

Legal Regime of Advertisement in Bangladesh and Protection of Consumers

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Abstract

Advertisement is an action through which enterprises communicate. The content of the advertisement of a business enterprise offers a signal that provides information about the products or services of that enterprise to their consumers. As the advertisers themselves decide on the content of advertisements, consumers take information that is provided through advertisements with a "grain of salt." As a result, it should be a concern to determine how consumers interpret advertisements and to evaluate how they are affected by advertising. Here is the scope of violation of consumer rights by misleading, false or exaggerated advertisement. The protection of consumer rights is crucial in case of advertisement by the business enterprises. Apart from the Constitutional provisions, Bangladesh also has a few specific consumer protection legislations which are 'inadequate' and 'scattered'. Even the recently enacted Consumer Rights Protection Act, 2009 has not recognized this aspect of consumer rights fully. This study aims at finding out the loopholes of the existing laws of Bangladesh on consumer rights in case of advertisement and to give proper suggestions thereof.

Keywords : Advertisement, Consumer Protection, Consumer Policy.

1.0 Introduction

Advertisement is a communication process, a marketing process, an economic and social process, a public relations process, or an information and persuasion process through which enterprises communicate to their consumers. It involves a variety of contents (e.g., specific product details, quality signaling, product comparisons and image enhancement) and media (e.g., television, radio, internet, print, product packaging, and direct marketing). The information that is communicated may relate to the price of a product, weight, ingredients or other product characteristics. Information about product quality may be very direct or implied, i.e., it may be signaled by association with other things, including the price of the product or particular people. In fact, a firm's decision to advertise may offer a signal that provides information beyond the content of the advertisement. As the advertisers themselves decide on the content of advertisements, consumers take information that is provided through advertisements with a "grain of salt." As a result, it should be a concern to

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determine how consumers interpret advertisements and to evaluate how they are affected by advertising. Here is the scope of violation of consumer rights by misleading, false or exaggerated advertisement. The protection of consumer rights is crucial in case of advertisement by the business enterprises.

2.0 Advertisement and Consumer Rights

Proper implementation of laws by the Governments of the developed countries protects their consumers from violation of their rights (United Nations Guidelines for Consumer Protection, 2003) [1] by the business enterprises. (Advertising Standards Authority, n.d.) [2] All the business activities especially advertisements are required to disclose detailed information about products and services, particularly in areas where safety of public health is an issue, such as food. Marketing is a systematic planning, implementation and control of a mix of business activities intended to bring together buyers and sellers for the mutually advantageous exchange or transfer of products. (Lake, n.d.) Advertisement is an important component of the marketing process. It is the part that involves getting the word out concerning one's business, product, or the services one is offering. It involves the process of developing strategies such as advertisement placement, frequency, etc. Advertisement includes the placement of an advertisement in such mediums as newspapers, direct mail, billboards, television, radio, and of course the Internet. Advertisement is the largest expense of most marketing plans, with public relations following in a close second and market research not falling far behind.

Decisions relating to advertisement of a business enterprise are influenced and shaped by a variety of factors, such as – demographical, economical, social, cultural, technological, political and legal. (Kotler, 1988, p. 132) Moreover, legislation at all levels exercises more influence on the advertisement activities of an organization than on any other phases of its operations. (Stanton & Futrell, 1987, p. 28) Advertisement legislations have been increased steadily over the years owing to a number of reasons which constitute the purposes to protect enterprises from unfair competition, protect consumers from unfair business practices and protect the larger interests of society against unbridled marketing behavior specially in case of advertisement. (Kotler, 1988, p. 148)

Unlike the developed countries, Bangladesh has yet to achieve the standard level in respect of protecting her consumers by the advertisement activities of the business enterprises. Apart from the Constitutional provisions, Bangladesh also has a few specific consumer protection legislations which are 'inadequate' and 'scattered'. Even the recently enacted Consumer Rights Protection Act, 2009 has not recognized this aspect of consumer rights fully.

2.1 What is an advertisement?

There is hardly a single generally accepted definition of advertising. Instead, there are several ways to define it. In brief, advertisement is the paid, impersonal, one-way marketing of persuasive information from an identified sponsor disseminated through channels of mass communication to promote the adoption of goods, services or ideas. William F. Arens and Courtland L. Bovee have defined advertisement by the following way, (Arens & Bovee, 1994, p. 6)

Advertising is the nonpersonal communication of information, usually paid for and usually persuasive in nature, about products (goods and services) or ideas by identified sponsors through various media.

The practice of advertising law among the various legal systems is generally understood to include

- i. contests, coupon and premium promotions and other such offers;
- ii. television, radio and print advertisement;
- iii. direct mail and telemarketing issues;
- iv. films, stage shows, websites, billboards, posters, wall paintings, human billboards, flyers, rack cards, the back of event tickets mobile phone screens; etc.

Laws require the specific product details, product comparisons, image enhancement, quality signaling, pricing, ingredient details, warning etc. to ensure the safety of the consumers as well as to protect their relevant rights.

2.2 Importance of the Protection of Consumer Rights in Advertisement

The term 'consumer' is used in different senses. The declaration made by former US President John F. Kennedy in 1962 outlined only four basic consumer rights: (Our Rights, Our Mission, n.d.) [3] (1) the right to safety; (2) the right to be informed; (3) the right to choose; and (4) the right to be heard. Worldwide consumer movement led by Consumers International (CI), a global federation of over 250 consumer organizations, added four more rights: (5) the right to satisfaction of basic needs; (6) the right to redress; (7) the right to education; (8) the right to a healthy environment. Together these eight rights form the basis for current consumers' movement worldwide." Now-a-days, consumer rights include more sectors like banking, telecommunication etc.

A consumer right is considered as a basic human rights as part of right to life. Like many European countries, Spain has already inserted 'consumer rights' in

their constitution for giving special preferences. Article 51 of the Constitution of Spain (Cuatrecasas Gonçalves Pereira, n.d.) embodied the concept of consumer right by the following wordings –

“1. The public authorities must guarantee the protection of consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures.”

“2. The public authorities must inform and educate consumers and users, foster their organizations, and shall be concerned about those issues brought in by consumers which could affect them under the terms which the law shall establish.”

“3. Within the framework of the provisions of the above paragraphs, the law will regulate domestic commerce and the system for licensing commercial products.”

If we analyze the provisions, we can conceptualize the modern trend of consumer protection. In other words, recent legal frameworks regarding ‘consumer rights’ include the following matters–

1. Consumer rights must ensure the safety and health of the consumers.
2. The economic interests of the consumers are to be established.
3. Right to information and education are to be ensured.
4. Proper legal framework has to be developed to recognize the rights and make available remedies in case of infringement.

So, the right of a consumer must be seen through the mirror of economic progress. A consumer right includes a ‘bundle of rights’ and is a ‘package’ to ensure security and safety in life. Advertisement involves a variety of content (e.g., specific product details, quality signaling, product comparisons and image enhancement) and media (e.g., television, radio, Internet, print, product packaging, and direct marketing). The information that is communicated may relate to the price of a product, weight, ingredients or other product characteristics. Information about product quality may be very direct or implied, i.e., it may be signaled by association with other things, including the price of the product or particular people. As the advertisers are the sole decision makers regarding the contents of advertisements, it should be a concern to determine how consumers interpret advertisements and to evaluate how they are affected by advertising. Here is the scope of violation of consumer rights by misleading, false or exaggerated advertisement. Thus the protection of consumer rights is crucial in case of advertisement by the business enterprises.

The importance of the protection of consumer rights carries a great value towards humanity. To ensure security and safety of life as well as economic condition of the consumers, the consumer rights protection related Laws should be effectively enforced. Effective enforcement of consumer rights shall have impact widely on economic progress in national and international level.

3.0 Laws and Policies in Bangladesh to Consumer Rights in Advertisement

The Constitution of Bangladesh recognizes 'right to life' as a fundamental right that indirectly protects consumer rights. The constitution also states that it is the fundamental responsibility of the State to ensure the basic necessities of life, including food, clothing, shelter, education and medical care with special regard to public health and morality. (The Constitution of the People's Republic of Bangladesh of 1972, Article 15)

In Bangladesh a lot of laws are prevailing on consumer rights that aim to ensure safe products and security in service. But very few of these laws ensure the protection of consumers by advertisement of the business enterprises.

a. Consumer Rights Protection Act, 2009

The right of a consumer has got recognition by the Government only in 2009 with the enactment of the "Consumer Rights Protection Act, 2009." Before the enactment, a set of consumer rights were mentioned in different Laws in a fragmented way. According the section-2 (19) of the Act, consumer is a person who hires or purchases a product or service for his own use or for the use of someone with his consent without any commercial purpose except a living by self-employed.

So, in Bangladesh, consumers can be divided into two types:

(i) service consumer; and (ii) product consumer.

In negative sense, a list of consumer rights can be found from the explanation of the term 'acts against consumer rights' under the section 2 (20). Under this section, deceiving any person by false and untrue advertisement with the purpose of selling any product or service has been defined as the violation of consumer rights. (The Consumer Rights Protection Act of 2009, section 2(20) (D)) And if any person deceives the general customers with the purpose to sell his product or service by untrue or false advertisement shall be punished with imprisonment for a term not exceeding one year, or with fine not more than 2,00,000 taka or with both. (The Consumer Rights Protection Act of 2009, section 44) But the Act is silent regarding the list of activities which constitutes 'deceiving' the consumers. Again, the punishment and imprisonment are not enough to deter the individuals and enterprisers from using of false and untrue

advertisement. The most crucial point is that there is no compensation option for the infringed consumer.

b. Contract Act 1872

The law of contract has developed as a result of increased complexity of commercial transactions. Until the 17th century, dispute between parties in the exchange of goods or services could be addressed only under tort law. However, as commerce increased and the range of products and services expanded, the need for specific law dealing with contracts became apparent, and the case law of contracts began to develop. The law of contract can be viewed as harsh and individualistic; however, not always addressing those issues seen as significant to the public good. As a result, governments have developed statute to address matters such as consumer purchases, residential rental agreements, and ownership of copyright, patents, or trademarks. The statute has been developed in the public interest, in order to afford protection for individuals against potentially more powerful business interests.

When parties intend to enter legal agreements, and meet certain criteria in the process of defining the nature of such agreements, contracts are formed. A contract is a process of negotiation of private rights and obligations between parties to a contract. These agreements may be written or verbal, or may be completed through actions of the parties involved. Individuals form contracts when they undertake common consumer transactions, whether as buyers or sellers, lessors or renters. The purpose of the law of contracts is to protect the reasonable expectations of the parties involved in an agreement, through application of contract law, and to provide an avenue for dispute settlement according to the rule of law. Under common law, only parties to a contract are entitled to contractual rights. This being so, the underlying assumption under common law is that contract is entered between two negotiating parties with equal bargaining strength. As commercial transactions increased in volume and complexity, the need to recognize a legal relationship in the exchange of goods and services became more apparent.

The Contract Act, 1872 which has codified the law regarding contract has contributed to the development of consumer law. It can also be said to have provided consumer protection in a nascent form. For instance section 14 defines "free consent" as the one without fraud, misrepresentation etc. This provides an opportunity to make a claim that contract is invalid. However this option is available to buyer (consumer) or seller. Consumer laws have made such an option more prominent with an express recognition of the same. It is mentionable that there is no specific section of this Act directly related to advertisement though the 'offer' can also be made through advertisement. (Carlill v Carbolic Smoke Ball Company, 1892)

It can be seen that principle of contract were the bases for evolution of consumer laws and still continue to contribute for the development of Consumer Laws. To this end, contract law needs to be revised, lest there should be deficiency in protection.

c. The Pure Food Ordinance, 1959

Under this Ordinance, it is a punishable offence to publish or cause to publish an advertisement which falsely describes any food article or is otherwise calculated to mislead the public as to its nature, substance or quality. (The Pure Food Ordinance of 1959, section 19[1]) Here both the manufacturer and the publisher shall be liable. (The Pure Food Ordinance of 1959, section 19[2]) The offender shall be fined for minimum taka five thousand (maximum fifty thousand) or rigorously imprisoned for one year (maximum two years) which may be imposed for a first offence. Again, the offender shall be both fined for minimum taka one lakhs (maximum two lakhs) and rigorously imprisoned for three months (maximum two years) which may be imposed for a second or subsequent offence.

d. The Indecent Advertisements Prohibition Act, 1963

Under this act, advertisement includes any notice, circular or other document, displayed on any house, building or wall, or published in any newspaper or periodical, and any announcement made orally or by any means of producing or transmitting light or sound, but does not include trade circulars issued by manufacturers of drugs to medical practitioners. (The Indecent Advertisements Prohibition Act of 1963, section 2[a])

An advertisement shall be 'indecent' if it amounts to any incentive to sensuality and excitement of impure thoughts in the mind of an ordinary man of normal temperament, and has the tendency to deprave and corrupt those whose minds are open to such immoral influence, and which is deemed to be detrimental to public morals and calculated to produce pernicious effect, in depraving and debauching the minds of persons. (The Indecent Advertisements Prohibition Act of 1963, section 2(b))

Whoever contravenes any of the provisions of this Act shall be punishable - in the case of a first conviction, with imprisonment which may extend to six months, or with fine, or with both; and in the case of any subsequent conviction, with imprisonment which may extend to one year, or with fine, or with both. (The Indecent Advertisements Prohibition Act of 1963, section 4)

e. The National Broadcasting Authority Ordinance, 1988

Under this Ordinance, the National Broadcasting Authority has been

established whose one of the functions is to implement the policy of the Government in respect radio and television broadcasting. (The National Broadcasting Authority Ordinance of 1988, section 5[1][b]) So, this authority is responsible to control the rules regarding advertisement in case of the radio and TV broadcasting. Rule 27 of the Bangladesh Betar and Bangladesh Television Onusthan Nitimala has provisioned that none can humiliate the product of others by their own advertisement. There shall be no offensive scene or indecent discussion in any advertisement.

4.0 Drawbacks in the Existing Legal Provisions and Some Recommendations

The existing advertising laws that are practised in Bangladesh are mostly old and outdated. Again we have lack of awareness among the consumers, lack of proper and strict laws, lack of accountability of the advertisers, lack of monitoring systems etc. In changing socio-economic environment, these acts may be reformed, updated and re-shuffled to meet the growing requirements of the consumers in existing market economy of the country. It is also a demand of the time that in order to make the advertising laws more relevant and coherent in the context of the global agenda like consumerism, environmentalism, human rights etc, they need careful revision and basic overhauling. However, the rule of law in context of advertising will make the natural economy further goal-oriented and development-directed. As a result, ideal advertising norms and behaviors will be practised. This would ultimately lead to creation of an environment free of dishonest advertising practices, e.g. fraud, exacerbated and misleading advertisement.

So, to attain the desirable growth and development of efficient advertising operations in the study areas, the following specific steps may be worth-mentioning:-

a. Simplified Procedures

The procedures followed by the different authorities involved in advertising seem to be round about, cumbersome, complicated and time-consuming which create problems for the entrepreneur to legalize the related matters. As a result, they keep away from legalizing the matters at their disposal. In order to improve the situation, the marketing legislation procedures may be simplified which, in turn, may play a positive role in the growth and development of efficient marketing systems. We need a government controlled cell to help not only the parliament in enacting laws but also the enforcing agencies in implementing the laws.

b. Frequent Vigilance

The law-enforcing agencies and various authorities will have to be made more vigilant so that they can take proper and timely actions against the violators of advertising legislations and policies. This might play an effective role in making advertising practices fair, smooth and efficient.

c. Vigilance by the Media

Media, such as TV, radio etc., need to review and reject material they regard as objectionable, even if it isn't deceptive. Many think the media to be more effective than the government. All media should conduct the strictest review under proper guidelines. Advertisers must submit all commercials intended for a network or affiliated station to the broadcast standards department of the network. Commercials (in script or storyboard form) may be returned with suggestions for changes or greater substantiation. Advertisement is to be rejected outright for violating network policies.

d. Encouraging Various Consumer Groups

From 1960, consumer movement has got acceleration by various consumer groups both at home and abroad. These types of groups fight actively against fraudulent and deceptive advertising around the world. In Bangladesh, Consumers Association of Bangladesh (CAB) is working to promote, protect and establish consumer rights. [4] The government should promote such type of institutions to ensure awareness of the consumers and platform to public discussion regarding consumer rights.

e. Punitive Measures

At present, there are both fine and imprisonment measures for the breakers of advertising legislations. But the punishment is not sufficient. Therefore, in such a context, the quanta of punishment need to be an exemplary one. In this regard, necessary reforms in relevant advertising laws may be advocated.

f. Law Orientation

Development of orientation among the various interest groups in the advertising area might go a long way to make people law-oriented. Clinical law education may be introduced in this perspective.

g. Mass Education Program

Mass Education programs may be launched to make the people educated so that they may exhibit excellent awareness in worldly affairs like advertising. Mass

education media, such as radio, television and documentary films may be introduced in this regard.

h. Legal Awareness

To establish Rule of Law, people need to be made legally aware. Seminars, symposia, workshops and the like may go a long way to educate people and assist in developing their legal awareness. It may assist in development of fair advertising practices.

i. Protection Legislations for Interest Groups

Legal coverage may also be given for interest groups like consumers, manufacturers, intermediaries, and the likes in order to ensure smooth functioning of business, industry, advertising and so on. Enforcement of the existing laws and enactment of new laws in this direction may be considered with priorities.

j. Motivation to Research

Government should encourage research endeavors aimed at identifying the problems of law-making, pin-pointing the advantages of the same and exploring its future potentials.

5.0 The Conclusion

Consumers are facing huge physical, mental and financial loss due to the abusive, fraud and sometimes misleading advertisement. Legal aspects in advertising are an area which is yet to receive adequate attention from different interest groups. In fact, it is an area which causes a number of infringements of consumer rights. But even the infringed person himself is not aware of his infringement. If proper legislative frame work is made and implemented in all spheres of advertisement, it would benefit not only the marketers and the consumers but also the producers, intermediaries and other interest groups. This would, in turn, bring about an overall improvement in the entire marketing environment, finally, leading to economic prosperity and growth of the country.

Notes

[1] Eight Consumer Rights recognized by the United Nations. These rights are Right to satisfaction of Basic Needs, Right to Safety, Right to be Informed, Right to Choose, Right to be Heard, Right to Redress, Right to Consumer Education, Right to Healthy & Sustainable Environment.

[2] For example, the ASA Council, in UK, is the jury that decides if advertisements

breach the Advertising Codes. Its work includes acting on and investigating complaints as well as proactively monitoring and taking action against misleading, harmful or offensive advertisements, sales promotions and direct marketing. It is independent of both the Government and the advertising industry and recognized by the Government, the courts and other regulators such as the Office of Fair Trading (OFT) and Ofcom as the body to deal with complaints about advertising.

[3] On March 15, 1962, President John F. Kennedy presented a speech to the United States Congress in which he extolled four basic consumer rights, later called 'the Consumer Bill of Rights'. This was the first time any politician had formerly set out such principles. The United Nations through the United Nations Guidelines for Consumer Protection expanded these into eight rights, and thereafter Consumers International adopted these rights as a charter and started recognizing March 15 as 'World Consumer Rights Day'. His wording was as follows -

'Consumers, by definition, include us all. They are the largest economic group, affecting and by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard.'

[4] Consumers Association of Bangladesh (CAB), a non-govt. non-political and non-profit voluntary organization was founded in February, 1978.

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