancer or of heart, only because he is required to go to public places? Is it not indirectly depriving of his life without any process of law? The answer is obviously-yes.” The learned judges, further observed, “Realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, we direct and prohibit smoking in public places and issue directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places....”

\(^6\) K. Ramakrishnan and Anr. Vs. State of Kerala and Ors. (AIR 1999 Ker 385)

\(^7\) Section 21 COTPA

\(^8\) For violation of section 6 of COTPA
3.2.1. Chapter XIV of IPC - Offences Affecting the Public Health, Safety, Convenience, Decency and Morals

3.2.1.1 Second hand smoke a ‘public nuisance’

It is firmly established through judicial observations that second hand smoke is a public nuisance as defined under Section 268 of the Code. It is both a danger and annoyance to the public who dwell in the vicinity or who may have occasion to use any public right e.g. attending a public meeting, dining in a restaurant, traveling in a public conveyance, reading in a public library, educational institution, and hence may be punishable under 290 of the IPC. It may be noted that besides the provisions under COTPA section 4 police officers can take action on complaints of smoking in public places under the IPC as well.

Further if any person repeats or continues the commission of public nuisance after injunction to discontinue he shall be punished with simple imprisonment for a term which may extend to six months, or with a fine, or with both under Section 291 of the IPC.

3.2.1.2. The Code further makes following acts punishable in the interest of protecting public health:

1. Negligent act likely to spread infection of disease dangerous to life

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9 Section 268, IPC
10 Narayana Kurup J in K. Ramakrishnan and Anr. Vs. State of Kerala and Ors. (AIR 1999 Ker 385) observed that: “Tobacco smoking in public places falls within the mischief of the penal provisions relating to “public nuisance” as contained in section 268 of the Indian Penal Code”.
11 Section 269 of IPC
2. Malignant act likely to spread infection of disease dangerous to life

3. Disobedience to quarantine rule

4. Adulteration of food or drink intended for sale

5. Sale of noxious food or drink

6. Adulteration of drugs

7. Sale of adulterated drugs

8. Sale of drug as a different drug or preparation

9. Fouling water of public spring or reservoir

10. Making atmosphere noxious to health

11. Rash driving or riding on a public way

12. Rash navigation of vessel

13. Exhibition of false light, mark or buoy

14. Conveying person by water for hire in unsafe or overloaded vessel

15. Danger or obstruction in public way or line of navigation

16. Negligent conduct with respect to poisonous substance

17. Negligent conduct with respect to fire or combustible matter

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12 Section 270 of IPC
13 Section 271 of IPC
14 Section 272 of IPC
15 Section 273 of IPC
16 Section 274 of IPC
17 Section 275 of IPC
18 Section 276 of IPC
19 Section 277 of IPC
20 Section 278 of IPC
21 Section 279 of IPC
22 Section 280 of IPC
23 Section 281 of IPC
24 Section 282 of IPC
25 Section 283 of IPC
26 Section 284 of IPC
18. Negligent conduct with respect to explosive substance\textsuperscript{28}

19. Negligent conduct with respect to machinery\textsuperscript{29}

20. Negligent conduct with respect to pulling down or repairing buildings\textsuperscript{30}

21. Negligent conduct with respect to animal\textsuperscript{31}

\textbf{3.3. CODE OF CRIMINAL PROCEDURE 1973}

\textbf{3.3.1. Removal of Public Nuisance}

Section 290 of the IPC makes public nuisance a punishable offence, the Cr.P.C. declares that the offence, though bailable, is cognizable.

Further section 133 of the Cr.P.C. empowers a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government to make a conditional order requiring the person causing nuisance, or carrying on such trade or occupation that is injurious to the health or physical comfort of the community, within a time to be fixed in the order

(i) to remove such nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, in such manner as may be directed; or,

\textsuperscript{27} Section 285 of IPC
\textsuperscript{28} Section 286 of IPC
\textsuperscript{29} Section 287 of IPC
\textsuperscript{30} Section 288 of IPC
\textsuperscript{31} Section 289 of IPC
(iii) if he objects so to do, to appear before himself or some other
Executive Magistrate subordinate to him at a time and place to be fixed by
the order, and show cause, in the manner provided under the code, why
the order should not be made absolute.

No order duly made by a Magistrate under section 133 shall be called in
question in any civil court.

With respect to preventing smoking in public places, the section explains
the meaning of the term ‘public places’ to include “also property
belonging to the State, camping grounds and left unoccupied for sanitary
or recreative purposes.” This may be used by the enforcement officers for
implementing section 4 of the COTPA more effectively.

The import of section 133 to protect public health has been abundantly
made clear by Krishna Iyer, J. in matter of Ratlam Municipality v.
Vardhichand and further quoted by Narayana Kurup J in K.
Ramakrishnan and Anr. Vs. State of Kerala and Ors.

*The responsibility of the Magistrate under Section 133. Cr.P.C.*

*is to order removal of such nuisance within a time to be fixed
in the order. This is a public duty implicit in the public power to
be exercised on behalf of the public and pursuant to a public
proceedings. Failure to comply with the direction will be visited
with a punishment contemplated by Section 188, IPC. The
new social justice orientation imparted by the Constitution of
India makes Section 133. Cr.P.C. a remedial weapon of*
versatile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under Section 133. Cr.P.C.\(^{32}\)

3.3.2. Power to Issue Order in Urgent Cases of Nuisance or Apprehended Danger

In addition, Section 144 of Cr.P.C. extends power to a magistrate to issue order in urgent cases of nuisance or apprehended danger. The Magistrate may direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent inter alia a danger to human life, health or safety. Such order is made to deal with a case of emergency and is limited for a maximum period of two months. However, State Government by notification could extend the order to remain in force for six months.

3.4. CONSTITUTION OF INDIA 1950

The Constitution of India stipulated a welfare state. The preamble itself envisages India to be a ‘socialist’ state, which aims at elimination of inequality in income, status and standards of life. Though political freedom is essential and but a means to realise the social welfare and raising of the people to higher levels and hence, the general advancement of humanity. The political freedoms of a citizen of India are outlined under

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Part III of the Constitution, however, the basic fabric of the Constitution also envision to secure social and economic justice, equality of status and opportunity and promote fraternity, assuring the dignity of the individual and the unity and integrity of the Nation.\textsuperscript{33}

An integrated approach to advancing ‘public health’ recognises its relationship with policies for economic development and addressing social inequalities. While working toward improving public health, governments should take on the responsibility of catering to the needs of the weaker and underprivileged sections. It must be recognised that access to health services is often dependent on determinants of social status such as caste, gender and class.\textsuperscript{34} Prof. Amartya Sen suggests that government should not only focus on new ideas but also address the gigantic persistent deprivations that are at the root of so much inequity and injustice in India. The perspective of realization of justice is central not only for the theory of justice, but also for the practice of democracy.\textsuperscript{35}

The Preamble aims at a social order with sovereign citizens and elected Government that is accountable to and responsible for the welfare of the public at large. The power of the government is restricted by the rights of the citizen to the extent guaranteed under the Constitution. The Preamble

\begin{footnotesize}
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\item[33] Preamble to the Constitution of India, 1950
\item[35] Prof. Amartya Sen, in the Prof. Hiren Mukherjee Memorial Parliamentary Lecture delivered at the Central Hall of Parliament House, New Delhi, 11 August 2008.
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magnificently captures this idea and the Constitution is to be read with and not in isolation of this declaration in the preamble.

Even though health as a right or entitlement does not find a mention in the Constitution of India, there are key mentions of the term “health” at 11 (eleven) occasions (including twice in part III) besides several indirect and tacit references to the health and wellbeing of the people and duty of the state to insure development of public health. It should be noted that any direct or indirect entitlements with respect to health rights under part III of the Constitution (including those read and included by judicial interpretations) are justiciable, while, those in the Part IV act as the policy directive to be pursued by the various governments in India to realise the dream of social welfare of the people of India in making a healthy nation.

3.4.1. Health in Part III of the Constitution of India

3.4.1.1. Non-Discrimination

Any kind of discrimination is antithetical to the principles of natural and social justice and may result in adverse health and social conditions of the vulnerable and weaker sections of the society. The Constitution of India guarantees equal opportunity for all citizens in public employment or appointment to any public office without any discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. Another grave evil practice that developed historically was “untouchability”. The framers of the constitution decided to prohibit this

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36 Article 16(1) Constitution of India
37 Article 16(2) Constitution of India
practice, not in its literal sense but the practice as it had developed historically in India. In accordance with the provisions of Article 17 of the Constitution\textsuperscript{38} the Parliament passed the Untouchability Offences Act, 1955. The practice was an evil based on social discrimination on ground of caste and descent, and since the concept of equality forbids discrimination, the theme of Article 17 is part of the general scheme of equality and non-discrimination enshrined in the Constitution. From a public health perspective, this implies that citizen from all section of the society shall be eligible to employment in a health institution supported by the government. No person shall be discriminated by another on the basis of caste and descent, and untouchability as a practice is prohibited at all places at all times. Meaning thereby that the health care services shall not be denied to any person from any caste or descent.

3.4.1.2. Right to Freedom

Following freedoms under Article 19 of the Constitution are available to all citizens of the country:

1. Freedom of speech and expression;
2. Freedom to assemble peaceably and without arms;
3. Freedom to form associations or unions [or co-operative societies];
4. Freedom to move freely throughout the territory of India;
5. Freedom to reside and settle in any part of the territory of India; [and]

\textsuperscript{38} Constitution of India Article 17: “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.
6. Freedom to practise any profession, or to carry on any occupation, trade or business.

All these freedoms help in enjoying a healthy interaction in the society ensuring not only the mental and physical health but advancing the social and economic health of individuals and thereby the country itself. However, it should be noted that all these freedoms are not absolute in nature and reasonable restrictions may be imposed on them. One of the restrictions that may be imposed on the freedoms is during any kind of health emergency e.g. serious disease outbreak like SARS or H1N1. People may be asked to restrict expression to prevent any rumours or creating a panic situation.\(^{39}\) In case of communicable diseases, freedom of assembly may be restricted to contain the disease.\(^{40}\) Similarly free movement may be curtailed while the infected person is quarantined with restriction on his liberty as well.\(^{41}\) The freedom of profession, or to carry any occupation, trade or business may be curtailed in case the very trade, profession, occupation or business pose a threat to public interest.\(^{42}\) No one may be allowed to sell contaminated food or substandard food for human consumption. The restrictions under the food laws, the vehicle emission norms, and standards of education including medical and health education are examples of restrictions under Article 19 (6).

The right “to freedom of speech and expression” cannot become an excuse for an indirect and surrogate advertisement of tobacco product; similarly the right “to practice any profession, or to carry on any

\(^{39}\) Article 19(2) Constitution of India

\(^{40}\) Article 19(3) Constitution of India

\(^{41}\) Article 19(5) Constitution of India

\(^{42}\) Article 19(6) Constitution of India
occupation, trade or business” may, in general public interest, be restricted or even completely taken over by the state in complete exclusion of the citizen or otherwise.

This is where the parliament through COTPA, realizing the health hazards of tobacco use, has decided to impose the total prohibition on advertisement of the tobacco products and to regulate its trade and commerce, production, supply and distribution. This is to restrict the tobacco industry from propagating its commercial interests above public health.

The constitution, inter alia, imposes a duty on every citizen to preserve the natural environment. Tobacco smoke being a pollutant every citizen should refrain from polluting environment and advancing public health by not lighting tobacco.

3.4.1.3. Right to Life and Liberty

The Indian constitution guarantees every person (not only the citizens) the protection of life and personal liberty. It lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. The basic object of this provision is to prevent state’s encroachment upon personal liberty and life except according to procedure established by law. Over the years, the Supreme Court have interpreted and attributed Article 21 with wider meaning and to include the right to lead meaningful, complete and dignified life, to live with human dignity. It is something more than surviving or animal existence. In plethora of cases the Apex Court have read right to health under Article

43 Article 21 Constitution of India
21 without which a man's life may not be meaningful, complete and worth living. The detail on the judicial pronouncements expanding the scope of Article 21 is discussed in the next Chapter IV.

It is certain that fresh air is necessary for life and polluting it with tobacco smoke would be hazardous to life within the meaning of Article 21 of the Constitution as it adversely affects the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself. Exposing innocent individuals to second hand tobacco smoke with serious health consequences amounts to taking away their life, not by execution of death sentence but through a slow and gradual process by robbing him of all his qualities and grace. Besides, Article 21 undertakes minors and women as a special group and shall therefore cover a sanction against smoking in public places, sale of tobacco products to minors and selling of tobacco products within a radius of 100 yards from educational Institutions.

Education is one of the key social determinant of health. In this regard the constitutional protection to right to education is imperative in advancing health outcomes for the citizens of the country. It is now a fundamental right for all children of the age of six to fourteen years to receive free and compulsory education.44

3.4.1.4. Right against Exploitation

The constitution prohibits traffic in human beings prohibits the practice of human traffic for begging or immoral traffic of women and children and also prohibits forced labour.45 Any such prohibited activity has direct relation with the health and wellbeing of the person so trafficked, besides

44 Article 21A Constitution of India
45 Article 23 Constitution of India
violating his fundamental right of life and liberty. The Constitution further prohibits employment of children in factories etc.\textsuperscript{46} It is a punishable offence to employ a child under the age of 14 years to work in any factory or mine or in any other hazardous employment. There is a constitutional obligation on the state and all other person to consider the health status of the young children, while giving employment to them. Thus, health status and physical fitness in the case of some occupations are considered as the precondition for employment. The provision restricts the right of employers to employ or even the right of the citizens to seek employment unless they reach to a certain level of health and physical fitness.

3.4.1.5. Freedom of Religion

The Constitution of India extends to every person a freedom of conscience and the right to profess, practise and propagate religion of his choice. However stipulation of this very freedom begins with the exception that it must not violate public order, morality and health and other fundamental rights under Part III of the Constitution.\textsuperscript{47} Therefore, a religious practice that is detrimental to the health of any person or community does not come under the provided freedom of religion and must be given up. A religious practice of smoking tobacco in public place or as part of a religious celebration must be prevented as it harms the health or others. The right to establish a religious institution and to impart religious education or teachings is also subject to the above restrictions,

\textsuperscript{46} Article 24 Constitution of India
\textsuperscript{47} Article 25 Constitution of India
meaning thereby any religious practice that pose a threat to public health is not be protected under this freedom.\textsuperscript{48}

3.4.2. Health in Part IV of the Constitution

It is significant that though Parts III and IV appear in the Constitution as two distinct fasciculus of articles, the framers of the Constitution drew no distinction between the two kinds of State's obligations. Both negative (limitation on state action) and positive (affirmative action by state) types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself.

The “directive principles of state policy” in part IV of the constitution are the bedrock of the Indian welfare state. It epitomize the ideals, the aspirations, the sentiments, the precepts, and the goals of our entire freedom movement and represent an ambitious list of an ideal welfare state with aspirational social, economic and cultural goals. Overall, realisation of the Part-IV provisions would mean improving upon the social determinants and the human development indices for the country. Meaning thereby improving overall national health outcomes. Initially the constitution makers strongly desired to make the directive principles as much justifiable as the fundamental rights, but considering it would not be practicable to make the positive rights justifiable the directive principles were enacted as the non-justifiable principles fundamental in the governance of the country. The state may not ignore, but it shall be the

\textsuperscript{48} Article 26 Constitution of India
duty of the State to apply these principles in making laws. As member of
the constituent assembly, Mr. T.T. Krishnamachari called the Part IV as “a
veritable dustbin of sentiment sufficiently resilient to permit any individual
of this house to ride his hobby- horse into it.”

3.4.2.1. General principles of social welfare having bearing on public
health

The directive principle require the state to secure a social order in which
justice, social, economic and political is practiced by all institutions and
endeavour to eliminate inequalities among individuals and group of
people residing in the country. The Constitution mandate the state to
follow the following principles and 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 subserve the
common good;

c) that the operation of the 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 for both men and
women;

e) that the health and strength of workers, men and women,
and the tender age of children are not abused and that

49 Article 37 Constitution of India
50 Article 38 Constitution of India
51 Article 39 Constitution of India
citizens are not forced by economic necessity to enter avocations unsuited to their age or 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.

These general policy guidelines embody the responsibility and a concern that the state must have towards physical and psychological health and wellbeing of the people irrespective of their social, economic and demographic background.

The following specific provisions have been made under this Part for the state to consider social and economic advancement of the Indian citizens.

- **Right to work, education, public assistance in case of unemployment, old age or sickness:** Article 41\(^{52}\) envisage right to work and education for all besides requires the state to strive for providing assistance in case of unemployment, old age or sickness. These are the social security measures for the population and for people whom there is no one to take care the state acts as the guardian of their social, health and economic needs.

- **Right to just and humane conditions of work and maternity relief:** Work place is virtually one’s second home. A person spends most of his productive and quality time at his workplace. It is

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\(^{52}\) Constitution of India Article 41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
important for him to enjoy working at his workplace and protect himself from any health hazard or injury at workplace. This provision under the constitution obligates state to provide conducive and proper condition at work to ensure healthy work environment that leads to healthy workforce with minimum occupational hazards, injury or accidents. Women are most vulnerable at workplace and require extra care and support to be able to work effectively. Pursuant to this provision maternity relief for women has now become a matter of right and they are entitled to several concessions during their pregnancy and post-delivery at their workplace. Maternity puts upon women into great stress and mental tension, under these circumstances, the state needs to provide the succours and relief. This may take the form of financial assistance for anti-natal and post-natal care and providing the facilities for such care.

- Right to leisure and rest and a living wage: The Constitution envision a social equality and economic independence and progress for all which is a precondition to enjoy a healthy living. It requires the state to make arrangements for its citizen to get not only work with equal wages but living wages to ensure descent standard of life whereby individuals could also get full enjoyment of

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53 Constitution of India Article 42: The State shall make provision for securing just and humane conditions of work and for maternity relief.
54 Constitution of India Article 43: The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.
leisure and social and cultural opportunities. To take care of the rural population the constitution requires state to promote cottage industries by individuals or through cooperative efforts such areas. This will provide the much needed financial support and help in advancing the socio-economic determinants of health.

- **Right to early childhood care and education for children below the age of six years:** Since the earlier goal of free and compulsory education for children below the age of 14 years has been incorporated under the Constitution as a Fundamental Right under Article 21A, the constitution now mandate the state to provide for early childhood care and education for adolescents and young children. Considering habits and hobbies concerning lifestyle begin at early ages, the age-group of children below 6 years become very vulnerable to such choices. Effective education and care at this age could help them make healthier choices which they find easy to continue in their adolescence, teenage and adulthood.

### 3.4.2.2. Right to public health under Part IV

Several historical social, economic, demographic, genetic factors influence the level of nutritional status of the population and hence their health status as well. It is established that the social determinants of

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55 Constitution of India Article 45: The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
56 Earlier Article 45: Provision for free and compulsory education for children - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years
57 With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in Parliament to insert a new article, namely, article 21A conferring on all children in the age group of 6 to 14 years the right to free and compulsory education.
health have a determining impact on whether a child can grow and develop to its full potential and live a flourishing life, or whether its life will be blighted. The development of a society, rich or poor, can be judged by the quality of its population’s health, how fairly health is distributed across the social spectrum, and the degree of protection provided from disadvantage as a result of ill-health.\textsuperscript{58} A better standard of living will ensure access to better health facilities and thereby ensure better health outcomes. It is also observed that the children and women living in a low and deprived socio economic condition are highly prone to disease and illness on account of the poor nutrition intake. In addition, such adverse conditions coupled with ignorance and unhealthy lifestyle further affects health outcomes adversely.

It is to deal with this problem, the constitution mandates the state to make arrangements for raising the standards of living and of nutrition for its people and overall improving public health.\textsuperscript{59} It has been said that social justice is the foundational moral justification for public health. Improving public health is a social responsibility that promotes human welfare by bringing about good health.\textsuperscript{60} “Public” in public health denotes both the entity that takes the responsibility of the public’s health i.e. the


\textsuperscript{59} Constitution of India Article 47: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

government and also the population at large who has a legitimate expectation of receiving the benefits.\textsuperscript{61}

Though measures preventing consumption of intoxicating drinks (alcohol) and of drugs (including tobacco use) which are injurious to health are integral to improving public health, it find specific mention in Article 47. This underscores the importance attributed by the framers of the constitution to the health and wellbeing of the citizens of the country. This particular provision has been the basis for several attempts to prohibit sale of liquor by various state governments in the country and also the basis of the national tobacco control law besides the law prohibiting the use of narcotic and psychotropic drugs in the country.

COTPA as a social legislation was framed for the purpose of enacting a comprehensive law against tobacco use in public interest and to protect public health. It echoes the mandate in part IV of the Indian Constitution with a view to achieve improvement in public health.\textsuperscript{62}

The COTPA seeks to ensure, the highest standards of public health and wellbeing and by intending to reduce tobacco use, it visualise achieving the mandate under Article 39 that requires State to direct its policy towards securing, among other things, that the health and strength of workers, men and women, and tender age of children are not abused. The legislation, as evident from the preambular declaration, further aims to implement article 47 of the Constitution which, inter alia, requires the State to endeavour to improve public health as among its primary duties.


\textsuperscript{62}Article 47 Constitution of India
3.4.2.3. **Agriculture, animal husbandry and environment**

Majority of the Indian population is dependent on agriculture for their livelihood and also fulfill the food requirements of the rest of the population of the country. While animals play a vital role in providing nutrition to the population both in the form of milk or meat. Therefore the framers of the constitution included organisation of agriculture and animal husbandry as one of the social goals.\(^{63}\) Later with the increasing knowledge about role of environment in the health and wellbeing of the population, protection of environment was included as an additional goal for requiring the state to protect and improve the environment and to safeguard the forests and wild life of the country.\(^{64}\) Preservation and improvement of healthy environment is critical for the improvement of health status of all living beings.

3.4.3. **Health in Part IVA of the Constitution**

Part IVA of the Constitution obligates every citizen with Fundamental Duties which inter alia requires us to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.\(^{65}\) It is our collective responsibility along with the state to keep a balance between human needs and the environment. We must care for agriculture, animals (for human use), wild life and protect and maintain the overall environmental balance to ensure better health, social and economic conditions of the human beings.

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\(^{63}\) Constitution of India Article 48: The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

\(^{64}\) Constitution of India Article 48A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

\(^{65}\) Constitution of India Article 51A (g)
3.4.4. Health under the Federal Set-up (Part XI of the Constitution)

While distributing the powers between the Centre and the State to make laws on a particular issues, Article 246 refers to the Seventh Schedule which contains three different lists that delineate the specific items on which the legislative powers of the Parliament of India or the State Legislature extend. Within the three lists following items have direct or indirect bearing on health:

3.4.4.1. List - I (Union List - Only the Parliament of India could legislate)

15. War and peace.
22. Railways.
23. Highways declared by or under law made by Parliament to be national highways.
28. Port quarantine, including hospitals connected therewith; seamen’s and marine hospitals.
30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.
31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.
41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.
42. Inter-State trade and commerce.
47. Insurance.
49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.
50. Establishment of standards of weight and measure.
55. Regulation of labour and safety in mines and oilfields.
56. Regulation and development of inter-State rivers and river valleys
57. Fishing and fisheries beyond territorial waters.
58. Manufacture, supply and distribution of salt
59. Cultivation, manufacture, and sale for export, of opium
69. Census.
81. Inter-State migration; inter-State quarantine.
84. Duties of excise on tobacco and other goods manufactured or produced in India

3.4.4.2. List - II (State List - only State can legislate)

6. Public health and sanitation; hospitals and dispensaries.
7. Pilgrimages, other than pilgrimages to places outside India.
8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.
9. Relief of the disabled and unemployable.
10. Burials and burial grounds; cremations and cremation grounds.
13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I;
14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.
17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.


23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of 2[entries 7 and 52] of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.


31. Inns and inn-keepers.

34. Betting and gambling.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;
but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

3.4.4.3. **List - III (Concurrent List – Both Parliament and State can legislate)**

15. Vagrancy; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental defectives.

17. Prevention of cruelty to animals.

17A. Forests.

17B. Protection of wild animals and birds.

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium.
20. Economic and social planning.

20A. Population control and family planning.

21. Commercial and industrial monopolies, combines and trusts.

22. Trade unions; industrial and labour disputes.

23. Social security and social insurance; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

26. Legal, medical and other professions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

33. Trade and commerce in, and the production, supply and distribution of,—

   (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

   (b) foodstuffs, including edible oilseeds and oils;

   (c) cattle fodder, including oilcakes and other concentrates;

    (d) raw cotton, whether ginned or unginned, and cotton seed; and

   (e) raw jute.
33A. Weights and measures except establishment of standards.

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

3.4.5. Health under Local Self Governance: Responsibilities of Municipalities, Panchayats, District and Regional Councils

Even the third tier of government stipulated under the Constitution of India envision public health as an important legislative and policy issue in the matrix of local self-governance by the panchayats (Schedule XI)\(^{66}\) and municipalities (Schedule XII)\(^{67}\). A similar approach has also been taken for governance by the autonomous councils as envisioned under Schedule Six of the Constitution\(^ {68}\).

Therefore, the Constitution of India provides for a comprehensive concept of health for all inclusive of human, plants, animal and aquatic health, covering not only physical health but also mental and environmental health for holistic improvement in public health. Some of the entitlements have been implemented by virtue of being in the Part III of the Constitution, while some of the set aspirational goals have been elevated and are read with fundamental rights and some are being implemented as legal rights by way of legislation by the Parliament or the State

\(^{66}\) Article 243G Constitution of India
\(^{67}\) Article 243W Constitution of India
\(^{68}\) Articles 244(2) and 275(1) Constitution of India
Legislature. However it is desirable that health goals are considered non-negotiable and prioritised in their implementation for both existing and proposed laws.

### 3.5. STATE AND NATIONAL PUBLIC HEALTH LEGISLATION

Keeping with the mandate of Article 47, a few states have legislated on public health in the lines of the Madras Public Health Act 1939. The Goa, Daman and Diu Public Health Act, 1985 is one of the early state legislation on public health. The state of Assam enacted the Assam Public Health Act in 2010 while state of Gujarat and Karnataka are contemplating similar legislation.

Though the Government of India prepared draft of a Model Public Health Act for the states, but it remained a non-starter in terms of adoption or enactment by the state governments. However, an attempt was made by the Government to realize the public health objectives of the Constitution by proposing a National Health Bill in 2009 with a view to “provide for protection and fulfilment of rights in relation to health and wellbeing, health equity and justice, including those related to all the underlying determinants of health as well as health care; and for achieving the goal of health for all; and for matters connected therewith or incidental thereto.”

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69 The Gujarat Public Health Bill, 2009
70 Karnataka Promotion of Public Health and Prevention of Diseases Bill
The proposed health legislation moved beyond delivery of health care services to endorsing health care rights of every individual and contemplated a paradigm shift towards an equitable realization of individual’s right to health and well-being. It is with an understanding that health care and a sound public health is a public good the Draft National Health Bill, 2009 stood apart from all other conceived health legislations in as much that it encompassed all the tenets of health and health care including the underlying determinants and hopes to stride towards the mammoth goal of “health for all”. Unfortunately, the Bill was never adopted and by the Parliament leaving the task of enacting a national public health law incomplete.

3.6. FREEDOM OF TRADE IN INDIA

3.6.1. Pre-Constitution

The Government of India Act, 1935 introduced federal form of Government in India wherein trade and commerce was given to provinces under Entry 27 of List II while inter-provincial trade was regulated by the Governor-General under his residuary powers, vested under Section 104. Further, the Act prohibited the provinces from imposing trade barriers on the entry and export of goods and it also prohibited them from levying taxes which discriminated between goods manufactured and produced in the province and goods not so manufactured and produced.74


74 Section 297, Government of India Act 1935: 297 (1) No Provincial Legislature or Government shall
The above restrictions envisaged free flow of trade within India, however it was not applicable to the Princely States and they could and did levy export and import duties at their custom frontiers. Another weak point in this Section was that 297 is only applicable to laws made under Entry 27 or Entry 29 of List II and not to law made under any other Entry that could amount to such restriction. A provincial law prohibiting the possession, sale, import, export of intoxicating liquor was challenged on the ground that it contravened Section 297. The Federal Court held that as the Provincial Legislature had exercised its power under Entry 31 of the Provincial List, and Section 297 had no application and the Provincial Law was held to be valid. Thus provisions under the Government of India Act 1935 were not sufficient to meet the need to achieve economic unity throughout the territory of India and thus it was left to the framers of the Constitution of independent India to find out means for maintaining freedom of trade, commerce and business along with commercial unity in the country.
3.6.2. Under the Constitution of India

Article 19(1)(g) of the Part III of the Constitution guarantees to every citizen a fundamental right to carry on trade and business. However, Article 19 (6) prescribes the limitations that the state could impose on the extent of exercising the right. The state enjoys a greater power to limit the extent of freedom to trade which is evident from the language of Article 19 (6) reproduced below:

“Article 19 (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular,

2[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.”

Therefore, the Constitution allows reasonable restrictions on trade to be imposed for protecting interest of the general public and could also restrict any trade and activity even to the exclusion of all and also impose a total
prohibition on such trade. Total prohibition on trade has been considered reasonable in cases where it was imposed against manufacture of drugs or preparations which are injurious to health. There are instances of state action putting restriction on the freedom of trade in India with earliest example being acquisition of the Spinning and Weaving Company in 1950 on account of its mismanagement. The Government appointed new board for an IT major company and directed its sale within 100 days by exercising its powers under Section 408 of The Companies Act, 1956 which entitles the Government to replace a company board with a view to safeguarding the interests of shareholders or the public at large – after the arrest of its chairman, managing director and several others on account of fraud in 2009. More recently, in March 2014, the Chairman and directors of one of the largest company in the country were sent to judicial custody for financial impropriety and non-payment of dues as determined by the Securities and Exchange Board of India.

### 3.6.2.1. Right only for Citizens

Freedom under 19(1)(g) only available to citizens i.e., living natural persons having Indian citizenship while non-citizens are not entitled to the freedom and he cannot challenge validity of laws under Article 19. 

Courts in various instances have considered the following entities to be

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76 Pratap Pharma (P) Ltd. v. Union of India (AIR 1997 SC 2648) and Laxmikant v. Union of India (1997, 4 SCC 739)
79 Sahara India Real Estate Corporation Ltd. & Others vs. SEBI available at [http://supremecourtofindia.nic.in/o%20o%20new%20cis/02%20to%202011%20June%20Os/cc41312p.pdf](http://supremecourtofindia.nic.in/o%20o%20new%20cis/02%20to%202011%20June%20Os/cc41312p.pdf) accessed on 11-11-2014.
80 Martiner Monstant Joan v. Union of India AIR NOC 2010 AP 87.
non-citizens. A company incorporated under the company Act, a religious denomination or a section thereof, Municipal committee, a juristic person like a Union, a deity an association registered under the Societies Registration Act. Though, a company have no fundamental right under Article 19, a shareholder and the managing director enjoy the protection of this right. However, the court pronounced that:

(i) The scope of Article 19 (1) (g) is restricted merely to those natural human beings who are Indian citizens and that

(ii) The state can regulate private business corporations in a major way without caring for limits prescribed by the Article 19 (1) (g) of the Constitution. This affords greater leeway to the government to regulate private enterprises to promote national interests.

It may be noted here that, a non-citizen cannot claim fundamental right under Article 19, however, the rights under Articles 14, 20, 21, 22 are available even to non-citizens. Even a foreigner national, though not entitled to the rights under Article 19, however he is entitled to equality before law and equal protection of the laws, guaranteed under Article 14. Thus, a foreign company can ask the Court to see whether the action of the State measure up to the various dimensions of Article 14 and demolish it if it fall short of the same.

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82 Ghodra Electricity Co. Ltd. V. State of Gujarat:(1975) SC 199; AIR 1975 SC 32
3.6.2.2. Part XIII of the Constitution

Apart from freedom of trade under Article 19 and the Legislative Entries relating to trade and commerce under Seventh Schedule, the express provisions relating to trade and commerce in India are found in Part XIII of the Constitution. Though, in the Constituent Assembly Debate, initially, trade and commerce was inserted under the fundamental right which was borrowed from Section 92 of the Australian Constitution. Later on, on the recommendations of the Committee headed by Alladi Krishnaswami Ayyar, several changes were made and finally it appeared under Part XIII of the Constitution, covering Article 301 to 307.

Article 301, subject to the Part XIII, envisions promoting free trade throughout the territory of India while imposing a general limitation on the exercise of legislative power, whether of the Union (Article 302-303) or of the States (Article 304), to secure unobstructed flow of trade, commerce and intercourse from one part of the territory of India to another.

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84 “Section 92: On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.”


86 Article 301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Article 302. Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Article 303. (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.
The Sarkaria Commission studying interstate relationship under the Constitution of India while examining the scope of various provisions under Part XIII of the Constitution observed that, unlike the Australian Constitution, the freedom guaranteed in Article 301 of our Constitution, is not confined to inter-State trade, commerce and intercourse, but also extends to intra-State trade, commerce and inter-course. Further, keeping with the observation of the Supreme Court, the taxing laws have not been excluded from the application of this principle. Measures which impose compensatory taxes, or, are purely regulatory, do not come within the purview of 'restrictions' contemplated in Article 301 nor does sales tax impede Article 301.

3.6.2.3. Trade Injurious to society

It is well settled that in proper cases, such as where the trade is injurious to society, 'reasonable restriction' within the contemplation of Article 302 or 304(b) may include prohibition or suppression of that trade altogether. Further, Article 305 makes provision for saving of existing laws and laws

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Article 304. Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—
(a) impose on goods imported from other States [or the Union territories] any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:
Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.


69 Articles 19(6)(ii) and 305 Constitution of India.
providing for State monopolies as contemplated under Article 19(6)(ii).  

Part XIII contains a further provision (Article 307) enabling Parliament to appoint by law such authority as it considers appropriate for carrying out the purposes of Articles 301, 302, 303 and 304 and confer on that authority such powers and such duties as it thinks necessary. However, the Government of India did not consider it necessary to set up such an authority while deposing before the Sarkaria Commission.  

Whereas, the Commission was of the view that:

“…it would be advantageous to constitute an authority under Article 307. It should be an expert body. Being removed from the pressures of day to day administration it would be able to formulate objective views, taking into account the long term perspective, in regard to various intricate problems relating to trade, commerce and intercourse. Being an expert constitutional body it would also inspire confidence among the various States and other interests. Such an expert body would be eminently suited to strike a proper balance between freedom of trade and the need for restrictions in order to foster development with social justice.”

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90 Constitution of India Article 305. Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19.  

91 Constitution of India Article 307. Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.  

In the post liberalisation era, Government has established multiple authorities to regulate various kinds of trade, commerce and industries one of such authorities are the Telecom Regulatory Authority of India. Responding to a challenge against fixation of price by the Telecom Regulatory Authority as violative of Articles 14 and 19(1)(a) and (g) as also Articles 301 to 307 of the Constitution the Delhi High Court in *Star India P. Ltd. vs The Telecom Regulatory Authority* held that:

“...the fixation of tariffs by the Authority is within their competence even in regard to broadcasters. The devising of an upper limit of pay channels will have the effect of a wider dissemination and viewership thereby safeguarding the pre-eminent right of the citizenry in the context of freedom of speech and expression. No material has been made available to us to indicate that because of the impugned tariff the Petitioners are unable to make reasonable profits. We are steadfast in this verdict even on the touchstone of Articles 14, 19(1)(a) or 19(1)(g) and/or 301 to 307 of the Constitution.”

According to noted scholar on the Constitution of India, interpretation of Article 301 to 307 require extrinsic aids to construction and that the provisions of the Constitution must be read in the light of the provisions of the Government of India Act, 1935. He reiterated that restrictions on trade and commerce was possible in case they do not come under the specific legislative item on trade and commerce.

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93 146 (2008) DLT 455

*A Thesis Submitted by Amit Yadav for the Award of Ph.D. Degree in Law*
“Thus a Province may prevent the entry of animals suffering from infectious diseases or may prohibit the entry of intoxicating liquors” in implementing a policy of “prohibition.” The first law may affect the trade in animals but no one would call it a law in respect of trade: it is a law for preventing the spread of infectious diseases. Similarly, a “prohibition” law is not a law in respect of trade: it is a law to prevent the consumption of intoxicating liquor. Such laws do not create and were not considered as creating trade barriers, because in their real nature they were not laws “in respect of trade” at all.”

Further, in the case of Fatehchand vs. State of Maharashtra, Justice Krishna Iyer observed that “every systematic, profit-oriented activity, however, sinister, suppressive or socially diabolic, cannot ipso facto, exalt itself into a trade” and treated money lending as extra commercium and held that “money lending may be ancillary to commercial activity and benignant in its effect, but money lending may also be ghastly when it facilitates a flow of trade….but merely stagnates rural economy, stagnates the borrowing community and turns malignant in its repercussions. The former may surely be trade, but the latter…..is not trade.”

It must be mentioned herein that, the freedom of trade contemplated under the Constitution is restricted to the ambit of Article 301 which is categorically limited by Articles 302-305. In view of the above description

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95 AIR 1977 SC 1825
of health and trade rights under the constitution of India it is clear that public health legislation imposing restriction on trade are given constitutional protection. This stands true for the tobacco control legislation or the provisions of the WHO Framework Convention on Tobacco Control and any other legislation giving effect to or advancing public health. Below is a non-exclusive list of key public health legislation (pre and post constitution) that enjoy constitutional protection as described in this chapter:

**Pre-Constitution Laws**

1. Births, Deaths and Marriages Registration Act, 1886
2. Epidemic Diseases Act, 1897
3. Lepers Act, 1898
4. Destructive Insects and Pests Act, 1914
5. Indian Medical Degrees Act, 1916
6. Indian Red Cross Society Act, 1920
7. Workmen’s Compensation Act, 1923
8. Trade Unions Act, 1926
9. Payment of Wages Act, 1936
10. Drugs and Cosmetics Act, 1940
11. Industrial Disputes Act, 1947
12. Indian Nursing Council Act, 1947
Chapter III: Public Health and Trade under the Constitution of India

13. Pharmacy Act, 1948

14. Minimum Wages Act, 1948

15. Dentists Act, 1948

16. Employees’ State Insurance Act, 1948

17. Census Act, 1948

18. Drugs (Control) Act, 1950

Post Constitution Laws

1. Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954

2. Personal Injuries (Compensation Insurance) Act, 1963

3. Beedi and Cigar Workers (Conditions of Employment) Act, 1966

4. Insecticides Act, 1968

5. Contract Labour (Regulation and Abolition) Act, 1970

6. Water (Prevention and Control of Pollution) Act, 1974

7. Tobacco Board Act, 1975

8. Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975


10. Equal Remuneration Act, 1976


15. Narcotic Drugs and Psychotropic Substances Act, 1985


17. Consumer Protection Act, 1986

18. Mental Health Act, 1987

19. Air (Prevention and Control of Pollution) Amendment Act, 1987

20. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988


22. Transplantation of Human Organs Act, 1994

23. National Environment Tribunal Act, 1995


26. Disaster Management Act, 2005
27. Commissions for Protection of Child Rights Act, 2005

28. The Food Safety and Standards Act, 2006

29. The Juvenile Justice (Care and Protection of Children) Act, 2015

3.6.3. Tobacco as Res Extra Commercium

*Res extra commercium* i.e. "a thing outside commerce" is a Roman law doctrine suggesting that certain aspects of commerce may not be claimed as inherent rights, and thus may not be traded. Courts, not only in India but across the globe, have used the doctrine to render certain purportedly immoral or pernicious activities such as gambling, rural money-lending, and selling intoxicating liquor as antithetical to the right to trade under Article 19(1)(g). The doctrine was first used in India in the context of prohibiting gambling in 1957 by the Apex Court which held that ‘gambling was an activity *res extra commercium*, which could not fall under the term ‘trade’ and therefore, there could be no fundamental right under Article 19(1)(g) in this regard.’\(^96\) While in 1971, it was extended to sale of intoxicating liquor.\(^97\)

The Court held that “[A]ctivities which are criminal, or dealing in articles or goods which are res extra com commercium could not have been intended to be permitted by Article 19(1)(f) and (g) relating to fundamental rights to trade or business.”\(^98\) Constraining the scope of freedoms under Article 19(1)(g), in doing trade in liquor, the court held that citizens are not

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entitled to carry on trade or business in immoral activities.\textsuperscript{99} In 1977, Justice Krishna Iyer further expanded the scope of the doctrine to exclude rural money as subject of trade or commerce.\textsuperscript{100} Therefore, any activity hit by the application of the doctrine, in effect is ex ante not protected by Article 19(1)(g) of the Constitution of India. The Apex Court further held that, a citizen has, no fundamental right to do trade or business in anything that is dangerous and injurious to health and is, therefore, an article which is \textit{res extra commercium}, the trade or business in such article can be completely prohibited.\textsuperscript{101}

Though the doctrine of \textit{res extra commercium} is now well established under the constitutional law of India, the same has also been criticised at several occasions.\textsuperscript{102} It was condemned by Subba Rao, J. in following words:

\begin{quote}
\textit{“If the meaning of the trade or business depends and varies upon the general acceptance of standards of morality obtaining at a particular point of time in the country it would lead to incoherence. Standards of morality can provide guidance for imposing restrictions but cannot restrict scope of the right.”}\textsuperscript{103}
\end{quote}

\begin{flushleft}
\textsuperscript{99} Khoday Distilleries Ltd. v. Karnataka, A.I.R. 1996 S.C. 911  \\
\textsuperscript{100} Himmatlal v. Maharashtra, A.I.R. 1977 S.C. 1825, 1839  \\
\textsuperscript{101} The Kerala Bar Hotels Association v State Of Kerala And Ors. Supreme Court of India. Civil Appeal No. 4157 OF 2015  \\
\textsuperscript{103} Narula v. Jammu & Kashmir, A.I.R. 1967 S.C. 1368, 1373
\end{flushleft}
Based the decisions extended by the Supreme Court, the government largely invokes the doctrine in any matter that, to their estimation, may be considered an immoral activity including an unsuccessfully attempt to justify a ban on dance bars\(^{104}\) in Maharashtra i.e.\(^{105}\)

While considering the question of trade in tobacco being res extra commercium or not, it is important to understand the relationship between the use of tobacco and its impact on public health. The mere numbers of people dying due to tobacco use in the country is astronomically colossal. Tobacco use kills about one million Indians every year,\(^{106}\) that amounts to completely wiping out, year after another, people from cities like Jodhpur, Chandigarh, Ranchi etc. which have a population of about million each.

### 3.6.3.1. Tobacco use prevalence and pattern

Tobacco is the cause of 14.3% of male deaths and 4.7% of female deaths in India. In India, smoking is the third leading risk factor for Disability Adjusted Life Years (DALYs) lost.\(^{107}\) Yet the estimated number of tobacco users in India is 274.9 million, with 163.7 million users of only smokeless tobacco, 68.9 million only smokers, and 42.3 million users of both smoking and smokeless tobacco. It is further estimated that 40% of Indians are exposed to second-hand smoke (SHS) at home, over 30% at

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\(^{104}\) Hotel establishments in the state of Maharashtra served alcohol along with dance performances by well-clothed female performers for their male patrons.

\(^{105}\) *Maharashtra v. Indian Hotels & Rests. Assoc.*, (2013) 8 S.C.C. 519


workplace and around 50% in restaurants.\textsuperscript{108} So far as youth are concerned, about 14.6% (Boy = 19.0%, Girl = 8.3%) among the age of 13-15 years use tobacco in some form.\textsuperscript{109}

### 3.6.3.2. Impact on Health and Economy

Tobacco is responsible for 42·0% of male and 18·3% of female cancer deaths with twice as many deaths from oral cancers as lung cancers,\textsuperscript{110} it also leads to cardiovascular diseases and chronic obstructive pulmonary diseases which is the leading cause of deaths in India.\textsuperscript{111} We also suffer the highest rates of oral cancer in the world due to high prevalence of using smokeless tobacco (26% of the adult population uses smokeless tobacco).\textsuperscript{112} As per Government estimates tobacco-related disease costs the Indian economy over 1,04,500 lakh rupees every year, just among adults aged between 35 and 69. The total cost across all age groups would be even higher.\textsuperscript{113}

### 3.6.3.3. Impact on the Society

Tobacco smoking violates various rights of non-smokers which includes the most important right to clean air.\textsuperscript{114} Tobacco use interferes with the enjoyment of tight to life as maintenance of health and environment falls
within the purview of Article 21, and their degradation adversely affects the life of citizens.\footnote{Mulri Deora vs. Union of India. Supreme Court of India. 2001.} Data from hospitals suggests that very young tobacco users are falling prey to tobacco related cancer and heart diseases and dying at very early age. Children, as young as between 11 and 12 years, are becoming victims of pre-cancerous growths after just 2 years of consuming tobacco.\footnote{http://tii.org.in/Public/Prevalence.aspx?str=Public accessed on 25-01-2017.}

3.6.3.4. Impact on Environment

Tobacco crop is water-demanding and consumes large quantities of fertilizers and pesticides which eventually degrade the land and pollute the water-bodies.\footnote{Soni, P., and Raut, D.K. Prevalence and Pattern of Tobacco Consumption in India. 2012, Int. Res. J. Social Sci., 1(4) 37} It also produced excessive waste in the form of tobacco slurries, solvents, oils and greases, paper, wood, plastic, packaging materials and results in air pollution.\footnote{Gowda M., The Story of Pan Chewing In India, Botanical Museum Leaflets, 14, 181-214 (1951)} Besides being responsible for removing approximately 200,000 hectare of forests/woodlands is each year leading to substantial tobacco related deforestation.\footnote{Gupta, P.C., Mehta, F.S., Irani, R.R. Comparison of mortality rates among bidi smokers and tobacco chewers. Indian J. Cancer. 1989.17(3), p.149–151}

3.6.3.5. Impact on Farmers and Workers

Even tobacco farmers suffer various occupational hazards including green tobacco sickness.\footnote{ILO. The beedi sector in India: an overview- improving working conditions and employment opportunities for women workers in beedi industry. Mangalore, Karnataka, India: International Labour Organization, 2001.} While the working conditions in beedi and cheroot industries are poor and inhalation of tobacco dust for prolonged periods...
induces respiratory problems\textsuperscript{121} dermatological, ophthalmic and podiatric issues.\textsuperscript{122} The industry is also responsible for exploitation of workers with women comprising 90 – 95\% of total employment in bidi manufacture\textsuperscript{123} whereas, roughly 10\% of all female beedi workers, and 5\% of all male beedi workers, are children under 12 years of age\textsuperscript{124}

3.6.3.6. Restrictions on tobacco trade in India

The tobacco industry is divided into three distinct and powerful sectors: bidis (smoking products hand-rolled in tendu leaves), smokeless tobacco (mainly chewing tobacco) and cigarettes in India.\textsuperscript{125} To deal with the deadly impact of tobacco use, the government has tried to restrict the advertisement of tobacco products and regulate its trade and commerce in the country through COTPA, an Act passed by the Parliament in 2003. However, the intention of the Government to include tobacco as \textit{res extra commercium} hit a setback at the Supreme Court in 2004,\textsuperscript{126} whereas, the Kerala High Court, as early as in 1958 had held that dealing in tobacco was also \textit{res extra commercium}.\textsuperscript{127}

\begin{thebibliography}{9}
\footnotesize
\item \textsuperscript{121} Sinha, D.N., Gupta, P.C., Pednekar, M.S., Jones, J.T., and Warren, C.V., Tobacco Use among School Personnel in Bihar, India. Tobacco Control. 2002. 11, 82.
\item \textsuperscript{123} Chauhan, Y. History and struggles of bidi workers in India. New Delhi: All India Trade Union Congress. 2001.
\item \textsuperscript{124} http://www.rcffi.org/bidirollinginindia_4.htm
\item \textsuperscript{126} Godawat Pan Masala Prods. I.P. Ltd. v. Union of India, (2004) 7 SCC 68
\item \textsuperscript{127} T.K. Abraham v. Travancore Cochin, A.I.R. 1958.
\end{thebibliography}
Though the courts in the country have not held trade in tobacco to be *res extra commercium*, in several instances it has upheld the restrictions imposed in the trade of this toxic and addictive substance. In a matter where the wholesalers of tobacco products in Delhi sought an exclusion of their wholesale trade from the law against sale within 100 yards of educational institution, arguing that the intent of the law was to reduce retail sale and their business would not be a danger to young people buying tobacco. The Delhi High Court, while highlighting the public health need for COTPA, dismissed the petition, holding that the sale of tobacco products, whether in wholesale or in retail, near the educational institution has the potential of attracting the students so both type of tobacco sellers should be equally restricted.\(^{128}\)

The court held that:

> “Undoubtedly, the Supreme Court in Godawat Pan Masala Products I.P. Ltd. (supra) maintained that the legislature/government having chosen not to ban the sale of tobacco products except to minors, trade in tobacco could not be classified as *res extra commercium* i.e. a business in crime, but the principles laid down in Cooverjee B. Bharucha v. Excise Commr., Ajmer AIR 1954 SC 220 and P.N. Krishna Lal v. Govt. of Kerala 1995 Supp (2) SCC 187, that there is no fundamental right to trade in dangerous and noxious substances, would

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\(^{128}\) *Naya Bans Sarv Vyapar Assoc. v Union of India & Ors. (W.P. No.7292/2011)*
nevertheless apply to tobacco which has now been universally accepted as a major public health hazard.”

The court agreed with the legislative intent to virtually make trade in tobacco to minors a res extra commercium ex post COTPA. Similar decisions were given by several other High Courts in the Country.

The apex court dealing with prohibition on sale of smokeless tobacco products i.e. gutkha upheld the regulation framed under the Food Safety and Standards Act, 2006 which prevented use of tobacco and nicotine as ingredients in any food items under the Regulation 2.3.4. of the Food Safety and Standards Rules 2011. Earlier the Apex Court upheld the Rajasthan High Court’s order prohibiting use of plastic material in the packaging of chewing tobacco products and directed the Central Government ‘to undertake a comprehensive analysis and study of the contents of gutkha, tobacco, pan masala and similar articles manufactured in the country, and harmful effects of consumption of such articles. Convinced with the hazards of smokeless tobacco use, the Court upheld the ban on sale of gutkha in the country and directed all state governments file compliance reports on their efforts toward banning the manufacturing and sale of such smokeless tobacco products containing

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129 Para 11. Ibid.
130 Ankur Gutkha vs. Indian Asthma Care Society and Ors. (April 3, 2013), SLP(C) No.16314/2007 (The Supreme Court of India). Available at http://www.tobaccocontrollaws.org/litigation/decisions/in-20130403-ankur-gutkha-v-india-asthma-c
131 Ankur Gutkha vs. Indian Asthma Care Society and Ors. (April 3, 2013), SLP(C) No.16314/2007 (The Supreme Court of India). Available at http://www.tobaccocontrollaws.org/litigation/decisions/in-20130403-ankur-gutkha-v-india-asthma-c
tobacco or nicotine. 132 This meant that trade in smokeless tobacco was rendered res extra commercium ex post the regulation under food safety law.

It is important to note here, that the courts in this country have been progressive in regulating tobacco products, considering its hazardous impact on public health. However, there has been a reluctance in declaring trade in tobacco as res extra commercium ex ante. It may also be recalled that the framers of the Constitution decided not to include the word tobacco under Article 47 when so proposed by a member of the Constituent Assembly.133 Since then the evidence about fatal character of tobacco use have been discovered over the period of time with new scientific evidence coming every day substantiating the same. It is in the light of the established scientific evidence, the courts, have taken strong reservation against trade in tobacco and upheld any legislation or a regulation therein that intends to impose ex post restrictions – prohibition even – by a law under Article 19(6). This is in line with the restrictions or prohibition imposed on the trade of narcotics and psychotropic drugs, human organs and protected animals through various existing laws in force in the country.

Mere fact that tobacco has been traded in the country since long and there is no express constitutional bar on trade in tobacco, given the toxic

132 Ankur Gutkha vs. Indian Asthma Care Society and Ors. (April 3, 2013), SLP(C) No.16314/2007 (The Supreme Court of India). Available at http://www.tobaccocontrollaws.org/litigation/decisions/in-20130403-ankur-gutkha-v.-india-asthma-c
133 Sardar Bhopinder Singh Man (East Punjab: Sikh) while moving his amendment motion in the Constituent Assembly on November 24, 1948.

A Thesis Submitted by Amit Yadav for the Award of Ph.D. Degree in Law
and addictive character of the products, does not preclude the state from taking and implementing a strict regulation like plain packaging or completely prohibit the trade in tobacco like the one on sale of gutkha and pan masala, under Article ambit of 19(6) without infringing upon a citizen’s right to trade under 19(1)(g). Considering the plethora of evidence from the scientific community across the globe and specific evidence from India, the Government should also consider an amendment to the Constitution of India to include tobacco under Article 47 to restrict the use of tobacco leaf only for any known medicinal or other purposes other than for human consumption.