



LITIGATING TOBACCO & PUBLIC HEALTH



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The Supreme Court of India has recognized the right to health as a part of the fundamental right to life under Article 21 of the Constitution.¹ The Court has recognized that the right to emergency care, basic medical facilities and adequate work conditions are all facets of this right. The right to health also includes the right to public health as guaranteed under Article 47 of the constitution.

ARTICLE 47:

“Duty of the State to raise the level of nutrition and the standard of living and to improve public health- 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 ...”

¹ See Parmanand Katara Vs Union of India, AIR 1989 SC 2039



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The WHO has estimated **100 million deaths** in the twentieth century due to tobacco use, and predicted **one billion** such deaths in the twenty first century, with India having the fastest rate of rise in tobacco related deaths.²

ONE of the major obstacles in fulfilling the obligation to protect and improve public health is the widespread production and consumption of tobacco. The WHO has estimated 100 million deaths in the twentieth century due to tobacco use, and predicted one billion such deaths in the twenty first century, with India having the fastest rate of rise in tobacco related deaths.² In order to address this public health concern, India enacted the Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Product, Supply and Distribution) Act, 2003 ("COTPA") being *"a comprehensive law on tobacco in the public interest and to protect the public health."*³ COTPA was introduced to prohibit advertisements and promotion of tobacco and to regulate the commerce, supply and distribution of cigarettes and other tobacco products. The law is in consonance with The WHO Framework Convention on Tobacco Control, 2003 ("FCTC"), that was introduced recognizing that "the spread of the tobacco epidemic is a global problem with serious consequences for public health".⁴ India has signed and ratified this evidence-based treaty that obligates parties

to undertake a comprehensive ban on all tobacco advertising and promotion, to ensure that health warnings accompany every sale of tobacco, to prohibit sale of tobacco to minors, to ensure that the governments work towards reducing tobacco supply and consumption, and promote alternatives to tobacco farming.

Since its introduction in 2003, the COTPA and the Rules made under it have been challenged repeatedly before the Courts by the tobacco industry. On the other hand, public health activists have also litigated actively around the COTPA seeking better implementation.

CLPR has been at the forefront of the constitutional public health litigation around tobacco control in Karnataka, where it has represented public health organisations for better implementation of the COTPA and other laws, and has also intervened on their behalf in constitutional challenges to tobacco control regulations by the tobacco industry.

³ See Statement of Objects, COTPA.

⁴ See Preamble, FCTC.

ONE

Prohibition of Sale of Tobacco near Educational Institutions

Cancer Patients Aid Association v. State of Karnataka and Others

[W.P. 17958/2009]

ARTICLE 14(2)(a) of the FCTC encourages parties to ensure that tobacco is not accessible in areas near educational institutions, health care facilities etc., where not only the toxic effects of tobacco are enhanced, but also where tobacco becomes more accessible to minors. Section 6(b) of COTPA prohibits sale of cigarettes and other tobacco products “in an area within a hundred yards of any educational institution”. The 2004 Rules⁵ mandate the display of the prohibition under Section 6(b) on a Board, in the prescribed measurement, “at a conspicuous

place outside the premises” of the educational institution (Rule 3(1)).

In the first case of its kind in the country, CLPR filed a petition on behalf of The Cancer Patients Aid Association, before the High Court of Karnataka, seeking implementation of Section 6(b) in all educational institutions across Karnataka. This petition was based on a study conducted by the Institute for Public Health finding that over 50% of the pre-university students in Bangalore were smokers and that their access to tobacco was made easy

by vendors selling tobacco within these prohibited areas. The Petition sought for directions to the Education Department, to direct all educational institutions and to strictly implement Section 6(b) of COTPA in all pre-university colleges. The petition also sought directions to the Bangalore City Municipal Corporation ("BBMP") to ensure that there was no sale of cigarettes or tobacco products within the prohibited area.

The Court issued an interim order directing the Respondent Government to implement Section 6(b) "in spirit and substance" and also to file a report on the action taken pursuant to the order (Order dated 29.06.2009). Thereafter, the Court, more specifically, directed the government to submit a report on the measures taken in implementing the prohibition and also to issue circulars to colleges to put up Display Boards compulsorily. The Court also directed the BBMP to seek the counsel's assistance and identify tobacco sale within the prohibited area and report on the identification and measures taken. (Order dated 6-4-2010 on Misc W. 2435/2010).

Finally, the Court closed the petition by issuing a final order by prescribing a detailed monitoring exercise by which, based on the government's list of Pre-University colleges, the Education Department in collaboration with the Petitioner's counsel was directed to carry out weekly area-wise inspections of all Pre-University colleges in Bangalore for compliance and take action in case of any violation. These directions and subsequent exercises to monitor compliance ensure that Section 6(b) and the 2004 Rules did not remain merely on paper, but were implemented throughout the State in a more efficient and supervised manner over a 6 month period.

This was the first litigation on the implementation of Section 6(b) in the country and illustrated the fact-finding task, undertaken by CLPR, of tracking implementation and monitoring compliance continuously.



TWO

Promotion and Sponsorship of the Tobacco Industry

The Institute of Public Health v. State Of Karnataka

[W.P. 17958/2009]

This petition was filed against the government's sponsorship of a tobacco industry international event known as the "Global Tobacco Networking Forum (GTNF)" in Bangalore in 2010. Article 13 of FCTC mandates a comprehensive ban on all tobacco advertising, promotion or sponsorship. Section 5 of COTPA also places a prohibition on advertising of tobacco and any promotion of its use or consumption.

Despite these clear goals to desist from tobacco promotion, the Tobacco Board, a statutory body set up under the Tobacco

Board Act 1976 had its logo put up on the GTNF website as a sponsor and had agreed to sponsor the event Rs. 3,26,320/- and take participants for field visits to tobacco growing areas. CLPR filed a petition on behalf of The Institute for Public Health as a public interest petition before the Karnataka High Court, seeking withdrawal of the Tobacco Board from all financial and non-financial sponsorship, support and participation at the GTNF event which was a tobacco industry event. This was the first petition in the country seeking the recognition of Article 13 and the core principles of Section 5, COTPA.

The petition sought directions to restrain the Tobacco Board and government representatives from participating or sponsoring this and other future tobacco industry events. It also aimed to provide directions to the State government to monitor the event for compliance with COTPA requiring that: health warnings were displayed, ensure the non-sale of cigarettes, disseminate COTPA provisions, and issue directions to the government for preparing a protocol and a code of conduct for the government to interact with the tobacco industry. CLPR also prayed for interim relief to restrain the Tobacco Board and the government from participating, sponsoring or promoting the GNTF event.

The Karnataka High Court granted an interim restraining order dated 17.09.2010, holding:

“We find that an activity such as participating in the international conference and also providing financial assistance to member/delegates participating therein and to take them around on a guide tour by the fourth respondent board to make them privy to tobacco growing areas and

market platforms, is an area which, even if does not amount to directly promoting and advertising cigarettes and other tobacco products, is an indirect support extended to manufacturers of cigarettes and other tobacco products, as is obvious from the website of the organizers, as many of the sponsors are cigarette manufacturers of leading brands all over the world. The fourth respondent, keeping company with them itself may amount to conveying a message that the fourth respondent is in league with such companies in promoting their products, which is most undesirable, if one should go by the provisions of Section 5 COTPA and Article 13 of WHO Convention on Tobacco Control.”

Thereafter, in its final order dated 8.2.2011, the Court directed the government to consider the petitioner’s Draft Code of Conduct while framing the Code of Conduct for public officials in their interaction with the tobacco industry. This litigation is a positive step towards imposing restrictions on the role of the government in the activities of the tobacco industry.

THREE

Fighting Smokeless Tobacco

Cancer Patients Aid Association v. State of Karnataka & Ors.
[W.P. 23661/2012]

This petition was concerned with banning of smokeless or chewing tobacco with the enactment of Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 ("FSS Regulations") that prohibited tobacco in any food product. This Rule states:

2.3.4: Product not to contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as ingredients in any food products "

This necessarily prohibits the inclusion of tobacco and nicotine in any food product such as gutkha, pan masala etc. CLPR filed a writ petition in the Karnataka High Court, on behalf of the Cancer Patients Aid Association, seeking implementation of Regulation 2.3.4 by a complete ban on the manufacture, storage, sale and

distribution of gutkha and other products such as zarda, pan masala, gul, bajjar, etc. containing tobacco in Karnataka.

The petition described the fatal effects of smokeless tobacco and argued that 20 other States had already banned the sale of gutkha and other chewing tobacco products in the country.

During the pendency of the petition, the newly elected State government issued a Notification dated 30.5.2013 prohibiting the manufacture, storage, sale or distribution of gutka and pan masala containing tobacco and nicotine as ingredients in the State.

In light of this development, the petition was closed. This litigation succeeded in increasing pressure on the State Government to implement Regulation 2.3.4 and ban gutkha and pan masala containing tobacco in the State.

Ghodawat Pan Masala Products Pvt. Ltd. v. Union of India & Ors.

[W.P. No. 78378/2013]

As soon as the Notification dated 30.5.2013 banning the sale and production of gutkha and pan masala containing tobacco was issued in Karnataka, a tobacco manufacturing company challenged the constitutionality of this Notification. through a writ petition before the Karnataka High Court. CLPR, represented the Cancer Patients Aid Association ("CPAA") and filed an Intervenor Application on its behalf and was heard by the Court.

On behalf of the CPAA, CLPR argued that the notification was valid as it sought to achieve the fulfillment of Article 21 and Article 47 of the Constitution of India that recognize the right to public health. Citing various reports that displayed the dangers of consuming gutkha, CLPR defended the ban on the ground that it was necessary to protect the right to health of the people.

The Karnataka High Court in a detailed interim order rejected a stay of the Notification, holding that the Commissioner of Food Safety was well within his powers in issuing it. Importantly, the Court took note of the toxic effects of gutkha and smokeless tobacco and held:

"The materials and information supplied by the Cancer Patients Aid Association prima facie make it clear that the dangerous effects of gutkha and pan masala on the human body, upon regular consumption, is serious, and it causes cancer, among other diseases...It is common knowledge that lakhs of youngsters including children, above and around the age of 15 years have been addicted to gutkha and pan masala. The said product is sold widely throughout the country and is available in almost every street and corner. It has now emerged as one of the biggest health hazards in the country. In order to address the growing concerns caused by these products, so as to raise the level of public health and nutrition in India, the regulations banning use of such products has been enacted in the year 2011 which has statutory sanction. The Regulations...is in discharge of the obligation of the State to improve public health and level of nutrition and standards of living of the people. The impugned notification is only a step in enforcing the ban imposed by the regulations and therefore, none of the contentions urged by the petitioner with regard to lack of jurisdiction, denial of principles of natural justice are tenable in law."

This petition has been transferred to the Supreme Court to be heard along with several other petitions that had challenged the gutkha ban.



FOUR

Opposing Tobacco Subsidies

Cancer Patients Aid Association v. State of Karnataka & Ors.

[W.P. 55697/2014]

Article 5.3 of FCTC obligates State Parties *to protect their public health policies on tobacco control from commercial and vested interest of the tobacco industry.*

Article 6 requires Parties to adopt price and tax laws that result reducing demand for tobacco. Article 17 obligates Parties to promote economically viable alternatives for tobacco growers, incentivizing the shift away from tobacco growth. COTPA aims to prohibit all promotion of tobacco use or consumption and reduce demand in the country. Despite these clear public health based goals, the Tobacco Board, set up under the Tobacco Board Act,

1975 provides huge subsidies to tobacco farming. The Board, provides various financial incentives to tobacco growers, such as interest-free loans ranging from personal loans to input loans and barn repair loans; subsidy on insurance premium and on agricultural supplies; and also compensation to farmers under loss.

Thus, on the one hand, the government is committed to tobacco control in the interest of public health and on the other hand, the Tobacco Board, is actively promoting tobacco through the provision of subsidies.



CLPR filed a public interest petition, representing the Cancer Patients Aid Association, seeking a phasing out of all State and Central government subsidies and incentives for tobacco growing. The petition traced the extent to which tobacco farming was actively encouraged despite a clear mandate against such promotion under FCTC and COTPA.

The Karnataka High Court passed an order dated 1.6.2015 directing that,

“the departments of the Central and State governments, in co-ordination with each other, shall take steps for reduction in local demand and supply of tobacco products and shall also, consider a policy for rehabilitation of tobacco growers and tobacco-related workers, particularly the beedi workers. The authorities shall, also, consider the continuance of direct and indirect incentives and subsidies for production of tobacco for local consumption, and also, to tobacco farmers and tobacco related workers, in the interest of justice.”

This litigation thus took the initiative in seeking the phasing out of subsidies and moving towards a policy that reduces tobacco supply and demand.



FIVE

Defending the new 85% Health Warnings on tobacco products

Tobacco Institute of India and others v. Union of India & Ors.
[W.P. 4470/2015] and connected matters

Rules concerning health warnings on tobacco product packs has been a contentious issue, as any move to increase the size of the pictorial and worded health warnings, has been aggressively attacked by the tobacco industry. The Rules as enacted in 2009 stipulated 40% coverage of tobacco packs with health warnings. Thereafter, the Ministry of Health and Family Welfare issued the COTPA (Packaging and Labeling) Amendment Rules, 2014 (2014 Amendment Rules), mandating that specified health warnings, including pictorial warnings, must occupy at least 85% of the front and back panel of the tobacco packaging which are to be rotated. The tobacco industry filed as many as 43 petitions across the country,

challenging the constitutional validity of these Rules, contending that the Rules violate the industry's right to trade under Article 19(1)(g) and freedom of commercial speech under 19(1)(a).

Since the Karnataka High Court was hearing most of these petitions, the Supreme Court directed all petitions to be transferred to the Karnataka High Court to be heard and decided. CLPR has filed Intervention Applications in 5 of these petitions on behalf of the Consortium for Tobacco Free Karnataka and the Citizens Forum for Justice, defending the Rules for increased health warnings. These petitions are presently pending in the Karnataka High Court.



The strategic litigation done by CLPR in the field of tobacco control is extremely important, as it has succeeded in building a judicial understanding and legal narrative for the prioritization of public health objectives under the constitution and COTPA and FCTC in the field of tobacco control. This has significant implications for the promotion of public health litigation in the country, not just in the field of tobacco control.



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