

● TOBACCO VENDOR LICENSING IN INDIA: REINFORCING THAT SELLING TOBACCO IS NOT AN UNFETTERED RIGHT



Prof. (Dr.) Ashok R. Patil*

Abstract

Vendor licensing schemes for tobacco products have been used globally for regulation of tobacco distribution with great success. By requiring tobacco vendors to get a license for distribution of tobacco products, the government can effectively implement the letter and spirit of the COTPA 2003 and the WHO FCTC. As such, the possibility of adopting such schemes in the Indian legal framework must be examined. Accordingly, this article seeks to provide a comprehensive analysis of vendor licensing - the underlying rationale and the benefits, existing legislations, landmark judicial decisions, a procedural framework and the challenges faced.

Key words-

Tobacco Control; Vendor Licensing; Enforcement of COTPA; Public Health

1. INTRODUCTION

The harmful effects of tobacco use are well established and accepted globally. The use of tobacco is a prominent risk factor for 6 to 8 leading causes of death and almost 40% of the Non-Communicable Diseases (NCD) including cancers, cardio-vascular diseases and lung disorders are attributable to tobacco use. According to Global Adult Tobacco Survey-2, India (GATS 2, 2016 -17), 28.6% (266.8 million) of adults currently use tobacco in any form. 21.4% of all adults consume smokeless tobacco product, while 10.7% smoke tobacco. The number of deaths every year in India which is attributable to tobacco use is almost 14 lakhs. Therefore, there is imperative need for framing intensive measures to discourage and eventually eradicate tobacco use and its trade. One such measure is to ensure that the sale of tobacco products is throughly authorized, licensed shops or vendors only.

The rationale for licensing tobacco vendors or sellers is to protect gullible consumers from misconstrued about the harms of the product and ensure public safety and public health. Tobacco is the single largest preventable cause of premature death, disease and disability in India. The sheer magnitude of the harm caused by tobacco clearly justifies the need for strict regulatory schemes through vendor licensing.

*Professor of Law, National Law School of India University, Bengaluru.

In addition to a national framework, tobacco vendor licensing has international support in the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), which is the first coordinated global effort to reduce tobacco use. The WHO FCTC requires Parties to implement evidence-based measures to reduce tobacco use and exposure to tobacco smoke. As per Art. 15 of the WHO FCTC, each Party shall endeavor to adopt and implement measures including licensing, to control or regulate the production and distribution of tobacco products in order to eliminate illicit trade.

Accordingly, this paper seeks to provide a comprehensive analysis of the tobacco vendor licensing framework in India. For this purpose, this paper has been divided into four parts the first part provides an overview of the concept and history of vendor licensing in India. The second part lays down the existing legal framework for tobacco vendor licensing. The third part the salient features of a model vendor licensing law, based on global best practices. The fourth part explains the procedure for implementation of vendor licensing. Finally, the paper concludes with a discussion on the challenges to vendor licensing and possible solutions.

2. VENDOR LICENSING- CONCEPT, HISTORY & BENEFITS

2.1. CONCEPT OF VENDOR LICENSING

The overriding rationale for the support of licensing arrangements is that it facilitates the enforcement of a number of tobacco control measures (for ex, prohibitions on sales to minors, prohibition on advertisements, prohibition on illicit trade, display of health warnings on packages, etc.).

In this light, licensing of tobacco vendors is seen as a way of reinforcing the understanding that selling tobacco is not an unfettered right, but a privilege that requires regulation to restrict its social, economic and health impact.

The regulation of the tobacco industry is justified from an economic perspective, as the consumers of tobacco products are not capable of making a rational decision after properly weighing the costs and benefits of consumption i.e. the tobacco industry is susceptible to market failure . Broadly speaking, regulation seeks to address two types of market failures in the tobacco industry.

(i) Information Asymmetry - Consumers of tobacco products often do not have complete information about the harms caused by tobacco products. This lack of information is due to multiple factors:

a)Minors also consume tobacco products but do not have the capability to properly assess the harms of tobacco consumption. As per the GATS-2 survey, nearly 55.3% of tobacco consumers started consuming tobacco before the age of 19. Despite Sec. 6 of COTPA prohibiting sale of tobacco products to minors, it was found that 81.5% of



minors aged 15-17 had purchased cigarettes from paan shops. In addition, tobacco companies actively promote tobacco product to minors.

b) Misleading industry practices which present tobacco goods to be less harmful than they actually are. As per the WHO notes, tobacco companies have denied the addictive properties of tobacco and the casual relationship between tobacco consumption and cancer in the past. They also promote 'light'/'mild' cigarettes as safer than regular cigarettes.

(ii) Negative Externalities - Consumption of tobacco products has numerous negative externalities i.e., the consumption of these products causes a negative impact on other non- smokers. This manifests in multiple ways:

a) Physical externalities where non-smokers are exposed to smoke which is harmful. The health hazard caused by second-hand smoke was recognised by the SC in *Murli S. Deora Vs Union of India*,² wherein it prohibited smoking in public places as it led to second-hand smoke which was violative of the right to life of non-smokers under Art. 21 of the Constitution. As per the GATS-2 survey, approximately

38.7% of adults were exposed to second-hand smoke at home and 36.2% of adults were exposed to second-hand smoke at public places.

b) Financial externalities where non-smokers have to bear the financial costs of harm caused by tobacco consumers. As per a report by the Ministry of Health & Family Welfare, tobacco use led to economic costs of Rs. 1,04,500 crores out of which 16% was the direct cost of medical treatment and 84% was the indirect costs of premature mortality and morbidity costs such as expenditure on transportation, costs incurred by caregivers, loss of household income etc.³

It is clear that tobacco regulation is justified from an economic perspective. The justification of using vendor licensing arises from the following aspects:⁴

(i) Licensing is justified when the activity sought to be controlled has a negative externality irrespective of the scale of the activity. In the case of the tobacco industry, the harmful effects of tobacco consumption exist irrespective of the scale at which trade takes place. This means as licenses can be utilised to regulate both small-scale and large-scale traders; manufacturers, retailers and wholesalers, they are effective.

(ii) Licensing is justified when the activity sought to be controlled has a negative

¹Allen Consulting Group, Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements (2002) 17

²(2001) 8 SCC 765

³Ministry of Health & Family Welfare, Economic Burden of Tobacco Related Diseases in India (2014) 15

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externality which cannot be managed effectively without prevention/reduction of access. In the case of the tobacco industry, tobacco products can cause irreparable damage to health are addictive, which makes prevention of consumption the most effective method of controlling tobacco consumption.

Accordingly, it is clear that the concept of vendor licensing for the purpose of regulating tobacco consumption is well-established in economic literature and has been successfully utilized by the government for regulation of other sectors.

2.2. HISTORY OF TOBACCO VENDOR LICENSING IN INDIA

The retail sale of manufactured tobacco has been regulated by Government through consolidated laws on sales tax and tobacco vend fee inter-alia authorizing a person to whom it is granted to sell or keep for sale by retail manufactured tobacco (i.e., cigarette, cigar, bidi, chewing tobacco, snuff), by granting license on payment of fee and period as prescribed and subject to such conditions and in such form and containing such particulars as may be prescribed. The laws further declared sale of manufactured tobacco, without license or in breach of any of the conditions subject to which the license has been granted a punishable offence leading to payment of fine and suspension and cancellation of license on conviction. Similar provisions were also prescribed under the pre-independence laws. The Municipal Corporation Acts of States/UTs also incorporated provisions making licensing mandatory for storing, processing and trading in tobacco products. The terms and conditions of issuing/suspension/revocation of licenses are fixed in exercise of power conferred by the Municipal Acts.

The State Municipal Corporation were also empowered under Section 24 of the Prevent of Food Adulteration Act of 1954, to grant license for distribution and sale of pan masala, pan, zarda, chewing tobacco, sweetened supari and allied products. The opening and closing hours and weekly holidays of tobacco retail shops is regulated under the Shops and Commercial Establishments Acts.⁵

2.3. BENEFITS OF TOBACCO VENDOR LICENSING

The benefits of tobacco vendor licensing are manifold and some of them are elucidated below:

I. Enforcement of Tobacco Control Laws: The terms and conditions for issuing/renewal/ cancelling licenses to the eateries/shops/hawkers can include conditions for strict enforcement of the laws regulating tobacco and its ancillary products such as, The Cigarettes and Other Tobacco Products (Prohibition of

⁵Madras Shops & Establishments Act 1947; Bombay Shops & Establishments Act 1948



Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, The Food Safety & Standards Act 2006, The Drugs and Cosmetics Act 1940, the Juvenile Justice (Care & Protection of Children) Act, 2015, The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, The Environment Protection Act, 1986, The Legal Metrology Act 2009, The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport,

Sale, Distribution, Storage and Advertisement) Act, 2019 and the enabling rules/regulations thereof. The aforesaid enactments include specific provisions that apply to tobacco vendors inter-alia prohibiting advertisement of tobacco products at their point of sale, except as prescribed by Rules, prohibiting sale of tobacco products to or by minors, prohibiting sale of tobacco products near educational institutions, prohibiting sale of tobacco products loose or in packages not containing the prescribed pictorial health warnings, prohibiting sale of food products having tobacco as an ingredient, prohibiting sale of tooth powder and tooth paste containing tobacco, prohibiting use of plastics material for packaging of tobacco in any form, prohibiting employment of minors in handling of tobacco, prohibiting sale of un-packaged tobacco products or sale in packages without mandatory declaration and prohibiting sale of electronic cigarettes etc.

ii. Exclusive Tobacco Shops: The terms and conditions of licenses can include a condition that the tobacco vendors shall exclusively sell tobacco products only and other goods/ articles especially those intended for children such as toffees, candies, cakes, chips etc., shall not be sold from the same shop or premise.

iii. Permanent or Semi-permanent tobacco shop: The terms and condition of licenses can include a condition that licenses shall be granted to only permanent or semi-permanent shops, thus restricting sale through mobile carts/kiosks, bars, restaurants etc.

iv. Reduce density of tobacco shops: The terms and condition of licenses can include a condition that licenses shall not be granted to shops in residential areas, near educational institutions and further envisaging a condition requiring population based minimum distance between tobacco retailers, to reduce the number and density of tobacco vendors.

v. Revenue Generation: Licensing of tobacco vendors can generate revenue for municipal bodies and state government to cover enforcement/administrative costs of the licensing system as well as other ancillary costs.

vi. Mapping of Vendors: Licensing of tobacco vendors will ensure availability of details of Business Premises/Location//Details of Business/Item of Trade, thus helping in mapping the tobacco trade for better regulation.

vii. Prevention of spread of infectious diseases: Licensing of tobacco vendors will

restrict the spread of infectious diseases like Covid-19 and other infectious diseases such as tuberculosis, hepatitis, influenza, etc., by easy monitoring of applied regulations for the containment of diseases. The tobacco vends are often used to facilitate tobacco use by providing lighters, matchbox, burnt thread, spittoons etc. The spitting of chewing tobacco and callous disposal of used cigarettes and bidi butts often leads to spread of infectious diseases such as Covid-19, tuberculosis, hepatitis, influenza, etc. Thus licensing of tobacco vendors can ensure that there is no use and disposal of tobacco products in and around tobacco vends.

viii. Prevention of Illicit Trade: Licensing of tobacco vendors will reduce illicit trade in tobacco products. This is also in compliance with WHO FCTC Article 15 and Protocol to Eliminate Illicit Trade in Tobacco Products, which India has ratified and therefore it has to adopt and implement measures including licensing, to control or regulate the production and distribution of tobacco products in order to prevent illicit trade.

Therefore, it is clear that tobacco vendor licensing has an established theoretical basis and history of usage, along with evidence that these policies have tangible benefits if implemented properly.

3. LEGAL OPPORTUNITIES FOR TOBACCO VENDOR LICENSING IN INDIA

Regarding the legal framework, tobacco vendor licensing has strong support from three aspects: India's existing legislations which seek to regulate tobacco distribution and consumption; central and state legislative instruments which specifically seek to implement vendor licensing schemes; and judicial pronouncements on vendor licensing.

3.1. STATUTORY BASIS FOR TOBACCO VENDOR LICENSING

The Central Government has enacted special laws or included specific provisions to regulate the production, distribution, sale and use of tobacco products, some of these are reproduced as below:

I. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, mandates, prohibition on smoking in public places,⁶ prohibition on direct and indirect advertisement of tobacco products, prohibition on sale of tobacco products

⁶*Murli S. Deora v. Union of India and Ors.* (2001) 8 SCC 765, Supreme court under Art. 32 of Constitution of India by way of writ petition as fundamental guaranteed under Art. 21 of our Constitution provide that no one shall be deprived of his life without due process of law. There is no reason why a nonsmoker should be troubled by number of diseases just because he has to visit public places. It is clear that he has been indirectly deprived of his right to life without process of law. Smoking is injurious to health and hence affects health of smoker but there is no proper cause why health of nonsmoker should be affected. Nonsmokers should not be compelled to become helpless victim of air pollution.



tominors, prohibition on sale of tobacco products near educational institutions and display of pictorial health warning on tobacco products packages. The Juvenile Justice (Care and Protection of Children) Act, 2015, prohibits giving to any child any tobacco products. There have been numerous cases where tobacco products were sold to children or near school premises.⁷ The offender will get imprisonment of seven years and a fine of Rs 1 lakh against the earlier fine of Rs 200 imposed under the Cigarettes and Other Tobacco Products Act (COTPA).⁸ With enactment of this act, India has become one of the nations who has imposed such a harsh penalty for selling to minors tobacco products.⁹ In case of *Akshay Chadha Vs State (NCT of Delhi)*¹⁰ petitioner seeks anticipatory bail in case filed under Sec. 77 of Juvenile Justice (Care and Protection of Children) Act 2015. In this case two children in conflict with law were produced before Juvenile Justice Board and stated that despite being juvenile they were allowed to smoke hookah at Keeva West Gate Mal. A raid was conducted on premise and two hookah packets and one packet of flavored tobacco was found and seized. From the statement recorded from children under Sec. 164 Cr.P.C. it is clear that premise was owned by petitioner and run under petitioner control and children were allowed to smoke tobacco hookah means tobacco was allowed to minor.

ii. The Environment (Protection) Act-1986, r/w the Plastic Waste Management (Amendment) Rules,2016,prohibitsuse of plastic material for storing, packing or selling gutka, panmasala and tobacco in all forms.

iii. The Food Safety and Standards Act, 2006 (FSS Act), read with Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulation, 2011, prohibits the use of tobacco and nicotine as ingredients in any food products and inter-alia prohibits the manufacture and sale of gutkha, pan masala (containing tobacco and nicotine) etc. The FSS licensing Regulations prohibiting handling of food items with tobacco. In case of *Joshy K.V. Vs State Of Kerala*, petitioner filed writ petition against respondent as respondent prevent him from supplying and selling tobacco product in Kerala saying it violate the provisions of Food Safety and Standards Act, 2006. Kerala high court state that tobacco and other products containing tobacco are not food under Sec. 3(1)(j) of Food Safety and Standards Act, 2006 and also it is not

⁷See also *Muhammedkutty v. State of Kerala* (2017 SCC OnLine Ker 29688); *Riyas v. State of Kerala* (2017 SCC OnLine Ker 29900); *Jayakumar v. State of Kerala* (2018 SCC OnLine Ker 4989); *Abdul Azeez v. State of Kerala* (2018 SCC OnLine Ker 14529); *Vijayappan v. State of Kerala* (2020 SCC OnLine Ker 3300)

⁸Tabassum Barnagarwal, 'Amended Juvenile Justice Act makes tobacco sale to minors punishable'*Indian Express* (Mumbai, 22 January 2016) <<https://indianexpress.com/Art./cities/mumbai/amended-juvenile-justice-act-makes-tobacco-sale-to-minors-punishable/>> accessed 17 October 2020

⁹Pankaj Chaturvedi, 'Juvenile Justice Act: India is the only nation to impose harsh penalty on sale of Tobacco to minors'*First Post* (16 January 2016) <<https://www.firstpost.com/india/juvenile-justice-act-india-is-the-only-nation-to-impose-harsh-penalty-on-sale-of-tobacco-to-minors-2586786.html>> accessed 17 October 2020

¹⁰FIR No. 690/2017.

food products as given in regulation 2.3.4 of Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. Therefore, court held that respondent has no right to take action under Food Safety and Standards Act, 2006 against petitioner for selling tobacco products as it is manufactured and sold in accordance with provision of COTPA Act 2003. The Drugs & Cosmetics Act, 1940, r/w notification GSR 443(E)/ 444(E), dated 30th April, 1992, prohibits the use of tobacco in tooth-pastes/tooth-powders and the sale, supply, import, manufacturing and trade of nicotine for human consumption in India is only permitted under "Schedule K" of "Drugs and Cosmetic Rules, 1945" as an aid for nicotine replacement therapy (NRT). The Legal Metrology Act r/w the Legal Metrology (Packaged Commodities) Rules, 2011: prescribes mandatory declaration for packaged commodities including tobacco products, such as details of manufacturers, importers etc. As noted by the Supreme Court in *State of Telangana Vs Himajal Beverages*,¹¹ the declarations under Sec. 18 of the LM Act 2009 r/w Rule 6(1) and 6(2) of the LMPC Rules 2011 are mandatory and the manufacturer must comply with these directions.

iv. The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, prohibits the engagement of children in all occupations and prohibits the engagement of adolescents in hazardous occupations and processes. Beedi-making or processing of tobacco including manufacturing, pasting and handling of tobacco in any form, is included as hazardous occupations or processes

in the Schedule to the Act. The children working in tobacco farms may cause an immediate health risk and fall sickness due to absorption dermal nicotine from the green leaves of tobacco plant.¹² They may also face variety of hazardous exposures, including long hours, lacerations and piercings from equipment, chemicals, heavy lifting, climbing, and extreme weather conditions.¹³

v. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) (Amendment) Acts, State Governments of Gujarat, Punjab, Rajasthan and Maharashtra have amended COTPA, by including provisions prohibiting opening and running of hookah bar.

vi. The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019, prohibits production, manufacture, import, export, transport, distribution, storage, sale and

¹¹Writ Appeal No.985/2018

¹²N. Lecours, G. E. G. Almeida and J. M. Abdallah et al., 'Environmental health impacts of tobacco farming: A review of the literature' (2012) 21 *Tobacco Control* 191, 196

¹³Human Rights Watch, *Tobacco's Hidden Children: Hazardous Child Labor In The United States Tobacco Farming* (2014)



advertisements of Electronic Cigarettes. The High of Delhi in *Seema Sehgal Vs Union of India* held that comprehensive ban on the manufacture, import, sale, distribution, storage and advertisement of e-cigarettes throughout India is imperative and in the public interest.

3.2. CENTRAL GOVERNMENT ADVISORY ON TOBACCO VENDOR LICENSING

i. The Ministry of Health & Family Welfare, Government of India, vide Advisory No.P-16012/14/2017-TC, dated 21st September 2017 to all States/UTs, referred to the tobacco control laws as means to achieve improvement of public health enshrined in Article 47 of the Constitution of India. The Advisory further stated that the regulation of tobacco products can be more effectively achieved by developing a mechanism to provide permission/authorization through Municipal/ Local Authority to the retail shops of tobacco products with a condition/ provision in the authorization that the shops authorized for selling tobacco products can not sell any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., which are essentially meant for children.

ii. The Ministry of Housing & Urban Poverty Alleviation, Government of India, vide Advisory D. No.N-11025/41/2018-LSG, dated 25th September 2018 to all States/ Uts/ Urban Local Bodies, referred to the Ministry of Health & Family Welfare, Government of India, dated 21st September 2017 and inter-alia advised the States/UTs/Urban Local Bodies, to take the following action:

a) A mechanism may be developed to provide permission/authorization/vendor license through Municipal/Local Authority to the retail shops selling tobacco products. This will help in compliance with all the applicable tobacco control laws at the retail level and will also generate revenue for Municipal Bodies to cover the enforcement of licensing system and for public health.

b) It may be ensured that the tobacco products are stored/ sold only through authorized shops/ retail outlets/ kiosks authorized under the Municipal Acts and Rules which have valid TIN/PAN/GSTNo.

c) Further, it would also be appropriate to make a condition/provision in the authorization that the shops authorized for selling tobacco products cannot sell any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., which are essentially meant for non- tobacco users especially children.

d) State Government Specific Acts for Regulation of Retail Business of Tobacco Products and State Municipal Acts to Regulate Trade in Tobacco Products

3.3. MUNICIPAL LAWS

Various State Governments issued notifications, orders, rules under their local or Municipal or Panchayat Acts to regulate tobacco trade by using provisions that

prescribed compulsory licensing and incorporated conditions for compliance with tobacco control laws.

i. Kerala Panchayat Raj Act, 1994: The Kerala Government has notified, tobacco storing, processing, making and selling as offensive or dangerous to human life, health and property under the Kerala Panchayat Raj (Issue of License to Dangerous & Offensive Trades and Factories) Rules, 1996. Thus, mandating compulsory licensing under Section 232 of the Kerala Panchayat Raj Act, 1994.

ii. The Mumbai Municipal Corporation Act: The Mumbai Municipal Corporation issued Circular dated 4th July, 2011, inter-alia incorporating conditions for compliance with COTPA, 2003, under Section 394 of the Mumbai Municipal Corporation Act.¹⁴

iii. Bihar Municipal Act, 2007: The Municipal Commissioner of Patna, in terms of Government of India, advisory dated 21st September 2017 and in exercise of power conferred by section 342 read with entry 324 of the schedule, and section 30 (6) of the Bihar Municipal Act, 2007, passed an order dated 02.11.2017, directing that, there will be no storing, packing, pressing, cleansing, preparing or manufacturing by any process whatsoever and any kind of trade in tobacco products without permission/authorization/license under the Bihar Municipal Act, 2007, further the retail shops authorized/licensed for selling tobacco products will comply with the provision of the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulations of Trade and Commerce Production, Supply and Distribution) Act 2003 and Rules, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Food Safety & Standards Act, 2006 and Regulations and not sell tobacco products loose and any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., to protect children from the exposure to tobacco products.¹⁵

iv. Jharkhand Municipal Act, 2011: The Municipal Commissioner of Ranchi, in terms of Government of India, advisory dated 21st September 2017 and in exercise of power conferred by section 455 read with entry 187 of the schedule, of the Jharkhand Municipal Act, 2011, passed an order dated 25.04.2018, directing that, there will be no storing, packing, pressing, cleansing, preparing or manufacturing by any process whatsoever and any kind of trade in tobacco products without permission/

¹⁴Section 394 of the Mumbai Municipal Corporation Act mandates that except under and in accordance with the terms and conditions of the license granted by the Commissioner, no person shall keep or use upon any premises, any article, carry any trade, process or operation, which is dangerous to life, health or property, or likely to create a nuisance.

¹⁵Section 342 of the Bihar Municipal Act 2007 read with entry 324 of the Schedule of the Act, mandates that a premise may not be used for the purposes of storing, packing, pressing, cleansing, preparing or manufacturing by any process whatsoever, tobacco (including snuff, cigar, cigarette and bidi) without a license or written permission.



authorization/ license under the Jharkhand Municipal Act, 2011, further the retails shops authorized/licensed for selling tobacco products will comply with the provision of the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulations of Trade and Commerce Production, Supply and Distribution) Act 2003 and Rules, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Food Safety & Standards Act, 2006 and Regulations and not sell tobacco products loose and any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., to protect children from the exposure to tobacco products. Subsequently other Municipal Councils of the State issued similar orders.¹⁶

v. Rajasthan Municipalities Act 2009, in exercise of power conferred by section 282(1) read with sections 269/340, passed an order dated 04.01.2018, directing that, there will be no storing, processing, distribution and sale in tobacco products without permission/authorization/license under the Rajasthan Municipal Act, 2009, further the retails shops authorized/ licensed for selling tobacco products will comply with the provision of the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulations of Trade and Commerce Production, Supply and Distribution) Act 2003 and Rules, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Food Safety & Standards Act, 2006 and Regulations and not sell tobacco products loose and any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., to protect children from the exposure to tobacco products.

vi. Uttarakhand Municipal Act 1959, in exercise of power conferred by section 2(46)¹⁷ read with sections 114¹⁸ /437¹⁹/438 passed an order dated 03.12.2019, directing that, there will be no storing, processing, distribution and sale in tobacco products without

¹⁶Section 455 - Premises not to be used for non-residential purpose without municipal license - No person shall use, or permit to be used, any premises for any of the non-residential purposes mentioned in the Schedule without or otherwise than in conformity with the terms of a license granted by the terms of a license granted by the Municipal Commissioner or the Executive Office. Entry 187: Tobacco (including snuff, cigar, cigarette and bidi) - storing, packing, pressing, cleansing, preparing or manufacturing by an process whatsoever.

¹⁷Sec.2(46) Uttarakhand Municipal Act 1959 -defines nuisance includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance, or offence to the sense of sight, smell or hearing or which is or may be dangerous to life or injurious to health or property;

¹⁸Sec.114, Uttarakhand Municipal Act 1959- Obligate the Municipal Corporation to regulate and abatement of offensive and dangerous trades callings or practices including prostitution.

¹⁹Sec. 437, Uttarakhand Municipal Act 1959 - If the municipal commissioner is satisfied that any person uses or intends to use as a factory or other place of business for the manufacture, storage, treatment or disposal of any article by reason of such use or by reason of such intended use, occasion or is likely cause a public nuisance defined under Sec 2 (46) within the limits of the city by notice desist or refrain from using or allowing to be used such places for such purpose or only to use, or allow to be used, the building or place for such purpose under such conditions or after such structural alterations as the Corporation imposes or prescribes in the notice with the object of rendering the use of the building or place for such purpose free from objection.

permission/ authorization/ license under the Uttarakhand Municipal Act, 1959, further the retail shops authorized/licensed for selling tobacco products will comply with the provision of the Cigarettes and other Tobacco products (Prohibition of Advertisement and Regulations of Trade and Commerce Production, Supply and Distribution) Act 2003 and Rules, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Food Safety & Standards Act, 2006 and Regulations and not sell tobacco products loose and any non-tobacco products such as toffees, candies, chips, biscuits, soft drinks etc., to protect children from the exposure to tobacco products.

vii. Uttar Pradesh Act of 1959: The Municipal Commissioner, Lucknow under rights conferred in sections 437²⁰, 438(1)D(2)²¹, 541²², 542 and 543 of the Uttar Pradesh Municipal Corporation Act 1959, passed an order dated 22.11.2019 publishing the Lucknow Municipal Corporation (Determination, Regulation and Control of License Fee for Sale of Tobacco Products and License Fee) By-Law 2019. It prohibits the sale of tobacco products without license and prohibits sale of other products along with tobacco products.

viii. West Bengal Municipal Act 1993: The Office of District Magistrate of Purba Bardhaman, Darjeeling, Kalimpong, Nadia, Purulia etc., requested the Municipal Authority to provide vendor license to all vendors selling tobacco products under Schedule II of Section 201 of the West Bengal Municipal Act, 1993, which states tobacco can not be stored or sold without license or written permission in the municipal areas of West Bengal.

ix. Karnataka Municipalities Act 1976, in exercise of power conferred in Sec. 325 of the Karnataka Municipalities Act 1976 which reads as power of government to make bye-laws on any of the matters enumerated in Section 324, passed a notification dated 31.12.2020 wherein it published the draft Karnataka Municipalities (Regulation and inspection of places used for sale of cigarettes and other tobacco products) Model Bye-Laws 2020 and the draft Karnataka Municipal Corporations (Regulation and inspection of places used for sale of cigarettes and other tobacco products) Rules 2020.

x. The Himachal Pradesh Prohibition of Sale of Loose Cigarettes and Beedis and Regulation of Retail Business of Cigarettes and Other Tobacco Products Act, 2016,

²⁰Sec. 437: Regulation of Offensive Trade-

²¹Sec. 438: Certain things not to be kept, and certain trades and operations not to be carried on without license

²²Sec. 541: Bye-laws for what purpose to be made: The Municipal Corporation has empowered to make bye-laws with respect to any trade or operation which is dangerous to life or health or property or likely to create a nuisance either from its nature or by reason of the manner in which or the conditions under which, the same, is or is proposed to be carried on.



this Act makes registration for carrying retail business of any tobacco products compulsory and further prescribes imprisonment and payment of fine for violation of the provision.

3.4. JUDICIAL ORDERS ON TOBACCO VENDOR LICENSING

The following judicial decisions/orders also provide for regulation of tobacco retail business and its use through licensing:

i. *Dr. Kaustubh Dadhich Vs The State of Rajasthan & Ors.*²³ The Hon'ble Rajasthan High Court vide order dated 20.09.2017 held that licensee of the kiosk who have been permitted to sell dairy products and food articles should strictly adhere to the terms of the license and not sell any tobacco product, be it in the shape of cigarette, bidi or gutkha pouches. The writ petition was disposed off with issuance of directions to the respondents to ensure that the licensees of the kiosk would sell products strictly as per the license and should there be any violation, action to cancel the license of the licensee would be taken.

ii. *Court On its Own Motion Vs State of Himachal Pradesh & Others*²⁴ The Hon'ble Himachal High Court vide judgment and order dated held on 6th November, 2018, dealt with the provisions of the Himachal Pradesh Prohibition of Sale of Loose Cigarettes and Beedies and Regulation of Retail Business of Cigarettes and Other Tobacco Products Act, 2016, (hereinafter referred to as the State Act), which made registration for carrying retail business of any tobacco products compulsory and further prescribed imprisonment and payment of fine for violation of the provisions. The Court opined: "As is evident from the record, the State Act of 2016 was brought into force only during the pendency of this petition and the same needs to be implemented in letter and spirit. No retailer of tobacco products which is not registered with the registering authority as notified by the state government vide notification dated 30.8.2018 should be allowed to sell distribute or store tobacco products. Such retailers if found violating the provisions of COTPA should be dealt strictly, regular inspections for sensitization of retailers as well as general public including school children should be resorted to, incentives to those who challan the defaulters shall be in the form of reward which shall be a part of fine levied."

iii. *Crusade Against Tobacco Vs Union of India Public Interest Litigation*,²⁵ The Bombay High Court directed the Bombay Municipal Corporation to incorporate necessary terms and conditions in the licenses of eating houses, including existing licenses, to provide

²³CWP No. 5131/2016

²⁴2018 Indlaw HP 2206

²⁵PIL No. 111 of 2010

that licensees shall comply with COTPA, 2003 and the Rules made thereunder and breach of the said condition shall entail cancellation/suspension of license. Subsequently BMC issued a Circular under Section 394 of the Mumbai Municipal Corporation Act inter-alia including conditions in compliance with COTPA 2003 and the Rules made thereunder.

iv. *Fariyaad Foundation Vs Government of Jharkhand & Ors.*,²⁶ The High Court of Jharkhand in the PIL vides its judgment order dated 15th January 2021, directed the State Government as well as Deputy Commissioners and Senior Superintendent of Police/ Superintendent of Police of each and every districts of the State to comply with order dated 12.01.2021, inter-alia mandates that there is no sale of tobacco products without authorization/license issued under the Jharkhand Municipal Corporation Act 2011 for one year from the date of issuance of the order. Further, the terms and conditions of the license shall also envisage the tobacco products will not be sold with food articles including Pan Masala and shall comply with the tobacco control provisions envisaged under the COTPA 2003 and Rules, the Juvenile Justice (Care and Protection of Children) Act 2015, the Food Safety & Standards Act 2006 and its Regulations.

Therefore, it is clear that there is a clear move towards adopting tobacco vendor licensing schemes in the Indian legal framework at various levels of central and state implementation.

4. Global Best Practices on Tobacco Vendor Licensing

Tobacco vendor licensing has been utilized in other jurisdictions as well. For the purpose of analyzing global best practices, this report discusses the tobacco vendor licensing schemes in Australia, Canada and USA. It must be noted that as there is no uniform policy in these countries, the practices followed in various regions of these nations are highlighted below:²⁷

- i. Licenses are required by all retailers and wholesalers.
- ii. The license only applies to specified premises and it must be prominently displayed to the public.
- iii. Licenses are not transferable.
- iv. For violation of the tobacco vendor licensing scheme, penalties are imposed through monetary fines and cancellation & suspension of license.

²⁶W.P. PIL No. 954 of 2019

²⁷Public Health and Tobacco Policy Center, Tobacco Retail Licensing: Promoting Health Through Local Sales Regulation (2017) 30-36; Non-Smokers' Rights Association, Reducing The Availability Of Tobacco Products At Retail: Policy Analysis (2011) 39-56.



5. Salient Features of a Model Vendor Licensing Law

Based on the existing laws in India and global best practices, the salient features of a model vendor licensing law would involve the following:

- i. All tobacco vendors, whether retailers or wholesalers, should have a license.
- ii. All tobacco vendor license shall be valid for a 12-month period, should be non-assignable or transferable and must be renewed annually.
- iii. All applicants for the purpose of obtaining a license, must comply with the tobacco control laws. The compliance of tobacco control laws should be treated as the minimum operational standards.
- iv. All applicants for the purpose of obtaining a license, must confirm that they have read, understood and agreed to abide by all applicable laws regarding the sale of tobacco products.
- v. All applicants for the purpose of obtaining a license, must confirm that they are not an affiliate of tobacco industry.
- vi. All tobacco wholesalers should be allowed to sell only to licensed retailers and wholesalers.
- vii. All tobacco suppliers must provide a list of the vendors to whom they are supplying tobacco products to the regulatory authority.
- viii. All tobacco retailers should be allowed to purchase tobacco products from licensed wholesalers only.
- ix. All tobacco license should be applicable to a particular venue.
- x. All tobacco license should be displayed prominently at each premises which is engaged in sale of tobacco products.
- xi. The license fees for acquiring the license should be appropriately determined to recover only the costs associated with:
 - (a) The administration of the licensing scheme
 - (b) The enforcement of licenses, which includes inspections and compliance checks
 - (c) The provision of information about licensing to consumers and the public
 - (d) The provision of information about licensing to applicants and licensees
- xii. The tobacco license should be given to vendors exclusively selling tobacco products and sale of non-tobacco products such as toffees, candies, biscuits, chips etc., with tobacco products shall be prohibited.
- xiii. The licensee must have a valid TIN/PAN/GST Number.

xiv. The penalty for contravention of terms and condition of license should be gradual with imposition of fine, followed by suspension of license and eventually cancellation of license.

Every existing tobacco vendor licensing scheme in India must be evaluated through this standard and any future policies should incorporate the same, in order to be effective in meeting the goal.

6. VENDOR LICENSING - PRACTICE & PROCEDURE

As a regulatory tool, vendor licensing facilitates better implementation of local, state, and federal laws concerning tobacco control. Therefore, it is important that the government should adopt a systematic process to effectively implement this policy. Although, in an evolving policy instrument such as tobacco vendors licensing, the process can go back and forth, a broad framework of the process can still be outlined, as given below.

6.1. BASE LINE SURVEY

The main goal of baseline survey is to conduct a community environmental assessment of the tobacco vendors for the implementation of licensing policy in a particular jurisdiction. Baseline is important for building a database, a reference for the purpose of monitoring, as well as creating awareness about the density and severity of tobacco availability. This also helps in mobilizing citizens for tobacco control. Baseline survey data has been effectively used to sensitize decision makers in favour of adopting and implementing a tobacco vendor licensing policy.

The Key Information Points in baseline survey include: Number (and density) of tobacco vendors; distance between tobacco vendors; location of tobacco vendors, type of business that sell tobacco, types of tobacco products for sale, and other tobacco control provisions, including COTPA 2003 (such as ban of sale by minors; ban on TAPS including product display, ban on sale of singles cigarettes, mandate health warning labels).

6.2. NOTIFICATION FOR START OF ISSUING VENDOR LICENSING

Once the vendor licensing policy is adopted or announced, a formal notification for initiating the issuance of licenses for tobacco vendors needs to be issued. Ideally, there should also be a Gazette notification so that the vendor licensing policy/order gets formally included in the legal and governance architecture of the state. After gazette notification, it would be hard for the tobacco industry or its front groups to lobby to get it reversed.

In most of the case where vendors licensing has been systematically adopted and implemented, the notification for vendor licensing was done in 2 stages: the first notification expressing and declaring the intent of the concerned authority to adopt



the vendor licensing policy, the second notification delineating the rules and/or implementation guidelines. The time lag between the two notifications has been significantly longer, requiring consistent efforts with the concerned government officials to move and conclude the process.

6.3. PRINTING OF REGISTRATION FORM, A) OFFLINE; B) ONLINE

As part of the preparatory process, the required forms for vendor licensing registration should be printed well in time. Now that, lot of similar forms for other licenses are put up online, vendor licensing registration form could also be made available both online and offline.

6.4. APPOINTMENT OF NODAL OFFICER/ ENFORCEMENT OFFICER WITH IN MUNICIPAL CORPORATION

Since issuing licenses is going to be a large exercise, especially in the initial days/months, it would need a dedicated officer within Municipal Corporation, as Nodal Officer, the person that people - vendors as well as TC advocates or public at large - with issues in vendor licensing could go to and get redressal. Something what Lucknow Municipal Corporation has done.

6.5. AWARENESS AND DISSEMINATION CAMPAIGN

Simultaneous to the steps 3 & 4, comprehensive awareness and dissemination need to happen. When this policy gets to the stage of implementation, it is quite likely that the tobacco industry, possibly through its front groups, will start disinformation campaign and try to thwart the whole exercise. The government/municipal corporation should pre-empt this, and pro-actively reach out to public at large about the value and necessity of tobacco vendor licensing.

6.6. SCRUTINY OF APPLICATION FORMS AS PER THE CRITERIA

The next cumbersome exercise will be scrutiny of received applications based on the criteria laid in the vendor licensing policy. Different states and/or municipal corporations will complete this exercise based on their capacities. One has to keep in mind the time-sensitivity, as vendors would make noises about the delay. To deal with the initial workload, Municipal Corporation could seek help of trained volunteers from civil society organizations, colleges, or universities to assist its officers.

6.7. GRANT OF LICENSE AS PER CRITERIA

Granting of licenses as per the criteria is the next step. These are also times, when states, through municipal corporations, are putting in place vending policies in general. The granting of tobacco licensing needs to be in alignment with vending policy.

6.8. MONITORING THROUGH SQUADS

Along with all possible facilitative measures to get the policy going for vendors, the policy will have to be effectively monitored and enforcement. And one of the most potent ways to do this is through enforcement squads, especially in initial years to bring the message to the vendors that provisions and issuance of license is being tracked. Municipal Corporation bodies are already quite experienced in undertaking such steps.

6.9. MONITORING AND SUSTAINABILITY

It is suggested to constitute an advisory committee comprising of representatives from different departments and civil society organization which shall meet quarterly. Ideally, the committee should be headed by Municipal Commissioner, and meet at least every quarter. Once the policy has been implemented, it is also important to monitor compliance through another round of data collection through endline survey.

7. CONCLUSION

Licensing of tobacco vendors or sellers is essential to protect consumers from misconstrued notion about the harms of tobacco and to ensure public safety and public health. Tobacco is the single largest preventable cause of premature death, disease and disability in India. Thus, the harm caused by tobacco clearly justifies the need for strict regulatory schemes through vendor licensing. The adoption of licensing of tobacco vendors will facilitate enforcement of tobacco control policies and measures.

As it is an innovative policy, tobacco vendor licensing does not have many precedents, and therefore has faced several challenges across states and municipalities. Two major challenges, which have slowed down the process of both adoption and implementation the policy include tobacco industry pushback manifesting in different ways, and disadvantage of being a starter without precedence and consequent lack of understanding among decision makers.

Since the vendor licensing will have far reaching consequences in tobacco use, the tobacco industry has tried all possible tricks to thwart the policy. Some of these methods include;

"Aligning with small traders and vendors associations to get them visibly engaged in creating a counter narrative,

"Reactive arguments such as loss of livelihood pushed in media,

"Building support among the public and policymakers using livelihood argument.



As experienced by several law making and enforcement processes, tobacco industry pushback can manifest in several ways - protests through farmers groups, vendors raising the bogey of livelihood loss, lobbying by tobacco manufacturers, and several other interest groups such as bidi workers.

The second challenge has meant that process of policy passage has invariably been a protracted one, with shifting responsibility from one government department to another. Additionally, the public representatives in general are very apprehensive of the impact of vendor licensing policy on their voters' base, as the livelihood arguments can be misused and camouflaged as 'license raj' etc. In two cities, where the implementation has been put through a proper process of notification and gazette, it has taken nearly 2 years from the first notification and the actual implementation after the rules and/or guidelines for vendors licensing started.

To address these challenges, the authorities, Municipal Corporations, or the State Government supported by tobacco control community need to be able to anticipate these challenges, wherever possible open channels of communication with perceived affected groups such as tobacco vendors and their associations to sensitize them about the real issues involved and create a counter narrative with the help of sensitized vendors and media. For ex., in Lucknow, to build a new narrative, research studies were conducted indicating that it was possible for vendors to choose between selling tobacco and non-tobacco products. For majority of vendors tobacco products were not the main source of revenue, and for some where tobacco products were important source of revenue, they could forgo other products such as toffee, candy, cold drinks etc.