

# SMOKING, PUBLIC HEALTH AND LAW: DELIBERATING THE CONTOURS OF A MORATORIUM ON SMOKING

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*This paper attempts to delineate the myriad contours of a moratorium on smoking as examined from the point of view of public health and law. In pursuance of the same, it analyzes the topic from the following perspectives: firstly, an identification of the classes of society primarily imperilled by the practise of smoking; secondly, an enunciation of the various arguments present for and against a moratorium on smoking, and thirdly, the current legal position with relation to a ban on smoking, which would include both Indian as well as International strands of opinion. At the same time, it focuses on ancillary issues such as the linkages between smoking and media as evinced by areas as diverse as advertisement and the world of celluloid, the causal relationship between smoking and elements of society such as women, along with an examination of the impact of the practise of smoking on culture as such. By analyzing each of these topics, it attempts to irrefutably demonstrate the importance of such a topic in the public health and law discourse.*

## I. INTRODUCTION

“There is a new Marlboro Land, not of lonesome cowboys but of social-spirited urbanites united against the perceived strictures of public health”

- Matthew Hilton<sup>1</sup>

Smoking as a practise can be traced back to literally time immemorial. Tobacco and various hallucinogenic drugs were smoked all over the Americas as early as 5000 B.C. in shamanistic rituals. Furthermore, many ancient civilizations, such as the Babylonians, Indians and the Chinese burnt incense as a part of

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<sup>1</sup> MATTHEW HILTON, SMOKE 133 (2004).

religious rituals, as did the Israelites and subsequently the Catholic and Orthodox Christian churches. In ancient Greece, smoke was used as healing practice and oracles such as those at Delphi relied on prophecies made while intoxicated by inhaling natural gases from a natural bore hole. The Greek historian Herodotus has recorded that the Scythians used cannabis for ritual purposes and to some degree, pleasure.<sup>2</sup>

Today however, the ritualistic dimensions of smoking have taken a back-seat as compared to its recreational usage. Smoking essentially is a process whereby a certain substance is burnt and the resultant smoke is subsequently tasted or inhaled. Although substances like cannabis, opium, methamphetamine, cyclidine (PCP) and heroin can also conceivably fall within the purview of smoking when considered in that sense, it is tobacco which is by far the most popular form of smoking and which is practised throughout the length and breadth of the world as we know it today. With relation to smoking, there are essentially three categories of people who are placed at substantial risk by the practise of smoking: firstly, the smokers themselves; secondly, non-smokers in the vicinity of such smokers who are also termed as passive smokers; and finally those involved in the tobacco industry who may be in the danger of causing significant harm to themselves by way of the substances subcutaneously ingested into their bloodstream.

The harmful effects of smoking are too well-known to be documented here. Tobacco use has been identified as “the single most important preventable risk to human health and an important cause of premature death worldwide”.<sup>3</sup> For the sake of clarity however, we need to identify the predominant and accepted strands of thought with regard to the relation between smoking and public health. With reference to smokers, the incomplete combustion produced by burning plant material produces carbon monoxide which impairs the ability of blood vessels to carry oxygen when inhaled into lungs. This in turn is manifested by way of hazards such as lung cancer, heart attacks, strokes, impotence, and other cerebrovascular and chronic obstructive pulmonary diseases such as asthma, bronchitis and emphysema.

On the other hand, passive smoking is even more dangerous and harmful as such an individual inhales more harmful toxins than the actual smoker himself. This is because sidestream smoke<sup>4</sup> contains three times more nicotine, three times more tar and about fifty times more ammonia than the smoke inhaled by the smoker. The dangers of passive smoking are therefore extremely real and parallel those of

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<sup>2</sup> Encyclopaedia Britannica Online, *A Social and Cultural History of Smoking*, available at <http://www.britannica.com/eb/article-242781/smoking> (Last visited on January 24, 2008).

<sup>3</sup> The United States' Centre for Disease Control and Prevention, *Nicotine: A Powerful Addiction* available at [http://www.cdc.gov/tobacco/quit\\_smoking/you\\_can\\_quit/nicotine.htm](http://www.cdc.gov/tobacco/quit_smoking/you_can_quit/nicotine.htm) (Last visited on August 25, 2007); Christina F. Pinto, *Measures to Control Tobacco Use*, 15 J. CONTEMP. HEALTH L. & POL'Y 307 (1998).

<sup>4</sup> Sidestream smoke is different from another related concept of mainstream smoke in the sense that whilst mainstream smoke is inhaled by the smoker himself sidestream smoke is on the other hand inhaled by the people in his vicinity.

direct smoke.<sup>5</sup> Furthermore, hazards are even faced by those engaged in the plucking and curing of tobacco leaves. The same has been highlighted by researchers at the Ahmedabad-based National Institute of Occupational Health which by way of its research findings has clarified that hands of the workers get affected by the chemicals in tobacco and when nicotine is absorbed into the body through the skin, the health of such workers is placed at considerable risk. Symptoms include head-ache, nausea and vomiting.<sup>6</sup>

What is infinitely more disturbing is the fact that most of the components inhaled by way of smoking such as nicotine, are inherently addictive in nature and once somebody is addicted to them, it becomes fiendishly difficult to relinquish such a habit. At the same time, researches have also shown that most of such substances are also carcinogens. In fact, there are over 19 known carcinogens in cigarettes.<sup>7</sup> Therefore, the harmful connection between public health and smoking is being taken as an *ipso facto* assumption in context of the present paper. If the reader were to refer back to the quotation cited at the start of this chapter, we would like to draw attention to the clearly evident linkages manifest between smoking, public health and society. At the same time other related attributes such as the effect of advertising and the 'brooding omnipresence' of law can also be read in, albeit in an implied manner.<sup>8</sup> Therefore, this quotation in a manner of speaking serves to illustrate the all-pervasiveness of the contemporary discourse pertaining to the practise of smoking. As such, the practise of smoking and its causal linkages with public health have long transcended mere researcharial dimensions; they are now an integral and familiar part of contemporary life; an aspect which has become so familiar and commonplace that it has literally been relegated to the status of a non-issue, an issue akin to a query which does not need to be answered, a debate which need not be deliberated, a concern which need not be addressed. Be that as it may, it shall be our effort to draw the reader's attention to the triumvirate of smoking, public health and law and the myriad of linkages which exist therein.

## II. THE RELATIONSHIP BETWEEN SMOKING AND LAW

In the aforementioned portions of this paper, we had highlighted the various kinds of hazards placed to public health by way of the practice of smoking.

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<sup>5</sup> K. Ramakrishnan v. State of Kerala, AIR 1999 Ker 385.

<sup>6</sup> National Institute of Occupational Health, *Prevention of Green Tobacco Sickness Among Tobacco Harvesters* available at <http://www.nioh.org/nioharchivepropretobbo1.htm> (Last visited on January 12, 2008).

<sup>7</sup> The same include substances such as benzopyrene and nitrosamine, Sumner *et al*, *Retrofitting Tobacco Curing Barns* available at <http://www.tifton.uga.edu/tobacco/retrofitinfo.htm> (Last visited on August 20, 2007).

<sup>8</sup> The Marlboro brand is probably the most evocative and instantly recognizable of almost all the cigarette brands present in the world today, which in no small measure can be attributed to its well-orchestrated advertising campaigns; The 'perceived strictures of public health' can only be enforced by way of adherence to the letter of the law as also is he case with whatever the stand 'social-spirited urbanites' might decide to make.

The next logical consequence of such an assertion would be that if the fact that smoking is harmful to health is so well-known and its deleterious effects so well-documented, then the simplest and most uncomplicated method of resolving this conundrum would be by way of imposing a complete ban and moratorium on smoking in all public places or for that matter resorting to indirect means such as levying prohibitively high taxes and duties. However, the adoption of such an approach is not as simple as would appear on mere face-value, and there are a myriad of other considerations which have to be taken into account when evaluating the possibility of imposing a ban on smoking; the same considerations are analysed in course of this portion of the paper.

### *A. A HISTORY OF THE BAN ON SMOKING*

The notion of a ban or moratorium on smoking is nothing novel. There have always been times, places and individuals who have attempted to put a stop to what in their view was this highly objectionable practise of smoking. Pope Urban VII by way of a papal bull issued during his 13-day papal reign in 1590 issued perhaps the world's first known public smoking ban, as he threatened to excommunicate anyone who "took tobacco in the porchway of or inside a church, whether it be by chewing it, smoking it with a pipe or sniffing it in powdered form through the nose".<sup>9</sup> Even earlier, during the Edo period in Japan, the shogunate frowned upon the cultivation of tobacco as that in their opinion led to the wastage of valuable farmland.<sup>10</sup> Murad IV, the Sultan of the Ottoman Empire (1623-40) as also the the Patriarch of Moscows in 1634 forbade the sale of tobacco by claiming it to be a threat to public morality and health. King James I of England, a staunch anti-smoker himself in trying to further the cause of imposing a ban of smoking authored a book entitled *A Counterblaste to Tobacco*.<sup>11</sup> However, in recent times the first modern, coherent, nationwide ban on the sale and consumption of tobacco was imposed, ironically enough by the Nazis.<sup>12</sup>

### *B. THE ARGUMENTS FOR AND AGAINST A BAN ON SMOKING*

There are numerous arguments raised both in support as well as in opposition to a ban on smoking. In this particular section of the paper, we shall be attempting to enumerate few of these oft-quoted and oft-repeated sentiments with relation to the debate as to whether smoking ought to be banned or not. The argument most commonly advanced with reference to an imposition of a ban on smoking is that the same would tantamount to being nothing more than a blatant case of interference on the part of the government in the personal lifestyle or

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<sup>9</sup> JACK E. HENNINGFIELD, *NICOTINE: AN OLD FASHIONED ADDICTION* 96-98 (1985).

<sup>10</sup> TIMON SCREECH, *SMOKE: TOBACCO IN EDO PERIOD JAPAN* 92-99 (2004).

<sup>11</sup> *A Counterblaste to Tobacco* available at <http://www.laits.utexas.edu/poltheory/james/blaste/index.html> (Last visited on January 14, 2008).

<sup>12</sup> Robert H. Proctor, *Nazi Medicine and Public Health Policy* available at [http://www.adl.org/Brau n/dim \\_14\\_1\\_nazi\\_med.asp](http://www.adl.org/Brau n/dim _14_1_nazi_med.asp) (Last visited on August 29, 2007).

property rights of individuals.<sup>13</sup> However, the very same argument can be viably countered by emphasising the fact that when the personal lifestyle or the property rights of individuals end up infringing concomitant rights of other individuals, the government has a duty, nay, a prerogative to step in, and that is precisely what is being done in the present case.<sup>14</sup>

Secondly, those in opposition to a ban on smoking, or for that matter other tobacco-related products, also cite the significant economic dimensions involved. Not only does it make a significant contribution to the state exchequer by way of taxes but also that a large number of tobacco farmers would be hit if consumption were to be curbed.<sup>15</sup> However, these arguments could be countered by noting that in any case the cost of healthcare met by the state exchequer is far higher than the revenues generated by tobacco. Furthermore, as regards the loss of livelihood amongst tobacco farmers, the health of the tobacco cultivators themselves are placed at substantial risk by way of such cultivation and additionally, the illnesses or deaths caused by the usage of tobacco can only possibly result in the perpetuation of the vicious cycle of poverty.<sup>16</sup>

Thirdly, there are also certain enthusiastic advocates of smoking who strive to emphasise the positives of smoking and insist that contrary to popular belief, smoking is actually good for health. For instance according to them, studies have shown that patients suffering from Alzheimer's<sup>17</sup> and Parkinson's disease<sup>18</sup> are more likely to have been non-smokers than smokers. We are arguably not in a position to question such incontrovertible medical research findings but would still submit that the reason why sufferers of such diseases are more likely to be non-smokers than smokers is simply because such afflictions generally strike people in an advanced age; or in other words, smokers simply do not survive long enough to invite the possibility of such maladies. Therefore, such findings are more suggestive towards the low proportion of smokers who live till a ripened age, than anything else.

Fourthly, opponents of any ban or prohibition on smoking also stress that smoking is akin to the philosophical concept of a 'victimless crime'. The

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<sup>13</sup> Michele L. Tyler, *Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783 (1998).

<sup>14</sup> Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty*, 61 U. PITT. L. REV. 419 (2000).

<sup>15</sup> Jonathan Gruber, *Government Policy Towards Smoking*, 3 YALE J. HEALTH POL'Y L. & ETHICS 119 (2002).

<sup>16</sup> Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769 (1999).

<sup>17</sup> Osvaldo P. Almeida et al., *Addiction, Smoking as a risk factor for Alzheimer's disease: Contrasting evidence from a systematic review of case-control and cohort studi* available at <http://www.blackwell-synergy.com/links/doi/10.1046/j.1360-0443.2002.00016.x/full/> (Last visited on August 14, 2007).

<sup>18</sup> M.F. ALLAM ET AL., *Smoking and Parkinson's disease: Systematic review of prospective studies*, 19 MOVEMENT DISORDERS 614 (2004).

concept of a victimless crime essentially posits that a crime in which the victim is the self, there is no offence or misdemeanour committed. Hence, smokers who smoke of their own free volition cannot be held accountable for the hazards resultant therefrom. However, what such advocates very conveniently manage to sidestep is the fact that passive smokers cannot possibly be brought within the notion of such a 'victimless crime' and being subjected to hazards for which there was not even the slightest modicum of consent in the first place, they have got every right to agitate for a ban on smoking in public places.<sup>19</sup>

Finally, there is also a strand of thought which posits that a ban of smoking shall amount to nothing more than removing the 'scene of crime' away from the public sphere and into the private sphere. Be that as it may, the same logic cannot possibly be used to justify not imposing a ban on smoking as regardless of the efficacy of the means proposed there is no escaping the fact that a ban on smoking in public places shall result in the reduction of the health hazards posed by the same.

### *C. THE LEGAL POSITION WITH RELATION TO A BAN ON SMOKING*

We, in the preceding portions of this paper have dealt with some of the various issues pertaining to smoking. In the subsequent portions, we shall be focussing exclusively on the legal positions with relation to a ban on smoking, both at a domestic as well as at an international level.

#### 1. The International position

Bhutan till now remains the sole country in the world which has forbidden the public sale and consumption of tobacco.<sup>20</sup> There are few other nations which either have a smoking ban in place or a ban which is scheduled to come into force in the near future. These include nations such as Ireland, United Kingdom, France and Netherlands. In the United States, any prohibitions on the act of smoking have been largely province-specific. For instance, California had introduced a ban on workplace smoking in as early as 1994. Ireland on the other hand was the first country to impose a workplace ban on smoking in 2004.<sup>21</sup> Similarly, Cuba had also early last year, imposed a ban on smoking, on public transport, in shops and in other enclosed spaces. The same has been the case in countries like Spain and France as well.<sup>22</sup>

On the other hand, as a corollary of such like developments in the international sphere, and following Alan Watson's influential theory of legal

<sup>19</sup> Maria Okonska, *Legal Aspects of Passive Smoking*, 86 LAW LIBR. J. 445 (1994).

<sup>20</sup> MSNBC World News, *The Butt Stops with Bhutan's Tobacco Ban*, available at <http://www.msnbc.msn.com/id/6606877/> (Last visited on December 20, 2007).

<sup>21</sup> *Smoking Bans: Around the World*, IRISH TIMES, May 29, 2007.

<sup>22</sup> *Id.*

transplants, it has been opined that legal change is frequently a consequence of learning from other jurisdictions. Therefore, legal change has been often seen to be a culturally contingent process dependant upon the interaction of the local and the global, rational actions and cultural dispositions.<sup>23</sup> Hence in a country like Japan, lawmakers have looked to foreign jurisdictions as models, but they have not focused on formal legal rules, and they have rarely imported fully articulated foreign laws for the purpose of the legal changes concerning the use of tobacco in Japan since 2000. This can be understood in the context of what sociologists and political scientists term as 'New Institutionalism' which states that the political change in a given locale is often a function of change in other locales. Among the most important factors which has lead to cross-border influence are the 'cultural rules, norms, and expectations' that shape the behaviour of lawmakers in a particular location keeping the policies of another nation or region in their minds as a standard norm.<sup>24</sup>

Internationally, there have been a number of instruments as well which have illumined the hazardous nature of tobacco as well as the need to control the consumption of the same in order to conserve public health.<sup>25</sup> The US Federal Public Health Cigarette Smoking Act, Tobacco Control Act, 2003 as well as the WHO Framework Convention on Tobacco Control are some of the more prominent instruments in this regard. Gradually, there has been a slight reduction in the amount of tobacco consumed, probably owing to such instruments as well as the concerted efforts of anti-tobacco campaigners worldwide. One interesting spin-off of such a turn of events has been felt in the realm of international trade law. A celebrated instance of such a scenario was the *Thai Cigarettes Case*.<sup>26</sup> In this case, the United States of America, one of the largest tobacco producing nations in the world, campaigned to expand the quantity of its cigarette exports. In this regard, the U.S. Cigarette Exporters Association (CEA) targeted markets which were traditionally closed to foreign cigarette imports. The argument which they took was that the target country's restrictive trade policies with respect to tobacco constituted unfair trade practices, which in turn would warrant the imposition of retaliatory sanctions. It must be noted that the Thai Tobacco Act effectively prohibited the prohibition and sale of foreign cigarettes and also had extremely stringent standards with relation to cigarette advertising and health warnings. Ultimately in this case, the U.S. government appealed the case taking recourse to the GATT and Thailand was forced to open up its cigarette import market so as to avoid retaliatory sanctions.

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<sup>23</sup> Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-first Century Japan*, 27 MICH. J. INT'L L. 743 (2006).

<sup>24</sup> *Id.*

<sup>25</sup> Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L LAW 257 (1996).

<sup>26</sup> *Cigarette Import Ban in Thailand, TED Case Studies* available at <http://www.american.edu/TED/cigar.htm> (Last visited on September 9, 2007).

## 2. The Indian position

The Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 is the primary legislative framework within which the Government of India seeks to address the issues related to the commercial aspects of tobacco products. In pursuance of Section 31 of the aforesaid Act, the Prohibition of Smoking in Public Places Rules, have been brought into effect from October 2, 2008, so as to curb smoking in public. These Rules mandate that it is the duty of the owner, proprietor, or for that matter, any person in-charge of a public place to ensure that there is no incidence of public smoking in their premises. It has also been provided under these very Rules that it is the responsibility of such individuals to prominently display the names of the persons with whom complaints can be lodged as regards those seen violating the ban. Further, a board displaying the 'No Smoking' sign also has to be displayed at the entrance to those premises as specified under Schedule II of the Rules. What remains to be seen however, is how effective and efficacious such an initiative shall be in terms of its execution and implementation. It is perhaps, only time which can best answer this question.

In India, there also have been a few cases which have served to highlight the various dimensions of the legal position with relation to a ban on smoking. The question as to whether a court can direct a legislature to enact a law banning tobacco smoking was answered in the case of *K. Ramakrishnan v State of Kerala*.<sup>27</sup> It was held that it is entirely for the executive branch to decide whether or not to introduce any particular legislation. The Court cannot usurp the function assigned to the executive and the legislature cannot assume a supervisory role over such law-making activities. At the same time however it also must be remembered that the court acting as the sentinel on the *que vive* can interfere and grant relief by way of the issuance of a writ of *mandamus* to the Government and officials to enforce existing laws which suffice to safeguard the interests of the public. It was further held that smoking violates Sections 268 and 278 of the Indian Penal Code<sup>28</sup> and furthermore, smoking can also be regarded as being in violation of Article 21 of the Constitution of India. Additionally under common law, a person whose right to property, easement or health is adversely affected by the act or omission of a third person is entitled to seek an injunction and also claim damages. In this context, a related concept of ETS, namely Environmental Tobacco Smoke, becomes important as the same standard helps ascertain the levels of noxious fumes present in the environment which are capable of causing harm to individuals situated in the same. Furthermore, smoking can also be regarded as coming under the definition of air pollution as under the Air Act.<sup>29</sup>

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<sup>27</sup> *K. Ramakrishnan v. State of Kerala*, AIR 1999 Ker 385.

<sup>28</sup> § 268 deals with public nuisance whereas § 278 deals with activities making the atmosphere noxious to health.

<sup>29</sup> Air Act, 1981, § 2 (b).



Another extremely important decision with reference to tobacco smoking is *Murli S. Deora v Union of India*,<sup>30</sup> in which the Supreme Court proceeded to opine *inter alia*, that passive smoking is in violation of Article 21 of the Constitution and that keeping in mind the fact that statutory provisions were being made for prohibiting smoking in public places, and that a Bill had already been introduced in the Parliament which was pending consideration before a Select Committee, smoking ought to be prohibited in public places like auditoriums, hospitals, schools, colleges, libraries, courts, public offices and means of public conveyancing. In this regard, the Court referred to the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 which in its Statement of Objects and Reasons had identified smoking as a harmful habit which could lead to grave health hazards and the then Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001 which vouchsafed the fact that tobacco was universally recognised as one of the major public health hazards.

#### D. CONCLUSION

A comprehensive moratorium on the practise of smoking in public might be the only fool-proof method of ensuring that the harmful effects of smoking, in the public sphere at least, are brought to a stop. Despite the fact that such a restriction might impinge upon the freedoms as guaranteed to any individual, such a step would be undoubtedly justified when eyed in terms of public interest and societal benefit. As would seem apparent, the implementation of such rules and regulations are of manifest importance insofar as the efficacies of such legislations are concerned.<sup>31</sup> Perhaps, in order to safeguard the interest of smokers, exclusive smoking zones in places like pubs and restaurants might be contemplated. However, it must always be noted that any such initiatives would be more in the nature of exceptions than the rule, and in the ordinary course of things, any person caught violating non-smoking norms in public should be subjected to the actions stringent enough to deter any such subsequent behaviour.

### III. THE RELATIONSHIP BETWEEN SMOKING AND MEDIA

We have so far attempted to highlight the various modalities and the dimensions of the debate pertaining to the correlation between smoking and law. However, these are only two of the entities of the triumvirate outlined earlier in the introductory part of this paper. The third element is that of public health. Insofar as the effect of smoking on public health is concerned, it has already been addressed in part in the foregoing portions of this paper. In this chapter however, we would instead like to address another dimension of public health. Discussions pertaining to public health and smoking, in addition to direct correlations thereof, can also be

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<sup>30</sup> *Murli S. Deora v. Union of India*, AIR 2002 SC 40.

<sup>31</sup> Peter D. Jacobson, *Implementation and Enforcement of Tobacco Control Laws*, 24 J. HEALTH POL., POL'Y & L. 567 (1999).

extended to cover ancillary linkages. Here, we shall be discussing two such ancillary linkages, namely, the linkage between smoking and advertising and the one between smoking and the world of celluloid.

### *A. SMOKING AND ADVERTISEMENT*

The promotion of smoking and other tobacco-related products by way of advertising can be essentially divided into two broad spheres. The first would consist of stimulation of primary demand which would signify a demand for tobacco products in general rather than a demand for a specific brand. In developing countries, this is particularly important as multinational tobacco companies are perennially seeking to induce experimentation in tobacco products such as cigarettes so as to stimulate this initial consumer demand in the direction of international brands instead of local products. The second sphere on the other hand is characterised by an effort to increase brand and customer loyalty by way of inculcating specific brand identification.

Advertising and promotional campaigns are in today's world, the surest means of monopolising and fixating consumer attention. With particular reference to the tobacco industry, the Marlboro Man and the Virginia Slims Lady still remain the most evocative symbols in the history of the advertising world.<sup>32</sup> The importance attached to advertising by the tobacco industry can perhaps be assessed in light of the fact that according to the U.S. Federal Trade Commission, close to \$15 billion was spent on advertisement and promotional campaigns alone. Notwithstanding the same, direct advertisement of smoking and tobacco products has come to be forbidden in most parts of the world. The WHO Framework Convention on Tobacco Control expressly prohibits such advertising and requires all of its signatories to act in pursuance of the same. The EU Tobacco Advertising Directive which took effect in June 2005 also bans tobacco advertising in print media, on the radio and over the internet. In Australia, the Tobacco Advertising Prohibition Act of 1992 expressly prohibits almost all forms of tobacco advertising. Additionally, almost throughout the world, tobacco companies are required to carry stringent warnings on their packagings.

In India also, there is a prohibition on direct advertising of tobacco products. In relation to the same, reference might be made to the Cigarette and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the Cigarettes and Other Tobacco Products (Packing and Labelling) Rules, 2008.<sup>33</sup> The former is an extremely comprehensive piece of legislation which not only prohibits advertisement of cigarettes and other tobacco products in various streams of

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<sup>32</sup> Kathleen M. Paralusz, *Ashes to Ashes*, 24 AM. J.L. & MED. 89 (1998).

<sup>33</sup> See Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003; Cigarettes and Other Tobacco Products (Packing and Labelling) Rules, 2008; Also See Cigarettes and other Tobacco Products (Packaging and Labelling) Rules, 2006.

media but also puts in place provisions positing the prohibition in sale of such substances in the vicinity of educational institutions. Further, specific requirements are expressly posited in terms of the statutory warning signs which such products shall have to carry. The latter rules on the other hand, in a manner of speaking, carry the former statute a step further by enunciating the requirement that every tobacco product shall have to display the health warning as specified in the attached schedule, comprising of a skull and bones sign and a health warning; a graphic representation of the ill-effects of tobacco use along with a health message.

The same however, with its underpinnings of 'compelled speech' has managed to instigate debate in the arena of constitutional law. The Constitution of India by way of Article 19 (1) (a) guarantees the freedom of speech and expression. However the same is also subject to clause (2) which justifies the imposition of reasonable restrictions in reference to the same. The issue in question is as to whether the restriction so imposed on tobacco products satisfies this 'reasonability' criterion or not. Nor is this query limited to tobacco products alone. This issue covers almost the entire gamut of product advertisement and there have been a number of seminal decisions in respect of the same.

In the case of *Hamdard Dawakhana v Union of India*<sup>34</sup>, although ostensibly in relation to drug-related products, the existence and the extent of protection available to the advertisements was elaborately and exhaustively laid down. It was held by the Supreme Court that the true character of the advertisement is to be determined by the object it seeks to achieve and as such protection under Article 19 (1) (a) was not available to the commercial speech. This pronouncement however has been modified over the years through judgments *Sakal Papers v. Union of India*<sup>35</sup> and *Bennett Coleman & Co v. Union of India*<sup>36</sup> which might be interpreted so as to extend the protection under the aforementioned Article to commercial speech as well. In doing so, perhaps the Indian judiciary has tried to keep pace with developments in developed countries. However, it must be remembered that the applicability of the judgments in these cases has been contextualized to suit whatever the relevant standards and norms might be.<sup>37</sup> Therefore, measures of such ilk, especially in relation to tobacco products, arguably fall well within the ambit of clause (2) of Article 19.

Despite all these measures however, tobacco companies have often devised ingenious ways to reach out to their consumers. The two most common methods of doing so are surrogate advertising and sports sponsorship. Surrogate advertising simply means that tobacco companies, in the guise of ostensibly promoting another product are in essence promoting tobacco products. Such advertisements are nothing more than an elaborately construed façade in order to bypass the technicalities which forbid direct tobacco advertisement. Sports

<sup>34</sup> *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

<sup>35</sup> *Sakal Papers v. Union of India*, AIR 1962 SC 305.

<sup>36</sup> *Bennett Coleman & Co. v. Union of India*, AIR 1973 SC 106.

<sup>37</sup> *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264.

sponsorship on the other hand has been a time-honoured weapon in the arsenal of tobacco companies in order to garner consumer attention. The Formula One Circuit, Cricket, Soccer, Basketball and Snooker have all been witness to innovative product placement by tobacco companies. In recent times however, such sponsorships have seen a substantial reduction, owing perhaps to governmental restrictions and legislations which have been put in place.<sup>38</sup>

It is submitted that the linkage between the advertising and the tobacco industry is simply too important to be ignored in the discourse pertaining to smoking, public health and law. More people have been induced into taking up smoking on the basis of alluring, glossy advertisement campaigns than by any other factor and there have in fact been few adjudications where such campaigns have been the crux of the dispute.<sup>39</sup> Until recently, this was a wholly unregulated sphere. Thankfully, of late, the world seems to have woken up to the dangers posed by such advertisement campaigns and the impact they might have on impressionable minds. As such, it can only be hoped that legislations and policy guidelines are put swiftly in place precluding any form of advertisement pertaining to tobacco, either direct or otherwise.

At the same time however, it must also be remembered that at certain points, political and economic compulsions would appear to take a seeming priority over the health concerns of a State. Such a charge, if anything, arguably becomes far more exacerbated as the election year draws close. The recent decision of the Group of Ministers (GoM), headed by the Foreign Minister Mr. Pranab Mukherjee, to suspend the ban on the display of health warnings on tobacco products from 1<sup>st</sup> December, 2008 to 31<sup>st</sup> May, 2009 might be taken as a case in point. Though it is argued that the ban has been temporarily suspended so as to ease the burden on the tobacco industry in the wake of the global economic meltdown, the real motive, as is being widely speculated, is to not to lose the support of the tobacco industry which has a decisive role to play in the politicking and government making process.<sup>40</sup> It is this thin line, between economic compulsions on one hand and social welfare measures on the other, which any and every related legislation or policy guideline would have to tread.

### *B. SMOKING AND MOVIES*

The world of celluloid has long captivated not only the heart and minds of its viewers, but has also served to galvanize public opinion and act as a bellwether for societal practices. Studies upon studies have served to irrefutably demonstrate the impact which the cinematic world has on reality. That being the case, and proceeding on the *ipso facto* assumption that the practise of smoking is detrimental to public health, it would seem apparent that a blanket prohibition on all

<sup>38</sup> Scot Sullivan, *Tobacco Talk: Why FDA Tobacco Advertising Restrictions Violate the First Amendment*, 23 WM. MITCHELL L. REV. 743 (1997).

<sup>39</sup> Godfrey Phillips India Ltd. v Ajay Kumar, (2008) 4 SCC 504.

<sup>40</sup> *Pictorial Warning on Puff Packs Put Off*, THE TIMES OF INDIA (Kolkata), November 26, 2008.

kinds of depiction of smoking practices would be the surest way to preclude any pliable minds from going astray. Be that as it may, and even if one were to choose to disregard any queries as to the efficacy of such a measure, what also merits discussion is the competence of any entity to initiate and impose such measures.

In recent times, there has been a substantial controversy regarding this aspect between our honourable Minister of Health and the reigning superstar of Bollywood. One would have us believe that we are such impressionable beings, liable to be swayed by such slight provocation that our very existences have to be molycoddled and our thought-processes stringently regulated while the other attempts to offer a justification under the garb of creative license and artistic freedom. The reality however lies somewhere midway between these two extremes. As suggestible as human being might be to external influences and stimuli, the precepts of rationality and logic still have their place in the world. At the same time, it also must not be forgotten that the much-vaunted term of artistic freedom is often used to act as a façade for narrow commercial interests.

The high-pitched initiative by the Ministry of Health and Family Welfare to prevent the depiction of smoking in films has now come to be roundly criticised on the grounds of such a ban curbing the artistic liberty of filmmakers. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2005 (Notification dated 31<sup>st</sup> May, 2005), made to amend the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, inserted the ban of depiction of smoking in movies and television under the principal rules published as the Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004.<sup>41</sup> The same however, is currently *sub-judice* before the High Court of Delhi, after being challenged as a being violative of the Fundamental Right of expression, by the filmmaker, Mahesh Bhatt.<sup>42</sup>

It is submitted that the world of cinema along with all its concomitant appendages is often referred to as a manifestation of manufactured reality, an

<sup>41</sup> Vide GSR 137 dated February 25, 2004.

<sup>42</sup> The Cigarettes and Other Tobacco Products (Prohibition of Advertisement, Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2005 (Notification dated May 31, 2005), available at [http://www.burningbrain.org/movie\\_rules.htm](http://www.burningbrain.org/movie_rules.htm) (Last visited on November 30, 2008).

*Postscript: At the time of this issue going to press, there has been a development which is bound to further queer the debate concerning the imposition of a moratorium on smoking. The Delhi High Court, by an order dated 23rd January 2009, has struck down the earlier notification banning cinematic portrayal of smoking, on the grounds of the same being an integral part of an artist's creative freedom. As such, in the opinion of the Hon'ble Court, such a measure would be akin to nothing more than censorship. (Per Kaul, J., Mahesh Bhatt v Union of India, Number WP (C) No.18761 of 2005 and WP (C) No.23716 of 2005) It however remains to be seen how the executive responds to the manner in which the judiciary has proceeded to so nullify its fiat. Ed.*

instrument of mass escapism. The world of movies therefore, by virtue of its very definition, is meant to stand apart from the material world. It is the transposition or juxtaposition of these two twin spheres of existence which might lend itself to points of conflict and that is precisely where topics such as the depiction of smoking on screens arises from. There have been studies conducted which have shown that movies are responsible from anywhere between 30 to 50 percent in terms of smoking initiation.<sup>43</sup> In pursuance of the same line of thought, it has been variously proposed that if characters in a movie are seen smoking they should be given a tougher rating so as to reduce their prospective audience or that the entire depiction of smoking on screen ought to be deglamourized. Be that as it may, studies would also seem to indicate that most sections of the society are not in agreement with such findings and neither are they too enamoured of the suggestion that an external authority might seek to determine what they ought to or ought not to watch.<sup>44</sup> The issue of movies and smoking therefore is one which has yet to be brought to a viable conclusion.

#### IV. THE RELATIONSHIP BETWEEN SMOKING AND SOCIETY

Smoking and societal practises have always borne a fascinating relationship with each another. In the present portion of this paper, we attempt to delineate the myriad contours of such correlation. In pursuance of the same, we shall first address the relation which persists between smoking and women. Subsequently, we shall attempt to outline the societal imperatives which not only influence but in a manner of speaking, serve to define the very practise of smoking.

##### A. SMOKING AND WOMEN

An interesting area that has not perhaps not yet received its fair share of attention is the issue of women and smoking. Smoking has seemingly far more serious repercussions on women than on men. If a man and a woman were to smoke equally under the same conditions, the woman's heart rate and blood pressure would increase more than the man's.<sup>45</sup> This has been corroborated by the findings of the health authorities of many nations. In Japan, while smoking by both males and females is generally on the decline, more young females are taking to smoking. According to a recent survey by Japan Tobacco Inc., 59.8 percent of males smoked, a decline of 16.5 percent from 20 years ago, while 13.8 percent of women smoked, a drop of 1.3 percent. But 20.8 percent of women in their 20s and 30s smoked almost double the number that smoked 20 years ago.<sup>46</sup>

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<sup>43</sup> *Teens Hurt by Smoking on Screen; Study Finds*, THE GLOBE AND MAIL (Canada), September 4, 2007.

<sup>44</sup> *It's a Thumbs Down for Film Ban on Smoking*, EVENING TIMES (Glasgow), May 28, 2007.

<sup>45</sup> *Yomiuri Shimbun, More young women light up despite decline in smoking*, THE DAILY YOMIURI (Japan), July 28, 1994.

<sup>46</sup> *Id. See also David George-Cosh, Teens hurt by smoking on screen, Study Finds*, THE GLOBE AND MAIL (Canada), September 4, 2007.

Stress has been often cited to be the single most important reason contributing to the increased incidence of smoking amongst women. However, specialists opine that young females are seduced by advertisements which portray smoking as being fashionable. Although advertising regulations *per se* prohibit the showing of women actually smoking, tobacco companies have subtly and successfully been able to portray smoking as being extremely fashionable and a statement of *uber* cool.<sup>47</sup> Based on Queensland Health Research and Australian Bureau of Statistics population trend figures, the cancer fund has estimated 12,300 women will die of lung cancer between 2000 and 2020 on account of smoking.

Women smokers already face a 50 per cent higher risk of coronary heart disease than male smokers do. Furthermore, the Australian Medical Association has also opined that the risk of heart attack, strokes and thrombosis significantly increases if women combined smoking and contraceptive pills. It was proposed that much more funding needed to be devoted to anti-smoking programs targeting women.<sup>48</sup> The Queensland Cancer Fund has obtained figures which depict that in the crucial smoking initiation period from 14 to 19 years, the number of female smokers is almost 50 per cent higher than males. A critical factor which might contribute to this phenomenon is the peer pressure that exerts pressure to take up smoking.<sup>49</sup> In short, smoking and women deserve to be treated on a slightly different footing than what would have been otherwise applicable. The very fact that certain very different considerations apply in the case of the fairer sex make it incumbent that these special factors are always taken into account while tailoring policies catering to them.

## B. SMOKING AND SOCIETY & CULTURE

Smoking has borne a long correlation with society and culture. The evidence of the same is very clearly manifested in the importance of smoking in the realm of creative studies as well as visual arts. It perhaps would not be amiss to state that smoking, purely considered as a recreational activity, has come to assume a position as yet unrivalled by any other, in contemporary times.<sup>50</sup> Be it literature, be it movies, or be it art, the practise of smoking has seemingly come to exert an all-pervasive influence in the creative fora, and by corollary, in society and culture.

Smoking has gradually come to be associated with many differing attributes, depending upon the place and mode of its practise. It has been variously regarded as a symbol of masculinity and virility, of strength and calmness, and of

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<sup>47</sup> *Id.* See also Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE L.J. 1133; John W. Fountain *Study Finds Teenagers Smoking Less; Campaign Is Cited*, N.Y. TIMES, December 20, 2001.

<sup>48</sup> Kay Dibben, *Playing with fire - Women smokers most at risk of cancer*, SUNDAY MAIL (Queensland, Australia), September 15, 2002.

<sup>49</sup> *Id.* See also Michelle Brooker, *Smoking looms as top killer of women*, THE PRESS (Christchurch), December 7, 2002.

<sup>50</sup> See Robert L. Rabin, *Some Thoughts on Smoking Regulation*, 43 STAN L. REV. 475 (1991).

power and respect. It has become a visual manifestation for characters as diverse as the lonesome cowboy, the power-hungry capitalist and the uber-cool metrosexual.<sup>51</sup> Smoking, in short, insofar as society and culture is concerned has transcended ordinary barriers of class, economics, language and region. Its sheer variety ensures that its appeal is not limited to specific segments of the society. There might be prohibitively costly Havana cigars on one hand but there are also cheap unfiltered varieties, or for that matter, our own *desi bidi* on the other. In short, this is an activity which can be enjoyed and pursued by every societal strand irrespective of the other wide chasms which might separate them.<sup>52</sup>

Herein lies the greatest challenge that the anti-smoking lobby has to face. If smoking had been limited to a few isolated pockets of society and culture, then it would have been relatively simpler to counter-act its influence. However, given the omnipresent nature of tobacco consumption and the sheer range of its influence, smoking as a practise is just too well-entrenched to hope for a swift demise.<sup>53</sup> In a way, smoking is just like the Greek monster Hydra, which had such regenerative powers, that whenever one of its heads was cut off, two more used to spring forth to take its place. As such, the only possible manner in which the all-pervasive influence of smoking and other tobacco products can be countered is by ensuring that society as one, wakes up to the dangers and hazards posed by the consumption of tobacco. As long as society and culture insist on revelling in the perceived romanticism of smoking, there can be no way smoking as a practise is likely to come to a stop. What is needed is a reality-check, concerted campaigns to do away with the perceived images and connotation of smoking, and awareness drives. It is only then that this causal linkage between smoking and society and culture can be weakened.

## V. CONCLUSION

The present topic of discussion lends itself to a myriad of issues which can arise therefrom. Moreover, this is a contemporary topic, a topic which has come to occupy societal consciousness and encourage public debate in the last few years. During the course of this paper, we have attempted to address few such topics, ranging from the origins of smoking to an analysis of an imposition of a moratorium on smoking in public places to examining the causal linkages between smoking and society as well as with the advertising world.

Smoking, considered solely as a subject matter of discussion is not too different from other issues of like ilk such as prohibition of alcohol

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<sup>51</sup> See Erin Myers, *The Manipulation of Public Opinion by the Tobacco Industry*, 2 J. HEALTH CARE L. & POL'Y 79 (1998).

<sup>52</sup> See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992).

<sup>53</sup> See David J. Malcolm, *Tobacco, Global Public Health and Non-Governmental Organizations*, 28 DENV. J. INT'L L. & PL'Y 1 (1999).



consumption or firearm prohibition; what makes the difference however in the case of smoking are the sheer numbers involved. At earlier occasions, we had referred to the triumvirate of smoking, public health and law. In addition to these three entities however, there is another factor which is perhaps even more significant than anything outlined before. That element is of public interest, the preservation of the interest of the people, the resolve to ensure that the well-being of the populace is at a position of superintendence over all other factors and attributes, and it is precisely on this touchstone of public interest that smoking and all such related issues must be gauged.

