THE SUPREME COURT AND ARTICLE 19(6) OF INDIAN CONSTITUTION

A Study of Judicial Behaviour

Thesis submitted to

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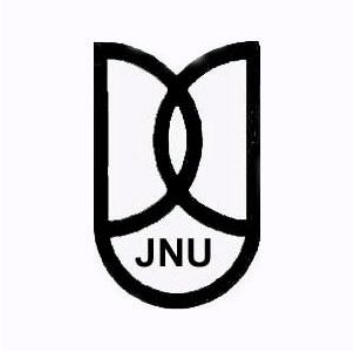
PRASHANT NARANG



Centre for the Study of Law and Governance
JAWAHARLAL NEHRU UNIVERSITY
New Delhi 110067
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JAWAHARLAL NEHRU UNIVERSITY
Centre for the Study of Law & Governance
NEW DELHI-110067, INDIA

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DECLARATION

I declare that the thesis entitled **"The Supreme Court and Article 19(6) of Indian Constitution: A Study of Judicial Behavior"**, submitted by me for the award of the Degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my original work. The thesis has not been submitted for any other degree of this University or any other university.

Prashant Narang

CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

Prof. Jaivir Singh
Chairperson, CSLG

प्रो. जयवीर सिंह/Prof. Jaivir Singh
अध्यक्ष/Chairperson
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law & Governance
जवाहरलाल नेहरू विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली / New Delhi - 110067

Prof. Jaivir Singh
Supervisor

पर्यवेक्षक/Supervisor
अध्ययन केन्द्र
Law and Governance
विश्वविद्यालय
University
-110067

Dr. P. Puneeth
Supervisor

पर्यवेक्षक/Supervisor
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरू विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Office Tel. : 91-11-26704231, 26742506 • Telefax : 91-11-26742506 • Email : dir.cslg@jnu.ac.in; dir.cslg@gmail.com

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Whose blessings made it possible

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LIST OF ABBREVIATIONS

AMC	Amritsar Municipal Corporation
BMC	Bombay Municipal Corporation
CJI	Chief Justice of India
DPSP	Directive Principles of State Policy
EWSD	Economically Weaker Sections and Disadvantaged
FR	Fundamental Right
MCD	Municipal Corporation of Delhi
MEHU	Maharashtra Ekta Hawkers Union
NDMC	New Delhi Municipal Council
NGO	Non Government Organisation
POTB	Profession, Occupation, Trade and Business
REC	Res extra commercium
STC	State Trading Corporation
TELCO	Tata Engineering and Locomotive Company

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Citizenship Act, 1948

Citizenship Act, 1955.

Companies Act, 2013

Defence of India Act, 1939

Delhi Act 80 of 2007

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Essential Commodities Act, 1955

Essential Supplies (Temporary Powers) Act, 1946

Essential Supplies Act, 1946

Indian and Pakistani Residents (Citizenship) act 3 of 1949

Indian Partnership Act, 1932

Madhya Pradesh Municipal Corporation Act, 1956

New Delhi Municipal Council Act, 1994

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The Constitution (Ninety Third Amendment) Act, 2005

the Constitution (Twenty-fifth Amendment) Act, 1971

UP Road Transport Act (Act II of 1951)

CHAPTER 1

INTRODUCTION

1.1 Background

In 2007, an NGO Manushi Sangthan challenged the owner-must-be-the-puller regulation mandated by the local municipal authority before the High Court of Delhi.[1] The regulation resulted in outlawing the hiring-rental of cycle rickshaws.[2] Rickshaw pullers who hired rickshaws on daily basis for pulling from the owners could not then do so.[3] The municipal corporation had also capped the number of licenses for cycle rickshaw pulling at 99,000.[4] A three-judge bench of the High Court of Delhi decided to strike down the regulation as ultra vires of the Constitution.[5]

The judgment noted that four cases from Delhi and Punjab (*Man Singh* v. *State of Punjab,*[6] *Azad Rickshaw Pullers Union (Regd) Ch. Town Hall, Amritsar* v. *State of Punjab,*[7] *All Delhi Cycle Rickshaw Operators Union* v. *MCD,*[8] *Nanhu.* v. *Delhi Administration*[9]) in the eighties had questioned the validity of the owner-must-be-puller regulation in the cycle-rickshaw sector before the Supreme Court. The Supreme Court had upheld the same.[10]

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[1] *Manushi Sangthan* v. *Govt of NCT of Delhi* 168 DLT 168.
[2] *Ibid*.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] (1985) 4 SCC 146.
[7] (1981) SCR 1 366.
[8] (1987) 1 SCC 371.
[9] (1981) SCR 1 373.
[10] *Supra* note 1.

The High Court of Delhi cited substantial change in circumstances such as changed urban landscape, more pollution and desirability of non-motorized transport as a ground to undertake a fresh review.[11] But these factors did not necessarily lead to a different conclusion.

While reviewing the restriction, a key question that the High Court of Delhi asked and the Supreme Court nowhere asked in those four cases was: whether a less drastic restraint would achieve the regulatory objective.[12] It's not as if the outcome was different despite the same standard of review; the outcomes were different because of the varied standards of review. When appealed, the Supreme Court did not reverse the High Court judgment but affirmed it.[13] It seems that the judges simply choose the standard of review to reach a conclusion they desire.

The above case is an illustration that judges are not necessarily consistent. The High Court decision struck down the restriction upheld by the Supreme Court in four different cases and turned around the legal position. It also implies that the precedent reversal led to expansion of the right to own and pull cycle rickshaws.

The judicial behavior of picking the standards of review may be strategic or instrumental. But whether the discretionary use of varying standards of review is constitutionally proper and what impact it has had on the scope and contours of a fundamental right such as article 19(1)(g) is not known.

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[11] *Ibid.*
[12] *Ibid.*
[13] *MCD* v. *Manushi Sangthan* (2012) 12 SCC 483.

Standard of review is one of the factors in decision-making, reasoning and procedure are other factors. For example, a reason that is logically flawed or incoherent would lead to a fallacious judgment. Similarly, procedural deviation such as remanding a writ petition to Lok Adalat is indeed constitutionally improper.

There may be other factors as well. It is not an exhaustive list. The bottom line is: Judicial behaviour can substantially curtail a fundamental right.

1.2 Literature Review

This part reviews the literature mainly in two domains. First part is about the rights under article 19(1)(g) lost owing to either infidel judicial interpretation or fallacious reasoning in sector-specific constitutional litigation such as liquor and higher education. Second part deals with the standards of review for article 19 rights in India and the application of those standards to article 19(1)(g) right.

Lost Rights

Adverse judicial interpretation may truncate a right. Not only legitimately by overruling or distinguishing a precedent, but illegitimately as well, the Court may simply ignore a precedent, may not give any reasons, or record false or irrelevant reasons. When a judgment based on fallacious reasoning gets entrenched and is followed subsequently, it may be difficult to retrieve the previously cherished right. Existing literature suggested three such instances: (i) right of a company to petition the Court for

enforcement of article 19(1)(g) right; (2) right to trade in alcohol; and (3) right to engage in trade of meat and eggs irrespective of community sentiments.

Right of a company to petition the Court under article 19(6)

Companies are not citizens for article 19. Shareholders were also excluded from the definition of citizens. The Court denied locus to the shareholders for bringing a petition to the Court under article 32.[14] In several initial cases, the Supreme Court did not even raise the question whether a company is a citizen; it went on reviewing the economic restrictions.[15]However, the Court made a departure in subsequent cases and refused to entertain a company and the shareholders as writ petitioners.

Krishnaprasad argued that *State Trading Corporation*[16] decision (followed in *TELCO*[17]) was an incorrect decision.[18] The Court should not have denied locus to shareholders based on the peculiar facts of *STC* case.[19] In subsequent cases, the Court lifted the corporate veil without overruling *STC* and *TELCO*.[20]

In *STC* case, the issue was maintainability of the petition and the Court had to first decide whether a company is a citizen for the purpose of Article 19.[21] However, the peculiarity of the facts of this case didn't let the appellant lawyer ask for lifting of

[14] KV Krishnaprasad, "Unveiling the Right: Corporate Citizenship in India Post *State Trading Corporation*" (2010) 22(1) NLSI Rev159.
[15] *State of Bihar* v. *Bengal Immunity Co.,* AIR 1955 SC 661; *Express Newspapers Pvt. Ltd.* v. *Union of India,* AIR 1958 SC 578; *Sakal Papers Pvt. Ltd.* v. *Union of India,* AIR 1962 SC 305
[16] *State Trading Corporation of India* v. *Commercial Tax Officer, Visakhapatnam* 1964 (4) SCR 99
[17] *Tata Engineering and Locomotive Co.* v. *State of Bihar,* AIR 1965 SC 40
[18] *Supra* note 14.
[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*

corporate veil.[22] State Trading Corporation though a private limited company registered under the Companies Act was a Public Sector Undertaking or "State" under article 12 because the Government of India in the name of Governor and the President funded its 98 per cent of its capital and the two joint secretaries funded the remaining two percent.[23]

The appellant could have raised two arguments to overcome the locus objection - First, the corporation *per se* is a citizen for the purpose of Article 19. Second, the corporation can claim Article 19 right through its citizen shareholders.[24] However, lifting the veil in this case might have led to an adverse outcome; it would have revealed a clear government control over the company.[25] The corporation would have been established as the state and hence not entitled to claim the rights as a citizen under Article 19.[26] In that sense, both his pleas were inconsistent. Appellants sought to protect the rights of shareholder through the corporation, but the appellant also avoided any discussion that might hint at the corporation being a state agent or instrumentality.[27] Unsurprisingly the appellants did not argue the grounds for lifting the corporate veil.[28]

Subsequently, in *TELCO* case, the petitioner company contended that the Court ought to pierce the corporate veil as the same was not considered in *STC* case.[29] But the Court rejected the contention on the ground that the Court would not do that indirectly what a nine-judge bench in *STC* had refused to do directly.[30] The Court could have

[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*

considered lifting the corporate veil as the question of citizenship of the corporation and protection of shareholder citizens are not the same questions.[31] It was Court's duty to see that the fundamental rights of the citizens who also happen to be the shareholder of the company are not being violated.[32]

In the *Bank nationalization* case[33] - an eleven-judge bench decision, a shareholder, the director and a current account holder of the bank challenged the validity of the Banking Companies (acquisition and transfer of undertakings) ordinance.[34] The Court held that irrespective of the violation of the company's right, the Court ought to grant relief to the petitioner if his fundamental rights are violated.[35]

In *Bennett Coleman* case,[36] the Court recognized that the editors, directors, shareholders exercised their freedom of speech and expression through the newspaper.[37] The premise seems to be that the newspaper is a separate class of company.[38] But this distinction is artificial and unreasonable.[39]

So, in *Bennett Coleman*, the Court did what it refused to do in *TELCO*. One may argue that it is not inconsistent with *STC* case but it certainly not in consistence with *TELCO* case.

There can possibly be three kinds of views, the Supreme Court could have taken in this regard: First, that the company is a citizen and can exercise its own rights. But the

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[31] *Ibid.*
[32] *Ibid.*
[33] *RC Cooper* v. *Union of India*, AIR 1970 SC 564
[34] *Supra* note 14.
[35] *Ibid.*
[36] *Bennett Coleman* v. *Union of India* AIR 1973 SC 106
[37] *Supra* note 14.
[38] *Ibid.*
[39] *Ibid.*

Supreme Court expressly rejected this view in *STC* case. Second, that a company derives its rights under Article 19 from the shareholders but the Court rejected this view in *STC* case on the ground that the company be an inanimate juristic person cannot exercise many of the rights under Article 19 therefore neither can it have rights under Article own its own nor can it derive from the shareholder. The third view is that the shareholder exercise their right through the company and this view the Supreme Court has adopted in *Bennett Coleman* case.[40]

In *Bennett Coleman*, the Court peeps behind the corporate veil of the company and finds out that the shareholders are citizens of India and then decides the case.[41] This limited lifting of the corporate veil is not contrary to the principle of limited liability because there is no question of liability to be imposed on the shareholders rather it is about recognizing the fundamental rights of the shareholders and for that purpose it carves out a small exception to the principle of separate personality.[42] Other cases where the court refused to lift the veil are about abusing the corporate entity to evade laws.[43]

Krishnaprasad argues that *STC* case is not properly understood and this has led to a distorted understanding of the subsequent cases on similar point.[44] He further argues that the Court's view in *STC* case goes against its role as the constitutional protector of fundamental rights of citizens.[45] Later decisions of the Court protect the

[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

economic rights of shareholder citizen rights better and lift the corporate veil in some ways.[46]

Right to trade in alcohol

Right to trade in alcohol is denied under article 19(1)(g) through judicial interpretation.[47] Dissenting judgments have questioned this constricted approach.[48] But prevailing majority judicial interpretation has excluded the trading in alcohol from the definition of trade or business and denied protection to it under article 19(1)(g).[49]

Few judges have reviewed the restrictions on the liquor trade. Most judges have held that there is no fundamental right to deal in liquor even if the state grants a license and makes rules for liquor trading because of the morally obnoxious nature of liquor.[50] But they held so without engaging with the conflicting view and overruling it. A minority view earlier had expressed reservations on the reasoning and some recent judgments as well have cited academic research to point out the discrepancies in the legal reasoning based on the moral obnoxious view, yet no larger bench has reconciled the conflict.[51] CJI Das erroneously introduced the doctrine of Res Extra Commercium in *RMD Chamarbaugwala* resulting in constricted reading of article 19(1)(g). It was to deliberately exclude certain immoral or noxious activities from the purview of article 19(1)(g) protection.

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[46] *Ibid.*
[47] Arvind Datar and Shivprasad Swaminathan. "Police Powers and the Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant." *Emory Int'l L. Rev.* 28 (2014) 63.
[48] *Krishna Kumar Narula* v. *The State of Jammu and Kashmir* (1967) (3) SCR 50; *Indian Handicrafts Emporium* v. *Union of India* (2003) 7 SCC 589; *Devans Modem Breweries* (2004) 11 SCC 26 (J. Agrawal J & J. Sinha; *dissenting*)
[49] *Supra* note 47.
[50] *Ibid.*
[51] Narula, *Supra* note 48.

Datar and Swaminathan argue that the police power doctrine - expressly rejected in Indian precedents and imported from the US jurisprudence - was the real basis for the application of *res extra commercium*. The doctrine of police powers seeks to curtail the scope of fundamental rights by placing certain government restrictions beyond judicial review. Larger benches had earlier dismissed the import of the American doctrine on grounds of structural differences between the two constitutions. Indian Constitution does not permit excluding certain activities from the purview of fundamental rights before judicial review. It allows for *ex post* restrictions, not *ex ante* constrictions. Res extra commercium - in the sense, Indian Supreme Court uses it - imposes ex ante constrictions on fundamental rights.

Res extra commercium in Roman Law meant resources or things that no one has a property right in and hence, there cannot be a trade or business in such resources. CJI Das used this phrase in *RMD Chamarbaugwala* to prohibit gambling on moral grounds. Malhotra disagrees with the Court's reasoning on four grounds: while there was no blanket ban on gambling, rather there was an express policy for authorising gambling, it could not be said that gambling was illegitimate business, if the license is obtained to carry on business in gambling. Two, gambling business is not beyond commerce, it is a commercial activity, hence not res extra commercium. Three, comparing gambling with criminal activities such as assault, murder and housebreaking is incorrect as gambling is a voluntary transaction between consenting adults and the state itself is engaged in the business of gambling. Fourth, it would also be incorrect to say that issuance of license and imposition of tax did not legitimize the business of gambling. It is otherwise.

In effect and indirectly, the police power doctrine has become a part of article 19 jurisprudence and it stops the courts to inquire into reasonableness and object of the restriction.

Datar et al also notes that *Krishna Narula* case refused to apply the doctrine to trade in liquor and further questioned its application in Indian jurisprudence. However, subsequent larger benches with few exceptions continue to apply the doctrine.

Moneylending in rural areas has been excluded from the definition of POTB.[52]

In 2003, while hearing an appeal challenging a ban on ivory trade, the Supreme Court disagreed with the high court on the application of this doctrine to ivory trade.[53] The Court reasoned that the trade in ivory was permissible in law, was subsequently restricted and then later totally prohibited. If the elephant population increases again, the policymakers might again legalize the ivory trade. The Court also noted that the trade in Asian Elephant ivory was prohibited but that in African ivory continued to be permitted under some strict conditions. Questioning the applicability of a foreign precedent *P. Crowley* v. *Henry Christensen*[54] in the High Court judgment, the Court pointed out that case involved a person dealing in liquor without a license. Challenge to law governing liquor license was dismissed but it did not imply that business in liquor was totally impermissible. The Court observed: "Restriction in trade, therefore, would depend upon the nature of the article and the law governing the field. By reason of

[52] *Fatehchand Himmatlal* v. *State of Maharashtra* (1977) 2 SCC 670; *State of Gujarat* v. *Vora Saiyedbhai Kadarbhai* (1995) 3 SCC 196.
[53] *Indian Handicraft Emporium*, *Supra* note 48.
[54] 137 U.S. 86 (1890).

judicial vagaries, fundamental right under Article 19(1)(g) of the Constitution cannot be further restricted."

The Court found a quote from Wynes (1970) p 263 in DD Basu:[55]

> The question whether exceptions to the otherwise express provisions of section 92 based upon inherent quality of goods can be made has not been settled … Since *Hughes* case it is no doubt true to say that a State may legitimately regulate the incident of trafficking in such cases, but this does not derive from inherent quality, but from the proposition that regulation can be consistent with freedom.

Quoting *Krishna Kumar Narula*, the Court upheld the ban on ivory without invoking the *res extra commercium* doctrine.

However, the right to produce and sell alcohol remains constricted and the traders of alcohol have no recourse to judicial review under article 19(1)(g).
The right to trade in alcohol remains constricted.

Cattle Slaughter, Community Sentiments and Other Rights

Bulls and Bullocks were deemed to be useless after a certain age and could be slaughtered.[56] But in 2005, the Supreme Court accepted the legislative absolute prohibition on bulls and bullocks.[57] Khanna noted this shift in judicial interpretation. He rightly pointed out that the Court acknowledged factual revision and new knowledge emerging about the usefulness of bulls and bullocks. But Khanna did not probe whether

[55] *Indian Handicraft Emporium*, *Supra* note 48.
[56] *Mohd Hanif Quareshi* v. *State of Bihar* (1959) 1 SCC 629
[57] *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat* (2005) 8 SCC 534

this new knowledge rightly justifies the shift. Khanna also found inconsistency in vegetarianism cases. In *Om Prakash* v. *State of Uttar Pradesh*,[58] the Court upheld the ban on the sale of eggs in Rishikesh considering the majority sentiments, whereas in *Mohd Faruk* v. *State of Madhya Pradesh*,[59] the Court had held that the prohibition of an activity based on community sentiments is unreasonable.

Amongst these three instances, the right to trade in alcohol stands most truncated based on dubious reasoning. As far as corporate citizenship is concerned, the Court has been admitting matters through shareholders. In context of vegetarianism cases, the Court justified the absolute ban on bulls and bullocks on factual grounds and the ground of community sentiments was expressly overruled in *Hinsa Virodhak Sangh v Mirzapur Moti Kureshi Jamat*[60].

In addition to these three instances, another example could be judicial reasoning in some of the higher education judgements.[61] *Indian Handicraft Emporium* judgment also discussed the applicability of *res extra commercium* to education. It noted that the *Unnikrishnan* judgment[62] invoked REC and applied it to education - "Education cannot be trade or business and in the name of occupation, it cannot be permitted to become commerce."[63] *Unnikrishnan* also observed that education might be an occupation if the institution seeks recognition not on the basis that it is a fundamental right.

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[58] (2004) 3 SCC 402
[59] (1969) 1 SCC 853
[60] (2008) 5 SCC 33.
[61] Devesh Kapur and Madhav Khosla. "Courts and colleges: A problematic relationship." (2011) 627 *Seminar* 75.
[62] *Unnikrishnan JP* v. *State of Andhra Pradesh* 1993 (1) SCR 594.
[63] *Indian Handicraft Emporium*, *Supra* note 48.

But an11-judge bench in *TMA Pai* judgment[64] overruled this view. *TMA Pai* clarified that education is indeed an occupation and fundamental right to establish an educational institution cannot be confused with right to seek recognition. A fundamental right can be restricted in several ways, but those restrictions cannot question whether there is a fundamental right at all.

Khanna documents the Court's concerns with commercialization and private provisioning of education.[65] He offers some utilitarian justification for the Court-led guidelines in higher education. He noted that despite *TMA Pai* judgment protecting autonomy of private educational institutions, subsequent judgments have leaned towards greater interference and policymaking. He discussed the economic or consequential merits and demerits of the judicial involvement and monitoring in higher education. While Khanna skipped a discussion on the propriety of the judicial involvement, Kapur and Khosla did so. They minced no words in contending that the judicial treatment to higher education sector – non-profiteering and the obligation to reinvest the surplus into education - has no constitutional basis. Instead of remedying the legislative excesses, judicial interventions may have compounded the ills. Not only the Court imposed its values judgments instead of limiting itself to adjudication or judicial review, it often passed detailed and unnecessary comments on the role of statutory regulator and even went on to redefine the role of statutory regulator.

[64] *TMA Pai Foundation* v. *State of Karnataka* (1993) SCC 4 276.
[65] Vikramaditya Khanna, "Profession, Occupation, Trade or Business" in *Oxford Handbook of Indian Constitution* (2016) ed. Choudhry, Khosla and Mehta (Oxford University Press).

Norms of Judicial Review

This part discusses two strands in the existing literature. One advocates for hierarchy of rights and differential standards of review for different rights. The other strand is about what the standards of review are and what those should be.

Differential standards of review

Khaitan has argued that article 19 barring article 19(1)(a) deserves lower standard of scrutiny than article 14, 15 and 19(1)(a) as per the relative importance of the right in the hierarchy of rights.[66] He argues that some rights are more fundamental than others. This argument is based on his intuitive response to a hypothetical comparison between differential tax rates for commodities - tea and coffee, vis-a-vis differential tax rates for Hindus and Muslims. He argues that the latter invokes a more shocking response intuitively and hence, the right to sell is qualitatively inferior to right to equality or right to practise one's religion. Because differential treatment of identities, particularly religious or caste identities invoke more shocking response, so it deserves a close examination and hence rigorous scrutiny.

De's detailed account of social-legal history of economic restrictions and the constitutional battles of practitioners who challenged those restrictions, stands in deep contrast to Khaitan's argument.[67] De's work illustrates an unmissable intersection of group identity and economic restrictions. His protagonists belonged to vilified minority

[66] Tarunabh Khaitan. "Beyond Reasonableness-A Rigorous Standard of Review for Article 15 Infringement." 50(2) JILI (2008) 177.
[67] Rohit De. *A People's Constitution: The Everyday Life of Law in the Indian Republic*. 2018 (Princeton University Press).

groups - the Anglophilic Parsi, the corrupt Marwari, the cruel Qureshi Muslim butcher or the immoral prostitute. They were subaltern in a sense that post-independence, these minorities living on the margins of society might not have had access to electoral representation. But their representation in constitutional litigation is disproportionately high.

Errors in Judicial Reasoning

Chandrachud's offers a relatively objective framework for a classification of errors in judicial decision-making. He lists three types of errors in judicial decisionmaking. Type one error leaves out some relevant reasons or cites some irrelevant reasons. Overall, the decision is correct and it does connect some relevant reasons to the right conclusion. Type two error implies employing reasons none of which has a rational nexus with the issue and such reasons that even if factually correct cannot logically impel the decision. Type three error has no reasons at all. Type two and type three errors involve judicial abdication. Former refers to extraneous reasons and latter is a fiat – no reasoning.

Grounds of Review

Bhatia argues that while the Court should presume public interest in Directive Principles of State Policy (DPSP), it should scrutinize reasonableness separately and not on the grounds of DPSP.[68] He gives an example of compulsory reservation in private schools for Economically Weaker Section and Disadvantaged (EWSD) children

[68] Gautam Bhatia, "Directive Principles of State Policy" *Oxford Handbook of Indian Constitution* ed. Choudhry, Khosla, Mehta 2016 (Oxford University Press)

in furtherance of DPSP. Is it in public interest? Must be, he says. Does that mean it is reasonable? Not necessary. There may be other less restrictive alternatives, or 80 per cent reservation may be excessive, twenty percent per cent may not be. It is akin to end-means test. The Court must test the 'means' separately.

However, article 19(1)(g) mentions "in the interests of general public". Is general public interest same as public interest?

Proportionality as the Standard of Review

What the standards of review are – to answer this question, one can look at the precedents and the constituent assembly debates. Several scholars have done it.

Most scholars pick "proportionality" - the European standard for judicial review as a reference point to understand and analyse the standard of review for the fundamental rights in Part-III of the Indian Constitution. Proportionality is a four-pronged test that examines proper purpose, rational connection, necessity, and proportionality *stricto sensu* (balancing).

State of Madras v. *V.G. Row*[69] mentioned the relevant factors for judging the reasonableness of a restriction: nature of the right in question, intended purpose, extent and urgency of the mischief, proportionality of the restriction, and the circumstances.[70] Here is the relevant excerpt from the judgment:[71]

[69] 1952 (3) SCR 597
[70] *Ibid.*
[71] *Ibid.*

> It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

Chandrachud notes that *V. G. Row* while propounding the four components – purpose, rational nexus, necessity and balancing mandated considering all these factors for reasonableness scrutiny.[72] However, in subsequent cases, the Court usually omitted one or more components and did not undertake tests based on all those factors. Although the Court has a poor reputation of precedential incoherence and is known for its polyvocality, Chandrachud finds it a case of doctrinal ambiguity. Since the reasonableness review in *VG Row* included all the components of proportionality and proportionality as a checklist approach to judicial review may certainly be more effective to ensure a comprehensive judicial review, a shift to a more structured test of 'proportionality' would work better, Chandrachud argues. While advocating for proportionality standards for judicial review, he identifies a lack of understanding in the judiciary that the phrase "reasonable restriction" demands the proportionality standard of review. He finds the Court highly inconsistent in applying the proportionality standard.

[72] Chintan Chandrachud "Proportionality, Judicial Reasoning, and the Indian Supreme Court." 1 ADLR (2017) 87.

Duara refers to *Chintaman Rao*,[73] finds the standard as strict as proportionality and advocates for the application of same standards for gender justice cases i.e. article 14 and 15 matters.[74] Felix too identifies the judicial review test employed in *Chintaman Rao* as proportionality.[75]

Chintaman Rao v. *State of Madhya Pradesh* was the first case in context of article 19(1)(g) explaining the reasonableness review. Following *V.G. Row*, *Chintaman Rao* clarified and augmented the concept of reasonableness a bit further by propounding: one, possibility of being applied for unsanctioned purposes (legitimate purpose); two, the restriction should have reasonable relation to the purpose in view and it should not be arbitrary (rational nexus/ not arbitrary); three, it should not be excessive or beyond what is required (necessity / not excessive); and four, there must be a balance between the freedom and the social control (proportionality *stricto senso/* balancing).

Recently, the Court itself admitted the use of proportionality standards in *Chintaman Rao*.

V.G. Row is a seven-judge bench judgment and *Chintaman Rao* - a five-judge bench judgment and none of the two is overruled.

[73] *Chintaman Rao* v. *State of Madhya Pradesh* (1950) 1 SCR 759
[74] Juliette Gregory Duara, "Proportionality analysis on gender equality: a multijurisdictional comparison with a view toward an Indian Migration" Doctoral Thesis, NUS 2015.
[75] Shivaji Felix. "Engaging unreasonableness and proportionality as standards of review in England, India and Sri Lanka: comparative studies." 1 Acta Juridica (2006) 95.

Relying on the Constituent Assembly debates, Sindhu and Narayan makes a historical argument for the applicability of proportionality standard to all cases of judicial review.[76] They argue so on three grounds. First, Indian framers expressly rejected the culture of authority and embraced a culture of justification. Sovereignty rests with people, implying that the Indian Constitution rejected a system of parliamentary sovereignty and adopted popular sovereignty. As per the Constitution, the Parliament is not supreme, and the judiciary has the power to invalidate legislation. Secondly, one can make out from the Constituent Assembly Debates that many members were skeptical about majoritarianism and abuse of power. Ambedkar was particularly concerned about the danger of subversion and social inequalities. Members were also concerned that FRs could be easily abridged through administrative action. The framers obligated the state to be mindful of fundamental rights in all its actions - article 13 casts an obligation on the State to respect fundamental rights and restrains all forms of state action including delegated legislation as well as executive discretion. Hence article 13 expressly subjected all state action to fundamental rights under article 13. One finds the fundamental rights chapter right after the chapter on citizenship and territories in the Constitution like the German Basic Law. Third, Indian Constitution covers wide scope of judicial review. Judicial review is the norm in Indian constitution and not an exception. The Constitution does provide certain exceptions in form of issues and questions immune from review such as

[76] Vikaramaditya Narayan and Jahnavi Sindhu. "A historical argument for proportionality under the Indian Constitution." 2(1) ILR (2018) 51.

Sindhu and Narayan argue that Indian Constitution adopts a culture of justification with judicial review as an essential feature and the level of justification it demands can only be fulfilled by proportionality standard.

Gaps in Existing Literature

Most of the popular constitutional commentaries such as MP Jain and MP Singh do not refer to constituent assembly debates or other research articles to offer an analytical critique of the jurisprudence. They merely compile the ratios of various landmark cases without offering any critique. The commentaries are ambiguous on the standards of review. Ratios of various cases look inconsistent.

Chintaman Rao laid down proportionality-like standard of review for article 19(1)(g). However, the Court did not seem to follow this standard of review consistently in a checklist like fashion in subsequent cases. The number of cases wherein the Court applied the proportionality standards (legitimacy, nexus, necessity and balancing) and the number of cases wherein the Court applied not a single test at all – no scholar has done such a study.

First question is: what exactly are reasonableness and general public interest, and how should these be assessed?

Second, in how many cases, has the Court applied the test of reasonableness and general public interest correctly?

Overall, the literature on article 19(1)(g) indicates judicial deviance in certain sectors but there is no comprehensive study measuring the extent or magnitude of deviance.

1.3 Scope and Objectives of the Study

The thesis examines the jurisprudence in article 19(1)(g) – the right to practice any profession or to carry on any occupation, trade or business, of the Constitution of India. Article 19(6) of the Constitution of India allows the state to cast "reasonable" restrictions on the freedom to trade, business, profession or occupation in "the interest of general public".

Why Article 19(1)(g)

Unlike article 19(1)(a) - freedom of speech and expression or erstwhile article 19(1)(f) - the right to property, article 19(1)(g) is one of the lesser investigated civil liberties. Article 19(2), (3), and (4) state several specific grounds for those reasonable restrictions unlike 19(5) and (6). Article 19(2) states the sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation or incitement to an offence as the grounds for imposing reasonable restrictions on the freedom of speech and expression. Article 19(3) mentions sovereignty and integrity of India or public order as grounds of reasonable restriction on the freedom of assembly; article 19(4) also states sovereignty and integrity of India or public order or morality as grounds of restrictions on the freedom of association.

Article 19(5) states two grounds - general public interest, and the interests of any scheduled tribes.

Article 19(6) has only one ground - general public interest for imposing reasonable restrictions. It further allows the State to make any law relating to professional or technical qualifications or carrying on any occupation, trade or business as well as have a monopoly - whether partial or full in any sector. The Constitution nowhere defines the term “in the interests of general public”.

Objective

As it happens with the constitutional provisions, judges expand or curtail the substantive rights through creative interpretation. The objective is to find out whether in the context of article 19(1)(g), judicial behavior has shrunk or expanded the right under article 19(1)(g) over 65 years - from 1950 to 2015, and if so, to what extent. Literature review indicates judicial deviance in certain sectors but there is no comprehensive study confirming an overall judicial curtailment.

Scope

The question - why some judges do what they ought not to do, or why some judges do not do what they ought to do, is beyond the scope of this study. Motives are not part of this study. It is limited to documenting and measuring the degree of curtailment of a constitutionally guaranteed right.

The thesis is solely dependent on the judgments or judicial opinion for the reasoning. Petitions and case briefs are not available in public domain.

It is possible that a judge may leave certain crucial contentions and facts or exaggerate other trivial facts in her written opinion to make her decision look more convincing.

Poorly drafted petitions or oral representation may also lead an otherwise good case to dismissal. The thesis could not cover these factors.

The thesis is limited to judicial review of restrictions under article 19(1)(g) read with article 19(6) and it excludes constitutional amendments that can only be reviewed under the basic structure.

The thesis deals with the published judgments only. Many special leave petitions and writ petitions are dismissed *in limine*. Those petitions or appeals are not readily available in public domain. Some judgements are not reported or published in law reporters.

1.4 Research questions

The study seeks to collate the norms of review applicable to judicial review under article 19(6) and to find the number of cases wherein the Court adheres to the norms of review.

1.5 Relevance and Utility of the Study

Fundamental rights are sacrosanct and not easily amendable. In fact, an amendment to Part-III of the Constitution must pass the basic structure test. Only the legislature can amend Part III of the Constitution, not the executive or the judiciary.

Judiciary is supposed to be the sentinel on the *qui vive*. It must safeguard the constitution and interpret the provisions as per the constitutional text, legal doctrines and precedents. However, judicial behaviour can illegitimately reduce a fundamental right to a paper right. Right to trade in liquor is a classic example. Right to slaughter bulls and bullocks is another example.

The thesis makes two important contributions. One, it lays down the contours of judicial review - how the Court is supposed to review a restriction under article 19(1)(g). No textbook, legal commentary or existing research has clearly laid down the requirements for review under article 19(1)(g) - its grounds and standards of review. What reasonableness and general public interest are and how the Court ought to review an economic restriction correctly.

Two, it exposes how adverse judicial behavior in 65 years has truncated the article 19(1)(g) right. In addition, it also seeks to measure the extent to which the right has been curtailed.

1.6 Hypotheses

Supreme Court Validating Executive overreach without authority of law

I. It is hypothesized that Supreme Court's denial to review the non-statutory state monopolies unduly truncated the freedom to carry on trade and business.

Judicial Overreach

II. Supreme Court assuming the role of a regulator for street vending in Delhi and Mumbai for twenty-five years truncated the right to challenge the infringement of article 19(1)(g) and seek remedy.

Supreme Court Validating Legislative Overreach

III. Supreme Court did not adhere to the standards of review laid down in *Chintaman Rao* in more than three-fourth of subsequent cases.

IV. The Supreme Court abandoned its rule of reversal of presumption of Constitutionality to be applied in cases of prohibition and drastic restriction without over-ruling it.

1.7 Research Methodology

Judicial Behavior

Segal defines Judicial behavior as "what do judges do and why do they do it."[77] Judicial behaviour is "theoretical and empirical study of the choices judges make".[78] It is what judges do and not do. Judges' policy preferences explain their behaviour and so do the legal influences.[79] Legal norms such as text and precedent help discern the extent of departure from what the judge ought to do.[80]

Judicial behavior studies in India have typically focused on voting behavior and outcomes. George Gadbois mapped judge's ideological preferences based on their solo dissents on the matters of economic freedom and civil liberties.[81] Shankar conducted an empirical study of the enforcement of socio-economic rights by the Supreme Court.[82] Her conclusion was that the judgments delivered post-1988 were 17 per cent less likely to favor health/ education rights than those pronounced pre-1988 and judgments delivered post-1993 were 16 per cent less likely to be in favor of citizens' right to education or health.[83] Krishnaswamy and Khosla find several limitations in the methodology: One of the main constraints for such studies is the case data.[84] Not all the cases are reported, many cases are dismissed *in limine*.[85] Relying on the reported cases might make the claim overbroad.[86] Second, a poorly drafted or argued matter may also lead to rejection and that requires a probe into reasons.[87] Third, to make a claim on the Supreme Court's overall behavior pattern, the study must cover all categories of

[77] Jeffrey Segal, "Judicial Behaviour" in *Oxford Handbook of Political Science*, ed. Robert Goodin (Oxford 2013).
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] George Gadbois, "Indian Judicial Behaviour", 5(3-5) *EPW* 149-166 (1970).
[82] Shyalshree Shankar, *Scaling Justice: India's Supreme Court, Anti-terror Laws, and Social Rights* (New Delhi: Oxford University Press; 2009).
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*

judgments and not be limited to selected domains such as health and education.[88] Or to make a general claim about a right, dataset comprising of all cases in that domain should be assessed.[89] A claim of change in judicial behavior with respect to a right required an evidence of differential treatment to similar cases.[90] One must show that the Court has "either reversed its recognition of rights or refused to grant remedies for rights that were hitherto enforced."[91]

Aney et al employed a more robust methodology to investigate pandering.[92] They classified the Supreme Court judges into two categories – "treatment group" those who retire long before an election and "control group" those retiring shortly before an election.[93] Their research showed that judges with pandering incentives (post-retirement appointment) wrote more pro-government judgments than those who didn't have such incentives.[94]

Judicial Deviance and Judicial Abdication

Mere outcomes may not necessarily indicate the propriety and fairness of decision-making. A judicial opinion must have reasons and those reasons must be legitimate and relevant. If a judgment is not reasoned or has no relevant reasons at all, then it is judicial abdication. It implies that the Court has not discharged its function of reviewing a restriction at all.

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[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] Giovanni Ko, Madhav Aney and Shubhankar Dam Ko, "Jobs for Justice(s):Corruption in the Supreme Court of India," *Economics and Statistics Working Papers* 6-2017, Singapore Management University, School of Economics (2017).
[93] *Ibid.*
[94] *Ibid.*

To claim a "shift in judicial behaviour", one needs to show differential treatment to similar cases. However, to claim that the Court has failed to duly protect the right, only requires a proof of Court's non-adherence to standards of review, reasoning or precedents, to validate the executive or legislative overreach. The Court has indeed the authority to set new precedents, overrule old ones and modify standards of review, but a silent and unjustified departure from a precedent or standard of review will be an act of deviation. A single case of deviation may be an error and is likely to get noted and corrected in subsequent cases. But if such a deviation is followed, repeated or expanded subsequently in derogation of the past norm without any justification or it remains unquestioned in subsequent cases, it becomes judicial deviance. It implies that the right is foregone or truncated.

To sum up, judicial deviance covers rights unduly foregone as well as abandoned review norms. Judicial abdication covers non-production of reasoning.

Devising Methodology

The thesis seeks to offer a detailed account of how judicial interpretation, abdication, overreach in the domain of article 19(1)(g) unduly validated several economic restrictions curtailing the article 19(1)(g) right. It will classify the overreach into three categories – executive overreach without an authority of law, legislative and executive overreach and judicial overreach. It will undertake a mixed method approach. It will undertake an empirical quantitative study to find out the percentage of judgments that do not adhere to the standards of review, wholly or partially. The study will undertake

a doctrinal research first to identify and discover the norms of review in the context of article 19(1)(g). It will also offer a qualitative critique of the jurisprudence under each of three heads.

Data

The study peruses all the reported judgments delivered by the Supreme Court of India on article 19(1)(g) from 1950 to 2015 as available on SCC Online repository.

The study makes use of this database for both doctrinal research as well as empirical research. To have a database of all the judgments pronounced by the Supreme Court, the chapter uses SCC Online software and MS Excel. A simple search with "article 19(1)(g)" with period selected as 1950 to 2015 generates 456 cases. Next step is to tabulate the data and filter the irrelevant ones. Some cases merely mention article 19(1)(g) but do not deal with judicial review in the context of article 19(1)(g); some cases may relate to article 15(5), Ninth Schedule, the Basic Structure Doctrine; some cases may have referred the matter to larger benches; some may be orders; some deal with the vires of delegated legislation with respect to parent Act. A column is created with field "whether included – Y/N" and another column for reasons "why not".

A case may have multiple instances of judicial review: (a) more than one issue or provision is under review; (b) there are multiple judicial opinions. "Case" is not the unit, it is "instance" based on the issue/ provision reviewed and the judge reviewing it. In total, there are 261 instances judicial review.

For these instances, more columns are created: judges, bench strength, judge writing the opinion, issue, outcome, deference, necessity/balancing and presumption of constitutionality.

For outcome, the data is coded. Judgments in favor of citizens/ individuals are fed as “I” (Individual), decisions favoring the State as “S”. For deference, it would be “D” if deferred expressly, or “NM” (Not Mentioned) if there is no deference. Necessity/ balancing, it would be “LRA” (Least Restrictive Alternative) for lesser restrictive alternative/ less drastic restraint, excess of coverage, excessive, disproportionate and an assessment of cost and benefits, or “NM” for not mentioned.

A database will be created containing all the instances with columns for “serial number”, “case title”, “citation”, “bench strength”, “judgment written by”, “issue” and “outcome”. Annexure-II lists the instances with express deference. The list mentions the relevant paragraph of the judgment and comments detailing whether it was deference to administrative authority, legislature, expertise, taxation or generally in respect of economic matters.

1.8 Design of the thesis

Chapter Two

Chapter two introduces article 19(1)(g) - the right to freedom of POTB, its nature and the scope. It discusses how a restriction must be a statute and not a mere executive instruction. It further discusses judicial review - the grounds of review and the standards

of review. It first discusses article 32 and then explains the grounds of review under article 19(1)(g) - reasonableness and general public interest. The chapter argues that the standard of review for article 19(1)(g) is akin to proportionality standard and the presumption of constitutionality is reversed in case of drastic regulation or prohibition. The chapter will attempt to find out the meaning of general public interest and the difference between public interest and general public interest.

Chapter Three

Chapter three is about executive overreach without authority of law. While state monopolies must be statutory to claim immunity under article 19(6), in certain cases judiciary has held otherwise and refused to treat executive-created non-statutory monopolies as a restriction. As a result, the right of a private enterprise to be treated at par with public sector enterprise for regulatory purpose stands forfeited. A preferential treatment to Public Sector Units without any legislative backing became constitutionally valid.

Chapter Four

Examining the article 19(1)(g) jurisprudence for adherence to above norms of review, the chapter will investigate the judicial behavior with respect to: (1) adherence to the *Chintaman* standards of review for reasonableness; (2) general public interest; (3) deference; and (4) rule of reversal of presumption. The chapter will also look into the reasoning offered by the Court and identify some of the irrelevant reasons frequently used to validate pro-state outcomes.

Chapter Five

Chapter Five investigates how the Supreme Court encroached the legislative and executive domain and assumed the regulatory role for street vending from 1985 to 2013. Instead of reviewing the evictions on the grounds of excessive delegation, unguided discretion or the procedural fairness of the licensing terms, the Supreme Court treated the writ petitions as public interest litigation, framed the regulations directly or indirectly and set up committees to implement or monitor the implementation of schemes.

CHAPTER 2

RIGHT TO FREEDOM OF POTB: CONSTITUTIONAL FRAMEWORK

2.1 Introduction

Article 19(1)(g) affirms the economic rights of every Indian citizen - the right to practice any profession or to carry on any occupation, trade or business.[1] Article 19(6) allows the State to impose reasonable restrictions in the interests of the general public, empowers the State to prescribe professional and technical qualifications and to monopolize any sector partially or fully.[2] First Amendment amended clause (6) of article 19 to allow the State to have monopoly.[3]

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[1] **19. Protection of certain rights regarding freedom of speech, etc.**-(1) All citizens shall have the right-
(*a*) to freedom of speech and expression;
(*b*) to assemble peaceably and without arms;
(*c*) to form associations or unions co-operative societies;
(*d*) to move freely throughout the territory of India;
(*e*) to reside and settle in any part of the territory of India; [and]
(*f*) [* * *]
(*g*) to practise any profession, or to carry on any occupation, trade or business.

[2] (6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-
(*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

[3] [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-
(*i*) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]
Subs. by the Constitution (First Amendment) Act, 1951, S. 3, for "nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business"

Clause (2) -(6) of article 19 allow the State to impose reasonable restrictions on the freedoms guaranteed in article 19(1)(a)-(g). Clause (2), (3), and (4) state several specific grounds for those reasonable restrictions to impose on the freedom of speech and expression, the freedom to assemble and the freedom to associate respectively. For example, article 19(2) states the sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation or incitement to an offence as the grounds for imposing reasonable restrictions on the freedom of speech and expression. Article 19(3) mentions sovereignty and integrity of India or public order as grounds of reasonable restriction on the freedom of assembly; article 19(4) also states sovereignty and integrity of India or public order or morality as grounds of restrictions on the freedom of association. Clause (5) too cites at least two grounds "in the interests of the general public" and "for the protection of the interests of any Scheduled Tribe" for imposing reasonable restrictions, on sub-clause (d) and (e) to clause (1) of article 19.

The first part of article 19(6) has only one ground, general public interest for imposing reasonable restrictions on article 19(1)(g). Second part (beginning from "… and, in particular, nothing in the said sub-clause shall affect …) as amended by the first amendment has two sub clauses to clause (6): sub clause (i) allows the State to make any law relating to professional or technical qualifications necessary for practicing any profession; and sub clause (ii) allows laws enabling the state to carry on any trade, business or service, whether to the complete or partial exclusion of others. Does it mean that the laws under the second part of article 19(6) are immune from article 19(6) and do need to be scrutinized on reasonableness and general public interest? Or does it mean that these laws the laws under the second part of article 19(6) also need to be reasonable

and in general public interest? In cases involving challenges to professional or technical qualifications, judiciary has sometimes reviewed such restrictions for reasonableness and general public interest,[4] but in case of state monopoly, judiciary reads immunity in the same provision to state monopolies from judicial review.[5]

The Constitution nowhere defines the terms "reasonableness" and "in the interests of general public". The thesis would examine the constituent assembly debates, precedents and other scholarly articles to ascertain the meanings of these grounds and other standards of review.

2.2 Nature of the Right

Datar and Swaminathan have argued that the Constitution of India does not grant article 19 freedoms; it merely affirms those freedoms.[6] Liberty is the default position.[7] All citizens have the natural capacity to do anything.[8] What article 19 does is to guarantee that the state cannot take away these freedoms arbitrarily.[9]

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[4] *Lingappa Pochanna Appelwar* v. *State of Maharashtra* (1985) 1 SCC 479; *BP Sharma* v. *Bar Council of Maharashtra and Goa* (1996) 3 SCC 342; *Ayurvedic Enlisted Doctors'Association* v. *State of Maharashtra* (2009) 16 SCC 170; *Rajasthan Pradesh Vaidya Samiti, Sardarshahar* v. *Union of India* (2010) 12 SCC 609. For contrary position, see *Udai Singh Dagar* v. *Union of India*, (2007) 10 SCC 306 (reasonableness and general public interest not applied);

[5] *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh* 1955 SCR 2 589; *Ramchandra Palai* v. *State of Orissa* 1956 SCR 28; *HC Narayanapp* v. *State of Mysore* 1960 SCR 3 742; *JY Kondala Rao* v. *Andhra Pradesh State Road Transportation Corporation* 1961 SCR 1 642; *Akadasi Padhan* v. *State of Orissa* 1963 Supp 2 SCR 691; *Municipal Committee, Amritsar* v. *State of Punjab* 1969 SCR 1 475; *State of Rajasthan* v. *Mohan Lal Vyas* (1971) 3 SCC 705

[6] Arvind Datar and Shivprasad Swaminathan, "Police Powers and the Constitution of India: The Inconspicious Ascent of an Incongruent American Implant" 28 *Emory Int'l L Rev* 63 (2014).

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

Datar and Swaminathan quote Chief Justice Shastri in *State of West Bengal* v. *Subodh Gopal Bose*:[10]

> I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen "to acquire, hold and dispose of property" with other natural rights and freedoms inherent in the status of a free citizen and embodied them in Article 19(1),…… I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of the citizen as a free man are embodied and protected from invasion by the State under clause 1 of Article 19, the powers of state regulation of those freedoms in public interest being defined in relation to each of those freedoms by Clause (2) to (6) of that article, […].

The Constitution allows the State to curtail the freedoms to a reasonable extent in the general public interest.[11] Article 19 freedoms do not constrict any activity; even if an activity is perceived to be immoral, it is not prohibited unless the State passes a reasonable law in general public interest.[12] Thus, the State can impose *ex post* reasonable restrictions in the interests of general public.[13] Unless the legislature passes a law imposing reasonable restrictions, no restriction is deemed to be vested in the State.[14] Freedom of trade includes trading in all activities and no activity is excluded unless reasonably prohibited by law.[15]

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[10] 1954 SCR 1 587, quoted in *Ibid.*
[11] *Supra* note 6.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

2.3 The Scope of Article 19(1)(g)

Restriction

A restriction is an intervention that curtails the freedom. If a government measure enhances the competition for traders and allows more choice to the consumer, then it is not a restriction and hence it does not warrant any judicial review. In *Harman Singh* v. *Regional Transport Authority, Calcutta*,[16] the petitioners contended that issuing licenses to small taxis in Calcutta may oust the existing cabs out of business. The Court held that an absence of monopoly and an introduction of competition did not amount to a denial of the right to carry on occupation and to ply their taxis.[17]

Professional facility is not included in the right. Unavailability of chambers for all the advocates-on-record within the Supreme Court compound does not violate the fundamental right under article 19(1)(g) of the Constitution.[18] It may be true that a chamber facilitates the exercise of fundamental right but a chamber is a mere facility made available to lawyers by the Court and its unavailability cannot be regarded as a breach of article 19(1)(g) of the Constitution.[19]

Article 19(1)(g) is a negative liberty. It does not include a right to work for the government at a certain post.[20] Retrenched workers may choose to pursue their rights and remedies under the industrial laws but retrenchment by itself is not a violation of

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[16] 1954 SCR 371.
[17] *Ibid.*
[18] *Vinay Balachandra Joshi* v. *Registrar General, Supreme Court of India* (1998) 7 SCC 461.
[19] *Ibid.*
[20] *Fertilizer Corporation Kamgar Union (Regd.), Sindri* v. *Union of India* (1981) 1 SCC 568; *K Rajendran* v. *State of Tamilnadu* (1982) 2 SCC 273.

worker's fundamental right under Article 19(1)(g) of the Constitution.[21] It would be open to the workers whether difficult or easy to find out other jobs.[22]

Contractual obligations for an employee are also not "restrictions" for the purpose of article 19(6). A contractual provision prohibiting doctors employed with the state government health services to engage in private practice is not a restriction in the constitutional sense.[23] The Court held: [24]

> Article 19(1)(g) confers on citizens right to practise any profession, or to carry on any occupation, trade or business for their individual benefit. It does not create an obligation to do so. It is for the citizen to exercise or not his said right. Further, the Article does not oblige a citizen to practise any particular occupation, business or trade. He is free to follow any occupation and on such terms and conditions as he chooses. It does not prevent him from accepting its discipline including such rights and obligations as flow from it. As in the present case, those who join the Government service with the full knowledge that they will have no right to practise the profession privately, agree to give up their right as private practitioners in consideration of the security, status and privilege as a government servant. The Government service is also an occupation and those who choose it cannot complain of its discipline or insist upon pursuing it on their terms. Nobody compels them to join it if they want to practise their profession privately. They are free to leave it at any time. The restriction imposed by Section 9 is not on the freedom to practise the medical profession but on such practice while one continues to be the member of the State Service. Article 19(1)(g) does not give a citizen a right to carry on any profession irrespective of the fact that he has voluntarily accepted restrictions on his said right in consideration of other rights, as in the present case. In the circumstances, it is not even necessary for the State to invoke the provisions of clause (6) of Article 19(1)(g) which permits the State to impose reasonable restrictions on the exercise of the right in the interest of the general public.

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[21] *Ibid.*
[22] *Ibid.*
[23] *Sukumar Mukherjee* v. *State of West Bengal* (1993) 3 SCC 723.
[24] *Id.* at para 20.

Hence, a government can impose contractual conditions on its employees. Those conditions may be the subject matter of industrial laws but those are not to be reviewed as restrictions under article 19(6).

Delegated Legislation

Article 13(3)(a) of the Constitution offers an inclusive definition of law and includes all kinds of executive and administrative imposts that the Supreme Court can review under article 32. It means that the constitutional courts can undertake a judicial review of any legislation, delegated legislation as well as executive action.

Does it mean that the Executive can frame any rule, regulation or notification without any mandate from the legislature and infringe the fundamental rights, because by virtue of article 13(3)(a) such delegated legislation would be a law?

An executive impost with civil consequences must be authorized by a statute.[25] In this context, the Court in *Thakur Bharat Singh*[26] listed three fundamental principles: first, limited government or the legislative check on the executive; second, the separation of powers and; third, the rule of law including the judicial review of the arbitrary executive action.[27] Quoting Dicey, the Court described the rule of law as the superiority of legislation, the absence of arbitrariness and discretion in the government

[25] *Thakur Bharat Singh* v. *State of Madhya Pradesh* 1967 SCR 2 454.
[26] *Ibid.*
[27] *Ibid.*

authorities.[28] Unlike the continental system where the government might have had sweeping discretionary powers to detain suspects, the English system had the rule of law. Since India followed the English system and opted for the rule of law, "[e]very Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must be supported by some legislative authority."[29]

In *Thakur Bharat Singh*,[30] the state counsel contended that as per *Ram Jawaya* judgment[31], the State could issue executive orders without any legislation.[32] Article 162 provides the executive power of a State shall extend to the matters with respect to which the Legislature of the State has the power to make laws.[33] But the Court rejected that contention on two grounds. First, Article 162 and Article 73 merely distribute the executive power between the Union and the States, and do not validate any exercise of legislative powers by the executive.[34] Second, in *Ram Jawaya* case, the state action was not held to be prejudicial to fundamental rights.[35] The Court had held that there was no fundamental right in the citizens to bar the State from trading.[36]

In *Madhubhai Amathalal Gandhi* v. *Union of India*,[37] the learned Solicitor-General contended that a notification cannot be challenged unless the parent Act is challenged. Justice Subba Rao disagreed. He pointed out that article 13(2) of the Constitution includes "notification" in its definition of "law".[38] He observed that if a

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[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab* 1955 SCR 2 225
[32] Supra note 25.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] 1961 SCR 1 191.
[38] *Ibid.*

notification merely restates the provisions of the Act, then its validity cannot be questioned without challenging the parent Act.[39] But if the Act vests a general power in the State and the notification details infringe one or other of the fundamental rights, the validity of the Act cannot equally obviously prevent an attack on the notification.[40] He offers an illustration: an Act vests power in the government to impose restrictions on the freedom of speech in the interests of security of State.[41] A notification issued under the Act imposing unreasonable restrictions may be unconstitutional.[42]

Justice Subba Rao opined that general terms of rule-making provisions in a statute may allow both reasonable and unreasonable restrictions.[43] But rules that cast unreasonable restrictions would be liable to set aside.

Vesting of rule-making power does not mean power to make a rule inconsistent with or repugnant o the parent Act.[44] Rule-making power does not enable the authority to bring a subject under its purview otherwise excluded or not contemplated by the Statute.[45]

A general rule-making power is for making rules to carry out the statutory purpose. If there is no prohibition mandated by the statute or the legislative intent expressly or by necessary implication, then such rules would be ultra vires of the parent Act.[46] A general rule-making power for carrying out the legislative intent without laying

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[39] *Ibid*.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Addl. District Magistrate (Rev) Delhi Admn* v. *Siri Ram* (2000) 5 SCC 451.
[45] *Kunj Behari Lal Butail* v. *State of HP* (2000) 3 SCC 40.
[46]*Ibid.*

any guidelines cannot and must not create substantive rights or obligations or disabilities not contemplated by the statute.[47]

A subordinate legislation can be challenged for lack of legislative competence to make rules, violation of fundamental rights, violation of any constitutional provision, repugnancy to the parent Act or any other legislation and arbitrariness.[48] In a delegated legislation is not immune to the same extent as a statute.[49] The Supreme Court has equated delegated legislation to an "order prescribed by a superior for the management of some business and implies a rule for general course of action." Rules cannot supplant the parent Act, rules supplement the parent Act. Power to fill up details can be delegated and the delgatee can figure out the details within the policy framework. Rule require granularity that a delegated authority understands.[50]

In *Akadasi Padhan* v. *State of Orissa and Others*, the Court observed: [51]

> The expression "law relating to" occurring in clause (ii) means "essential and basic provisions" enacted to give effect to the monopoly i.e provisions "integrally and essentially connected with the creation of the monopoly"; that the provisions which are incidental or subsidiary to the creation or operation of the monopoly must satisfy the test of the main clause, and that if the law infringes any other fundamental right in clause (1) of Article 19 it must be tested under the appropriate provision governing it.

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[47] *Ibid.*
[48] *State of T.N* v. *P. Krishnamurthy* (2006) 4 SCC 517.
[49] *Indian Express Newpapers (Bombay) Pvt Ltd v Union of India*, (1985) 3 SCC 641.
[50] *St. Johns Teachers Training Institute v. Regional Director, National Council For Teacher Education*, (2003) 3 SCC 321.
[51] *Supra* note 5.

If the government authorizes agents to carry on trade in leaves purchased on their own account, then it may not be a state monopoly deserving protection under article 19(6)(ii).[52] Agents must act for and on behalf of the Government; the law must not be for the private benefit of agents.[53] Any arrangement that under the garb of state monopoly results in private profit for agents is invalid.[54]

Similarly, in *State of Rajasthan* v. *Mohan Lal Vyas*,[55] the Supreme Court held the pre-constitutional contracts conferring monopoly on the private bus operator for a consideration as void.[56] In 1948, the Government of the State of Jodhpur entered into two agreements with a bus operator for two bus routes giving the monopoly right to ply the buses on specified routes for a certain sum.[57] After the Constitution came into force, the bus operator refused to pay money to the government contending the monopoly contracts between the respondent and the State had become void.[58] The Court agreed and held that "… after the Constitution came into force every citizen under Article 19(1)(g) of the Constitution has the right of freedom of trade including the right to ply buses and trucks on the road. […] A monopoly right cannot be conferred on a citizen under the Constitution nor can it be justified under the Constitution."[59] As per the first amendment of the Constitution, the monopoly rights were valid in favour of the State.[60] State monopolies are defensible but State-conferred monopoly rights on a citizen would be "indefensible and impermissible".[61]

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[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] (1971) 3 SCC 705.
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*

Sixth Schedule

In *Lala Hari Chand Sarda* v. *Mizo District Council*,[62] the applicability of Part III to the Para 10 of the Sixth Schedule to the Constitution of India was in question.

Para 10 of the Sixth Schedule to the Constitution of India vests power in the District Council to regulate and control moneylending and trading by non-tribals in the District.[63] Mizo District Council enacted the Lushai Hills District (Trading by non-Tribal) Regulation, 2 of 1953.[64] Section 3 of the Regulation stated: "no person other than a tribal resident in the District shall carry on wholesale or retail business in any commodities except under and in accordance with the terms of a licence issued by the District Council."[65] The second proviso which is applicable to both permanent and temporary licences, mandates the recording of reasons in the order by the District Council, particularly in case of refusal of licenses.[66]

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[62] (1967) SCR 1 1012.
[63] Para 10 of the Sixth Schedule to the Constitution vests the power in the District Council to make Regulation for the control of moneylending and trading by non-tribals. Clauses 1 and 2 of that paragraph state:
(1) The District Council of an autonomous district may make regulations for the regulation and control of moneylending or trading within the district by persons other than scheduled tribes resident in the District.
(2) In particular and without prejudice to the generality of the foregoing power, such regulations may
(a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of moneylending
(b)-(c) * * *
(d) prescribe that no person who is not a member of the Scheduled Tribes resident in the District shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council.
[64] *Supra* note 62.
[65] *Ibid.*
[66] *Ibid.*

Para 10 represents a protective and cautious approach to safeguard tribals from exploitation by non-tribals who may like to carry on moneylending and other activities in the district. Section 3 of the regulation prohibits trade without a licence. A non-tribal cannot trade in the District without a license.[67] And in case of refusal he is prohibited to engage in any trade in the District. License is temporary in nature and for a period of one year only.[68] Refusal to renew the license would imply that the non-tribal trader would need to wrap up his bags and leave. The Regulation had no right of appeal to any superior authority against a refusal order.[69]

The question is: is such a regulation immune from article 19(1)(g) by virtue of para 10 of the Sixth Schedule to the Constitution?

Justice Bachawat seemed to have based his reasoning on autonomy and immunity though he did not use these words. He noted that Para 10(2)(d) of the Sixth Schedule to the Constitution of India vests the power to license trade in the District Council of an autonomous district.[70] It is the policy for how the tribal areas in Assam are to be administered.[71] If Para 10 does not violate Part III of the Constitution and if section 3 of the regulation made under Para 10 strictly conforms to Para 10, then how can section 3 infringe Part III of the Constitution?[72]

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[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] Although Justice Bachawat held that the above ground was enough to dispose of the case but still he went on to deal with the judicial review. He referred to article 46, a directive principle of state policy to uphold the regulation. That part of the judgment not relevant for the applicability of the Sixth Schedule is not discussed here.

What he did not mention was whether there was any immunity clause in the Sixth Schedule that saves the regulations made under Para 10 from the application of Part III of the Constitution. While Para 10 merely vests the licensing power in the District Council, the judgment mentioned no provision that saves those regulations from the application of Part III of the Constitution.

Justice Shelat (on behalf of himself and Justice Subba Rao) noted that a non-tribal trader had no remedy against a refusal order.[73] Recording of reasons was hardly a safeguard against an arbitrary refusal in absence of any provision for appeal.[74]

The Regulation nowhere offered any guidance, principles or standards for how the power to grant a license is to be exercised.[75] Justice Shelat observed: "The power of refusal is thus left entirely unguided and untrammelled. How arbitrary the exercise of such unguided power can be is seen from the fact that the Executive Committee not only refused to renew the appellant's licence but also directed him to remove his property by the end of July 1960 and imposed a fine if he failed to do so."[76]

The Executive Committee indeed gave the reasons for the refusal to renew the licence.[77] The reason was: there were too many licensed vendors already. But the order did not clarify how many licenses could be issued; who prescribed the number of licenses; when it was prescribed and under what authority.[78] The Regulation did not

[73] *Supra* note 62.
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*

provide for a cap on number of licenses.[79] It did not state any formula for fixing any such maximum number.[80] Hence, it implied that the Executive Committee as per its whims and fancy could vary the number of licenses and refuse old traders to continue their trade or newcomers to set up their businesses.[81]

Merely because the Sixth Schedule to the Constitution seeks to safeguard the tribals from exploitation, an arbitrary and unreasonable restriction made under the Sixth Schedule does not become reasonable.[82] Justice Shelat held that "even if a statute lays down a policy it is conceivable that its implementation may be left in such an arbitrary manner that the statute providing for such implementation would amount to an unreasonable restriction. A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable".[83]

What Justice Shelat should have emphasised was absence of any provision in the Sixth Schedule saving the regulations from judicial review.

State Monopoly

After the Constitution came into force, the constitutional courts began to review the constitutionality of socialist and welfare laws on the fundamental rights to property and the fundamental right to trade and business, particularly article 19(l)(f)-(g) and 31 respectively.[84] Although Entry 21 in List III enabled both the State and the Union

[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.* at para 9.
[82] *Ibid.*
[83] *Ibid.*
[84] *Akadasi Padhan*, *Supra* note 5.

Legislatures to create commercial and industrial monopolies, combines and trusts, but the such legislations were challenged for violation of Article 19(l)(f) and (g).[85]

During 1947 and after, the United Provinces government began operating buses in competition with private bus and conferred special privileges on its bus operations.[86] Private bus operators challenged the discriminatory treatment and the unreasonable deprivation of their right to carry on a trade or business (Article 19(6)) before the Allahabad High Court.[87] The Court held that so long as a state-run activity does not infringe the fundamental rights, or is not illegal, a state government may own property and run a business.[88] Nationalization requires a law and the law needs to be justified under Article l9(6).[89] State running a business to the exclusion of its citizens would deemed to be a violation of fundamental rights.[90]

Intending to remove barriers for nationalisation of road transport, Nehru wrote to his Law Minister on 19 October 1950.[91] A note prepared by the Law Ministry dated 20th March for the cabinet mentioned the *Moti La1* case in the context of Article 14 and stated that a proper legislation would remove the legal difficulties faced earlier.[92] Chief Minister Pant believed that the UP Road Transport Act, passed after the Moti Lal decision, had addressed the legal lacunae.[93] But he was also not sure about article 19(6) whether it would permit nationalisation "'in the interest of the general public".[94] The

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[85] *Ibid.*
[86] Granville Austin, *Working a democratic constitution: a history of the Indian experience* 92 (Oxford University Press, New Delhi, 1999).
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid.*
[94] *Ibid.*

Cabinet Committee on the Constitution, in its mid-April report pointed out article 19 as the main barrier for nationalisation.[95] It rejected the proposal to do away with reasonableness, instead it decided to add a saving clause for nationalisation. This part of the first amendment barely got any attention in the parliamentary debates.[96]

Article 19(6)(ii) is a saving clause; State monopolies are to be presumed to be reasonable and in the interests of the general public.[97] However, article 19(6)(ii) protects only the core provisions of a monopoly-enabling statute that create a monopoly, not the peripheral provisions.[98]

Ninth Schedule

[95] *Ibid.*
[96] *Ibid.*
[97] *Akadasi Padhan*, *Supra* note 5.
[98] *Ibid.*

The original constitution did not contain the Ninth Schedule. The Constitution (First Amendment) Act 1951 inserted the Article 31A[99] and Article 31B[100] along with Ninth Schedule with retrospective effect. Article 31C was inserted later by the Constitution

[99] 31A. Saving of laws providing for acquisition of estates, etc
(1) Notwithstanding anything contained in article 13, no law providing for-
a. the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
b. the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
c. the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
d. the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or
e. the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,
shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19:
Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:
Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.
(2) In this article,-
a. the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-
i. any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;
ii. any land held under ryotwari settlement;
iii. any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;
b. the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

[100] 31B. Validation of certain acts and regulations
Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provision thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

(Twenty-fifth Amendment) Act, 1971.[101] Saving clauses intended to protect laws aimed at agrarian reforms and implement certain DPSPs.[102]

In *Prag Ice and Oil Mills* v. *Union of India*,[103] petitioners challenged the validity of a control order passed on September 30, 1977 by the concerned Ministry under Section 3 of the Essential Commodities Act, 1955[104].

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[101] 31C. Saving of laws giving effect to certain directive principles
Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

[102] *Saving Clauses: the Ninth Schedule and Articles 31A-C, in* The Oxford Handbook of the Indian Constitution 627–643

[103] (1978) 3 SCC 459.

[104] 3. (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.
(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide:
(a) * * *
(b) * * *
(c) for controlling the price at which any essential commodity may be bought or sold;
(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;
(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;
(f) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity,
(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or
(b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the matter.
Explanation 1—An order made under this clause in relation to food-grains, edible oilseeds or edible oils, may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of, the producers.
Explanation 2—For the purpose of this clause, "production" with its grammatical variations and cognate expressions includes manufacture of edible oils and sugar;"

The petitioners contended that the Control Order violates Articles 14 and 19(1)(f) and (g). Although the Act was placed in the Ninth Schedule, hence Section 3 of the Act was immune from judicial review based on Part III of the Constitution.[105]

Justice Beg noted that article 31-B saved the Acts placed in the Ninth Schedule from application of Part III of the Constitution but not any rules or executive action done or to be done in future under those Acts. But if an Act is placed in the Ninth Schedule, does that make the orders passed under the Act also immune from Part III of the Constitution?

Justice Beg began with the premise: if Section 3 of the Act has passed the test of constitutional validity,[106] a Control Order passed under Section 3 could not gone beyond the scope of the parent Act because a "delegated or derivative power could not rise higher or travel beyond the source of that power from which it derives its authority and force" and hence, it implied that "articles 14 and19(1)(f) and (g) could be deemed to be, if one may so put it, "written into" Section 3 of the Act itself. They would control the scope of orders which could be passed under it."[107] This is a sheer fallacy. Merely because an Act is constitutionally valid, it does not necessarily mean that the delegated legislation and the executive orders passed under the provisions of the Act cannot be invalid.

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[105] *Supra* note 103.
[106] Justice Beg referred to *Shri Harishankar Bagla* v. *State of Madhya Pradesh*, AIR 1954 SC 465. The thesis argues in subsequent chapters that *Harishankar* did not really review section 3 of the impugned Act and merely reviewed the control order under it.
[107] *Supra* note 103.

Petitioners contended that Ninth Schedule made the Act immune and so the delegation of rule-making powers was also immune but it did not make the exercise of those powers immune.[108] Justice Beg disagreed. He saw no distinction between power delegation and its exercise.[109] He observed:[110]

> Powers are granted or conferred so as to be exercised and not to be kept in cold storage for purposes of some kind of display only as though they were exhibits in a show-case not meant for actual use. The whole object of a protection conferred upon powers meant for actual use is to protect their use against attacks upon their validity based upon provisions of Part III. If this be the correct position, it would, quite naturally and logically, follow that their use is what is really protected.

Justice Beg claimed that an order passed under Section 3 of the Act would also be immune because of the "derivative" immunity so long as section 3 covers that order and so long as Ninth Schedule protects section 3.[111]

Justice Chandrachud disagreed on this part and he wrote a concurring separate opinion on behalf of himself, Bhagwati, Fazal Ali, Shinghal and Jaswant Singh.[112] They disagreed that because an Act is protected under the Ninth Schedule, so every order passed under that Act would also be immune from judicial scrutiny.[113] Justice Chandrachud observes: [114]

> On a plain reading of this article it seems to us impossible to accept that the protective umbrella of the Ninth Schedule takes in its everwidening wings not only

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[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*

the Acts and Regulations specified therein but also orders and notifications issued under those **Acts and Regulations. Article 31-B** constitutes a grave encroachment on fundamental rights and doubtless as it may seem that it is inspired by a radiant social philosophy, it must be construed as strictly as one may, for the simple reason that the guarantee of fundamental rights cannot be permitted to be diluted by implications and inferences. An express provision of the Constitution which prescribes the extent to which a challenge to the constitutionality of a law is excluded, must be construed as demarcating the farthest limit of exclusion. Considering the nature of the subject-matter which **Article 31-B** deals with, there is, in our opinion, no justification for contending by judicial interpretation the provisions of the field which is declared by that article to be immune from challenge on the ground of violation or abridgement of fundamental rights.

[…] Extending the benefit of the protection afforded by **Article 31-B** to any action taken under an Act or Regulation which is specified in the Ninth Schedule, appears to us to be an unwarranted extension of the **provisions contained in Article 31-B,**neither justified by its language nor by the policy or principle underlying it. When a particular Act or Regulation is placed in the Ninth Schedule, Parliament may be assumed to have applied its mind to the provisions of the particular act or regulation and to the desirability, propriety or necessity of placing it in the Ninth Schedule in order to obviate a possible challenge to its provisions on the ground that they offend against the provisions of Part III. Such an assumption cannot, in the very nature of things, be made in the case of an Order issued by the Government under an Act or Regulation which is placed in the Ninth Schedule. The fundamental rights will be eroded of their significant content if by judicial interpretation a constitutional immunity is extended to Orders to the validity of which Parliament, at least theoretically, has had no opportunity to apply its mind. Such an extension takes for granted the supposition that the authorities on whom power is conferred to take appropriate action under a statute will act both within the framework of the statute and within the permissible constitutional limitations, a supposition which just experience does not justify and to some extent falsifies. In fact, the upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and accordingly Orders and Notifications issued under Acts and Regulations which are specified in the Ninth Schedule must meet the challenge that they offend against the provisions of Part III of the Constitution. The immunity enjoyed by the Parent Act by reason of its being placed in the Ninth Schedule cannot proprio vigore be extended to an offspring of the Act like a Price Control Order issued under the authority of the Act. It is therefore open to the

> petitioners to invoke the writ jurisdiction of this Court for determination of the question whether the provisions of the Price Control Order violate Articles 14, 19(1)(f) and 19(f)(g) of the Constitution.
> […]
> 50. The decision of this Court in Godavari Sugar Mills Ltd. v. S.B Kamble 1975 1 SCC 696 appears to us to be in point and it supports the petitioners' contention that the benefit of **Article 31-B of the Constitution** cannot be attended to an order or notification issued under an Act which is placed in the Ninth Schedule. […] [I]f the protection afforded under **Article 31-B** is extended to amendments made to an Act or Regulation subsequent to its inclusion in the Ninth Schedule, the result would be that even those provisions would enjoy the protection which were never scrutinised and could not, in the very nature of things, have been scrutinised by the prescribed majority vested with the power of amending the Constitution. That, according to the Court, would be tantamount to giving a power to the State Legislature to amend the Constitution in such a way as would enlarge the contents of the Ninth Schedule to the Constitution. Khanna, J., who spoke for the Court, observed that "Article 31-B carves out a protected zone", that any provision which has the effect of making an inroad into the guarantee of fundamental rights must be construed very strictly and that it is not permissible to the Court to widen the scope of such a provision or to extend the frontiers of the protected zone beyond that is warranted by the language of the provision. In the result, it was held that the entitlement to protection cannot be extended to provisions which were not included in the Ninth Schedule and that this principle would hold good irrespective of the fact whether the provision in regard to which the protection was sought dealing with new, substantive Matters or with matters which were mainly incidental or ancillary to those already protected. This decision shows unmistakably that the circumstance that a Control Order is a mere creature of the parent Act and is incidental or ancillary to it cannot justify the protection of the Ninth Schedule being extended to it on the ground that the parent Act is incorporated in that Schedule.

Whether substantive provisions or ancillary provisions, immunity cannot be extended to any provision beyond the mandate of textual provisions.[115] Ninth Schedule cannot be expanded by interpretation.[116]

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[115] *Ibid.*
[116] *Ibid.*

Article 15(5)

The Constitution Act (Ninety Third Amendment Act), 2005 added clause 5 to article 15 in 2006. Clause (5) of article 15 begin with a clear overriding clause that trumps article 19(1)(g).[117]

The amendment sought to achieve greater access to higher education for underprivileged classes.[118] In pursuance of article 46, as a directive principle of State policy - the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice - the Parliament amended article 15.[119] To enable the reservations in private educational institutions, the amendment expressly limited the scope of article 19(1)(g) and curtailed their autonomy to allow for state-imposed reservations.[120]

Hence, a law giving effect to article 15(5) cannot be challenged on the ground of article 19(1)(g).

In *Indian Medical Association* v. *Union of India*,[121] the Court had to address whether the provisions of Delhi Act 80 of 2007 to the extent those provided

[117] Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]
[118] The Constitution (Ninety-Third Amendment) Act, 2005 (Act 93 of 2005).
[119] *Ibid.*
[120] *Ibid.*
[121] (2011) 7 SCC 179.

reservations, were constitutionally valid. The Court had to review the impugned Act on the Basic Structure doctrine.[122] The Court held: [123]

> 201. […] … by the insertion of clause (5) of Article 15, the Ninety-third Constitutional Amendment has empowered the State to enact legislations that may have very far-reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently we find that clause (5) of Article 15 strengthens the social fabric in which the constitutional vision, goals and values could be better achieved and served. Or in terms of the analogy to Ship of Theseus, clause (5) of Article 15 may be likened to a necessary replacement and in fact an enhancement in the equality code, so that it makes our national ship, the Constitution, more robust and stable.
>
> […]
>
> 234. Consequently, given the absolute necessity of achieving the egalitarian and social justice goals that are implied by provisions of clause (5) of Article 15, and the urgency of such a requirement, we hold that they are not a violation of the basic structure, but in fact strengthen the basic structure of our Constitution.

A law enacted under article 15(5) can be challenged on the Basic Structure and not on article 19(1)(g).

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[122] *Ibid.*
[123] *Ibid.*

Applicability during Emergency

Article 358 of the Constitution allows for suspension of article 19 freedoms during a proclamation of emergency due to war or an external aggression.[124]

Article 19 cannot limit the power of the State to make any law or to perform any executive action that the State would but for Part-III be competent to make or to take. Article 359 allows the President to suspend the Part-III rights except article 20 and 21 during emergency.[125] By Article 359, the President is authorised to suspend the right to

[124] 358. Suspension of provisions of article 19 during emergencies
1. While a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect: Provided that where such Proclamation of Emergency is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.
2. Nothing in clause (1) shall apply
a. to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or
b. to any executive action taken otherwise than under a law containing such a recital.

[125] 359. Suspension of the enforcement of the rights conferred by Part III during emergencies
1. Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.
1A. While an order made under clause (1) mentioning any of the rights conferred by Part III (except articles 20 and 21) is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect: Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.
1B. Nothing in clause (1A) shall apply
a. to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or
b. to any executive action taken otherwise than under a law containing such a recital.
2. An order made as aforesaid may extend to the whole or any part of the territory of India: Provided that

move any Court for the enforcement of Part III rights during the proclamation of emergency or for a shorter period.

In *Jalan Trading Co Pvt ltd* v. *Mill Mazdoor Sabha*,[126] the Court declined to review the impugned law on article 19(1)(g) because the article 19(1)(g) too stood suspended by the Presidential declaration of emergency.[127]

In *District Collector of Hyderabad* v. *Ibrahim and Co.*,[128] the Court was to adjudge the validity of an executive order issued during emergency.[129] The Court noted that the State did not make any statute infringing the fundamental right guaranteed by Article 19(1)(g).[130] Instead it issued an executive order.[131] But an executive order can be immune from judicial review only if the State was but for Article 19 competent to issue.[132] An executive action otherwise invalid is not immune from judicial review, merely because of emergency.[133] If the executive order is contrary to the statutory provisions, it would not be immune under Article 358 of the Constitution.[134] Secondly, Presidential order dated November 3, 1962 issued under Article 359 stated: "the right of any person to move any Court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article

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where a Proclamation of Emergency is in operation only in a part of the territory of India, any such order shall not extend to any other part of the territory of India unless the President, being satisfied that the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation, considers such extension to be necessary.
3. Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

[126] 1967 SCR 1 15.
[127] *Ibid.*
[128] (1970) 1 SCC 386.
[129] *Ibid.*
[130] *District Collector of Hyderabad* v. *Ibrahim and Co* (1970) 1 SCC 386, at para 9.
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] *Ibid.*

352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder".[135] The impairment of rights was limited to the rights under the Defence of India Ordinance, 1962.[136] Only if the impugned order was issued under the Defence of India Ordinance or rules, the Court would not be able to entertain a petition for impairment of the guarantee under Article 14.[137]

Locus Standi

Unlike article 14 and 21, article 19 freedoms are available to citizens only. A company is an artificial juristic person and not a natural person. A company cannot vote. Company whether incorporated or not is excluded from the definition of persons under the Citizenship Act, 1955.

In *State Trading Corp. Of India* v. *CTO*, the issue was tax assessment and issuance of notice demanding payment of the tax from the corporation.[138] Star Trading Corporation of India though registered as a private limited company, had ninety-eight per cent of its capital funded by the Government of India and the remaining two per cent held by two joint secretaries.[139] Respondent raised a preliminary objection that a corporation is not a citizen and hence, the writ petition is not maintainable.[140] The corporation could have possibly raised two arguments to overcome the locus objection - first, the corporation *per se* is a citizen for the purpose of Article 19.[141] Second, the corporation can claim

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[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] (1964) SCR 4 89.
[139] *Ibid.*
[140] *Ibid.*
[141] KV Krishnaprasad, "Unveiling the rights: corporate citizenship in India post State Trading Corporation." 22 *Nat'l L. Sch. India Rev.* 159 (2010).

Article 19 right through its shareholders who also happens to be Indian citizens.[142] This implied lifting the veil. However, in this case, lifting the veil might have led to an adverse outcome.[143] The problem was lifting the veil would have revealed clear government control over the company and the corporation would have been established as the state and hence not entitled to claim the rights under Article 19. Both pleas would have looked inconsistent.[144] Appellants sought to protect the rights of shareholder through the corporation, but the appellant also avoided any discussion that might hint at the corporation being a state agent or instrumentality.[145] Unsurprisingly, the appellants did not argue the grounds for lifting the corporate veil.[146] It argued the first contention only that the corporation *per se* is a citizen.[147]

Chief Justice Das on behalf of majority rejected this contention on three grounds. First, he differentiated between nationality and citizenship.[148] A company may have nationality. Place of incorporation determines it.[149] But nationality is not synonymous with citizenship. Nationality is a jural relationship referred in international law whereas citizenship determines the civic rights under municipal law.[150] Hence, all citizens are nationals of a state, but all nationals may not be citizens of the state.[151] The Court held that citizenship is limited to natural persons and no artificial person can be a citizen.[152] Second, Chief Justice Das held that the word citizen in Part III of the Constitution could not be given a different word from its usage in Part II of the

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[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*

Constitution which does not contemplate non-natural persons as citizens. Third, he observed that because a non-natural person cannot exercise some of the article 19 rights such as right to assemble or movement, original intention would have been to limit these rights to natural persons only.[153]

Justice Hidayatullah in a concurring opinion offered two additional reasons: one, various other provisions in the Constitution referring to citizenship did not refer to juristic persons.[154] Two, he observed that corporations are adequately protected under other constitutional provisions.[155]

Justice Das Gupta wrote a dissenting opinion.[156] He pointed out the irony that two individuals who by virtue of being citizens can file a writ to enforce their right under article 19 cannot do so if they form a corporation.[157] Associating with others to form a corporation would strip a citizen of his constitutional guarantees under article 19 – this would be the implication if one were to follow the majority reasoning. Secondly, constitution framers were aware of the legal developments in the United States and the doctrine of lifting of veil, hence absence of an express inclusion of juristic persons does not necessary imply exclusion of corporation from the word citizen.[158]

Another dissenting opinion was written by Justice Shah. He also gave two reasons: one, treating the Citizenship Act and Part-II of the Constitution as exhaustive

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[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *State Trading Corp* v. *CTO* (1964) SCR 4 89.
[157] *Supra* note 141.
[158] *Ibid.*

for defining citizenship would imply no citizenship prior to these codes.[159] Two, while a narrow interpretation of citizen for article 19 does not take away article 14 and 21 from juristic persons, it would deny the most important rights for a corporation – the right to carry on a trade and business.[160]

Star Trading decision comprehensively dealt with the issue of corporate citizenship for the purpose of article 19. Being a nine-judge bench, it constrained the future benches to revisit the issue.[161] Subsequent judgments particularly *Tata Engineering* case without appreciating the factual peculiarity of *Star Trading* case have misconstrued the legal and constitutional position.[162] The Court's view in *Star Trading* case goes against its role as the constitutional protector of fundamental rights of citizens.[163] Later decisions protected the economic rights of shareholder citizen rights better and lifted the corporate veil in some ways.[164]

In *Tata Engineering and Locomotive co. ltd.* v. *State of Bihar*,[165] the petitioners contended that *State Trading* case did not really decide the question of lifting the corporate veil and hence, the question could be taken up and decided.[166] The petitioner further argued that citizens can exercise their fundamental right under article 19(1)(c) to set up a company.[167] To say that the company will be bereft of the right to carry on trade and business that its founding members or the citizens have, will frustrate their

[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] (1964) SCR 6 885.
[166] *Ibid.*
[167] *Ibid.*

fundamental rights.[168] But the Court speaking through a five-judge bench rejected this contention on the ground that the petitioner wanted the Court to do something indirectly what a nine-judge bench judge had rejected directly.[169] As a result, the Court did not consider the grounds for lifting the corporate veil in this case.[170] The Court should have considered lifting the corporate veil as the question of citizenship of the corporation and protection of shareholder citizens are not the same questions.[171] So even if corporations are not held to be citizens it was Court's duty to protect the fundamental rights of the citizens who also happen to be the shareholders of the company.[172]

In *RC Cooper* v. *Union of India*[173] (the bank nationalization case) - an eleven-judge bench judge decision, a shareholder, the director and a current account holder of the bank challenged the validity of the Banking Companies (acquisition and transfer of undertakings) ordinance.[174] The Court held that irrespective of the violation of the company's right, the Court ought to grant relief to the petitioner if his fundamental rights are violated.[175]

However, in *Bennett Coleman* the Court recognized that a restriction on the newspaper would also affect the fundamental rights of the shareholders of the company.[176] It was of the view that the editors, directors, shareholders exercised their freedom of speech and expression through the newspaper.[177] Mere fact that petitioner

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[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*
[173] 1970 SCR 3 530.
[174] *Supra* note 141.
[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*

include a company that it should not prevent the Court from granting remedy to the citizens who may be shareholders, editors or printers.[178] The Court tried to distinguish the facts from *State trading* case, *Tata Engineering* case and *Bank nationalization* case and relied on *Express newspapers* case and *Sakal newspapers* case.[179] The premise seems to be that the newspaper is a separate class of company. But this distinction is artificial and unreasonable.[180]

Bennett Coleman did what *Tata Engineering* refused to do.[181] One may argue *Bennett Coleman* is not inconsistent with *State Trading* case but it certainly not in line with *Tata Engineering* case.[182] The Supreme Court could possibly three kind of views in this regard. First, that the company is a citizen and can exercise its own rights.[183] But the Supreme Court expressly rejected this view in *State Trading* case. Second, that a company derives its rights under article 19 from the shareholders but the Court rejected this view in *State Trading* case on the ground that the company be an inanimate juristic person cannot exercise many of the rights under Article 19.[184] Hence, neither can a corporation have rights under article 19 on its own nor can it derive from the shareholder.[185] The third view is that the shareholder exercise their right through the company and this view the Supreme Court adopted in *Bennett Coleman* case.[186]

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[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*

In *Bennett Coleman*, the Court peeped behind the corporate veil of the company and found out that the shareholders are citizens of India and then decided the case.[187] This limited lifting of the corporate veil is not contrary to the principle of limited liability because there is no question of liability to be imposed on the shareholders rather it is about recognizing the fundamental rights of the shareholders and for that purpose it carves out a small exception to the principle of separate personality.[188] Other cases where the Court refused to lift the veil are about abusing the corporate entity to evade laws.

Profession, Occupation, Trade or Business

Article 19(1)(g) uses four different expressions to make its coverage of livelihood and commercial activities as wide as possible. Once an activity is recognised and bucketed under one of these terms, a citizen will be entitled to pursue it unless restricted by a reasonable measure in general public interest.

Either to validate drastic government control over some activities or because of their cognitive biases based on their perceived sense of morality, judges refuse to acknowledge certain activities as trading or commercial activities so that a restriction can be upheld without undertaking a judicial review.[189] Jain calls it a "juridical technique",[190] but such an interpretation is questionable and in derogation of the constitutional text. Textually, no commercial activity looks outside of the purview of

[187] *Ibid.*
[188] *Ibid.*
[189] MP Jain, *Indian Constitution Law* (Lexis Nexis, 7th ed. 2014), at 1068.
[190] *Ibid.*

the above four terms and a restriction must be reviewed for reasonableness and general public interest.

CJI Das erroneously introduced the doctrine of res extra commercium in *RMD Chamarbaugwala* case[191] resulting in constricted reading of article 19(1)(g).[192] It was to deliberately exclude certain immoral or noxious activities from the purview of article 19(1)(g) protection.[193]

Datar and Swaminathan argue that police power doctrine - expressly rejected in Indian precedents and imported from the US jurisprudence - was the real basis for the application of res extra commercium.[194] The doctrine of police powers seeks to curtail the scope of fundamental rights by placing certain government restrictions beyond judicial review.[195] Larger benches had earlier dismissed the import of the American doctrine on grounds of structural differences between the two constitutions.[196] Indian Constitution does not permit excluding certain activities from the purview of fundamental rights before judicial review. It allows for ex post restrictions, not *ex ante* constrictions. Res extra commercium - in the sense, Indian Supreme Court uses it - imposes *ex ante* constrictions on fundamental rights.

Res extra commercium in Roman Law meant resources or things that no one has a property right in and hence, there cannot be a trade or business in such resources.[197]

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[191] *State of RMD Chamarbaugwala*, AIR 1957 SC 699.
[192] *Supra* note 6.
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*

CJI Das used this phrase in *RMD Chamarbaugwala* to prohibit gambling on moral grounds.[198] Malhotra disagrees with the Court's reasoning on four grounds: while there was no blanket ban on gambling, rather there was an express policy for authorising gambling, it could not be said that gambling was illegitimate business, if the license is obtained to carry on business in gambling.[199] Two, gambling business is not beyond commerce, it is a commercial activity, hence not res extra commercium.[200] Three, comparing gambling with criminal activities such as assault, murder and housebreaking is incorrect as gambling is a voluntary transaction between consenting adults and the state itself is engaged in the business of gambling.[201] Fourth, it would also be incorrect to say that issuance of license and imposition of tax did not legitimize the business of gambling.[202] It is otherwise.

In effect and indirectly, the police power doctrine has become a part of article 19 jurisprudence and it stops the courts to inquire into reasonableness and object of the restriction.[203]

Datar et al also notes that *Krishna Narula* case[204] refused to apply the doctrine to trade in liquor and further questioned its application in Indian jurisprudence.[205] However, subsequent larger benches with few exceptions continue to apply the doctrine.[206]

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[198] *Ibid.*
[199] Shefali Malhotra, "Does gambling qualify as trade, commerce or intercourse?", *available at*: http://ijustice.in/sites/default/files/resources/does_gambling_qualify_as_a_trade.pdf (last visited on 15 June, 2019)
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Supra* note 6.
[204] *Krishna Kumar Narula* v. *State of J & K* (1967) SCR 3 50.
[205] Supra note 6.
[206] *Ibid.*

In 2003, while hearing an appeal challenging a ban on ivory trade, Supreme Court disagreed with the high court on the application of this doctrine to ivory trade.[207] The Court upheld the ban on ivory without invoking the res extra commercium doctrine.[208] The Court reasoned that the trade in ivory was permissible in law, was subsequently restricted and then later totally prohibited.[209] If the elephant population increases again, may be the policymakers might again legalise the ivory trade. So, it is difficult to say that the ivory trade has always been a prohibited activity. The Court also notes that the trade in Asian Elephant ivory was prohibited but that in African ivory continued to be permitted under some strict conditions. Questioning the applicability of a foreign precedent *P. Crowley* v. *Henry Christensen* in the High Court judgment, the Court pointed out that case involved a person dealing in liquor without a license.[210] Challenge to law governing liquor license was dismissed but it did not imply that business in liquor was totally impermissible.[211] The Court observes: "Restriction in trade, therefore, would depend upon the nature of the article and the law governing the field. By reason of judicial vagaries, fundamental right under Article 19(1)(g) of the Constitution cannot be further restricted."[212]

The Court found support in DD Basu's commentary which notes even in Australia, the question has produced conflicting decisions.[213] The Court also then discussed res extra commercium and its applicability to education.[214] It noted that

[207] *Indian Handicraft Emporium* v. *Union of India* (2003) 7 SCC 589.
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid.*
[214] *Ibid.*

Unnikrishnan judgment[215] invoked res extra commercium and applied it to education - education cannot be trade or business and in the name of occupation, it cannot be permitted to become commerce.[216] *Unnikrishnan* had also observed that education might be an occupation if the institution seeks recognition not on the basis that it is a fundamental right.[217]

But this view was soon negatived by the 11-judge bench in *TMA Pai* judgment[218] where the Court expressly disagreed with the views expressed in *Unnikrishnan* judgment.[219] *TMA Pai* clarified that education is indeed an occupation and fundamental right to establish an educational institution cannot be confused with right to seek recognition.[220] A fundamental right can be restricted in a number of ways but those restrictions cannot lead to a question: whether there is a fundamental right at all.

2.4 Judicial Review: Article 32

[215] *Unnikrishnan JP* v. *State of Andhra Pradesh* (1993) 1 SCC 647.
[216] *Supra* note 207.
[217] *Ibid.*
[218] *TMA Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.
[219] *Supra* note 207.
[220] *Ibid.*

Express provisions in the Indian Constitution – article 32[221] as well as article 226[222] mandates the constitutional courts to review a law whenever a citizen brings in a challenge. Textually, article 226 merely vests power in all the high courts to issue directions, orders and writs to any person or authority for enforcement of Part-III rights. In comparison, article 32(1) is relatively strongly worded. Article 32 guarantees the enforcement of Part-III rights, so the Court has no discretion. Article 32(2) empowers the Supreme Court to issue directions, orders or writs for the enforcement of Part-III rights.

[221] 32. Remedies for enforcement of rights conferred by this Part
1. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
2. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
3. Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
4. The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[222] 226. Power of High Courts to issue certain writs
1. Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
2. The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
3. Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without
a. furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
b. giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.
4. The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Article 13(2) mandates that the State shall not make any law that takes away or abridges a fundamental right; any law contrary to the Part-III shall be void.[223] In *Kavalappara Kottarathil Kochunni* v. *State of Madras*,[224] the Court emphasised the "guarantee" in article 32(2): [225]

> Clause (2) of Article 32 confers power on this Court to issue directions or orders or writs of various kinds referred to therein. This Court may say that any particular writ asked for is or is not appropriate or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition. In both cases this Court decides the petition on merits. But we do not countenance the proposition that, on an application under Article 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid notification of learned counsel, we would be failing in our duty as the custodian and the fundamental rights. We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Article 32 and to decide the same on merits may encourage litigants to file many petitions under Article 32 instead of proceeding by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, prima facie, appear to have been infringed. Further, questions of fact can and very often are dealt with on affidavits.

Since the Colonial Courts in India also exercised judicial review based on the doctrine of ultra vires, the legitimacy of judicial review was never a question in India.[226] Although the Constitution has express provisions for judicial review, the

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[223] . The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
[224] *Kavalappara Kottarathil Kochunni* v. *State of Madras* (1959) Supp SCR 2 316, at para 12.
[225] *Ibid.*
[226] SP Sathe, "Judicial review in India: limits and policy" 35 *Ohio St. LJ*, 870 (1974), at 870.

Indian Supreme Court made it clear in one of the earliest cases that the power of judicial review is inherent in a written constitution and exists independently of article 13 (2).[227]

Ayyangar called the Supreme Court as the "Supreme guardian of the citizen's rights" and "the soul of democracy".[228] He was skeptical that the executive was likely to abuse its powers, and so, he advocated for a strong supreme court capable of guarding the rights and privileges of the citizens - whether majority or minority.[229]

Deference to State Policy and legislative wisdom would then mean abdication of judiciary's constitutional role. It is court's job to take a stand on the validity of laws. To quote Mehta: [230]

> There is no overreach when the court protects fundamental rights like liberty, when it upholds equality in the face of discrimination, when it upholds privacy in the face of encroachment by the state, when it protects the dignity of the individual against prejudice. This is the primary function of the court. If the court does not want to perform this function, it might as well pack up and go home.

One of the first judicial review cases - *State of Madras* v. *V.G. Row*[231] clarified the position in India. It observed that unlike the US Constitution, Indian Constitution places an express obligation on the courts to protect civil liberties and vests power of judicial review in the courts for the same.[232] The Court stated: [233]

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[227] *A. K. Gopalan* v. *State of Madras* 1950 SCR 1 88.
[228] Ananthasayanam Ayyangar, Constituent Assembly Debates 7(70), para 109.
[229] *Ibid.*
[230] Pratap Bhanu Mehta, "Justice denied" *Indian Express*, December 12, 2013; *available at*: https://indianexpress.com/article/opinion/columns/justice-denied/ (last visited on June 19, 2019).
[231] (1952) SCR 3 597.
[232] *Ibid.*
[233] *Ibid*.

> . . . our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative acts undercover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights ", as to which this Court has been assigned the role of a sentinel on the qui vive. **While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.** We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country.
>
> [emphasis supplied]

While the Court may accord more weight to the legislative and executive reasoning, the Court must not withdraw from its constitutional duty to test the constitutionality of an impugned law. Similarly, in *Chintaman Rao* v. *State of Madhya Pradesh*,[234] the Court had expressly rejected the notion of legislative supremacy over reasonableness: [235]

> . . . [L]egislature alone knew the conditions prevailing in the State and it alone could say what kind of legislation could effectively achieve the end in view [...] and this Court sitting at this great distance could not judge by its own yardstick of reason whether the restrictions imposed in the circumstances of the case were

[234] (1950) SCR 759.
[235] *Ibid.*

> reasonable or not. This argument runs counter to the clear provisions of the Constitution. **The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to the supervision by this Court.** In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its functions it has the power to set aside an act of the legislature if it is in violation of the freedoms guaranteed by the Constitution.
>
> [emphasis supplied]

Legislative determination of end and means is not conclusive and is subject to judicial review, clarifies *Chintaman* judgment.[236]

2.5 Judicial Review under article 19(1)(g): Requirements

As per the Constitution, reasonableness and 'in the interests of general public' are the two grounds to scrutinize a restriction curbing article 19(1)(g).

'in the interests of general public' – What does it mean?

[236] *Ibid.*

During the debate on the restriction clauses to the fundamental rights in the constituent assembly, some members were not happy with the use of wide and ambiguous language.

KT Shah found the enumeration structure faulty. The freedoms were enumerated in the same sub-clause but the exceptions were all enumerated in separate sub-clauses. Looking at the wide language, he wondered "what cannot be included as exception to these freedoms rather than the rule". He calls the freedom "so elusive" that one would need "a microscope to discover where these freedoms are, whenever it suits the State or the authorities running it to deny them".[237] Damodar Seth also found the expression "in the interests of general public" too wide enabling potential abuse of legislative and executive powers.[238] He cited S K Vaze of the "Servants of India Society" that except in cases where petitioners would prove malafides which anyways is very difficult to prove, restrictions would be upheld in most cases.[239] Amiyo Kumar Ghosh disappointed for the same reasons emphasized that individual rights must be expressed in easy-to-comprehend language to a common man.[240] What he meant was unambiguous and

> *"... I think it will take centuries for the Supreme Court to exactly say what really these words mean."*
>
> *– Amiyo Kumar Ghosh*

precise language leaving no room for uncertainty.[241] People should not be dependent

[237] KT Shah, Constituent Assembly Debates 7(64), at para 27.
[238] Damodar S Seth, Constituent Assembly Debates 7(64), at para 14.
[239] Constituent Assembly Debates 7(64), at para 14.
[240] Constituent Assembly Debates 7(65), para 116.
[241] Constituent Assembly Debates 7(65), para 116.

on judicial interpretation for clarity and certainty on where their rights begin and end.[242] Linguistic ambiguity can render weaken the safeguards against legislative and executive excess.[243]

It seemed that the exceptions are too wide and ambiguous and hence anything and everything can fit in the exceptions. But Das Bhargava explained the difference between 'public interest' and 'in the interests of general public' – "public interest may be sectional interests inherent in state subjects but general public interest denotes the whole general interests of Indians as such".[244] So, the phrase ïn the interests of general public" is not an empty phrase for passively validating all kinds of restrictions. It is purposefully intended to safeguard against the restrictions favouring sectional interests.

Hence, a judge must ask is - whether a restriction is overall good for the society in general and whether it favours a specific sectional group at the cost of others.

"General public interest" denotes an inquiry into the common good. Common good may have two different conceptions depending upon how they consider private and sectional interests for determination of "the relational obligations of citizens": (a) *communal conceptions* and (b) *distributive conceptions*.[245]

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[242] Constituent Assembly Debates 7(65), para 116.
[243] Constituent Assembly Debates 7(65), para 116.
[244] Constituent Assembly Debates 11(155), at para 307.
[245] Waheed Hussain, "The Common Good", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), *available at*: https://plato.stanford.edu/archives/spr2018/entries/common-good/ (last visited on June 8, 2019). One can argue that article 19(1)(g) and clause (6) represents the relational obligations between State and Citizens and not the relational obligations of citizens. However, under clause (6) of article 19, the State does precisely that; it makes laws to determine the relational obligations between citizens. It upholds certain values and interests and trumps others. For example, a government decision to keep the municipal slaughterhouses shut for nine days during a Jain festival upholds certain interests over others.

A "communal" conception prioritizes the interests that citizens have *as* citizens over their interests as a private individual.[246] A restriction under clause (6) would then require the State to ignore not only the private interests of specific individuals but also the sectional interests that citizens may have as members of one subgroup or another. The State must only be concerned with their common interests as citizens. For example, a ban on cattle slaughter cannot be sustained based on the demand of a religious group. However, if it can be shown that such a ban would make the economy more productive and efficient, the State should consider it.

A "distributive" conception requires the State to be cognizant of various groups with distinct sectional interests and their "partly competing claims".[247] State can consider options that would maximize the prospects for one of the sub-groups or groups. State will calibrate the restriction from the standpoint of that sub-group.

For example, 25 per cent quota for economically weaker sections and disadvantaged (EWSD) groups in private schools is a calibration of partly competing claims. It is clearly tilted in favour of certain groups, namely the children belonging to the EWSD category.

This part argues that the phrase "in the interest of general public" as used in article 19(6) denotes the communal conception of common good and not the distributive conception of common good. The Constitution indeed recognizes the distributive conception of common good and it does so in article 31-B read with the

[246] *Ibid.*
[247] *Ibid.*

Ninth Schedule, article 15(5) and article 19(6)(ii). These articles expressly trump the right under article 19(1)(g) for distributive justice. For all other restrictions that can be reviewed under article 19(1)(g) read with clause (6), communal conception of common good applies. Why? Because the constitution framers wanted the restrictions to cater to overall common good and not sectional interests and hence, they made a conscious choice of picking general public interest over public interest. Distributive conception is not compatible with the idea of general public interest as conceived by the constitutional framers.

Now, let's consider the common good from a standpoint of self-interest. Does the pursuit of self-interest by all citizens in a society detrimental to common good? A consensual exchange of cattle for money between a cattle owner and a butcher is a positive sum game what John Stossel calls a "double thank you moment".[248] Both act in their self-interest. The cattle owner gets rid of his useless cattle for money and the butcher gets the cattle for slaughter by paying money. Both get in return what they value more over what they currently have.

Market transactions are mutually beneficial and consensual in nature. The market encourages specialization through price signaling.[249] Social coordination through markets leads to more efficient use of land and labour and ultimately to common good.[250] Hence, the state must justify why it wants to regulate trade and business.

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[248] John Stossel, "The Double 'Thank-You' Moment", *ABC News*, May 31, 2007, *available at*: https://web.archive.org/web/20181104125912/https://abcnews.go.com/2020/story?id=3231572

[249] Waheed Hussain, Supra note 245.

[250] Waheed Hussain, *Ibid*. See Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* 1-2 (Harcourt Brace Jovanovich, New York and London, 1980); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 162, 293, 407 (Harriman House Ltd, Hampshire 2007

Does the market never lead to socially detrimental outcomes? Mutually beneficial consensual transactions may have negative externalities.[251] Sometimes, a transaction may be sub-optimal for want of better information and tilted towards one of the parties.[252] Negative externalities and information asymmetry – both may be valid reasons for economic regulations.

The point is: State must have good reasons to regulate business and trade. And these reasons must denote common good and not sectional interests.

For instance, the claim that a ban on cattle slaughter is justified to boost agricultural productivity cannot be taken on its face value. It would deprive many people of their food choices; it would severely affect the business of butchers and tanners and people who are employed in these sectors. For consumers as well, the prices of leather and substitute meats would escalate. Cattle farming would become unproductive as the farmers would then have to compulsorily take care of old, sick and useless cattle. Alternatively, the farmers might abandon the old and sick animals who would then be a threat to crops and other farms. Old and sick abandoned animals would also yield poor breeds and it would be overall detrimental to the farming sector. Hence, it is difficult to argue that a ban on cattle slaughter would be in general public interest.

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ed.). For empirical evidence, See "The Power of Economic Freedom", 2019 Index of Economic Freedom, *available at*: https://www.heritage.org/index/book/chapter-4 (last visited on June 8, 2019). It shows with empirical evidence that free-market capitalism, built on the principles of economic freedom, can be relied upon to lead to societal progress in terms of better jobs, better goods and services, and better societies.

[251] Gregory Mankiw, *Principles of Economics*, 12-13 (South-Western Cengage Learning, Ohio, 6th ed 2012).

[252] *Id.* at 468-473.

A judge may refer to the preamble, statement of aims and object of the statute, provisions, committee reports preceding the statute, legislative debates to find or infer the intended purpose of the restriction. A judge must not either take the intended purpose on its face value or assume it to be in general public interest merely because it claims to be. A judge ought not to ignore the consequences or likely outcomes of the impugned restriction for discerning the general public interest.

Bhatia argues that the Court must presume 'public interest' for a DPSP-serving legislation.[253]So, a ban on cattle slaughter, a ban on sale of eggs in certain districts, shutdown of municipal slaughterhouses during religious festivals are all in public interest, as per Bhatia.[254]

Khanna questions the application of directive principles and fundamental duties to further the majoritarian restrictions and the incentives resulting from there, particularly in the ban on cattle slaughter and egg cases.[255] Clearly, these restrictions further sectional interests.

Article 19(6) does not prescribe public interest as a ground for economic restrictions. Instead the criterion is general public interest. General public interest entails that the restriction must be overall good for the society in general and in addition, it must not harm any group at the cost of other. General public interest is compatible with the communal conception of common good and not with the distributive conception of

[253] Gautam Bhatia, "Chapter 36: Directive Principles of State Policy", in S. Choudhry, M. Khosla et. al. (eds.) *The Oxford Handbook of Indian Constitution* 644 (Oxford University Press, 2016), at 661.

[254] Bhatia's concern would then be the extent of restriction or reasonableness. But public interest is unquestionable for him.

[255] Vikramaditya Khanna, "Chapter 48: Profession, Occupation, Trade, or Business", in S. Choudhry, M. Khosla et. al. (eds.) *The Oxford Handbook of Indian Constitution* 867 (Oxford University Press, 2016), at 876.

common good. Hence, a judge would need to assess whether a DPSP-furthering restriction furthers any sectional interests at the cost of other, and if so, it would not be in the interest of general public. Many laws that are based on the distributive conception of common good have been accorded immunity from article 19(1)(g) by the legislature. For example, article 15(5) and article 31-B read with the ninth schedule. Hence, the legislature can make a choice. A judge does not need to bend over backwards to validate a restriction and presume general public interest if the restriction furthers sectional interests.

Reasonableness

Most scholars pick proportionality - the European standard for judicial review as a reference point to understand and analyze the standard of review for the fundamental rights in Part-III of the Indian Constitution. Proportionality test entails an inquiry into legitimacy, suitability, necessity and proportionality in the narrow sense.[256] A judge would ask: whether the restriction furthers a legitimate object; whether the restriction is capable of leading to the object; whether the restriction is the least intrusive means of achieving object; and whether the restriction results in a net gain, when the intrusion into the right is weighed against the object realisation.[257]

[256] Julian Rivers, "Proportionality and the Variable Intensity of Review", 65(1) Cambridge Law Journal, 174 (2006), at 181.
[257] *Ibid.*

Relying on the Constituent Assembly debates, Sindhu and Narayan makes a historical argument for the applicability of proportionality standard to all cases of judicial review. They argue so on three grounds.[258]

First, Indian framers expressly rejected the culture of authority and embraced a culture of justification.[259] Sovereignty rests with people, implying that the Indian Constitution rejected a system of parliamentary sovereignty and adopted popular sovereignty.[260] As per the Constitution, Parliament is not supreme and judiciary has the power to invalidate legislation.[261]

Secondly, one can make out from the Constituent Assembly Debates that many members were skeptical about majoritarianism and abuse of power.[262] Ambedkar was particularly concerned about the danger of subversion and social inequalities.[263] Members were also concerned that fundamental rights could be easily abridged through administrative action.[264] The framers wanted the state to be mindful of fundamental rights in all its actions - article 13 casts an obligation on the State to respect fundamental rights and restrains all forms of state action including delegated legislation as well as executive discretion.[265] Hence article 13 expressly subjected all state action to fundamental rights under article 13.[266] One finds the fundamental rights chapter right after the chapter on citizenship and territories in the Constitution similar to German Basic Law.[267]

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[258] Jahnavi Sindhu and Vikram Aditya Narayan, "A historical argument for proportionality under the Indian Constitution." 2(1) *Indian Law Review* 51 (2018).
[259] *Ibid.*
[260] *Ibid.*
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*

Third, Indian Constitution covers wide scope of judicial review. Judicial review is the norm in Indian constitution and not an exception.[268]

Sindhu and Narayan argue that Indian Constitution adopts a culture of justification with judicial review as an essential feature and the level of justification it demands can only be fulfilled by proportionality standard.[269]

In *State of Madras* v *V.G. Row*,[270] the Court mentions the relevant factors for judging the reasonableness of a restriction: nature of the right in question, intended purpose, extent and urgency of the mischief, proportionality of the restriction, and the circumstances.[271] Here is the relevant excerpt from the judgment: [272]

> It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

Chintaman Rao v. *State of Madhya Pradesh*[273] was the first case in context of article 19(1)(g) explaining the reasonableness review.[274] *Chintaman Rao* reviewed a restriction prohibiting the bidi-making business during agricultural season intended to

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[268] *Ibid.*
[269] *Ibid.*
[270] (1952) SCR 597
[271] *Ibid.*
[272] *Ibid.*
[273] (1950) SCR 1 759.
[274] *Ibid.*

ensure the labour availability.[275] The Court found it to be in excess of its object for it could have either merely regulated the business hours of bidi-industry or might have restricted the agricultural labour only.[276] Since the labour employment restriction unintentionally and unnecessarily covered non-agricultural labour as well, the Court held it to be void.[277]

Following *V.G. Row, Chintaman Rao* clarified and augmented the concept of reasonableness a bit further by propounding: one, the possibility of being applied for unsanctioned purposes (legitimate purpose); two, the restriction should have reasonable relation to the purpose in view and it should not be arbitrary (rational nexus/ not arbitrary); three, it should not be excessive or beyond what is required (lesser restrictive alternative/ not excessive); and four, there must be a balance between the freedom and the social control (balancing).[278] Here is how the Supreme Court defined reasonableness for the first time in the context of article 19(1)(g): [279]

> Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it. […] The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.

[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*

> [. . .] So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

Chintaman Rao propounds 'intelligent care and deliberation' and choosing 'a course which reason dictates'.[280] Reason demands causation, explanation, justification, understanding and forming judgments logically.

The Court should first look at the purpose of the restriction and whether the purpose is legitimate. This test overlaps with "in the interests of the general public". Before the Court goes on to review the restriction for general public interest, it should ask: is there a problem that the restriction seeks to address? The petitioner might have facts or evidence that may dispute the purpose. The first part of his test is that object of the law must be constitutionally sanctioned and not illegitimate. It overlaps with the general public interest.

Secondly, whether there is a relation or nexus between the measure and the intended purpose otherwise the measure would be arbitrary.

Third is whether there are other lesser restrictive alternatives for the same purpose. If so, then it implies that the restriction resricts more than what is required to achieve the purpose. Excess of object or possibility of application for unsanctioned purposes – these grounds are not different from the test of lesser restrictive alternative. Former implies more than necessary coverage; latter means possibility of a less restrictive alternative.

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[280] *Ibid.*

Fourth, it must balance the freedom with social control. It should answer whether the general public interest is worth pursuing considering the extent of intrusion into the fundamental right?

Post *Chintaman Rao,* the Court has been inconsistent with the proportionality standard of review. In most cases, it has merely applied the first and the second part. Rarely, it applied the test of lesser restrictive alternative and balancing. Nevertheless, *Chintaman Rao* judgment remains a precedent for all subsequent cases on article 19(1)(g). Many cases cite it but fail to apply it. However, it is indisputably the norm for standard of review.

Recently, in *Justice Puttaswamy* v. *Union of India*,[281] the Supreme Court cited *Chintaman Rao* in the context of proportionality standard of judicial review and observed: [282]

> Ever since 1950, the principle of proportionality has indeed been applied vigorously to legislative (and administrative action) in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. (Emphasis supplied) The early decisions of this Court may not have used the expression proportionality. But the manner in which the court explained what would be a permissible restraint on rights indicates the seeds or the core of the proportionality standard. Proportionality has been the core of reasonableness since the 1950s. Chintaman Rao v State of Madhya Pradesh345 concerned a State legislation which empowered the government to prohibit people in certain areas from manufacturing bidis. The object of the law was to ensure the supply of adequate labour for agricultural purposes in areas where bidi manufacturing was an alternative source of employment for persons likely to

[281] W.P. (C) 496 of 2012, SC, Sep 26, 2018. Justice A.K. Sikri (For Chief Justice, himself and Justice A.M. Khanwilkar)
[282] *Id.* at 272.

> be engaged in agricultural labour. The Court held that the State need not have prohibited all labourers from engaging in bidi manufacturing throughout the year in order to satisfy the objective.

Mariyam Kamil culls out the proportionality test as applied by the Court in Justice Puttaswamy judgment.[283] First part (legitimate aim) and second part (nexus) of the test are essentially the same as discussed above. However, the Court in the third part included balancing (fourth part) along with lesser restrictive alternative.[284] Regarding the fourth part, the Court merely observed that balancing requires following bright-line rules but did not elaborate what those rules are and in fact did not even undertake this test.[285]

Duara refers to *Chintaman Rao*, finds the standard employed therein as strict as proportionality and advocates for extending the application of same standard of review to gender justice cases i.e. article 14 and 15 matters.[286] Felix too identifies the judicial review test employed in *Chintaman Rao* as proportionality.[287]

Chandrachud reached a similar conclusion referring to *VG Row.*[288] He noted that *V. G. Row* case while propounding the four components – purpose, rational nexus, necessity and balancing mandated considering all these factors for reasonableness scrutiny.

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[283] Mariyam Kamil, "The Aadhaar Judgment and the Constitution – II: On proportionality", *Indian Constitution Law and Philosophy*, Sep 30, 2018, *available at*: https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/ (last visited on June 8, 2019)
[284] *Ibid.*
[285] *Ibid.*
[286] Juliette G Duara, *Proportionality analyses on gender equality: a multijurisdictional comparison with a view toward an Indian migration* (2015) (Unpublished Ph.D. thesis, NUS Singapore).
[287] Shivaji Felix "Engaging unreasonableness and proportionality as standards of review in England, India and Sri Lanka: comparative studies." 1 *Acta Juridica* 95 (2006).
[288] Chintan Chandrachud. "Proportionality, Judicial Reasoning, and the Indian Supreme Court." 1 *Anti-Discrimination Law Review* 87 (2017).

But he claims that proportionality as a norm in Indian legal system is a myth and the standards applied in *VG Row* have not been consistently applied in subsequent cases.[289] He finds the Court highly inconsistent in applying the proportionality standard, probably for want of a clear understanding in the judiciary that the phrase "reasonable restriction" demands the proportionality standard of review.[290] However, in subsequent cases, the Court usually omitted one or more components and did not undertake tests based on all those factors. Chandrachud thinks it as a case of doctrinal ambiguity. Since the reasonableness review in *VG Row* included all the components of proportionality and proportionality as a checklist approach to judicial review may certainly be more effective to ensure a comprehensive judicial review, a shift to a more structured test of 'proportionality' would work better, Chandrachud argues.[291]

However, the Court itself has recently admitted the use of proportionality standards in *Chintaman Rao* in *Puttaswamy* case. Instead of doctrinal ambiguity, the problems are precedential incoherence and polyvocality, Indian Supreme Court is now known for.[292]

The constitutional text uses the word "reasonable" and the test would remain a test of reasonableness whether the Court performs it in a checklist fashion or otherwise. The duty to apply the above two precedents in article 19 cases is a matter of binding norm, not a matter of discretion. Both in the *V.G. Row* case and *Chintaman Rao* case, judgments were pro-petitioners and hence, the Court did not need to test the impugned

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[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid.*
[292] Nick Robinson, "The Indian Supreme Court and its benches" 642 *Seminar* (2013), *available at*: https://india-seminar.com/2013/642/642_nick_robinson.htm (last visited on June 10, 2019).

restriction on subsequent components once the restriction failed on any of the former component.

Doctrinal ambiguity is no excuse, particularly when *V.G. Row* states '… should all enter into the judicial verdict' making it mandatory to consider all the components laid down for scrutiny. *V.G. Row* is a seven-judge bench judgment and *Chintaman Rao* - a five-judge bench judgment and none of the two is overruled.

Khaitan has argued that article 19 barring article 19(1)(a) deserves lower standard of scrutiny than article 14, 15 and 19(1)(a) as per the relative importance of the right in the hierarchy of rights.[293] This idea of variable intensity based on a fictional hierarchy of rights is deeply problematic. Khaitan locates his argument in the assumption that some rights are more fundamental than others.[294] The assumption is based on his intuitive response to a hypothetical comparison between differential tax rates for commodities - tea and coffee, vis-a-vis differential tax rates for Hindus and Muslims.[295] He argues that the latter invokes a more shocking response intuitively and hence, the right to sell is qualitatively inferior to the right to practice one's religion.[296] Since differential treatment of identities, particularly religious or caste identities invoke more shocking response, so it deserves a close examination and hence rigorous scrutiny; differential tax rates for commodities does not need or deserve the same level of scrutiny.[297]

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[293] Tarunabh Khaitan, "Beyond reasonableness – a rigorous standard of review for article 15 infringement" 50(2) *JILI* 177 (2008).
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*

The analogy is too simplistic and fallacious. Identity-linked tax discrimination may be more conspicuous than commodity-linked tax discrimination. But commodity-linked tax discrimination being for being indirect and inconspicuous deserves rigorous scrutiny. Identity-based fiscal discrimination would not easily pass a purpose test; nexus test would be even more difficult. Identity-linked discrimination may not require closer examination.

But commodity-linked discrimination is counter-intuitive on four grounds. First, it requires understanding that commodities do not pay taxes to the state; it is always the producers or the consumers of those commodities who pay taxes. Those producers and consumers have identities, obviously - religious, caste, ethnic, gender and age. Production trends as well as consumption trends deeply intersect with these demographic identities. Imagine, government exempts tea from Goods and Services tax (GST) but imposes 28 per cent GST on coffee. Most North Indians would be elated. But wouldn't Kannadiga coffee producers as well as all the coffee consumers - majority of whom are South Indians feel deeply prejudiced? Isn't this discrimination?

A second example is a ban on cow slaughter. In several cases, judiciary has justified a ban on cattle slaughter in the interest of boosting agricultural and farming outputs, heavily relying on the directive principles. However, its impact would be disproportionately severe for Muslim Qureshi butchers and Dalit communities engaged in leather industry.

Many civil liberties challenges to the State in 1950s and 1960s were assertions of the right to carry on trade, business and livelihood; and two, these claims involved mostly minorities.[298] Here is a relevant excerpt from De's book: [299]

> "Where did claims for rights emerge from in the 1950s? A common thread running through the cases in this book is a concern about the practice of a trade and profession and the free movement of people, goods and services. Although the butchers and the commodity traders directly fall into this category, it also exposes the commercial interests that lay behind the civil liberty challenges to prohibition. The cases brought by the sex workers were about harassment and equality but also fundamentally about the right to earn their livelihood. Therefore, a significant proportion of everyday rights cases in Nehruvian India emerged through the market.
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> […]
>
> The overrepresentation of minorities in litigation shows that they took seriously the promise of equality and the state's obligation to protect their rights. Despite minority rights in India having been largely understood through the realm of identity and culture, the claims made by minorities were for economic rights: the need to protect minority-owned businesses (Parsi liquor interests and Muslim butchers), to feed the poor (prostitutes 'claims to welfare), or to reduce bureaucratic arbitrariness."

Two, would a lack of any other common demographic identity amongst beef-eaters or egg consumers make them less equal citizens and more vulnerable to be ruled by majoritarian values? A meat eater may be an atheist, an upper caste Hindu or even a Jain. But her right to buy and consume meat during Jain festival is not less or more important than a Muslim or a Dalit.

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[298] Rohit De, *A People's Constitution: The everyday life of law in Indian Republic*, (Princeton University Press, Princeton & Oxford, 2018)
[299] *Ibid.*

Three, according more importance to religion over commodity consumption involves making a universal value judgment. How a person defines her identity is a matrix of her individual choices and preferences. For some citizens, their religious identity may be the most important facet of life. However, for many citizens - be they atheists, non-practitioners or even believers, consumer identity may prevail over the religious identity.

Four, Public Choice theory can offer additional reasoning for tax discrimination. Let's say, in our example of differential tax rates for tea and coffee, the part-in-power that has the majority in the parliament as well as most North Indian state legislatures exempted tea from Goods and Services tax (GST) and imposed 28 per cent GST on coffee. It is clearly majoritarianism. Another perverse reason could be rent seeking. Tea producers may be better at lobbying with the government and so they get tax rebate as well as production subsidy. Additional tax burden is passed to domestic coffee producers and in form of tariffs on imported tea. It would be a pity if such rent-seeking remain protected under the garb of public interest. A judge may not want to look into the motives of the ruling party, but that does not exempt the government from the obligation to justify undue restriction and discrimination.

A blanket value-judgment that certain freedoms are more fundamental than others has no textual or constitutional basis in Indian jurisprudence. Judging the constitutionality of impugned restrictions based on a fixed set of value-judgment would be imposing one's morality on others.

In *Azad Rickshaw Pullers Union*,[300] rickshaw pullers challenged the vires of the Punjab Cycle Rickshaws (Regulation of Licence) Act, 1976. The Statement of Objects and Reasons of the Act was as follows: [301]

> In order to eliminate the exploitation of rickshaw pullers by the middlemen and for giving a fillip to the scheme of the State Government for arranging interest-free loans for the actual pullers to enable them to purchase their own rickshaws, it is considered necessary to regulate the issue of licences in favour of the actual drivers of cycle rickshaws, plying within the municipal areas of the State.

Section 3 of the Act provided: [302]

> 3. (1) Notwithstanding anything contained to the contrary in the Punjab Municipal Act, 1911, or any rule or order or bye-law made thereunder or and other law for the time being in force, no owner of a cycle rickshaw shall be granted any licence in respect of his cycle rickshaw nor his licence shall be renewed by any municipal authority after the commencement of this Act unless the cycle rickshaw is to be plied by such owner himself.
> (2) Every licence in respect of a cycle rickshaw granted or renewed prior to the commencement of this Act shall stand revoked, on the expiry of a period of thirty days after such commencement if it does not conform to the provisions of this Act.

First is the test of legitimate aim. The legislative object is to encourage rickshaw pliers to buy their own rickshaws so that they do not have to hire rickshaws from middlemen.

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[300] (1981) 1 SCC 366
[301] *Ibid.*
[302] *Ibid.*

Second is nexus test. Prohibiting multiple ownership of rickshaws in a single person will force pliers to buy their own rickshaws. So, there is a nexus between the prohibition on multiple ownership and the object of equality of rickshaw ownership.

Third is the test of lesser restrictive alternative. There was already a government program for financial assistance to enable the pliers to buy their own rickshaws. Why did pliers not avail of financial assistance to buy rickshaws? Affordability may be a reason but there may be other reasons as well. Rickshaw pliers were rural seasonal migrants and probably they did not want to buy rickshaws. They were better off hiring rickshaws. Prohibition on multiple ownership also meant a ban on renting and hiring rickshaws. Thus, the ban is detrimental to the rickshaw plier who it wants to save from the exploitation.

Fourth, whether the restriction balances the freedom and the social control. To achieve equality of ownership, the restriction takes away the right to fire and rent cycle rickshaws. Middlemen existed because it may not be feasible for all the pliers to buy their own rickshaws. The restriction not only intruded the rights of middlemen but also the rights of rickshaw pliers. Did the restriction make the society better off? No. it made it difficult for the rural migrants to ply rickshaws temporarily, bred illegality in cycle rickshaw sector, raised the enforcement costs and boosted corruption.

Hence, the restriction is an unreasonable restriction.

Bhatia cites an example of twenty-five percent quota for economically weaker section and disadvantaged children in private schools to argue why a restriction cannot

be justified based on directive principles.[303] He says, eighty per cent may be excessive, twenty-five percent may be reasonable.[304] Although reservation quota is not a valid example for assessing reasonableness because article 15(5) makes it immune from article 19(6). Assuming it to be prone to review, first question should be the purpose of twenty-five per cent compulsory reservation in private schools. Please note, the quota is akin to expropriation or nationalization of twenty-five percent capacity of private schools for which they are paid at government's cost of educating a child or the fee of private school whichever is lower. Let's say, the stated purpose in the preamble is to address the issue of access to education. The presumption – EWSD children have no access to education – may be questioned. Are there no private schools charging low fee? Is the public-school capacity not adequate? The Court may ask for relevant data. Is the object legitimate? Well, there may be objections to whether the economic background is a legitimate criterion for reservation.

Second question would be if there is nexus between compulsory reservation in private schools and the access to education – whether compulsory reservation can ensure access to education.

Third step would be a comparison with lesser restrictive alternatives. For example, one, opening more public schools can ensure access to education for EWSD children. Two, government can directly fund the parents. Direct cash transfers or vouchers can enable the parents to be able to admit their wards in schools of their choice without coercing any private school. Three, the government could make it voluntary for

[303] Gautam Bhatia, "Chapter 36: Directive Principles of State Policy", in S. Choudhry, M. Khosla et. al. (eds.) *The Oxford Handbook of Indian Constitution* 644 (Oxford University Press, 2016), at 650.
[304] *Ibid.*

private schools instead of compulsory. Most private schools that charge less than government cost of educating a child would happily admit more than twenty-five percent EWSD children.

One may disagree with the merit of the arguments in the above example and offer counter-arguments. The objective here is not to discuss the merits of compulsory reservation in private schools, but to illustrate the logical flow of judicial review to be undertaken in case of article 19(1)(g).

Aspects of Reasonableness

As held in *Dr N.B. Khare* v. *State of Delhi*,[305] both substantive and procedural aspects of reasonableness must be scrutinized.

By invoking the principles of administrative law, judges check the administrative discretion for reasonableness under article 19(6) and declare it unconstitutional if the discretion is unfettered. First, delegated power should not be arbitrary and unguided.[306] Adequate safeguards in the law against abuse of discretion can save it from being arbitrary or unguided.[307] Second, there should be enough procedural safeguards such as absence of bias or conflict of interest, *audi alterem partem* or hearing, reasons to be recorded and review/appeal.[308] Third, a set of

[305] 1950 SCR 519.
[306] MP Jain and SN Jain, *Principles of Administrative Law*, (Lexis Nexis, 7th ed. 2017), at 476, 496-497, 701.
[307] *Ibid.*
[308] *Ibid.*

substantive aspects of the procedure such as leaving out relevant consideration and mala fide can also check the discretionary power.[309]

Chintaman Rao standard or the proportionality standard of review mainly deals with the substantive aspect of reasonableness. But there is no bar on the Court to assess the substantive merits of a procedural norm as it did in *Abdul Hakim Quraishi* v. *State of Bihar*.[310] For slaughtering a bull, bullock or a female buffalo over 25 years of age, Rule 3 of Bihar Preservation and Improvement of Animals Rules, 1960 prescribed a procedure: a veterinary officer and the chairman or chief officer of the District Board or Municipality needed to concur to issue a certificate for slaughter.[311] If they differ, the matter would be referred to the Sub-divisional Animal Husbandry Officer.[312] Although the rule mandated recording of reasons and opportunity of being heard particularly in case of refusal, the petitioner contended that the cost of this procedure would be more than the cost of animal and if they were to incur the costs involved, it would result in shutting down their businesses.[313] The Court agreed that the restriction was disproportionate.[314] It required the concurrence of two officers whereas the veterinary officer having necessary technical knowledge could be trusted to issue the certificate.[315]

The Court may invoke the normative values inherent in the right to POTB such as the right to bargain [316] and the right to shut down a business[317] to strike down a

[309] *Ibid.*
[310] (1961) SCR 2 610.
[311] *Ibid.*
[312] *Ibid.*
[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Mafatlal Industries Ltd* v. *Union of India* (1997) 5 SCC 536.
[317] *Excel Wear* v. *Union of India* (1978) 4 SCC 224.

restriction without much scrutiny. Normative appeal of a fundamental right can trump the utilitarian considerations, asserting the core of right is too sacrosanct and non-negotiable to be compromised through those impugned means.

2.6 Presumption of Constitutionality

In *Saghir Ahmad* v. *State of Uttar Pradesh* case,[318] the Court laid down the rule of reversal of burden of proof.[319] UP Road Transport Act (Act II of 1951) allowed for exclusion of private operators and establishing a state monopoly in road transport business.[320] Article 19(6) clause (ii) granting immunity to state monopolies being a later amendment was not applicable to this case.[321] The Court found the restriction *prima facie* in violation of article 19(1)(g).[322] Although affirming the presumption of constitutionality in favour of the statute, the Court disagreed with the High Court on burden of proof.[323] The High Court wanted the petitioners to prove that the state monopoly was not in the interests of general public.[324] The Supreme Court reasoned that on the face of it, it was clear that thousands of people would lose their jobs, bus transport business would end up in losses and the buses would be of no use without the permit as a direct and immediate impact of the restriction.[325] No material before the Court supported any benefit of the state monopoly – what additional services or amenities would be added for the enjoyment of general public and how the road transport would improve.[326] Mere statement in the preamble that the state monopoly

[318] (1955) SCR 1 707.
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid.*
[326] *Ibid.*

would lead to an efficient transport service in the interests of the people was not enough.[327] The Court observed that it could decide on the question of reasonableness only by considering the relevant facts such as conditions, circumstances and consequences and it would hold the restriction invalid unless the state can place material before the Court to bring it within the ambit of reasonableness.[328] It would be not for the petitioner to prove negatively that the restriction is not reasonable or not in the interests of general public.[329] Here is the relevant excerpt from *Saghir Ahmed*: [330]

> There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community.

Hence, the rule: if the restriction is *prima facie* drastic, the State needs to prove its scope to be within the limits of article 19(6). Although subsequently an amendment to article 19(6) immunized state monopolies from judicial review, the rule of shifting the burden of proof remained valid and several subsequent judgments followed it. *Mohd. Faruk* v. *State of Madhya Pradesh*[331] further clarified, a prohibition or a ban

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[327] Compare it to *T.B. Ibrahim* v. *Regional Transport Authority, Tanjore* 1953 SCR 290. The Court viewed public convenience as enough ground for not probing further.
[328] *Ibid.*
[329] *Ibid.*
[330] *Ibid.*
[331] (1969) SCR 1 853.

requires the state to defend the restriction, the burden is on the state, not on the citizen: [332]

> Imposition of restriction the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State.

Messrs Virajlal Manilal and Co v. *State of Madhya Pradesh*[333] too reiterates the same position.

The three judgments mentioned above are five-judge bench not-overruled judgments. Hence, the *Saghir Ahmed* rule is binding on all subsequent judicial review cases involving article 19(1)(g). It implies that the Court must ask a question whether there is a *prima facie* infringement of the right under article 19(1)(g) and if held so, the burden would shift to the State to show that the restriction is valid. In case of prohibition or ban, no test is required, and the burden of proof is on the state to bring the restriction within the ambit of article 19(6).

2.7 Conclusion

This chapter laid down and discussed the contours of article 19(1)(g). It is the doctrinal foundation on which the judicial adherence can then be assessed to find judicial deviance.

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[332] *Ibid.*
[333] (1969) SCR 2 248.

Here is a summary. Article 19 freedoms cannot be ex-ante restricted for Indian Constitution does not envisage police powers. To regulate a trade or business, the State can impose reasonable restrictions in the interests of general public but these restrictions would be ex-post restrictions. Unless the legislature passes a law imposing reasonable restrictions, no activity can deemed to be prohibited ex-ante. Freedom of trade includes trading in all activities and no activity is excluded unless reasonably prohibited by law. Law is defined under Article 13(3)(a) of the Constitution. It includes all kinds of executive and administrative imposts that the Supreme Court can review under article 32. It means that constitutional courts can undertake a judicial review of any legislation, delegated legislation as well as executive action.

But it does not mean that the Executive can frame any rule, regulation or notification without any mandate from the legislature and infringe the fundamental rights. An executive order with civil consequences must be backed by a legislation.

Several constitutional provisions trump article 19(1)(g). Article 19(6)(ii) is a saving clause; State monopolies are immune from judicial review. However, article 19(6)(ii) protects only the core provisions of a monopoly-enabling statute that create a monopoly, not the peripheral provisions. Similarly, the ninth schedule read with article 31-B protects legislations placed in the ninth schedule. But it does not extend the immunity to any provision beyond the mandate of textual provisions. Ninth Schedule cannot be expanded by interpretation. A law enacted under article 15(5) can be challenged on the Basic Structure and not on article 19(1)(g).

During emergency, the State can make any law or to perform any executive action in derogation of suspended provisions of Part-III of the Constitution that the State would but for Part-III be competent to make or to take.

Judicial review is part of the basic structure. Express provisions in the Indian Constitution – article 32 as well as article 226 mandates the constitutional courts to review a law whenever a citizen brings in a challenge. Deference to State Policy and legislative wisdom would then mean abdication of judiciary's constitutional role. While the Court may accord more weight to the legislative and executive reasoning, the Court must not withdraw from its constitutional duty to test the constitutionality of an impugned law.

Article 19(6) provides for two conditions for framing restrictions: reasonableness and general public interest. General public interest excludes sectional interests. A judge must assess whether a restriction is overall good for the society in general and whether it favors a specific sectional group at the cost of others. General public interest denotes the communal conception of common good and not the distributive conception of common good. The distributive conception of common good is covered under article 31-B read with the Ninth Schedule, article 15(5) and article 19(6)(ii). These articles expressly trump the right under article 19(1)(g) for distributive justice. For all other restrictions that can be reviewed under article 19(1)(g) read with clause (6), communal conception of common good applies.

The pursuit of self-interest is often conducive to common good. A consensual trade transaction is a positive sum game as both parties get in return what they value more over what they currently have. Market transactions are mutually beneficial and consensual in nature, hence the state must have good justification for regulating trade and business.

Reasonableness is to be assessed as per the proportionality standards. Constituent Assembly debates offer a lot of insight supporting this position. Precedents decided in the early days of Constitution point out the proportionality standard of review for reasonableness. While it is true that the Court has been inconsistent with the proportionality standard of review, those precedents remain binding precedents for all subsequent cases on article 19(1)(g).

There is no case for differential standards of review in the India Constitution. Particularly for article 19(1)(g), the case for applying lower standards of review than other freedom has no good justification.

If the restriction is *prima facie* drastic, the State needs to prove its scope to be within the limits of article 19(6). It implies that the Court must ask a question whether there is a *prima facie* infringement of the right under article 19(1)(g) and if held so, the burden would shift to the State to show that the restriction is valid. In case of prohibition or ban, no test is required, and the burden of proof is on the state to bring the restriction within the ambit of article 19(6).

Next chapter can now check the subsequent judgments for adherence to these standards.

CHAPTER 3

VALIDATING EXECUTIVE OVERREACH WITHOUT AUTHORITY OF LAW

3.1 Introduction

The Supreme Court safeguards the fundamental rights and interprets the laws and the constitution as per the constitutional text, legal doctrines and precedents. Judicial behavior can unduly reduce a fundamental right to a paper right. Last chapter laid down the contours of judicial review - how the Court is supposed to review a restriction under article 19(1)(g). What the standard of reasonableness and the general public interest are and how the Court ought to review an economic restriction correctly, the thesis explored in the last chapter.

There are two important lessons extracted from the previous chapter that are relevant for this chapter.

One, article 19(6)(ii) is a saving clause. By virtue of this clause, state monopolies are to be presumed to be reasonable and in the interests of the general public.[1] Any law enacted in pursuance of this provisions would be immune from review on ground of reasonableness and general public interest.[2]

Two, a monopoly- whether complete or partial must be statutory in nature. It should be a law enacted by the legislature and not an executive instruction without any

[1] *Akadasi Padhan* v. *State of Orissa* 1963 SCR Supp 2 691.
[2] Not immune from article 14 and other constitutional provisions; only from article 19(1)(g).

statutory mandate. An executive order with civil consequences must be backed by a legislation.[3] Limited government, the separation of powers and the rule of law including the judicial review of the arbitrary executive action are fundamental principles of our legal system.[4] The rule of law means the superiority of legislation, the absence of arbitrariness and discretion in the government authorities.[5] Since India followed the English system and opted for the rule of law, "[e]very Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must be supported by some legislative authority."[6]

Another important point to be kept in mind before proceeding further is article 19(6)(ii) contains the phrase "whether to the exclusion, complete or partial, of citizens or otherwise" which includes partial monopolies too. Hence, preference extended to public sector units would also be immune, provided it is authorized by law.

This chapter argues that the Supreme Court of India truncated the article 19(1)(g) right, by unduly validating state monopolies or preferential treatment to state enterprises extended through executive orders without any authority of law.

Scope and Implications

The chapter is limited to questioning the validation of executive orders without any statutory mandate in pursuance of state monopoly as illustrated above. In absence of any statute authorizing the executive orders, these executive orders would be null and

[3] *State of Madhya Pradesh* v. *Thakur Bharat Singh* 1967 SCR 2 454.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

void. Hence, the possibility is a binary: either valid state monopoly if created or extended through a law; or null and void because created through an executive order without any statutory basis. In either case, judicial review is irrelevant – former is immune from judicial review and latter does not require any review.

3.2 Monopoly not backed by any legislation

In several such cases, the Court refused to acknowledge these cases as monopoly cases and simply denied that there was any restriction at play. For example, state department publishing textbooks and prescribing the same textbooks, distributing agricultural pumps through state cooperatives, procuring medicines through state corporations – these are all instance of monopoly, either complete or partial monopoly, to the exclusion of citizens. But the Court brushed aside the monopoly argument.[7] The Court implied that a legislation was not required for the executive to print textbooks and stop certifying private textbooks or allow/prefer only state corporations and cooperatives for exports and public procurement.[8] Let's first look at why the executive cannot restrict a fundamental right unless backed by a legislation.

Definition of "law" – can the executive restrict the fundamental rights through orders?

All executive action which operates to the prejudice of any person must have the authority of law to support it.[9] The Indian federal structure is based on three

[7] *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab* 1955 SCR 2 225.
[8] *Ibid.*
[9] *State of Madhya Pradesh* v. *Thakur Bharat Singh* 1967 SCR 2 454.

fundamental principles. One, people are sovereign, and the government is limited.[10] The government must be conducted in accordance with the will of the majority of the people. The people choose their representatives who form the legislature. Executive agencies are bound by the powers conferred by the legislature. Two, all the organs of the State have different powers and they keep a check on each other. Three, there is the rule of law which excludes arbitrary exercise of power, and includes supremacy of legislation.[11] "Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must, be supported by some legislative authority."[12]

Article 162 provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.[13] Does article 162 of the Constitution enable the government to issue executive orders in absence of a legislation?

Article 162 and Article 73 distribute the executive power between the Union and the States.[14] Only when the Parliament or the State Legislature enacts a legislation on a certain subject belonging to their respective lists, that the Union or the State executive, as applicable can execute the law.[15]

***Ram Jawaya Kapoor* – first step in the wrong direction**

This part argues that *Ram Jawaya Kapoor* validated an illegitimate monopoly. In absence of any legislation, Government moved from certification system to state

[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

monopoly for the prescription of school text books through executive instructions, thereby excluding private book publishers. Refusing to scrutinize the *de facto* monopoly, the Court declared that the publishers had no right to get their books certified and prescribed, and there is no possibility of infringement of a right that does not exist.[16]

The obvious question is: did the publishers have a fundamental right to get their books approved by the government and prescribed in the schools? If so, then the Court should have assessed whether the textbook nationalization infringed the fundamental rights and then whether it could have been done through executive orders.

The Court in *Ram Jawaya Kapoor* mis-framed the question and decided wrongly that there was no fundamental right in the publishers to have their textbooks approved and printed. The Court erroneously perceived the State Government as a customer whereas the State Government shifted its role from a regulator to monopolist provider, thereby infringing the fundamental right of the publishers. Until 1950, the State Government as a regulator approved and prescribed textbooks.[17] It could not stop doing so arbitrarily without any authority of law.

Facts

Prior to 1950, Government of Punjab followed the "alternative method" for text book prescription: an author or a publisher could prepare and submit books on relevant subjects to the Education Department.[18] The Department would scrutinize and approve selected books, minimum three, and up to ten and sometimes more than 10 on each

[16] *Supra* note 7.
[17] *Ibid.*
[18] *Ibid.*

subject as alternative text books.[19] School headmasters had the discretion to choose any of those books and prescribe it for their respective schools.[20]

Post-1950, assuming the role of publisher, the State Government began to publish books on certain subjects including agriculture, history, social sciences without inviting any author or publisher.[21] For other subjects, the State Government would now approve only one text book for each subject.[22] On these books, the State Government charged five percent royalty on the sale price of all the approved text books.[23]

Further in 1952, barring the publishers, the State Government invited only the authors for submission of books on a condition - if the State Government selects the book, it would pay a royalty of five percent on the sales price to the author and keep the rest since now the government would publish, print and sell. In an incremental manner and without passing any legislation, the State Government effectively monopolized the textbook publishing sector ousting the private publishers.[24]

Contentions and Court's reasoning

Petitioner's counsel in *Ram Jawaya Kapoor* had raised three contentions: one, the executive could not engage in a business without an express legislative sanction.[25] As the function of the executive was to execute the agenda legislated by the legislature,

[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*

executive could not carry out a task in absence of any legislation for want of separation of powers.[26] Two, state monopoly could not be established without authority of a legislation.[27] Three, even if there was a state monopoly authorized by legislation, it must compensate the expropriated businesses. Nationalization without compensation would be invalid constitutionally.[28]

Responding to the second contention whether the nationalization of textbooks had violated any fundamental rights, the Court found since the petitioner had no fundamental right to get the books certified, the questions – the validity of state monopoly without an authority of law and the payment of compensation did not arise.[29] Using the "no-right" reasoning, the Court made the second and third contentions redundant.

Analysis

First issue - whether the government could get into business without legislative sanction is beyond the scope of this paper. After dealing with the first issue in para 6 to para 16, the Court concludes in para 16: as long as the executive activities are in furtherance of a policy and the executive has a majority in the legislature, then appropriation acts would suffice.[30] The paper deals neither with this issue nor its merits.

In the next para, the Court adds a caveat:[31]

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[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

> 17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the government to carry on their business, a specific legislation sanctioning such course would have to be passed.

An important point in the second line above. If a proposed state business is likely to restrict private rights, a specific legislation would be necessary. The question is: does the impugned government action encroach upon private rights? The Court did not decide this question. It is strange because in para 17, the Court asserted the condition for constitutional validity: a restriction must be backed by legislation if it is likely to encroach private rights. And instead of deciding the question, the Court concluded in para 20 and 21, the Court concluded that the publishers have no fundamental right to insist on any of their books accepted as textbooks.[32] So, the Court gave no finding whether the fundamental right had been infringed; instead, the Court stopped at the finding that there was no fundamental right at all to have the text books approved that could possibly be infringed. In para 21, the Court expressly stated: "As the petitioners have no fundamental right under article 19(1)(g) of the Constitution, the question whether the Government could establish a monopoly without any legislation under Article 19(6) of the Constitution is altogether immaterial."[33]

Why is there no fundamental right? The Court equated the Government to a customer: State as a customer can be arbitrary and can adopt any method of selection.[34] The Court observed: "A trader might be lucky in securing a particular market for his

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*

goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers forever".[35]

Was the Government or the Department of Education a customer for textbooks publishers? Certainly not.

First, the Education Department was a regulator that under the alternative method merely *certified* textbooks to be prescribed for private recognized schools. Even under the alternative method, the Government could not have arbitrary certified textbooks, it ought to be fair and reasonable in approving the textbooks.

Second, there is no ambiguity that the Government was never a customer: it did not buy any books from private publishers. It merely approved those books, not one or two but 3-10 text books and allowed the recognized schools to prescribe any of them.

Third, it is not the case that the Government started printing the books for free distribution to the students. The Government stopped "approving" the private books, as a regulator. In the absence of any "approved" textbook printed by publisher, recognized schools would by default shift to the government printed textbooks. Whether the Education Department would impose its books or not would be immaterial. A *de facto* regulatory shift from certification based competitive market to state monopoly made those private books unsellable.

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[35] *Ibid.*

Fourth, even if the Government were to print books for free distribution to students, it could still simultaneously approve the private textbooks. The recognized school authorities would have more choice and there would be more competition for better quality, content and pricing. Alternatively, the government could simply fund the students directly: award scholarships to buy books from the market and address affordability concerns, if any.

Please note that the recognized schools were not government schools though these might have been partially aided by the Government. Schools no longer had a choice but to compulsorily prescribe the textbook printed and published by the government. Under the alternative method, the schools had more choice and autonomy in selection of text books from a list of approved books.

The Court failed to see that the case is about the change in regulatory regime in the textbook sector. The question is: whether the publishers had a fundamental right to have their books certified. Yes, they had.

As discussed in the last chapter, under our constitutional scheme, a restriction is to be justified, not freedom. Everyone is free to pursue a vocation of her choice unless restricted by a reasonable *law* in general public interest. Similarly, textbook publishers were free to publish textbooks and schools were free to adopt any textbook. Now if the State required the textbooks to be certified, it must have a law to mandate that the schools could adopt only a textbook certified by the State. And further, if the State moves from certification to a monopoly, the legislature must enact a statute to exclude the private publishers from the market. The statute can either mandate the schools to

adopt no textbook other than the one published by the government department, or the statute could deny certification to all private publishers and reserve the textbook publishing to a government department.

While state certification was not compulsory for the publishers for the sale of their books, it was compulsory for the schools to prescribe only the certified books. A regulation applicable to consumers instead of producers is still an economic restriction if it regulates an aspect or the subject matter of transaction. As per the conditions of recognition, no school could have chosen and adopted a non-certified textbook. Hence, the condition of recognition, for the purpose of article 19(1)(g), was indeed a restriction albeit without the authority of law.

3.3 *Ram Jawaya Kapoor* – as interpreted subsequently

An alternative interpretation could be that the State is a competitor and competition cannot be equated to infringement of fundamental right to business. In *State of Madhya Pradesh* v. *Thakur Bharat Singh*,[36] while discussing *Ram Jawaya Kapoor*, the Court stated: "by entering into competition with the citizens, it did not infringe their rights." It would have been a valid contention, had the State not denied certification to private textbooks and allowed them to compete with its textbooks. An abuse of coercive regulatory powers to capture market share - either by way of omission to approve private publishers' books or mandating its textbooks on the schools was arbitrary and without any authority of law. The act of prescribing its books as textbooks and omitting to approve other text books does infringe private rights and deserve judicial review.

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[36] *Supra* note 9.

In *Naraindas Indurkhya* v. *State of MP,*[37] the Court discussed the applicability of such prescription to private schools and justified it on the ground that it was a condition of recognition. But this reasoning is flawed. Schools applied for recognition for two reasons: one, because they had to: regulation 61(b) made it compulsory that all schools affiliated to the Board must be recognized by the State Government.[38] Two, only the recognized schools were eligible to get grants.[39]

Here, the Court's reasoning can confuse any reader as the Court tried to justify the applicability on the importance of grant-in-aid and ignored the mandatory nature of the regulation.[40] The Court did not differentiate whether recognition is a mandatory regulation or voluntary. If the recognition was mandatory, then the reason that the schools applied for recognition and abide by conditions of recognition to become eligible for grant-in-aid - is flawed. In that case, all schools had to mandatorily seek recognition. It implied that the prescription of text books was a regulation, mandatory for all schools as a condition for recognition. It was not voluntary or contractual and there was no possibility to opt out. The Court stated it clearly, "[t]hus, even though there is no law which confers power on the State Government to prescribe text books, the State Government can by virtue of the need of the private schools for recognition, prescribe text books for them and oblige them to use such text books."[41] This condition of recognition monopolized the textbook market: students were left with no choice but to buy the government-printed textbooks only. Further, the Court borrowed the flawed

[37] (1974) 4 SCC 788.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*

reasoning from *Ram Jawaya Kapoor*: the publisher had no right but a mere chance or prospect of getting his books approved as textbooks. Clearly, the reasoning is erroneous.

Naraindas case dealt with not only prescription of powers under the executive powers but also legislative provisions vesting power to prescribe text books in the state government. The Court recorded the petitioner's contention: "the schools are precluded from using any other textbooks for the purpose of imparting instruction to the students. This directly interfered with the business of the petitioner, for if the text books printed and published by the petitioner were not selected and approved by the State Government, the petitioner would not have any market for the sale of his text books and that would prejudicially affect his business."[42] Petitioner further contended that the legislature could have provided for an independent body of experts for prescribing text books to ensure fairness.[43] Petitioner challenged the unguided power vested in the state government to prescribe any text book.[44] Responding to the contentions, the Court picks uniformity over competition: there should be uniformity in courses of instruction.[45] The Court deferred to the legislature on both the questions – the method of selection of text books and choosing the authority with the power to select and prescribe text books - whether it should be text book committee comprising of experts or the state government.[46]

[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*

The Court came back to denial of fundamental right and echoes *Ram Jawaya Kapoor* again:[47]

> ...[E]qually applicable where the State Government instead of prescribing text books in exercise of the executive power does so in exercise of statutory power such as that conferred under section 4 subsection (1). No fundamental right guaranteed to the petitioners under article 19(1)(g) is infringed if the State Government in exercise of the statutory power conferred under Section 4, subsection (1) does not prescribe text books printed and published by him.

A crucial point that the Court skipped was of conflict of interest. If the state government performs both functions: one that of printer and the other that of regulator, how can it be expected to be not biased? Text Book Corporation - Madhya Pradesh Pathya Pustak Rachna Avam Shaikshinik Anusandhan Nigam (hereinafter referred to as the Text Books Corporation) though registered as a non-for-profit organization was a State Government institution for the purpose of carrying on the work of printing, publishing and distributing text books for use in the Primary and Middle school classes in the State of Madhya Pradesh.[48] The Minister-in-charge of the portfolio of education was an ex-officio, Chairman of the text Books Corporation, while some officers of the Government connected with the Education Department were ex-officio members along with certain other non- official members nominated by the State Government.[49]

The Court did record the fact that Secondary Education Commission (SEC), 1952-53 set up by the Government of India had recommended constituting a high-power committee to avoid all political and other extraneous influence in selection of

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[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*

text books.[50] SEC was aware that the ruling political party could easily indoctrinate the young minds by abusing its power to select and prescribe text books.[51] Instead of checking this potential abuse and raising questions, the Court adopted a passive attitude and responded with a lowered standard of review: there is no bar on the State Government from setting up an independent high-power committee to assist it in the task of selecting and prescribing text books.[52]

Other cases

In *Krishnan Kakkanth* v. *Govt of Kerala*, [53] petitioners challenged the executive order directing implementation of subsidized agricultural pump-set distribution through two government sponsored cooperatives only. The Court reasoned: one, Indian Constitution does not recognize franchise or rights to business which are dependent on grants by the State or business affected by public interest (*Saghir Ahmad*[54]); two; canalization is permissible "where vital interests of the community are concerned"; three, law should be a statutory law, not an executive instruction but if there is no fundamental right infringed, then the question of executive instruction or statute is immaterial.[55] Since there is no fundamental right in a dealer to insist upon the government for doing business with him, no fundamental right is violated.[56] Four, Government can select any dealer.[57] Five, subsidy is not compulsory; rather it is voluntary.[58] Whoever wants the subsidy will purchase the pump from a state-cooperative instead of a private dealer,

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[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] (1997) 9 SCC 497.
[54] *Saghir Ahmad* v. *State of UP* 1955 SCR 1 707.
[55] *Supra* note 53.
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*

otherwise there is no compulsion on anyone to buy it from the state cooperative.[59] Six, the subsidy scheme did not prohibit the trade of private dealer wholly.[60]

First contention, if looked carefully, is against the Government. *Saghir Ahmad*[61] case implied that the citizens can do business as a matter of right and their right to do business is not subject to state grant. State holds public resource as a trustee for the citizens and every citizen is entitled to avail these resources as beneficiaries.[62] The right to use the resources of a citizen is subject to the similar right vested in every other citizen.[63] The State as a trustee may impose reasonable restriction as required for protecting the rights of the public generally but the right of a citizen in dealing with a resource may not be denied on the ground of state ownership.[64]

With respect to second contention, whether canalisation is permissible is a question of judicial review. It may be permissible if it qualifies the test under article 19(6), it is in the interests of general public and a reasonable restriction. But it is not backed by law, then it is void and does not warrant ay judicial review.

Third and fourth contention are connected: whether there is a fundamental right in a dealer to insist upon the government for doing business with him and whether the government can select any dealer. Petitioner had contended that the Government cannot arbitrarily select any dealer and quoted *Dayaram Shetty* case.[65] Government cannot

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[59] *Ibid.*
[60] *Ibid.*
[61] *Supra* note 54.
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] *R Dayaram Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489.

select a dealer arbitrarily: it has to be fair and reasonable in its selection.[66] It must have a process - either based on merit such as bidding or auction, randomness such as lottery or time such as first come, first get. Responding to the contention, the Court merely observed that the Government may deviate from the general allocation norms based on rational classification but falls short of giving any reasons whether and how selection of two public cooperatives for distribution of agricultural pump-sets was a rational classification.[67] Nowhere it explains the "valid principle which in itself is not irrational, unreasonable or discriminatory" – that the government applied for selection to justify the preferential treatment.

Fifth contention is regarding the consumer. Since the channelized subsidy is not compulsory, it violates no right of the consumer. However, it is a question of access as well as choice. Widespread dealership would help in ensuring better access and multiple players in the market would encourage competition and better after-sales-service. The Court does not address these arguments.

Whether the petitioner was totally barred from trading in agricultural pump-sets is not the issue. The issue is of preferential treatment and market distortion. Such canalisation unilaterally benefits the state cooperative only and adversely affects the private dealers. The consumer would have been better off, had there been multiple channels of subsidized sales.

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[66] *Ibid.*
[67] *Krishnan Kakkanth, Supra* note 53.

The Court cited *Viklad*[68] case wherein the private transporters of coal alleged discrimination and *de facto* prohibition on private transport of coal. But *Viklad* can be distinguished from the present case on two grounds: one, there was a statutory provision enabling the Central Government to accord preferential treatment in rail transport; two, the Court offered a dubious reason: the petitioner's main trade was not coal transport but coal trading and coal transport was merely incidental to their main business - coal trading.[69] The argument was bizarre and no way it is applicable to the present case.

Again, in *Indian Drugs & Pharmaceuticals Ltd.* v. *Punjab Drugs Mfgr Association*,[70] the Court had to decide on the question of preferential treatment to public pharma-companies for procurement of medicines and other medical products by the government hospitals. The Court began by diverting the attention from public procurement to the rest of the market and tried to justify by pointing at the half-full glass: since the restriction is not total exclusion or prohibition, it is okay.[71] Further, it rejected the definition of monopoly to be inclusive of partial monopoly or preferential treatment.[72] It expressly denied that creation of a captive market in favor of state undertaking could be monopoly under article 19(6).[73] On the contrary, article 19(6) expressly mentions "... the exclusion, complete or partial ..." as monopoly.

Then, it cited *Ram Jawaya Kapoor* and *Naraindas Indurkhya* and while concluding the ratio of these two judgments made a sweeping fallacious statement: [74]

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[68] *Viklad Coal Merchant, Patiala* v. *Union of India* 1984 1 SCC 619.
[69] *Ibid.*
[70] (1999) 6 SCC 247.
[71] *Ibid.*
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*

> In this case as well as in *Ram Jawaya* case the Court further accepted the authority of the state to issue directions restricting the sale of the textbooks by an executive order under article 162 of the constitution on the basis that the executive power of the State extends to all matters with respect to which the State Legislature has power to make law and in the absence of there being any law, the said field could be covered by an executive action.

Such a conclusion is erroneous. As discussed above, the Court in *Ram Jawaya Kapoor* had merely concluded that the publishers have no fundamental right to insist on any of their books accepted as text books and gave no finding whether the fundamental right had been infringed.[75] Based on the finding that the petitioners had no fundamental right under article 19(1)(g) of the Constitution, the Court refused to further probe the issue whether the Government could establish a monopoly through executive instruction under Article 19(6) of the Constitution.[76]

In the next para, the Court copies and pastes a para from *Sarkari Sasta Anaj Vikreta Sangh* v. *State of MP* without any discussion and reasoning.[77] The para contained the excerpt: "No one could claim a right to run a fair price shop. All that he could claim was a right to be considered to be appointed as an agent of the Government to run a fair price shop."[78] The Court should have ideally discussed the difference between the right to run a fair price shop agency and the right to be considered for government fair price shop agency. But the Court did not.

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[75] Supra note 7.
[76] *Ibid.*
[77] *Supra* note 70.
[78] *Ibid.*

The reason why Court emphasized on no-right position is because an economic restriction whether under article 19(1)(g) or article 19(6)(ii) exception - both need to be a legislation. By asserting "there is no fundamental right", the Court was able to uphold an otherwise illegitimate executive order that should have been declared null and void.

In many subsequent cases, the Court upheld the preferential treatment on grounds of reasonable classification as permissible under article 14. Article 19(1)(g) finds no mention in in *Hindustan Paper Corpn. Ltd.* v. *Govt. of Kerala*[79] and *Oil and Natural Gas Commission* v. *Assn. Of Natural Gas Consuming Industries of Gujarat.*[80] In *Hindustan Paper Corpn. Ltd.* v. *Govt. of Kerala* the Court upheld the preferential treatment meted out to government companies on the premise that government companies stand on a different footing and the classification is a valid one.[81] In *Oil and Natural Gas Commission* v. *Assn. Of Natural Gas Consuming Industries of Gujarat*, this Court upheld the favorable pricing offered to public sector organizations, particularly dealing in essential commodities.[82]

3.4 Conclusion

Beginning with *Ram Jawaya Kapoor*, the Court followed its reasoning in *Naraindas Indurkhya* - a case with similar facts from Madhya Pradesh or the Central Province. Subsequently, the Court applied this flawed reasoning to a number of preferential treatment cases - where the state through executive instructions accords preference to state undertakings over private players and distorts the market. In *Sarkari Sasta Anaj*

[79] 1986 3 SCC 398.
[80] 1990 SCC SUPP 1 397.
[81] *Supra* note 79.
[82] *Supra* note 80.

Vikreta Sangh, the Court while addressing the question of state preference to cooperative societies in allotment of fair price shops held in the favor of the government policy. But here, the Court made a nuanced distinction: "No one could claim a right to run a fair price shop as an agent of the Government. All that he could claim was a right to be considered to be appointed as an agent of the Government to run a fair price shop." The Court fails to appreciate the nuance in subsequent judgments such as *MP Ration Vikreta Sangh Society* v. *State of Madhya Pradesh.*[83] The Court made a sweeping statement again: "There is no fundamental right in any one to be appointed as an agent of a fair price shop under Government Scheme".[84] Similarly, in *Krishnan Kakkanth*, the Court upheld the preference given to public cooperatives in supply of pump sets.

In the cases discussed above, executive orders extended monopolistic exclusion through executive orders without any statutory mandate. Since the Court had always insisted on a legislation for the purpose of article 19 rights and particularly so for monopolistic exclusion, the respondent state tried to defend the executive orders by contending otherwise – either there is either no monopoly, or there is no restriction, or there is no fundamental right. While acting as a regulator or a welfare financier, the Government abused its executive capacity to assume monopoly or extend monopoly to its affiliates, either partial or complete, without any legislation. Such monopolistic conduct would have been entirely permissible under article 19(6)(ii), had it been backed by a law. Initially, the Court skipped the question - whether there is a law backing such partial monopoly. Later, it came to erroneously believe that the executive can restrict the fundamental right under article 19(1)(g) even without any legislation. Secondly, the

[83] (1981) 4 SCC 535.
[84] *Ibid.*

Court also erroneously finds the issue to be beyond the scope of the right under article 19(1)(g) on the premise that the state was free to act as it wanted, either as a consumer or a competitor.

CHAPTER 4

VALIDATING LEGISLATIVE AND EXECUTIVE OVERREACH THROUGH JUDICIAL ABDICATION

4.1 Introduction

Last chapter dealt with the executive overreach without the authority of law. Next chapter will be about the judicial overreach. This chapter is concerned with the propriety of judicial review. The Court in certain cases undertook judicial review but did not do what it ought to. The Court ought to raise pertinent questions for scrutiny and offer proper justification before upholding a restriction.

Chapter two identified the norms of review for article 19(1)(g) cases. One, the Court must not hesitate to scrutinize any restriction. The legislative determination of the right under article 19(1)(g) read with article 19(6) is not ultimate and is subject to judicial scrutiny under article 32 or article 226. Two, the Court must review a restriction on both counts – reasonableness and general public interest. Both grounds must be scrutinized separately. Three, reasonableness criterion demands the review to be a deliberative exercise and based on a thoughtful weighing of competing contentions. Such a criterion cannot be met by merely labeling a restriction as reasonable without any deliberation. Four, for determining reasonableness as defined in *Chintaman Rao*[1] the court must check: (a) the restriction leaves no possibility of it being applied for constitutionally unsanctioned purposes; (b) the restriction should have reasonable relation to the purpose in view, and it should not be arbitrary; (c) it should not be

[1] *Chintaman Rao* v. *State of Madhya Pradesh* 1950 SCR 759.

excessive or beyond what is required; and (d), there must be a balance between the freedom and the social control. Five, general public interest requires common good without favoring 'sectional interests' at the cost of other citizens. General public interest must be scrutinized separately. Sixth, the burden of proof shifts to the state in case of drastic restrictions, as laid down in *Saghir Ahmed* v. *State of Uttar Pradesh*.[2] Seventh, the Court must assess both procedural reasonableness as well as substantive reasonableness of a restriction.

Examining the article 19(1)(g) decisions for adherence to above norms of review, the chapter investigates the judicial behavior with respect to: whether the Court deferred judicial review; and if so, the number of cases wherein the Court deferred.

Two, whether the Court attempted to find out the difference between general public interest and public interest in any case; and in how many cases, did the Court disallowed sectional interests to restrict article 19(1)(g)?

Three, the chapter will find out the number of cases wherein the Court applied or did not apply the necessity and balancing tests. Did the Court apply the tests correctly or skipped, contradicted, rejected or distorted these tests?

Four, for the rule of reversal of burden of proof for drastic restrictions as laid down in *Saghir Ahmed* case, the chapter will find out the number and frequency of its application, and whether it has been rejected or overruled.

[2] 1955 SCR 1 707.

Fifth, the chapter also seeks identify the common logical fallacies or the irrelevant reasons commonly employed by the Court to justify and uphold restrictions.

The Court has indeed the authority to set new precedents, overrule old ones and modify standards of review, but a silent and unjustified departure from an established standard of review amounts to impropriety and judicial indiscipline, which is problematic and is reprehensible. For example, abandoning the rule of reversal of presumption of constitutionality in case of drastic restrictions as laid down in *Saghir Ahmed* is deviance.

Methodology

The chapter seeks to undertake an empirical assessment of the judicial decisions on article 19(6). It has a three-point empirical inquiry: (a) In how many cases did the Court expressly mention deference to the state action/ restriction and not undertake a proper review? (b) In how many cases did the Court apply necessity or balancing tests? (c) In how many cases did the Court acknowledge or apply the rule of reversal of presumption of validity? (d) In how many cases, the court, while dealing with drastic restrictions, did not apply the rule of reversal of presumption of validity?

To have a database of all the judgments pronounced by the Supreme Court, the chapter uses SCC software and MS excel. A simple search with "article 19(1)(g)" with period selected as 1950 to 2015 generates 456 cases. Next step is to tabulate the data and filter the irrelevant ones. Some cases merely mention article 19(1)(g) but do not deal with judicial review in the context of article 19(1)(g); some cases may relate to

article 15(5), Ninth Schedule, the Basic Structure Doctrine; some cases may have referred the matter to larger benches; some may be orders; some deal with the vires of delegated legislation with respect to parent Act. A column is created with field "whether included – Y/N" and another column for reasons "why not".

A case may have multiple instances of judicial review: (a) more than one issue or provision is under review; (b) there may be multiple judicial opinions, some concurring or dissenting. Therefore, "Case" should not be the unit, it should be "instance" based on the issue/ provision reviewed and the judge reviewing it. In total, there are 261 instances of judicial review.

For these instances, more fields are created: judges, bench strength, judge writing the opinion, issue, outcome, deference, necessity/balancing and presumption of constitutionality.

For outcome, the data is coded. Judgments in favor of citizens/ individuals are fed as "I", decisions favoring the State as "S". For deference, it would be "D" if deferred expressly, or "NM" (not mentioned) if there is no deference. Necessity/ balancing, it would be "LRA" for lesser restrictive alternative/ less drastic restriction, excess of coverage, excessive, disproportionate and an assessment of cost and benefits, or "NM" for not mentioned.

Annexure-I is the database of all the instances. It has serial number, case title, citation, bench strength, judgment written by, issue and outcome. Annexure-II lists the instances that expressly states deference. The list mentions the relevant paragraph of

the judgment and comments detailing whether it was deference to administrative authority, legislature, expertise, taxation or generally in respect of economic matters.

Annexure-III lists instances that apply either necessity test, balancing test or both. It has serial number, case title, citation, bench strength, judge, issue and outcome.

Annexure-IV is a list of cases that either acknoweldge or apply the rule of reversal of presumption of constitutionality and Annexure-V lists down the cases wherein the issues deal with “ban”, “prohibition”, “expropriation” or “demonetisation” but where the reversal rule was not applied.

Chapter Plan

Section 4.2 offers a detailed account of departure from norms of review, particularly abdication, general public interest, reasonableness and the rule of reversal of presumption of constitutionality. Section 4.3 identifies some recurring logical fallacies and irrelevant reasons entrenched in the article 19(1)(g) jurisprudence.

4.2 Manipulating Standards of Review

Chapter two distinguished the norms of review for article 19(1)(g) cases. Those are binding norms and ought to be followed. This part identifies the judgments in derogation of the norms of review.

Abdication and its Synonyms

The part argues that in the context of article 19(1)(g) read with article 19(6), the Court became more deferential in post-emergency era. Pre-emergency, the Court deferred in less than three per cent of instances but post-emergency, the Court deferred in almost 10 per cent instances (Annexure-II).

Textual mandate in the Indian Constitution – article 32[3] as well as article 226[4] leave no scope for the judiciary to abdicate judicial review. A key difference between article 226 and 32 is the use of word "guaranteed" in article 32. Article 226 is not in the

[3] 32. Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[4] 226. Power of High Courts to issue certain writs
(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without
(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.
(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Part III of the Constitution, article 32 is. The Supreme Court has no discretion in entertaining writ petitions for the enforcement of fundamental rights. The power of judicial review existed even in colonial era and the Court too held that the power of judicial review is inherent in a written constitution and exists independently of article 13 (2).[5]

Constituent Assembly favored a strong supreme court capable of guarding the rights and privileges of the citizens - whether majority or minority.[6]

"Deference to State Policy and legislative wisdom" may then imply the abdication of judiciary's constitutional role. The Court must have a stand on the validity of laws. It must raise questions and deliberate on the justification. Judicial review to protect liberty, equality and dignity is the primary function of the Court; it is not overreach.[7] The Court may accord more importance to the legislative determination of the right, but it cannot abdicate its role to scrutinize the constitutionality of a impugned restriction.[8]

Deference to legislature is contrary to the textual mandate of the Constitution; legislative determination of a right is not ultimate, and the judiciary is the constitutionally designated protector of fundamental rights.[9] Here is a list of cases that do not scrutinize the restrictions enough in the garb of deference.

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[5] *A. K. Gopalan* v. *State of Madras* 1950 SCR 1 88.
[6] Ananthasayanam Ayyangar, 7 *Constituent Assembly Debates* 70, para 109.
[7] Pratap Bhanu Mehta, "Justice denied" *Indian Express*, December 12, 2013; *available at*: https://indianexpress.com/article/opinion/columns/justice-denied/ (last visited on June 19, 2019).
[8] *State of Madras* v. *V.G. Row* 1952 SCR 3 597.
[9] *Supra* note 1.

Similarly, an expert cannot determine the permissibility of invasion of fundamental right, judiciary can and ought to. A medical expert may not distinguish between essential, necessary and desirable levels of regulations but the Court must. An economist or a committee may go overboard in invasion of right to justify an end, ignoring the constitutional permissibility of means. Merely because ends are noble and guaranteed, means do not become justified. For example, population control was an undisputed noble objective for policymakers in India. Genocide and forced sterilization may be most effective means to control population. A mere combination of nobility of object and effectiveness of means does not justify the choice of policy measures. Judiciary ought to assess the intrusion of restrictions into fundamental rights in all cases. Deference is neither constitutionally permissible nor desirable.

First such judgment was *T. B. Ibrahim, Proprietor, Bus Stand, Tanjore* v. *Regional Transport Authority, Tanjore*.[10] In 1950, Regional Transport Authority (RTA), Tanjore issued a show cause notice to the owner of a private intercity bus station located near the railway station requiring to show cause as to why the starting and terminal points of intercity buses should not be shifted elsewhere. The owner filed a written statement. After hearing the owner, RTA passed a resolution shifting the starting and terminal points of all outstation buses to a municipal bus stand in another area of the town. When the bus station owner challenged the resolution, the High Court dismissed the petition. Hearing the appeal, the Supreme Court ('the Court') held that the order was not contrary to article 19(1)(g) for following reasons: one, as the bus station could still have intra-city buses picking and dropping passengers, the restriction on outstation journeys from that bus stand was not unreasonable. Two, even if it

[10] 1953 SCR 290.

resulted in deprivation of income because of shifting the bus stand, it is not unreasonable. Three, the restriction might 'eliminate' the utility, but the restriction was not unreasonable – because the authority had the power to restrict. Four, the Court merely stated public convenience as a justification for shifting, hence refusing to probe further. Most importantly, the Court stated that it is for the RTA, not the Court, to judge how the abolition of bus stand at the current location was conducive to public convenience. Did the Court rightly defer it to RTA or was it an instance of judicial abdication?

RTA had passed the impugned order under rule 268 of the Motor Vehicles Rules.[11] Instead of reviewing the order on article 19(1)(g), the Court should have reviewed the impugned order on the rule. The rule required "good and proper reasons". The question was whether public convenience is a good and proper reason. It is not obvious and clear how altering the starting and terminal points for buses would be in public convenience.

The Court could have asked RTA for its reasons to justify public convenience. RTA could have possibly stated reasons such as: one, the intercity bus terminal handled a huge number of passengers on a daily basis adding to traffic congestion; two, shifting the starting and terminal points elsewhere would ease the traffic; three, the current inconvenience would be much more than the potential inconvenience long-distance

[11] 268. In the case of public service vehicles (other than motor cabs) the Transport Authority may after consultation with such other authority as it may consider desirable, and after notice to the parties affected, fix or alter from time to time for **good and proper reasons**, the starting places and termini between which such vehicles shall be permitted to be used within its jurisdiction. A list of such places shall be supplied by such authority to every holder of a permit for such vehicles at the time of grant of or renewal of permits, when such places have been fixed every such vehicle shall start only from such places. (*emphasis supplied*)

travelers would face, should the RTA shifts the intercity bus terminal far from the railway station; four, RTA did not want two bus stations operating simultaneously in the town because monopoly would achieve optimal scale and efficiency; five, other alternatives such as building a flyover, underpass, subway or charging a congestion fee were not practically or financially viable.

The petitioner could have then rebutted these reasons if he disagreed with them. In absence of any rebuttal, the Court could then defer to the RTA reasoning without further scrutiny. But accepting "public convenience" without recording any justification or explanation is not deference – it is abdication.

A Systemic Shift towards Deference

A judgment that influenced the jurisprudence on article 19(1)(g) and encouraged judicial abdication in economic matters was *R. K. Garg* v. *Union of India*.[12] The case did not involve article 19 at all. The petitioner challenged the validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and the Special Bearer Bonds (Immunities and Exemptions) Act, 1981, mainly on the ground of article 14. Justice Gupta writing the dissenting opinion found the rational nexus between the provisions and the object lacking. He observed that the Act went overboard in rewarding the tax evaders as compared to honest taxpayers. The Act ensured "anonymity and security for tax evaders", allowed for free transfer of bonds, offered two per cent interest and immunity from several taxes. Justice Gupta emphasized that free transferability would make these bonds as parallel currency and on maturity, the

[12] 1981 4 SCC 675.

money might again go underground. The Act did nothing to prevent black money and tax evasion, rather it incentivized tax evasion.

However, Justice Bhagwati, writing the majority opinion advocated for a restrained approach:[13]

> 8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicit ously expressed than in Morey v. Doud 351 US 457 where Frankfurter, J., said in his inimitable style:
>
> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."
>
> The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment

[13] *Id*. at para 8.

> is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Company 94 L Ed 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

The Court has quoted these lines in many subsequent judgments dealing with article 19(1)(g).[14] It is important to deconstruct this view. Justice Bhagwati had borrowed it from the US jurisprudence. Comparative method must not ignore the fundamental and inherent differences between the subjects of comparison. There are two such key features pertinent to note before applying the foreign notions of judicial restraint. One, the Indian Constitution includes the right to practice any profession, or carry on any occupation, trade or business within the fundamental rights chapter, Part

[14] *Peerless General Finance and Investment Co Ltd* v. *Reserve Bank of India* (1992) 2 SCC 343; *T. Velayudhan Achari* v. *Union of India* (1993) 2 SCC 582; *Dalmia Cement (Bharat) Ltd*. v. *Union of India* (1996) 10 SCC 104; *Bhavesh D. Parish* v. *Union of India* (2000) 5 SCC 471; *State of U.P.* v. *Sukhpal Singh Bal* (2005) 7 SCC 615; *Southern Technologies Ltd* v. *Joint Commissioner of Income Tax, Coimbatore* (2010) 2 SCC 548.

III of the Constitution. Two, this right comes under the title “Right to Freedom” that covers article 19, 20, 21 and 22. Under this title, this right finds place in article 19, grouped with other civil liberties such as freedom of speech and expression, freedom of movement, freedom of association and freedom of assembly. Therefore, it is incorrect to differentiate article 19(1)(g) from other civil liberties or fundamental rights. Also, no textual basis exists in the Constitution for an inferior standard of review to article 19(1)(g) as compared to other fundamental rights. Wherever the Indian Constitution needs to protect another competing interest such as reservations or price control from the operation of a fundamental right such as article 19(1)(g), it does so through saving clauses such as ninth schedule, article 19(6)(ii) and article 15(5).

Subsequent benches quoted Justice Bhagwati without critically analyzing his view. “Restraint” sounds more legitimate than abdication for upholding restrictions without having to give reasons. It is not. It is as illegitimate as abdication.

Before emergency, there was only three instances of deference out of 109 instances; post-emergency, the Court deferred in fifteen cases out of 152 (see Annexure-II).

The chapter does not probe into the motives or reasons for judicial behavior. It may or may not have to do with emergency (supersession of judges). There may be other factors at play.

General Public Interest

Chapter two discussed the meaning and scope of the phrase "general public interest" and how it is different from "public interest". "In the interests of general public" is not an empty phrase for passively validating all kinds of restrictions. It is purposefully incorporated to safeguard against the restrictions favoring sectional interests. What a judge must ask is - whether a restriction is for overall good of the society in general and whether it favors a specific sectional group at the cost of others.

"General public interest" depicts an inquiry into the common good. Common good may have two different conceptions: (a) *communal conceptions* and (b) *distributive conceptions*.[15] A "communal" conception requires the State to ignore not only the private interests of specific individuals but also the sectional interests that citizens may have as members of one subgroup or another. The State must only be concerned with their common interests as citizens. For example, a ban on cattle slaughter cannot be sustained based on the demand of a religious group. However, if it can be shown that such a ban would make the economy more productive and efficient, the State should consider it.

A "distributive" conception requires the State to be cognizant of various groups with distinct sectional interests and their "partly competing claims".[16] State can consider options that would maximize the prospects for one of the sub-groups or groups. State will calibrate the restriction from the standpoint of that sub-group.

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[15] Waheed Hussain, "The Common Good", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), *available at*: https://plato.stanford.edu/archives/spr2018/entries/common-good/ (last visited on June 8, 2019). One can argue that article 19(1)(g) and clause (6) represents the relational obligations between State and Citizens and not the relational obligations of citizens. However, under clause (6) of article 19, the State does precisely that; it makes laws to determine the relational obligations between citizens. It upholds certain values and interests and trumps others. For example, a government decision to keep the municipal slaughterhouses shut for nine days during a Jain festival upholds certain interests over others.

[16] *Ibid*.

For example, 25 per cent quota for economically weaker sections and disadvantaged (EWSD) groups in private schools is a calibration of partly competing claims. It is clearly tilted in favour of certain groups, namely the children belonging to the EWSD category.

"General public interest" as mentioned in article 19(6) denotes the communal conception of common good and not the distributive conception of common good. The Constitution indeed recognizes the distributive conception of common good and it does so in article 31-B read with the Ninth Schedule, article 15(5) and article 19(6)(ii). These articles expressly trump the right under article 19(1)(g) for distributive justice. For all other restrictions that can be reviewed under article 19(1)(g) read with clause (6), communal conception of common good applies. Why? Because the constitution framers wanted the restrictions to cater to overall common good and not sectional interests and hence, they made a conscious choice of picking general public interest over public interest. Distributive conception is not compatible with the idea of general public interest as conceived by the constitutional framers because it is meant to exclude sectional interests.

Chapter two also discussed that market transactions are usually consensual and efficient. Markets result in efficient use of land and labour and ultimately lead to common good.[17] Hence, the State must justify why it wants to regulate trade and

[17] Waheed Hussain, "The Common Good", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), *available at*: https://plato.stanford.edu/archives/spr2018/entries/common-good/ (last visited on June 8, 2019). See Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* 1-2 (Harcourt Brace Jovanovich, New York and London, 1980); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 162, 293, 407 (Harriman House Ltd, Hampshire 2007 ed.). For empirical evidence,

business. Mutually beneficial consensual transactions may have negative externalities.[18] Sometimes, a transaction may be sub-optimal for want of better information and tilted towards one of the parties.[19] Negative externalities and information asymmetry – both may be valid reasons for economic regulations.

The point is: State must have good reasons to regulate business and trade. And these reasons must denote common good and not sectional interests. For instance, the claim that a ban on cattle slaughter is justified *to boost agricultural productivity* cannot be taken on its face value. It would deprive many people of their food choices; it would severely affect the livelihood of butchers, tanners and their employees. For consumers as well, the prices of leather and substitute meats would escalate. Cattle farming would become unproductive as the farmers would then have to compulsorily take care of old, sick and useless cattle. Alternatively, the farmers might abandon the old and sick animals who would then be a threat to crops and other farms. Old and sick abandoned animals would also yield poor breeds and it would be overall detrimental to the farming sector. Hence, it is difficult to argue that a ban on cattle slaughter would be in general public interest. However, there may be negative externalities caused by slaughterhouses such as wastewater and water contamination that may deserve regulation. But these externalities neither feature in the past regulations nor in the judgments concerning prohibition on slaughter in article 19(1)(g) jurisprudence.

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see "The Power of Economic Freedom", 2019 Index of Economic Freedom, *available at*: https://www.heritage.org/index/book/chapter-4 (last visited on June 8, 2019). It shows with empirical evidence that free-market capitalism, built on the principles of economic freedom, can be relied upon to lead to societal progress in terms of better jobs, better goods and services, and better societies.

[18] Gregory Mankiw, *Principles of Economics* 12-13 (South-Western Cengage Learning, Ohio, 6th ed 2012).

[19] *Id*. at 468-473.

How to discern General Public Interest

As discussed above, a consensual exchange is usually a positive sum transaction for the parties involved. Unless there is a negative externality, common good can be presumed. A restriction would be justified to regulate or contain the negative externality emanating from a market transaction. To ascertain common good, a judge may refer to the preamble, the statement of aims and object of the statute, provisions, committee reports preceding the statute, legislative debates to find or infer the intended purpose of the restriction and undertake a two-point inquiry: one, what externalities does the restriction seeks to address? Whether the restriction would effectively address it. A judge must not either take the intended purpose on its face value or assume it to be in general public interest merely because it claims to be. A judge ought not to ignore the consequences or likely outcomes of the impugned restriction for discerning the general public interest. Two, whether the restriction favors any sectional interest in promoting common good.

Application

There is only one judgment where the Court identified sectional interests and differentiated it from general public interest. *Mohd. Faruk* v. *State of Madhya Pradesh*[20] rejected the distributive conception of common good on the ground that the economic restriction promoted the sectional interests of another community.[21]

[20] 1969 SCR 1 853.
[21] *Ibid*.

Section 257 of the Madhya Pradesh Municipal Corporation Act, 1956[22] regulated the slaughter of animals in Jabalpur. However, the byelaws made under the previous law Section 178(3) of the C.P and Berar Municipalities Act 2 of 1922, in January 1948 remained valid. The byelaws regulated the conditions of slaughter and as well as permitted what animals could be slaughtered. Bulls and bullocks were permitted animals for slaughter as per these byelaws. On January 12, 1967, the Municipality of Jabalpur issued a notification cancelling the confirmation of the byelaws only to the extent of permitted the slaughter of bulls and bullocks. As a result, bulls and bullocks then became prohibited animals for slaughter.

The Court observed:[23]

> 11. The sentiments of a section of the people may be hurt by permitting slaughter of bulls and bullocks in premises maintained by a local authority. But a prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade or business will not be regarded as reasonable, if it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people whose way of life, belief or thought is not the same as that of the claimant.

Please note that there is no pleading or contention recorded in the judgment reprimanding sectional appeasement. The Court tracking the precedents and litigation history viewed the impugned restriction as another attempt to circumvent the previous judgments. This is remarkable.

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[22] S. 257(1) empowered the Corporation to fix places for the slaughter of animals for sale, and may with the like approval grant and withdraw licences for the use of such premises. Ss. (3) prohibited slaughter of any such animal for sale within the city at any other place. Ss. (4) prohibited bringing into the city for sale, flesh of any animal intended for human consumption, which has been slaughtered at any slaughter-house or place not maintained or licensed under the Act, without the written permission of the Commissioner.

[23] *Supra* note 20 at para 11.

Justice Katju in *Hinsa Virodhak Sangh* v. *Mirazpur Moti Kuresh Jamat*[24] while upholding the closure of municipal slaughterhouses in Ahmedabad during a Jain festival treated the above observations made in *Mohd Faruk* to be impliedly overruled in *State of Gujarat* v. *Mirzapur Motipur Kassab*.[25] He observed:[26]

> 24. Before we proceed further it may be mentioned that a seven-Judge Constitution Bench judgment of this Court in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat 2005 8 SCC 534 has partially overruled the decision of the five-Judge Constitution Bench in Mohd. Hanif Quareshi case. In the aforesaid decision the seven-Judge Constitution Bench has referred, inter alia, to the decision of the five-Judge Constitution Bench decision in Mohd. Faruk case (in para 29). In para 67 of the seven-Judge Bench judgment it has been observed: (Mirzapur Moti Kureshi case, SCC p. 570)
>
> > 67. The State and every citizen of India must have compassion for living creatures. Compassion, according to Oxford Advanced Learner's Dictionary means a strong feeling of sympathy for those who are suffering and a desire to help them. According to Chambers 20th Century Dictionary, compassion is fellow-feeling, or sorrow for the sufferings of another; pity. Compassion is suggestive of sentiments, a soft feeling, emotions arising out of sympathy, pity and kindness. The concept of compassion for living creatures enshrined in Article 51-A(g) is based on the background of the rich cultural heritage of India the land of Mahatma Gandhi, Vinobha, Mahaveer, Buddha, Nanak and others. No religion or holy book in any part of the world teaches or encourages cruelty. Indian society is a pluralistic society. It has unity in diversity. The religions, cultures and people may be diverse, yet all speak in one voice that cruelty to any living creature must be curbed and ceased.
>
> 25. We have quoted para 67 of the seven-Judge Bench decision of this Court because this observation will be deemed to have impliedly overruled the

[24] (2008) 5 SCC 33.
[25]
[26] *Supra* note 24 at para 24-25.

observation in para 11 of the judgment in Mohd. Faruk case that sentiments of a particular section of the people are irrelevant in imposing a prohibition.

Bhatia argues that the Court must presume 'public interest' for a DPSP-serving legislation.[27]So, a ban on cattle slaughter, a ban on sale of eggs in certain districts, shutdown of municipal slaughterhouses during religious festivals are all in public interest, as per Bhatia.[28]

Khanna questions the application of directive principles and fundamental duties to further the majoritarian restrictions and the incentives resulting from there, particularly in the ban on cattle slaughter and egg cases.[29] Clearly, these restrictions further sectional interests.

Article 19(6) does not prescribe 'public interest' as a ground for economic restrictions. Instead the criterion is 'general public interest'. General public interest entails that the restriction must be overall good for the society in general and in addition, it must not harm any group at the cost of other. General public interest is compatible with the communal conception of common good and not with the distributive conception of common good. Hence, a judge would need to assess whether a DPSP-furthering restriction furthers any sectional interests at the cost of other, and if so, it would not be in the interest of general public. Many laws that are based on the distributive conception of common good have been accorded immunity from article

[27] Gautam Bhatia, "Directive Principles of State Policy", in S. Choudhry, M. Khosla *et. al.* (eds.) *The Oxford Handbook of Indian Constitution* 644 (Oxford University Press, 2016), at 661.
[28] Bhatia's concern would then be the extent of restriction or reasonableness. But public interest is unquestionable for him.
[29] Vikramaditya Khanna, "Profession, Occupation, Trade, or Business", in S. Choudhry, M. Khosla *et. al.* (eds.) *The Oxford Handbook of Indian Constitution* 867 (Oxford University Press, 2016), at 876.

19(1)(g) by the legislature. For example, article 15(5) and article 31-B read with the ninth schedule. Hence, the legislature can make a choice. A judge does not need to bend over backwards to validate a restriction and presume general public interest if the restriction furthers sectional interests.

Except in *Mohd Faruk* case, the Court did not even raise this question in any other case. Unfortunately, the Court overruled the landmark judgment and effectively buried the safeguard of general public interest forever that too not expressly but *sub-silentio*.

Necessity and Balancing – Abdication and Deviance

The Court applies purpose and nexus tests to most cases. Nexus test checks arbitrariness and furthers generality. It is similar as article 14 equality test. An economic restriction applicable to X would leave out the rest. A restriction can be challenged for treating X differently from non-X. An Indian judge would look at the nexus between the basis of classification and the object. Nexus test under article 19 examines the link between the means and the end. Hence, an arbitrary restriction can be red flagged.

Necessity test compares the restrictions with other alternatives. A restriction in question must not be more restrictive than another equally effective means of achieving the legislative object.

Balancing entails a cost-benefit analysis: whether the restriction is a net gain and hence a worthwhile pursuit, considering the degree of curtailment of individual freedom.

Purpose test and nexus tests can check arbitrariness, but these tests do not safeguard against excessive restrictions. For example, a law for population control could choose a measure among various options: an awareness campaign, incentives for family planning, disqualifications from certain privileges, coercive sterilization and genocide. All these measures would pass the object and nexus test. But not all would be reasonable. Some are clearly excessive and hence, unreasonable. It requires necessity and balancing to pronounce such restrictions as unreasonable.

One can count the number of judgments in which the Court applied one of these two tests. *Chintaman Rao* called it "excess of object" and "possibility of application to unsanctioned purpose". Justice Sarkar's dissenting opinion in *Lord Krishna Sugar Mills*[30] applied both less restrictive alternative and balancing. *Abdul Hakim Quareshi*[31] frowned at the "double restriction" for slaughter of bulls and bullocks. Same judgment also scrutinized the procedure for administrative approval for slaughter and the review/ appeal mechanism on substantive grounds.[32] This was remarkable because most other judgments involving procedural scrutiny emphasize on the procedural propriety and principles of natural justice only. *Mohammed Faruk* used the term "less drastic restraint".

[30] *Lord Krishna Sugar Mills* v. *Union of India* 1960 SCR 1 39, at 56 (J. Sarkar *dissenting*).
[31] *Abdul Hakim Quraishi* v. *State of Bihar* 1961 SCR 2 610, at para 14.
[32] *Id*. at para 15.

In *V. Subramanium*,[33] the Court called it extreme hardship: fetters on dissolution of partnership firms deprives a partner of a legal remedy and results in extreme hardship.[34] Similarly, a notification prohibiting all CAs from joining a CFA course was found to be an excessive restriction.[35]

Less Drastic Restraint

Chintaman Rao v. *State of Madhya Pradesh*[36] was the first case in context of article 19(1)(g) explaining the reasonableness review. *Chintaman Rao* reviewed a restriction prohibiting the *bidi*-making business during agricultural season intended to ensure the labor availability.[37] The Court found it to be in excess of its object for it could have either merely regulated the business hours of bidi-industry or might have restricted the agricultural labor only.[38] Since the labor employment restriction unnecessarily covered non-agricultural labor as well, the Court held it to be void.[39] The restriction could have covered the agricultural labor only and that would have been a lesser restrictive alternative. A restriction that restricts more than what is required to achieve the purpose is unreasonable. Excess of object or possibility of application for unsanctioned purposes – these grounds are not different from the test of lesser restrictive alternative. Former implies more than necessary coverage; latter means possibility of a less restrictive alternative. Post *Chintaman Rao*, the Court has merely applied the first and the second part in most cases. Rarely, it applied the test of lesser restrictive alternative and

[33] *V Subramanium* v. *Rajesh Raghuvendra Rao*, (2009) 5 SCC 608
[34] *Id*. at para 25.
[35] *Institute of Chartered Financial Analysts of India* v. *Council of the Institute of Chartered Accountants of India* (2007) 12 SCC 210 (J. Katju) at para 47-48.
[36] 1950 SCR 1 759.
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid*.

balancing. Nevertheless, *Chintaman Rao* judgment remains a precedent for all subsequent cases on article 19(1)(g). Many cases cite it but fail to apply it. However, it is indisputably the norm for standard of review.

Justice Sarkar's dissenting opinion in *Lord Krishna Sugar Mills*[40] is remarkable. He observed that the economic restriction with an object to earn foreign exchange compelled the sugar producers to part with their products at a loss.[41] The question he posed: whether the government could have earned foreign exchange without inflicting loss on the manufacturers of sugar.[42] He suggested that the government had indeed opted for an alternative course earlier, that is subsidies.[43] Compulsive loss for sugar producers to earn more foreign exchange for the country was not a balanced choice.[44] Here is the relevant excerpt: [45]

> We then get to this that on the respondents' own case, the exports under the Act can be made only at a loss. The result, therefore, is that the Act compels the petitioners to part with a portion of their merchandise at a loss. Can the restrictions so put on the petitioners' trade by the Act then be said to be reasonable? I conceive it is impossible to do so. It is said that the Act was passed with a view to earn foreign exchange by export of sugar. Indeed so it appears from the Objects and Reasons of the Act earlier set out and the provisions of section 4 earlier quoted. I will agree that earning of foreign exchange is essential for the country. But I do not see that that justifies the enactment of a legislation which imposes a loss on a sugar manufacturer. *It is not as if foreign exchange could not be earned without inflicting loss on the manufacturers of sugar. That indeed is not the respondents' case. The loss might have been avoided if, for example, the exports were made by the grant of a subsidy, a course in fact adopted by the Government in the year 1951-*

[40] *Supra* note 30.
[41] *Ibid*.
[42] *Ibid*.
[43] *Ibid*.
[44] *Supra* note 30.
[45] *Id*. at para 56.

> *52.* It has not been said that there was any difficulty in granting the subsidy for the exports under the Act. A reasonable restriction on a citizen's right to carry on his trade which alone is permitted by Article 19(6) of the Constitution, must be, as Mahajan J. said in Chintaman Rao v. State of Madhya Pradesh 1950 SCR 759, 763 a restriction "which reason dictates", which "unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, must be held to be wanting in that quality." Here I do not find the balance struck nor the infliction of the loss, a course which reason dictates. *The loss which the restrictions imposed by the Act on the petitioners' trade caused to them, was by no means such as could only have been avoided by incurring a greater loss.*
>
> [emphasis supplied]

In *Abdul Hakim Quareshi*[46] case, two conditions were prescribed for slaughter of bulls and bullocks: one, age restriction, and two, permanent unserviceability. The Court called it "double restriction" and struck it down. Court's reasoning to strike down the rule governing the procedure for administrative approval for slaughter and the review/ appeal mechanism was based on substantive grounds.[47] This was remarkable because most other judgments involving procedural scrutiny emphasize on the procedural propriety and principles of natural justice only. Here is the relevant excerpt from *Abdul Hakim Quareshi*:[48]

> Secondly, it is pointed out that not being content with fixing an unreasonably high age-limit, the impugned provision imposes a double restriction. […] Before a certificate can be given, the animal must fulfil two conditions as to (1) age and (2) permanent unfitness. We consider this to be a demonstrably unreasonable restriction. In Md. Hanif Quareshi case this Court had said that a total ban on the slaughter of bulls and bullocks after they had ceased to be capable of breeding or working as draught animals was not in the interests of the general public. Yet this

[46] *Abdul Hakim Quraishi* v. *State of Bihar* 1961 SCR 2 610
[47] *Id*. at para 14.
[48] *Id*. at para 14-15.

> is exactly what the impugned provision does by imposing a double restriction. It lays down that even if the animal is permanently unserviceable, no certificate can be given unless it is more than 20 years in age. The restriction will in effect put an end to the trade of the petitioners. […]
>
> Thirdly, the impugned provision provides (1) that the animal shall not be slaughtered within twenty days of the date of the issue of the certificate and (2) that any person aggrieved by the order of the competent authority may appeal to the State Government within 20 days. […] In other words, even when a certificate is given, any person, even a member of the public, who feels aggrieved by it may prefer an appeal and hold up the slaughter of the animal for a long time. From the practical point of view these restrictions really put a total ban on the slaughter of bulls and bullocks even after they have ceased to be useful, and we must hold, following our decision in Md. Hanif Quareshi case that Section 3 of the Uttar Pradesh Act insofar as it imposes unreasonable restrictions on the right of the petitioners as to slaughter of bulls and bullocks infringes the fundamental right of the petitioners and is to that extend void.

However, in *Himmatbhai Narbheram Rao*,[49] Justice Shah rejected a comparison with alternative measure. He observed: "The legislature has designed a scheme by which reasonable restrictions are placed upon the right of a citizen to dispose of his property; possibility of an alternative scheme which might have been but has not been designed, will not justifiably expose the first scheme to the attack that it imposes unreasonable restrictions."[50] The problem with this statement is that it assumes reasonableness of the measure in question before comparing it with a hypothetical alternative. Also, Justice Shah offers no reason for why the possibility of a lesser restrictive alternative should not expose the vulnerability of the measure in question. This four-judge bench judgment is dated 15 Oct 1968.

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[49] *State of Maharashtra* v. *Himmatbhai Narbheram Rao* 1969 SCR 2 392.
[50] *Id*. at para 11.

Justice Shah as a part of a five-judge bench wrote another judgment on April 1, 1969 in which he used the phrase "less drastic restraint" three times in a single paragraph as a standard for scrutinizing the regulation: "The impugned notification, […] may be upheld only if it be established that […] a less drastic restriction will not ensure the interest of the general public."[51] The Court emphasized on an evaluation based on restriction's "direct and immediate impact upon the fundamental rights of the citizens affected", the necessity to restrict the fundamental right, and the possibility of achieving the object by imposing a lesser restrictive alternative.[52]

Laxmi Khandsari judgment, instead of following *Mohd Faruk* case followed *Himmatbhai Narebheram Rao* and quoted the same lines: [53]

> The legislature has designed a scheme by which reasonable restrictions are placed upon the right of a citizen to dispose of his property: possibility of an alternative scheme which might have been but has not been designed, will not justifiably expose the first scheme to the attack that it imposes unreasonable restrictions.

The Court did not engage with or overrule either *Chintaman Rao* or *Mohammed Faruk*, and simply agreed with *Himmatbhai Narbheram Rao*.

Srinivasa Enterprises v. *Union of India*[54] too is problematic. To begin with, Justice Iyer while accepting the test of lesser drastic restraint, observed: [55]

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[51] *Mohammed Faruk* v. *State of Madhya Pradesh* 1969 SCR 1 853, at para 10.
[52] *Ibid*.
[53] *M/s. Laxmi Khandsari* v. *State of UP* (1981) 2 SCC 600, at para 79.
[54] (1980) 4 SCC 507.
[55] *Id*. at para 11.

> Surely, Article 19(6) permits reasonable restrictions in the interest of the general public on the exercise of the right conferred by Article 19(1)(g). It is a constitutional truism that restrictions, in extreme cases, may be pushed to the point of prohibition if any lesser strategy will not achieve the purpose. Fundamental rights are fundamental, and so, no ban can be glibly imposed unless effective alternatives are unavailable. Counsel on both sides cited rulings for the two sides of the proposition but it is an act of supererogation to load judgments with profusion of precedential erudition to make out what is plain, profound.

He then went on to reject the less drastic alternatives. The problem is not the rejection of alternatives but in not recording the deliberation on alternatives. His choice of most effective measure for a noble object in disregard of fundamental right is akin to the example of forced sterilization for population control. Justice Iyer's reasoning can be quoted to justify any drastic measures:[56]

> So long as there is the resistless spell of a chance, though small, of securing a prize, though on paper, people chase the prospect by subscribing to the speculative scheme only to lose what they had. Can you save moths from the fire except by putting out the fatal glow?
> […]
> But when a general evil is sought to be suppressed some martyrs may have to suffer for the legislature cannot easily make meticulous exceptions and has to proceed on broad categorisations, not singular individualisations.

In *Shree Bhagwati Steel Rolling Mills,*[57] the Court looked at the "direct and immediate impact" of the restriction on the fundamental right and citizens would be liable for exorbitant penalties for delay arising out of circumstances beyond his control.[58] The Court was of the view that other lesser restrictive measures could also

[56] *Id*. at para 12-13.
[57] *Shree Bhagwati Steel Rolling Mills* v. *Commissioner of Central Excise* (2016) 3 SCC 643, at para 36.
[58] *Ibid*.

have the same degree of deterrence.[59] Similarly, prohibition on women dancing in bars to ensure their safety was struck down by the Court on the ground of possibility of several other lesser restrictive alternatives to achieve the same objective.[60]

The Court must look at other possible alternatives. It may choose to reject them and hold the impugned restriction as reasonable. But the Court must not be indifferent to the standard of lesser drastic restraint. In *Systopic Laboratory*,[61] the Court considered a less drastic alternative of labeling – "permitting manufacture and sale of the drugs with a warning about its use" and then rejected it.[62] The rationale for rejection may be a subject matter of another discussion. The problem is: many cases did not even raise the question.[63]

Excessive

Like lesser drastic restraint, excessiveness also indicates disproportionality of restriction. The Court has employed the standard of excessiveness to strike down several restrictions.

In *V Subramanium* v. *Rajesh Raghuvendra Rao*,[64] the Court held the fetters on dissolution of partnership firms as extreme.[65] Such restrictions can tilt the power

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[59] *Ibid*.
[60] *State of Maharashtra* v. *Indian Hotels and Restaurants Association* (2013) 8 SCC 519, at para 141.
[61] *Systopic Laboratory Pvt Ltd*. v. *Dr. Prem Gupta* (1994) 1 SCC 160.
[62] *Id*. at para 22.
[63] *Id*. at para 26.
[64] *V Subramanium* v. *Rajesh Raghuvendra Rao* (2009) 5 SCC 608, at para 25.
[65] Ss. 2A of s.69 of the Indian Partnership Act, 1932. Ss. 2A was introduced by the Maharashtra Act no.29 of 1984.
(2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a

balance in favour of mighty partners.[66] A dishonest partner can abuse the law to deprive the other partner of his share.[67] Hence, such a measure is likely to "result in extreme hardship and injustice" and an aggrieved would have no legal remedy.[68]

Similarly, a notification prohibiting all CAs from joining a CFA course is excessive restriction. [69] A citizen can be CA and undertake auditing assignments for one firm and simultaneously he can be a financial adviser for another firm.[70] There would be no conflict of interest. Having dual qualifications also allows a person to switch over to a different career.[71]

Can the state regulate merely because it has power to? Absolutely no. A regulation must be justifiable on reasonableness including purpose, nexus, necessity and balance. While dealing with the question of age criteria for tour guides, the Court held that the government may prescribe certain regulations such as issuance of identity card, its renewal and their fee. However, the guides are independent professionals and the State is not their master. There is no contractual relationship either. Government gives no subsidies or emoluments to the guides. In the absence of any contract for service or contract of service, the Government has no justification to impose an age criterion to carry on a private profession or self-employment. The Court rejected the

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partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm:
Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realize the property of a dissolved firm.

[66] Supra note 64.
[67] *Ibid*.
[68] *Ibid*.
[69] *Institute of Chartered Financial Analysts of India* v. *Council of the Institute of Chartered Accountants of India* (2007) 12 SCC 210 at para 47-48.
[70] *Ibid*.
[71] *Ibid*.

classification based on kind of skills and faculties required to profess – whether the profession requires mental skills or physical labour and observed that it is up to the tourists to choose whom to engage and also up to the tour guides themselves to undertake tasks as per their physical and mental capacity. The Court observed:[72]

> Regulatory measures may be for better efficiency, conduct and behaviour in the public interest, but ordinarily it cannot prohibit a person totally debarring him from carrying on his profession at an age chosen by the Government unless there may be special reasons for it. […]The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under Article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition, it may result in jeopardizing or seriously affecting the interest of the people in general.
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> […]
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> It is always better, nay, necessary too that the freedoms as guaranteed under the Constitution should be allowed to be enjoyed by the citizens to the fullest possible extent without putting shackles of avoidable cobweb of rules and regulations putting check and restrictions in the enjoyment of such freedoms. We find no reasonable ground to put a condition of age bar, whereafter a guide may not be allowed to continue his profession as it does not fall in any of such categories which may justify placing such restrictions completely debarring him to act as guide. Curtailment of freedom must have some strong reasons and real nexus with the purpose sought to be achieved. It would not be imposed merely because it is permissible for the State to do so.

[72] *B. P. Sharma* v. *Union of India* (2003) 7 SCC 309, at para 15 and 17.

While nationalization of banks was upheld, the prohibition on erstwhile banks to carry on non-banking business post-nationalization was held to be excessive and unreasonable. The Court held:[73]

> A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and even its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, is not made immediately payable to it.
> […]
> If compensation paid is in such a form that it is not immediately available for re-starting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and vests in the new banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff. 68. The restriction imposed upon the rights of the named banks to carry on non-banking business is, in our judgment, plainly unreasonable. No attempt is made to support the Act which while theoretically declaring the right of the named banks to carry on non-banking business makes it impossible in a commercial sense for the banks to carry on any business.

However, the Court diverged from its earlier views in following cases without distinguishing or overruling the precedents. Heavy burden, reduction of profits and even poor viability of business because of high taxes are not adequate grounds as per the Court to demonstrate the unreasonableness of a restriction. An interesting feature of these judgments is the usage of the word "mere"/ "merely" to understate the adequacy of the excessive ground. In *Malwa Bus Service*,[74] the Court observed:[75]

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[73] *Rustom Cavasjee Cooper* v. *Union of India* (1970) 1 SCC 248, at para 67-68
[74] *Malwa Bus Service (Pvt) Limited* v. *State of Punjab* (1983) 3 SCC 237.
[75] *Id*. at para 22.

> **Merely** because certain taxes are levied on them it cannot be said that trade or commerce has become unfree. […]
>
> The **mere** fact that a tax falls more heavily on certain goods or persons may not result in its invalidity.
>
> It cannot also be said that **merely** because a business becomes uneconomical as a consequence of a new levy, the new levy would amount to an unreasonable restriction on the fundamental right to carry on the said business. […] But the impugned levy cannot be struck down on the ground that the operation of stage carriages has become uneconomical after the introduction of the impugned levy.
>
> [emphasis supplied]

In *FHRAI*[76] case, the Court had similar observations: "Then again, the **mere** excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under Article 19(1)(g)."[77] Even if an economic restriction leads to diminishing returns or "greatly reduced" profit, it does not necessarily mean infringement of Article (19)(1)(g).[78] Here are several other similar observations:

"Mere excessiveness of a tax or that it affects the earnings cannot, per se, be held to violate Article 19(1)(g)**."**[79]

"Mere excessiveness of a tax is not, by itself, violative of Article 19(1)(g)."[80]

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[76] *Federation of Hotels and Restaurants Association of India* v. *Union of India* (1989) 3 SCC 634.
[77] *Id*. at para 62.
[78] *Nazeria Motor Service* v. *State of Andhra Pradesh* (1969) 2 SCC 576, at para 8.
[79] *Express Hotels Pvt Ltd* v. *State of Gujarat* (1989) 3 SCC 677, at para 28.
[80] *M/s. Pankaj Jain Agencies* v. *Union of India* (1994) 5 SCC 198, at para 22.

In these cases, the Court without disputing the excessiveness, rejected the contention that an excessive restriction cannot be reasonable.

Possibility of Abuse

As per *Chintaman Rao*, "[s]o long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void".[81]

Twelve years later, the Court stated: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity."[82] It is not clear what the Court meant by "otherwise valid". If a restriction allows for its misuse, it probably vests unguided discretion or is wider than its intended coverage. It implies that a lesser restrictive alternative might have been enough. The Court further observed in the subsequent case:[83]

> The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements.

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[81] *Chintaman Rao* v. *State of Madhya Pradesh* 1950 SCR 1 759.
[82] *Collector of Customs, Madras* v. *Nathella Sampathu Chetty* (1962) 3 SCC 786.
[83] *Ibid*.

An arbitrary law that can possibly be administered reasonably sometimes does not become constitutional; this is correct. But converse – a law that can be administered arbitrarily sometimes does not become unconstitutional – is an incorrect proposition. Possibility of arbitrary enforcement or unreasonable execution does imply that the impugned restriction is not reasonable. If a restriction allows for its misuse, how can the Court say for sure that the abuse would be rare and not frequent?

The Court concludes: "In saying this we are not to be understood as laying down that a law which might operate, harshly but still be constitutionally valid should be operated always with harshness or that reasonableness and justness ought not to guide the actual administration of such laws."[84] However, this would precisely be the outcome of upholding restrictions with scope for abuse. If the restriction allows for unguided discretion and leaves scope for its abuse, this means, an administrator's abuse of law would perfectly be within four corners of the text.

Empirical Finding

Out of 261 instances, the Court applied the necessity test or the balancing tests to sixteen instances. It means barely six per cent cases; almost 94 per cent instances of judicial review, the Court skipped these tests.

Out of sixteen cases wherein the judges applied one of these tests, thirteen cases (more than eighty per cent) went in favour of citizens. For rest of the cases, it is a mere

[84] *Collector of Customs, Madras* v. *Nathella Sampathu Chetty* (1962) 3 SCC 786, at para 34

ten per cent. In absence of necessity and balancing test, a citizen might rely on either procedural safeguard, unguided discretion or a precedent.

Presumption of Constitutionality

Chapter two discussed *Saghir Ahmed* v. *State of Uttar Pradesh*[85] case and the rule of reversal of burden of proof.[86] It would be not for the petitioner to prove negatively that the restriction is not reasonable or not in the interests of general public.[87] Here is the relevant excerpt from *Saghir Ahmed*:[88]

> There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community.

Hence, the rule: if the restriction is *prima facie* drastic, the State needs to prove its scope to be within the limits of article 19(6). Although subsequently an amendment to article 19(6) immunized state monopolies from judicial review, the rule of shifting the burden of proof remained valid and several subsequent judgments followed it. *Mohd. Faruk* v. *State of Madhya Pradesh*[89] further clarified, a prohibition or a ban

[85] 1955 SCR 1 707.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] 1969 SCR 1 853.

requires the state to defend the restriction, the burden is on the state, not on the citizen: [90]

> Imposition of restriction on the exercise of a fundamental right may be in the form of control or prohibition, but when the exercise of a fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of the general public interest lies heavily upon the State.

Messrs Virajlal Manilal and Co. v. *State of Madhya Pradesh* too reiterates the same position.[91]

The three judgments mentioned above have been rendered by five-judge benches and they are not-overruled judgments. Hence, the *Saghir Ahmed* rule is binding on all subsequent judicial review cases involving article 19(1)(g). It implies that the Court must ask a question whether there is a *prima facie* infringement of the right under article 19(1)(g) and if so, the burden would shift to the State to show that the restriction is valid. In case of prohibition or ban, no test is required, and the burden of proof is on the state to bring the restriction within the ambit of article 19(6).

Despite the position outlined above, the Court in many cases involving challenges to bans and prohibitions did not raise a preliminary inquiry: whether the restriction is a drastic one and the burden should be shifted to the State.[92]

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[90] *Ibid*.
[91] 1969 SCR 2 248.
[92] *Burrakur Coal Co. Ltd*. v. *The Union of India* 1962 SCR 1 44 (temporary ban on private mining lease); *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange* (1974) 1 SCC 167 (ban on addition of saccharine and cyclamate to supari); *Srinivasa enterprises* v. *Union of India* 1980 4 SCC 507 (ban on prize chits and money circulation schemes); *Haji Usmanbhai Hasanbhai Qureshi* v. *State of Gujarat* (1986) 3 SCC 12 (ban on slaughter of Bulls and bullocks below 16 years of age); *Municipal Corporation of the City of Ahmedabad* v. *Jan Mohammad Usman bhai* (1986) 3 SCC 20 (slaughterhouses to be shut for seven days in a year); *State of Tamilnadu* v. *M/s. Sanjeetha Trading Co* (1993) 1 SCC 236 (ban on export of timber);

Last time, the reversal rule was applied in 1981. Post-emergency, judges reviewed the drastic restrictions in at least twenty instances without applying the rule (See Annexure-V).

4.3 Reasoning – Logical Fallacies

The Court ought to raise the questions of general public interest and reasonableness to review an economic restriction. As discussed above, general public interest requires a probe into common good as well as a check on sectional interests. Hence, a justification based on the directive principles or fundamental duties is not enough unless it addresses the concern on sectional interests as well.

For reasonableness, directive principles and fundamental duties can pass the test of legitimate aim. Nexus test demands a link between the end and the means. Necessity test enatils a comparison with other possible alternatives. Balancing needs an inquiry into the benefits and the social control.

As held in *Dr N.B. Khare* v. *State of Delhi*, [93] both substantive and procedural aspects of reasonableness must be scrutinized. Judges can scrutinize the restriction for

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Razakbhai Issakbhai Mansuri v. *State of Gujarat* (1992) 2 SUPP SCC 659 (prohibition on possession of rotten jaggery); *Shriram Chits and Investment Pvt Ltd* v. *Union of India* (1993) 4 Supp SCC 226 (S.12- Ban on carrying on any other business; S.20- Non-payment of interest to the foreman on the bank deposits); *State of Kerala* v. *Joseph Antony*, (1994) 1 SCC 301 (ban on fishing by mechanised vessels); *Jayantilal Ratanchand Shah* v. *Reserve Bank of India* (1996) 9 SCC 650 (demonetization of currency notes); *Bhavesh D. Parish* v. *Union of India* (2000) 5 SCC 471 (prohibition on sharafi transactions); *Indian Handicraft Emporium* v. *Union of India* (2003) 7 SCC 589 (ban on trade of ivory products); *Om Prakash* v. *State of U.P.* (2004) 3 SCC 402 (Ban on sale of eggs in certain districts); *Godawat Pan Masala Products I.P. Ltd* v. *Union of India* (2004) 7 SCC 68 (ban on pan masala).

[93] 1950 SCR 519.

unguided discretion,[94] check for procedural safeguards such as absence of bias or conflict of interest, *audi alterem partem* or hearing, reasons to be recorded and review/appeal,[95] and for substantive aspects of the procedure such as leaving out relevant consideration and *mala fide* can also check the discretionary power.[96]

Chintaman Rao standard or the proportionality standard of review mainly deals with the substantive aspect of reasonableness. But there is no bar on the Court to assess the substantive merits of a procedural norm as it did in *Abdul Hakim Quraishi* v. *State of Bihar*.[97] For slaughtering a bull, bullock or a female buffalo over 25 years of age, Rule 3 of Bihar Preservation and Improvement of Animals Rules, 1960 prescribed a procedure: a veterinary officer and the chairman or chief officer of the District Board or Municipality needed to concur to issue a certificate for slaughter.[98] If they differ, the matter would be referred to the Sub-divisional Animal Husbandry Officer.[99] Although the rule mandated recording of reasons and opportunity of being heard particularly in case of refusal, the petitioner contended that the cost of this procedure would be more than the cost of animal and if they were to incur the costs involved, it would result in shutting down their businesses.[100] The Court agreed that the restriction was disproportionate.[101] It required the concurrence of two officers whereas the veterinary officer having necessary technical knowledge could be trusted to issue the certificate.[102]

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[94] MP Jain and SN Jain, *Principles of Administrative Law*, (Lexis Nexis, 7th ed. 2017), at 476, 496-497, 701.
[95] *Ibid*.
[96] *Ibid*.
[97] 1961 SCR 2 610.
[98] *Ibid*.
[99] *Ibid*.
[100] *Ibid*.
[101] *Ibid*.
[102] *Ibid*.

The Court may invoke the normative values inherent in the right to POTB such as the right to bargain [103] and the right to shut down a business[104] to strike down a restriction without much scrutiny. Normative appeal of a fundamental right can trump the utilitarian considerations, asserting the core of right is too sacrosanct and non-negotiable to be compromised through those impugned means.

Based on the reasoning requirement outlined above, this part identifies logical fallacies used to justify the impugned economic restrictions in various cases.

X is a reasonable restriction because another restriction Y makes it reasonable.

In *Lord Krishna Sugar Mills,*[105] there were three separate opinions penned by three judges. One of the issues was whether it is permissible to peruse another statute or executive order to ascertain the constitutional validity of a "law".[106] Justice Hidayatullah answered that in affirmative while Justice Subba Rao and Justice Sarkar disagreed. Under section 3 of the Essential Commodities Act, 1955 (Act 10 of 1955), the Central Government issued an order dated August 27, 1955, called the Sugar (Control) Order, 1955.[107] Under Rule 5, the Central Government could fix the price or the maximum price for sale of sugar.[108] Exercising this power, the Central Government issued a notification dated July 30, 1958 and fixed the ex-factory price for Indian Sugar Standard (ISS) D-29 grade. Just a few days before, the Central Government promulgated an Ordinance called the Sugar Export Promotion Ordinance that became

[103] *Mafatlal Industries Ltd* v. *Union of India* (1997) 5 SCC 536.
[104] *Excel Wear* v. *Union of India* (1978) 4 SCC 224.
[105] *Supra* note 30.
[106] *Ibid*.
[107] *Id*. at para 4. (J. Hidayatullah).
[108] *Ibid*.

an act (30 of 1958).[109] It enabled the Central Government to plan and allocate sugar exports considering availability, consumption and requirement for foreign exchange.[110]

Government contended that while fixing the price for sugar produced during the season 1957-58 in vacuum pan sugar factories, it factored in the possible loss the exporters might incur by reason of the Sugar Export Promotion Act, 1958.[111] Vide Sugar (Control) Order 1944, Notification G.S Rule 661.ESS. Com/Sugar dated July 30, 1958, the Central government increased the price of sugar by 50 np. per maund on all internal sales to enable the factories giving their export quota to compensate themselves for the potential loss.[112] Justice Hidayatullah cited *State of Madras* v. *V.G Row*[113] for the proposition that for ascertaining the reasonableness of a restriction, "surrounding circumstances" can be investigated.[114] Petitioners contended that surrounding circumstances did not mean "other laws on the subject, unless those laws be incorporated by reference".[115] But Justice Hidayatullah was not convinced. He observed that surrounding circumstances included contemporaneous legislation. He stated:[116]

> The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account. The existence of such other law is not difficult to establish. The Courts can take judicial notice of it.

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[109] *Ibid*.
[110] *Ibid*.
[111] *Id*. at para 24.
[112] *Id*. at para 26.
[113] 1952 SCR 597, 607.
[114] *Supra* note 30 at para 25.
[115] *Ibid*.
[116] *Id*. at para 26.

He cites two foreign cases: one, *Alberta* v. *Attorney-General for Canada*[117] for the proposition that courts can consider any public general knowledge and take judicial notice for determining the impact of a legislation.[118] Provincial legislations may also be considered to assess the effect of legislation in question. Courts can generally investigate the history and other circumstances to discover the object of legislation.[119]

Second foreign case was *Pillai* v. *Mudanayake*.[120] It involved a challenge to the constitutional validity of the Citizenship Act, 1948, of Ceylon. The principal contention was that the Act sought to indirectly prevent the Indian Tamils from attaining citizenship of Ceylon. However, a subsequent legislation the Indian and Pakistani Residents (Citizenship) act 3 of 1949 allowed Indian Tamils to apply for citizenship by registration subject to certain residential qualification.

Justice Hidayatullah opined that "if there was a legislative plan, the plan must be looked at as a whole".[121] He observed that the judicial review must be based on the present context and not on speculation whether other remedial laws would continue to exist or not.[122] Justice Subba Rao differed. His point was that if two laws are unconnected, then a law cannot derive its validity from another law.[123]Two or more laws would be deemed to be part of the same scheme or plan if they further a common objective, or the subsequent law was an extension to further the same purpose or if there

[117] 1939 AC 117, 130, cited in *Ibid*.
[118] *Ibid*.
[119] *Id*. at para 26.
[120] 1955 2 All ER 833; cited in *Id*. at para 27.
[121] *Supra* note 30.
[122] *Id*. at para 28.
[123] *Id*. at para 42. (J. Subba Rao).

is an express reference to the other in the statutory provisions.[124] Otherwise, it would be antithetical to the legal stability and certainty.

But the facts of the case did not involve two legislations. Instead, it involved a subsequent notification. Justice Subba Rao observed that "a notification of a transitory nature issued under an unconnected Act is to place the statute in a fluid state. In such a situation its validity would depend upon a statutory order of temporary duration; it would change colour with the changing attitudes of an authority empowered to issue the order. It would also mean that a Court will have to embark upon a roving search of all Acts and notifications which may, by design or accident alleviate or mollify the evil consequences of an impugned Act. Such a result cannot be contemplated."[125] So what the Government contended that while the impugned Act did not impose a duty on the Government to offset the loss, mere fact that the government did so under some other notification should validate the Act that otherwise should be invalidated. It implies that the constitutional validity would become a fluid concept subject to mood swings of the authority concerned.[126]

Justice Sarkar too disagreed with Justice Hidayatullah. He too emphasised that prevailing conditions cannot include discretionary decisions. Reasonableness cannot depend on what the executive may do or undo as per its whims and fancies. He asked: "Is it to be said that the restrictions imposed by a statute are reasonable because the Government has, when the question cropped up, done something which makes the restrictions reasonable though it was not bound to do that and though it is free to undo

[124] *Ibid*.
[125] *Ibid*.
[126] *Id*. at para 43.

that which it has done? To say that would be to say that the Act is valid because the Government has, for the time being, chosen to make it so. This seems to me to be against all known principles of law.[127]

While Justice Subba Rao focused on the connection or the common objective as the deciding factor, Justice Sarkar's objection was to do with the source of law – an executive-made rule or notification cannot decide the validity of another law.

In *Man Singh* v. *State of Punjab*,[128] Justice Pathak decided the constitutionality of a law based on an executive scheme framed by a previous bench. The case involved a challenge to owner-must-be-plier policy. Same had been challenged twice earlier wherein the Court delivered two similar judgments.[129] Instead of undertaking judicial review, the Court in those two judgments framed a loan scheme for rickshaw pullers to enable to purchase cycle rickshaws.[130]

In *Man Singh*, many rickshaw pullers of Amritsar challenged the law again. One of the grounds was that Amritsar Municipal Corporation did not implement the scheme.[131] The validity of Section 3 of the Punjab Act should not anchor on a non-legislative scheme that is subject to executive whims and fancies. What if the scheme is altered to extent that it ceases to be identifiable with the purpose of the impugned legislation?[132]

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[127] *Id*. at para 67.
[128] (1985) 4 SCC 146.
[129] *Azad Rickshaw Pullers Union (Regd) Ch. Town Hall, Amritsar* v. *State of Punjab* (1980) 1 SCC 601; *Nanhu* v. *Delhi Administration* 1980 1 Supp SCC 613.
[130] *Man Singh v. State of Punjab,* (1985) 4 SCC 146, at para 6.
[131] *Id*. at para 9.
[132] *Id*. at para 17.

Referring to Justice Subba Rao's remarks in *Lord Krishna Sugar Mills*, Justice Pathak observed:[133]

> These are valuable dicta, valid whenever the constitutionality of a statute falls to be examined in the context of contemporaneous legislation. In the present case, however, the Punjab Act was enacted with an eye to a scheme already existing and in operation. The Scheme supplied the mechanics for the operation of the Punjab Act. The two were not unconnected. They were closely connected and, indeed, constituted an integrated plan. The apprehension that the validity of the Act is dependent on the continued operation of the Scheme which was open to subsequent modification at the will of its authors has no foundation. The consequences of such modification can be taken care of. The Punjab Act confers on the State Government, by Section 7, power to frame appropriate rules in support of and for the furtherance of the object of the Act. In the event of the Scheme being altered or modified by its authors to a degree incompatible with the true operation and success of the Punjab Act, the situation can always be met by the State Government framing suitable rules under Section 7 of the Act. The State Government is not only empowered to do so; it is under an obligation to frame rules appropriate to the successful implementation of the legislative goal. It seems to us that in a situation which calls for adjustment from time to time in view of varying economic and social factors, a sufficient degree of flexibility is needed, and consequently it was appropriate for the legislature to leave the measures of control to the Rule-making power of the State Government. That in truth is one of the primary reasons for delegated legislation. So long as the Rules so made serve the object of the Act and fall within the limitations implied thereby no fault can be found with them.

Justice Pathak rebuts the objection with two points. One, both the scheme and the Act have a common purpose and hence, they are connected and part of an integral plan. Two, in case the scheme is modified subsequently, the consequences can be taken care of by enacting a scheme under the rules.

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[133] *Id*. at para 18.

The problem with the second argument can best be appreciated by understanding the stand taken by Justice Sarkar. As discussed above, while Justice Subba Rao emphasised on the common purpose, Justice Sarkar focused on the source of law. A notification being temporary in nature is subject to whims and fancies of the executive and hence, locating the constitutional validity of legislation in a notification is absurd. A notification can any time be modified or abrogated and therefore, the validity of a connected legislation would be uncertain and fluid. Legislature usually takes a policy decision and the Executive can at best fill in the details for implementation. The contention was poor implementation. Moreover, the Executive had not made any such rules under the Act in last many years. Judicial review cannot be based on optimism - hoping that the Executive would make another scheme under the Act after it modifies the scheme.

Looking from a different perspective, the legislature need not ban hiring of cycle rickshaw to make pullers as owners. Pullers can be given financial support, reimbursement, cash transfer, loan or subsidy to enable them to buy rickshaw and become owners. Once they become owners, they wouldn't have to rent a rickshaw from another owner. One of the conditions for financial support could be current non-ownership status.

X is a reasonable restriction because it leaves the rest unrestricted.

In *Mohd Hanif Quareshi* v. *State of Bihar*,[134] butchers contended that the impugned Acts would compel them to shut down their business. Whether a restriction is a mere restriction or a prohibition – it is a significant question. It could potentially reverse the presumption of constitutionality. Beef and buffalo meat were cheaper than mutton.[135] Poor could afford to buy beef occasionally but not mutton.[136] It would significantly reduce their income.[137] Further, the skin of goats and sheep is not as useful as hides of cows and buffaloes.[138] So, income from the hides would also be gone.[139] The Court asked whether a restriction may extend to total prohibition.[140]

Respondent States cited an illustration: a ban on foreign-made cloth is not prohibition, it is only a restriction.[141] Traders can still trade in domestic cloth. Another example, let's say, the import of Sarees was prohibited but dhotis and other piece goods were allowed. Would it necessarily result in closure of business?

The argument relates to the definition of market and product substitutability.

Based on this understanding of prohibition, the Court observed that the butchers in Uttar Pradesh could freely slaughter buffaloes, goat and sheep, and sell their meat for food.[142] Madhya Pradesh butchers too could slaughter buffaloes subject to certain controls and sheep and goat.[143] Bihar butchers could not slaughter any bovine cattle but

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[134] 1959 SCR 1 629.
[135] *Id*. at para 18.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] *Ibid*.
[140] *Ibid*.
[141] *Id*. at para 19.
[142] *Id*. at para 20.
[143] *Ibid*.

they could slaughter goats and sheep.[144] Hence, the Court concluded that it was not a case of total prohibition.

However, it is a debate leading in the wrong direction. The question is not: whether probation would necessarily lead to business closure, or whether there are other substitutes that a producer or a trader can shift to. Even if they are, why that particular product is prohibited?

For example, a trader can sell Dhotis instead of Sarees but that does not absolve the Government from the obligation to provide a justification as to why it banned Sarees. Or why it banned the import of cloth. Just because the business is not shut down or there are other substitutable commodities does not mean that a prohibition is not a drastic restraint.

Also, the Court forgets that the right of a producer, trader or a retailer also represent the right of a buyer and a consumer. Without the former, latter has no meaning.

What is prohibition then? Prohibition should not be assessed in terms of product substitutability or segmentation but it should be seen in context of the levels of regulation. Regulation may start with registration, certification, licensure and prohibition. Milton Friedman defines registration as "an arrangement under which individuals are required to list their names in some official register if they engage in

[144] *Ibid*.

certain kinds of activities".[145] There is no criteria or qualification and hence, there is no way someone can be stopped from offering that service. He may have to pay a tax or a fee. Certification would mean that a governmental agency would certify goods or service-providers for features or qualifications but still it would not prevent others from offering or selling goods and services. Gold "Hallmark" sign is certification, but it is not mandatory. Computer programming is one such sector. A degree or a diploma may indicate the skill or competence but anyone without a degree is free to offer services.

Licensure is "an arrangement under which one must obtain a license from a recognized authority in order to engage in the occupation".[146] Prohibition is the most drastic regulation. It bans a product or service.

Merely because of the possibility of survival of a business based on product substitutability, does not convert a prohibition to regulation. If a product or service is banned, it is prohibition. The Court need to question the degree of rationale.

X is a reasonable restriction because it is reasonable and not unreasonable.

[145] Milton Friedman, *Capitalism and Freedom*, p. 137-160 (University of Chicago Press, Chicago and London, 1962).
[146] *Ibid*.

In *Bhana Mal Gulzari Mal*, [147] the Court referred to *Harishankar Bagla*[148] and assumed the validity of section 3 and 4 of the Essential Supplies Act 1946. The Court in *Bhana Mal* observes:[149]

> 4. Before we address ourselves to the question about the vires of clause 11-B it is necessary to make it clear that the validity of Sections 3 and 4 of the Act has not been disputed before us, and indeed it cannot be disputed, in view of the decision of the Court in Harishankar Bagla v. State of Madhya Pradesh 1955 1 SCR 380. The challenge to the vires of clause 11-B has, therefore, to be examined on the basis that Sections 3 and 4 of the Act are valid. It is relevant to set out the implications of this position. When it is assumed that Sections 3 and 4 are valid it necessarily means that they do not suffer from the vice of excessive delegation. When the legislature delegated its authority to the Central Government to provide by order for regulating or prohibiting the production, supply and distribution of steel and iron, it had not surrendered its essential legislative function in favour of the Central Government.

Going back to *Harishankar Bagla*, Bagla's lawyer had raised four questions:[150]

> (1) That Sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946 and the provisions of the Cotton Cloth Control Order contravened the fundamental right of the appellants guaranteed by Article 19(1)(f) and (g) of the Constitution;
> (2) That Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 and Section 4 were ultra vires, the legislature on the ground of excessive delegation of legislative power;
> (3) That Section 6 having been found ultra vires, Section 3 was inextricably connected with it and that both the sections should have been declared ultra vires on that ground; and

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[147] *Union of India* v. *Bhana Mal Gulzari Mal* 1960 SCR 2 627.
[148] *Harishankar Bagla* v. *State of Madhya Pradesh* 1955 SCR 313; See Rohit De, *A People's Constitution: The everyday life of law in Indian Republic*, (Princeton University Press, Princeton & Oxford, 2018), De offers an interesting legal and historical backdrop of *Harishankar Bagla* case. He informs that the argument of excessive delegation was not new, it had been employed earlier in cases involving Essential Supplies Act 1946 cases and Defense of India Act, 1939. But the Indian Constitution also allowed Bagla to challenge the constitutionality of the Act as well as the control order issued the Act. He indeed did.
[149] *Supra* note 147.
[150] *Supra* note 148.

> (4) That the impugned Control Order contravened existing laws viz. the provisions of Sections 27, 28 and 41 of the Indian Railways Act, and was thus void in its entirety.

For the purpose of this chapter, only the first question is relevant. Let's look at the first contention: Section 3[151] and 4[152] of the Essential Supplies Act (Temporary Powers) Act, 1946 and section 3 of the Control Order infringed the rights guaranteed in article 19(1)(f) and (g) of the Constitution.

Harishankar Bagla deliberated on the justification. Here is the relevant excerpt:[153]

> The first question canvassed by Mr Umrigar was that the provisions of Section 3 of the Control Order infringed the rights of a citizen guaranteed in sub-clauses (f) and (g) of Article 19(1) of the Constitution. These sub-clauses recognise the right of a citizen to dispose of property and to carry on trade or business. The requirement of a permit to transport by rail cotton textiles to a certain extent operates as a restriction on the rights of a person who is engaged in the business of purchase and sale of cotton textiles. Clause (5) of Article 19 however permits such restrictions to be placed provided they are in the public interest. During the period of emergency, it was necessary to impose control on the production, supply and distribution of commodities essential to the life of the community. It was for this reason that the

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[151] 3. (1) The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.
(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide
(a) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;.
(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity.

[152] 4. The Central Government may by notified order direct that the power to make orders under Section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by
(a) such officer or authority subordinate to the Central Government, or
(b) such State Government or such officer or authority subordinate to a State Government as may be specified in the direction.

[153] *Supra* note 148 at para 7.

> legislature passed the Essential Supplies (Temporary Powers) Act authorising the Central Government to make orders from time to time controlling the production, supply and distribution of essential commodities. Clause 3 of the Control Order does not deprive a citizen of the right to dispose of or transport cotton textiles purchased by him. It requires him to take a permit from the Textile Commissioner to enable him to transport them. The requirement of a permit in this regard cannot be regarded as in unreasonable restriction on the citizen's right under sub-clauses (f) and (g) of Article 19(1). If transport of essential commodities by rail or other means of conveyance was left uncontrolled it might well have seriously hampered the supply of these commodities to the public. act 24 of 1946 was an emergency measure and as stated in its preamble, was intended to provide for the continuance during a limited period of powers to control the production, supply and distribution of, and trade and commerce in, certain commodities. The number of commodities held essential are mentioned in Section 2 of the Act, and the requirement of a permit to transport such commodities by road or rail or other means of transport cannot, in any sense of the term, be said, in a temporary Act, to be unreasonable restriction on the citizen's rights mentioned in clauses (f) and (g) of Article 19(1).

Above para has no mention of section 3 and 4 of ESA 1946. It only talks about clause 3 of the Control order.

To uphold the validity of clause 3 of the Control Order, the Court offers three reasons: one, it was an emergency measure. Two, it is control or a regulation and not a deprivation or prohibition. Three, the Court quotes the purpose – “to provide for the continuance during a limited period of powers to control the production, supply and distribution of, and trade and commerce in, certain commodities.”

One, could a law restrict freedoms in the name of emergency without an official proclamation of emergency under Part XVIII of the Constitution? Two, a permit is relatively drastic than free movement of goods. The Court should have recorded a justification as to how a requirement of a permit is reasonable and in general public

interest. The tone of review is so casual that the Court does not even distinguish between public interest and general public interest. It also foregoes the standard of reasonableness that it laid down not long ago in *Chintaman Rao*. Three, as stated above, the purpose or the end does not justify the means. Means ought to be reasonable and that requires a separate justification as laid down in *Chintaman Rao*. Perhaps Rohit De is right that the Court had made up his mind to not let go the Baglas.[154]

Om Prakash v. *State of UP*[155] judgment has two concurring judicial opinions. The first opinion written by Justice Shivraj Patil has no reasons on why the impugned prohibition on sale of eggs in Rishikesh and other towns was constitutionally valid. His opinion indeed recorded the contention that the appellants have challenged the total prohibition on sale of eggs in the municipal limits of Rishikesh for being unreasonable and hence, in breach of their right to carry on trade under article 19(1)(g) of the Constitution.[156] To answer this contention, he merely quoted the High Court judgment.[157] Here is the relevant except:[158]

> 8. The High Court in the impugned order has dealt with the contentions advanced on behalf of the appellants and negatived them keeping in view the provisions of the Act and the various decisions cited. The High Court has noticed that the welfare of the people is paramount consideration, which has to be kept in mind while deciding the validity of a law when it is said to be contravening the constitutional guarantees. The High Court, as can be seen from the impugned judgment, while dealing with the challenge to the notification on the ground that it infringed the right of the appellants guaranteed under Article 19(1)(g) of the Constitution of India, after referring to various decisions of this Court and following them, has concluded that the impugned notification does not violate any right of the

[154] De, *Supra* note 148.
[155] *Om Prakash*, *Supra* note 92.
[156] *Id*.at para 8-9.
[157] *Ibid*.
[158] *Ibid*.

> appellants as guaranteed under Article 19(1)(g) of the Constitution in the context of the facts of the case and keeping in view Section 298 of the Act and bye-laws framed thereunder. Hence it is not necessary to deal any further with this question.
> […]
> 9. Referring to various decisions of this Court the High Court concluded that the amended bye-laws prohibiting sale of eggs within the municipal limits was permissible to achieve the object of the Act in the interest of the welfare of the people.

Please note that the above reasoning listed only one thing "welfare of the people" or "in the interest of the welfare of the people". It may be debatable whether "welfare of the people" is same as "in the interests of general public" or not. Certainly, it is not same as reasonableness. He did not even elaborate why the impugned judgment is right according to him and refused to deal with the appellant's reasoning on reasonableness. The opinion by Justice Shivraj Patil is wishy-washy on the constitutional validity. Moreover, he wrote that it was not necessary for him to deal with the question because the High Court had already dealt with it. Rest of the judgment dealt with the competence question.

X is a reasonable restriction because it inflicts a small loss.

Can the degree of restriction if it is insignificant or too less, validate an otherwise illegitimate restriction?

Law does recognise *de minimis* which means "the law does not care for or take notice of, very small or trifling matters. The law does not concern itself about trifles."[159]

[159] *Indian Banks' Assn.* v. *Devkala Consultancy Service* (2004) 11 SCC 1, at para 30.

De minimis non curat lex is "a common law principle whereby judges will not sit in judgment of extremely minor transgressions of the law.[160]

First question is: how to define "very small" or "extremely minor". Is 25 per cent very small? 10 per cent? 1 per cent? 0.1 per cent? 0.01 per cent? What is trivial or negligible? Second question is: if a matter is trivial, should the Court even proceed to engage in judicial review? Should it not reject the matter? In *People* v. *Durham*,[161] Justice Robert Steigmann of the Appellate Court of Illinois refused to hear a claim for five dollars compensation for a disputed traffic ticket. Dismissing the claim, the judge noted:[162]

> Litigation like this brings the judicial system into disrepute. Rational citizens (not connected to the law) would deem this appeal an utter waste of time and resources for all concerned. The time and money already spent bringing this appeal amounts to squandered resources. We will not be part of further squandering.

Once a judge issues notice to the other party to file a reply, other party must engage a lawyer and spend on litigation expenses. Petitioners too must spend more and more on litigation expenses as the case progresses. The judge would hear the matter multiple times over a period of months and typically years and then pronounce the judgments. Then at that stage, would the judge be right to say that the claim is extremely minor and does not deserve judicial attention? No. A judge must dismiss petitions at the first instance if the claim is too trivial. They usually do so. But in a judgment involving judicial review for enforcement of fundamental rights, *de minimis* to feature

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[160] De Minimis Non Curat Lex, *Duhaime's Law Dictionary*, available at: http://www.duhaime.org/LegalDictionary/D/DeMinimisNonCuratLex.aspx (last visited on July 14, 2019)
[161] *People* v. *Durham* 915 NE 2d 40 (2009).
[162] *Ibid*.

as a ground amongst other grounds for upholding a restriction is bizarre, improper and illogical.

If the loss is not trivial, then does it not matter for reasonableness? It is not denied that a inconvenient restriction with huge social benefits would score well on the balancing test. But merely because a restriction inflicts a small loss, it does not become a reasonable restriction. One cannot make that claim without even looking at the other alternative restrictions or the quantum of social benefits produced by the impugned restriction. Whether other restrictions produce the same social benefits with no loss, or the impugned restriction produces meagre social benefits, these two questions become more relevant.

In *Lord Krishna Sugar Mills*, [163] there were three separate opinions. Here, the issue was control measures on sugar including price control for exports and levy of excise on sugar produced in India to boost sugar exports.[164] One of the reasons that Justice Hidayatullah based his decision on was the insignificant size of loss. He stated:[165]

> There is one more circumstance which may be considered. The foreign export served the national interest by stabilising the sugar market so that the production of sugarcane may be maintained at a reasonable level. It also stabilised national economy by earning foreign exchange. The loss, if any, was comparatively small and was spread over many factories. Apart from the very real possibility of its being recouped by sales in the country, the loss itself was so small as not to amount to an unreasonable restriction.

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[163] *Supra* note 30.
[164] *Ibid*.
[165] *Id*. at para 32.

Without judging the factual veracity of the claim, the question then is: if the loss to the producer is significantly small, is such a restriction then legitimate? Justice Sarkar strongly disagreed:[166]

> I am also unable to agree to the proposition that the reasonableness of a restriction depends on the quantum of the loss it produces. Even a small loss may conceivably make a restriction causing it, unreasonable. The quantum of the loss cannot by itself decide the reasonableness of the restriction. Does reason dictate that a small loss shall be inflicted? Nothing that has been said in this case leads me to hold that.

Justice Hidayatullah could have meant either *de minimis* or small adverse impact as compared to social benefits. *De minimis* at this stage is out of question. Loss was small or not could be contentious question of fact, but certainly it was not insignificant or trivial. However, he skipped the two tests – necessity and balancing and decided merely on the factum that loss is small. Justice Sarkar is right that because the loss is small does not justify its imposition. Its justification can only be based on two points: one, a comparison with other alternative measures and two, the quantum of social benefits. Without these tests, one cannot be even sure whether "small" is small.

Second case is *Union of India* v. *Motion Picture Association*.[167] The impugned restrictions required the cinema theatre exhibitor to show an educational, scientific or documentary film produced by Films Division of the Government of India for a duration of 15-20 minutes along with the other films.[168] Films Division would get each exhibitor to sign an agreement for the supply of such films for exhibition.[169] As per the

[166] *Id*. at para 60.
[167] (1999) 6 SCC 150.
[168] *Ibid*.
[169] *Id*. at para 27.

terms and conditions of the agreement, the exhibitor would have to pay to the Films Division a rental amounting to 1 per cent of his net weekly collection for the supply of the films.[170]

Exhibitors contended that the cost to exhibitors for showing these films was excessive.[171] Not only their machinery, their show time, their theatres are used for the duration of these films, they were also asked to pay one percent of their net earnings as rental of the film to the Films Division.[172]

One of the reasons that the Court offered was that one per cent is a small amount and the Court justified the quantum on the ground of high cost incurred by the films division to distribute the films considered as unreasonable.[173]

Three reasons why Court's usage of de minimis is inappropriate here: one, if the Court meant *de minimis*, then it was too late to cite this ground. Two, if the Court implied that smaller the loss, better the case for reasonableness. It does sound like a better justification for balancing test. But this too is false. The Court did not once look at the adverse impact of restriction on the petitioners; instead it merely emphasized the intended benefits accrued to the society at large.

The restriction was drastic in nature. Exhibitors screening time as well as screening services were partially expropriated without any compensation. Instead of receiving compensation, exhibitors were forced to pay money to Film Division as

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[170] *Ibid*.
[171] *Id*. at para 28.
[172] *Ibid*.
[173] *Id*. at para 29.

rental. The question here should have been about loss and compensation, and not cost. The Court's determination of whether the restriction was excessive or not was unduly anchored on what the Films Division spent as costs, and not on the quantum of loss to exhibitors.

In the third case *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kuresh Jamat,* [174] Ahmedabad butchers challenged the municipality's decision to observe the closure of municipal slaughterhouses for nine days in a year on grounds of violation of their fundamental rights to do trade and business as guaranteed by Article 19(1)(g) of the Constitution. The reason for closure of slaughterhouses was a Jain festival. One of the reasons, the Court gave to reject the challenge was the short duration of closure. The Court stated:[175]

> 72. As already stated above, it is a short restriction for a few days and surely the non-vegetarians can remain vegetarian for this short period. Also, the traders in meat of Ahmedabad will not suffer much merely because their business has been closed down for 9 days in a year. There is no prohibition to their business for the remaining 356 days in a year. In a multi-cultural country like ours with such diversity, one should not be oversensitive and overtouchy about a short restriction when it is being done out of respect for the sentiments of a particular section of society.

Instead of discussing the impact of the slaughterhouse closure for nine days on the butcher's business, the Court emphasised that it was nine days *only* and "there is no prohibition for the remaining 356 days in a year".[176] There was no discussion on the quantum of loss of earnings or even an attempt to assess the loss. The Court even

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[174] *Supra* note 24.
[175] *Id*. at para 72.
[176] *Ibid*.

labelled the petitioners as "overtouchy" and "oversensitive" which was clearly unwarranted.[177]

It is problematic. For traders, tanners and their employees who earn a daily living to forego their business for nine days consecutively, this claim is not trivial. If nine days in a year was so insignificant, why did the Court even bother to admit the writ, hear the matter and write a judgment on merits? *De minimis* implies that a matter is insignificant and not worth litigating. But that was not the case here because the Court admitted the matter, heard it multiple times and delivered a judgment.

To conclude, *de minimis* exception was not applicable in any of the cases discussed above. Secondly, the "low" adverse impact of a restriction does not justify the restriction unless it is lower than the social benefits as well as the adverse impact of other alternatives.

X is a reasonable restriction because it is consensual or agreed.

Does the prior consent to a law make the law reasonable or valid for judicial review? Citizen's consent is immaterial for the legal validity of a law. Whether the petitioner lobbied for the law or complied with it for years is also immaterial. Reasonableness is an assessment of law for its ability to achieve an intended legitimate object while minimally curtailing citizen's freedom. Therefore, stakeholder's conduct is immaterial. This part identifies four judgments where the Court unduly upheld the restrictions based

[177] There is no word as "overtouchy"; touchy means easily upset or offended. *Ad hominem* fallacy is attacking the person rather than the arguments

on petitioner's conduct or other stakeholders' conduct even though it was irrelevant for judicial review.

In *Mohd. Hanif Quareshi*[178] – the first case before the Supreme Court dealing with the prohibition on cattle slaughter, the Court upheld a blanket ban on cow slaughter based on flawed reasoning that petitioners' counsel did not object to. The Court noted that "[t]he counsel for the petitioners, be it said to their credit, did not contend otherwise". Does that make the reasoning valid? No, because reasoning depends on logic and not on any external validation. Petitioners' consent cannot be a basis of the judgment on questions relating to constitutional validity of state action.

It is important to note how the reasoning accorded by the court is flawed. One, DPSP directs a ban on cattle slaughter based on the agricultural utility and breed improvement.[179] It implies that the slaughter for alternative utilities of cattle such as meat and leather should be allowed unless they affect the agricultural utility of cattle. It implies that slaughter of agriculturally defunct cattle should be fine, particularly because old cattle may be burden on cattle feed and may also deteriorate breed.

Two, the Court realised that agriculturally, cows are less useful than buffaloes, bulls and bullocks, and therefore, more prone to slaughter. It observes:[180]

> The danger of such premature slaughter is greater for the cow, for being an animal with a scanty yield of milk it does not pay the owner to maintain her through the long dry period and hence there is an inducement for adopting even cruel practices to get her passed by the inspectors. But a dry she-buffalo is well worth preserving

[178] *Supra* note 134.
[179] Article 48 trumping certain values and vocations at the cost of others is also questionable.
[180] *Supra* note 134 at para 43-44.

> and maintaining in expectation of rich return at the next lactation. Besides, buffaloes for slaughter will not fetch as good a price as cows would do. Likewise there will not be much inducement to the agriculturist or other owner to part with the breeding bulls or working bullocks (cattle and buffalo) as long as they are serviceable. For their sheer usefulness and their high market value as breeding or working animals the breeding bulls and working bullocks, as long as they are fit, are, to the agriculturists, worth more then the price of their flesh in gold. There can hardly be any inducement for maiming valuable animals which, as breeding bulls or working animals, can at any time fetch from the agriculturists a price higher than what the maimed ones will fetch from the butchers. The breeding bulls and working bullocks (cattle and buffaloes) do not, therefore, require as much protection as cows and calves do.
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> 44. […] For reasons of economy rapacious gowalas or callous agriculturists find it uneconomical to maintain the dry cow and even resort to cruel practices and main the cow in order to get her passed for slaughter. As already stated, the she-buffalo and the breeding bulls and working bullocks (both cattle and buffaloes) for their value, present and future, do not run the same amount of danger as a dry cow does. Regulation of slaughter of animals above a specified age may not be quite adequate protection for the cow but may be quite sufficient for the breeding bulls and working bullocks and the she-buffaloes. These considerations induce us to make an exception even in favour of the old and decrepit cows. The counsel for the petitioners, be it said to their credit, did not contend otherwise.

If dry and useless cows are uneconomical to maintain, then why is the protection justified? The Court should not justify the protection. But the Court went on and discussed what may be “adequate” protection for cows from slaughter.

Three, the Court’s apprehension that unregulated slaughter would lead to scarcity of cattle was baseless and unjustified. The question was not unregulated slaughter; it was whether a blanket ban on cattle slaughter is justified. In any case, higher demand and higher consumption of cattle meat would have been good for farmers, butchers and leather tanners. For example, unprohibited chicken production

does not cause any scarcity of chicken. From the Court observations and reasoning, farmers appear to be rational actors who make a cattle-sale decision based on its utility.

Petitioners' counsel "did not contend otherwise" perhaps realising that it would be better to negotiate on buffalo and bullocks rather than on prohibition of cow slaughter. It seemed that the outcome was probably a judicial negotiation.

Second judgment is *Lord Krishna Sugar Mills*.[181] The opinion by Justice Subba Rao brought this factor of consent in the judicial review. He perused the communication between the Government and the industry and concluded that the industry "cooperated with the State in evolving the scheme, which culminated in the passing of the Act".[182] The Government as well as the industry – both were keen to enhance foreign trade and target foreign market.[183] He emphasised that the Act was passed "with the consent of the industry".[184] Justice Sarkar in his dissenting opinion expressly rebutted this argument:[185]

> Then it is said that the Indian Sugar Mills Association of which the petitioners are said to be members, wanted that arrangements for export of sugar abroad be made and it was for that reason that the impugned Act was passed. It was suggested that the Association agreed to the Act being passed. It is, therefore, contended that the restrictions imposed by the Act must be presumed to be reasonable and the petitioners cannot be heard to say that they are not. Now the request by or the agreement of the Association is, of course, not the request by or the agreement of the petitioners. The Association has no authority to bind the petitioners by any

[181] *Supra* note 30.
[182] *Id*.at para 44.
[183] *Ibid*.
[184] *Id*. at para 44.
[185] *Id*. at para 71-72.

> request or agreement. The fact that the petitioners were members of the Association if that were so, does not give the Association the authority. There is no evidence that the petitioners had assented to the Association making the request or the agreement. For all that is known the petitioners may have been against the Association making any request to the Government to take steps for export or agreeing to the passing of the Act. Therefore, it seems to me that the petitioners' rights are not affected by anything which the Association might have done.
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> 72. I think it right also to say that there is no material on the record whatever to lead to the conclusion that the Association had agreed to the Act being passed in the form in which it stands. And of course it is only the Act with which we are concerned. It is true that the Association had suggested that the Government should take steps for export of sugar. That would appear from the minutes of various meetings annexed to the affidavits used on behalf of the Government. But there is nothing in these minutes nor anywhere else in the records which would indicate that the Association wanted that sugar should be exported though that might put the manufacturers to a loss.

Justice Sarkar gave two reasons: one, the association had no authority to bind a member-producer. The fact that the association agreed to the Act is not the same as agreement by petitioners. Secondly, he also disputed the evidence. He observed that no evidence indicated that the petitioner was a party to the demand. Further, no evidence suggested that the association had demanded or supported the measures as they were in the Act. Merely because the association supported the objective did not necessarily implied its support for the means as well.

Justice Sarkar's criticism of the "consent" ground is two-fold: petitioner is not necessarily a party to the agreement; association did not support the Act in its present form. Both the counterarguments were factual in nature.

However, there is a bigger question here: can prior consent/agreement to a proposed bill waive off a citizen's fundamental rights? Justice Subba Rao seemed to be in favour. Justice Sarkar did not rebut it. The argument implies that an unconstitutional statute may be legitimate because citizens agreed to it.

Third judgment is *Om Prakash* v. *State of UP*.[186] As discussed earlier, there are two concurring judicial opinions. The first opinion written by Justice Shivraj Patil quoted the following para from the High Court judgment with approval:[187]

> … as noted in the earlier part of this judgment, it is not denied that several organisations, societies and residents of Rishikesh had approached the Municipal Board for such a ban on sale of eggs as it was already imposed concerning sale of meat and fish and that was the reason that by the amended law the aforesaid word eggs was added in the existing bye-laws.

Here, he implied that since majority wanted the prohibition on eggs, it was okay to have it and labelled it as "welfare of the people".[188]

Justice Dharmadhikari too gave similar reason. He recorded government's justification:[189]

> … it was so imposed on constant demands of citizens, various organisations and institutions operating within Haridwar and Rishikesh areas. Copies of some of such representations in writing received from individuals and religious organisations have been placed on record of this case. A major section of the society in the three

[186] Supra note 92.
[187] *Id*. at para 8.
[188] *Id*. at para 9.
[189] *Id*. at para 27-28.

> towns considers it desirable that vegetarian atmosphere is maintained in the three towns for the inhabitants and the pilgrims.
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> 28. In the municipal limits of Haridwar public dealing in meat, fish and eggs was banned by the notification issued as far back as on 23-7-1956 and in Muni ki Reti by notification dated 18-12-1976. These restrictions imposed in Haridwar and Muni ki Reti have not been challenged by any section of people in the court and have continued as fully acceptable to all.

Justice Dharmadhikari suggested two points above: one, majority asked for it; two, similar restriction imposed in other two towns remained unchallenged.

Did Justice Dharmadhikari imply that minority (religious or economic) cannot challenge what is in accordance with the sentiments of majority community? Such reasoning completely contradicts the counter-majoritarian role ascribed to the Court by the Constitution. Secondly, because a restriction remained unchallenged for a long time in other districts, can the Court presume its reasonableness?

Both arguments are fallacious. Just because the majority lobbied for a law – that does not make that law legitimate. Merely because a law is not challenged for a long time, or it is not challenged by inhabitants of other districts, or because a similar law (say, a ban on meat) is not challenged, has no bearing on the reasonableness of a law.

Union of India v. *Motion Picture Association*[190] is the fourth judgment. As discussed above, the impugned restrictions required the cinema theatre exhibitor to show an educational, scientific or documentary film produced by Films Division of the Government of India for a duration of 15-20 minutes along with the other films. Films

[190] *Supra* note 167.

Division would get each exhibitor to sign an agreement for the supply of such films for exhibition. As per the terms and conditions of the agreement, the exhibitor would have to pay to the Films Division a rental amounting to 1 per cent of his net weekly collection for the supply of the films.

Exhibitors contended that procurement is compulsory, and it came at a cost of time as well as money.[191] Second contention was that the Government would pay for the showing time on television but in their case, they are made to pay a rent to the Films Division.[192]

Justice Sujata Manohar observed that the said "arrangement" had been in existence for the last 30 years and it was not challenged.[193]

Exhibitors also contended that one per cent charge was a tax, not authorised by either the Act or the provisions of the licence. The judge agreed that the relevant Act, the notification, the rules, or the terms and conditions of the licence did not stipulate the payment of any rental. Yet she upheld the tax on the ground of "agreement". She observed: [194]

> This amount is required to be paid under an agreement which the exhibitors individually enter into with the Films Division for the supply of these films. It is a payment under the terms of a contract between the two parties. It cannot, therefore, be viewed as a tax at all. The exhibitors contend that because they are required to enter into these agreements, any payment under the agreement is a compulsory exaction and is, therefore, tax. We do not agree. Under the terms of the agreement, the Films Division has to supply certain prints to the theatre owners at stated

[191] *Ibid*.
[192] *Id*. at para 24.
[193] *Id*. at para 30.
[194] *Id*. at para 31.

> intervals. The Films Division is required to maintain a distribution network for this purpose. It is required to pack these films and is required to allow the exhibitors to retain these films in their possession for a certain period. The films are to be returned to the Films Division thereafter. The charge is termed in the agreement as rental for the films.

Justice Manohar called it an agreement or a contract. She did not ask whether the exhibitors had signed any contract out of their own volition and what would be the consequences if they did not pay the rental. If the exhibitors *had to* pay rental to the Films Division and *had to* screen the films, can it be called as an agreement?

The arrangement was compulsory, and the exhibitors had no choice. Calling it an agreement does not make it an agreement.

X is a reasonable restriction because the discretion is vested in a higher authority.

In *Kishan Chand Arora*,[195] the issue was the discretion to issue a license to run a restaurant vested in a police officer was constitutionally valid.[196] The impugned provision stated:[197]

> The Commissioner of Police, may, at his discretion, from time to time, grant licences to the keepers of such houses or places of public resort and entertainment as aforesaid for which no license as is specified in the Bengal Excise Act, 1909, is required upon such conditions, to be inserted in every such licence, as he, with the sanction of the said State Government from time to time shall order, for securing the good behaviour of the keepers of the said houses or places of public resort or entertainment, and the prevention of drunkenness and disorder among the persons

[195] *Kishan Chand Arora* v. *Commisioner of Police, Calcutta* 1961 SCR 3 135.
[196] *Ibid*.
[197] *Id*. at para 3.

> frequenting or using the same; and the said licenses may be granted by the said Commissioner, for any time not exceeding one year.

It is pertinent to note that it was a colonial law passed in 1866. The Act replaced another law of 1860 with a similar provision.[198] As per the previous Act, licensing was mandatory but the Commissioner had no discretion, once the applicants fulfilled the conditions prescribed under the Act.[199] However, the new Act provided for discretion.[200] The question was whether the provision meant an absolute and unguided discretion and therefore it was an unreasonable restriction.

One of the reasons Justice Wanchoo offered was: "The section appears in the Police Act, which deals generally with matters of law and order and the two objects specified in the section are also for the same purpose. The discretion is vested in a high police officer who, one would expect, would use it reasonably."[201]

Justice Subba Rao disagreed. He found the discretion to be "free and unqualified".[202] Looking at the legislative history, it was clearly a move from objectively laid down criteria to unrestrained discretion vested in police commissioner to suit the colonial masters. Had the legislature intended to lay down an objective criterion, it would have done so instead of leaving it to the absolute discretion of the police commissioner.[203] He observed:[204]

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[198] *Ibid*.
[199] *Ibid*.
[200] *Ibid*.
[201] *Id*. at para 5.
[202] *Id*. at para 20
[203] *Ibid*.
[204] *Id*. at para 22.

> The suggestion that the authority is a high officer in the police department and that he can be relied upon to exercise his discretion properly does not appeal to us for two reasons, namely, (1) as we have already pointed out, the Constitution gives a guarantee for the fundamental right against the State and other authorities; and (2) **the status of an officer is not an absolute guarantee that the power will never be abused. Fundamental rights cannot be made to depend solely upon such presumed fairness and integrity of officers of State**, though it may be a minor element in considering the question of the reasonableness of a restriction. Therefore, it is clear to our mind that the exercise of the power also suffers from a statutory defect as it is not channelled through an appropriate machinery.
>
> [emphasis supplied]

Justice Subba Rao hits the nail on the head. Status of an officer does not make the unguided discretion into an objective determination. It has no relevance for assessment of reasonableness.

Similarly, in *Ramchand Jagdish Chand*,[205] in response to the petitioner's contention that discretion vested in state officers under clause 3 of Import (Control) Order, 1955 was unguided, the Court observed: [206]

> But the authority to grant or refuse to grant licences is conferred upon high officers of the
> State and the grant of licences is governed by the Import Trade Control Policy which is issued from time to time and detailed provisions are made in the Imports (Control) Order setting out the grounds on which licences may be refused, amended, suspended or cancelled (see clauses 6 to 9 of the order).

[205] *Ramchand Jagdish Chand* v. *The Union of India* 1962 SCR 3 72.
[206] *Ibid*.

In *Shriram Chits*,[207] the issue was discretion vested in state government to permit a chit-fund company to carry on other businesses (section 12, the Chit funds Act, 1982)[208]. The Court observed:[209]

> It was submitted on behalf of the Union of India that it was found that some of the companies which were carrying on chit business in association with other businesses had diverted chit funds by way of advances to allied firms of the foreman or financing activities unconnected with chit business. Many of those advances had become irrecoverable which in turn affected the liquidity of the chit fund companies and as a result the chit fund companies failed to pay the dues to the subscribers. Some of the companies had utilised the funds for shipping business, producing cinemas and also utilised the funds for venturing into fields with high degree of risk. Some of those ventures had flopped, the chit fund companies, had come to grief and consequently defaulted in the payment of dues to the subscribers i.e subscribers were left high and dry to suffer in silence in view of the prohibitive cost and time-consuming nature of litigations. **In regard to policy guidelines for exemption i.e permission to carry on other business the highest authority in administration has been given the power to determine** and the guidelines, of course, are public interest and the interest of the subscribers to the chit. The provisions of the Act gives sufficient guidelines to ensure subscribers' interest. This section, therefore, is again regulatory and is not hit by Article 19(1)(g) of the Constitution.
>
> [emphasis supplied]

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[207] *Shriram Chits and Investment Pvt Ltd* v. *Union of India* (1993) 4 Supp SCC 226.

[208] 12. Prohibition of transacting business other than chit business by a company. (1) Except with the general
or special permission of the State Government, no company carrying on chit business shall conduct any other business.
(2) Where at the commencement of this Act, any company is carrying on any business in addition to chit business, it shall wind up such other business before the expiry of a period of three years from such commencement:
Provided that the State Government may, if it considers it necessary in the public interest or for avoiding any hardship, extend the said period of three years by such further period or periods not exceeding two years in the aggregate.

[209] *Supra* note 207 at para 39.

Note that one, most justification pertains to the nature of business, risk, object and background reasoning. Two, there is no discussion on how a higher rank officer is less likely to abuse the discretion than a lower rank officer. Three, the Court vaguely mentioned "guidelines" in the provision as adequate. It did not engage in any discussion how the provision would safeguard against abuse of discretion or adequately guide the exercise of discretion. On the contrary, the proviso to section 12(2) is ambiguous enough to ensure discretionary abuse as it uses the phrases "public interest" and "avoiding any hardship".

The judgment has no justification for why discretion vested in higher authority validates unguided discretion.

In *Papanasam Labour Union*,[210] the power to approve lay-offs in companies was vested in a state officer. The Court was of the view that "it can well be presumed that the one to be specified would be a high authority who would be conscious of his duties and obligation."[211] This is precisely what Justice Subba Rao had warned against – "Fundamental rights cannot be made to depend solely upon such presumed fairness and integrity of officers of State".[212]

4.4 Conclusion

Last chapter was about the cases wherein the Court validated non-statutory monopolies and preferential treatment to public sector units on flimsy grounds not based on judicial review applying proper parameters. It did not undertake any judicial review on the

[210] *Papanasam Labour Union* v. *Madura Coats Limited* (1995) 1 SCC 501.
[211] *Id*. at para 19.
[212] *Supra* note 204.

ground that there was no right. The right was curtailed because it was not acknowledged and recognized. It was simply trampled over.

Here, the chapter examined the cases that acknowledge and recognize the right to carry on trade and business and involve the judicial review of economic restrictions challenged for violation of article 19(1)(g). The chapter found that the Court barely adhered to the norms of review. First, the Court did not even take its role seriously. Judges upheld the restrictions in most cases without a proper review. In derogation of the constitutional mandate to scrutinize the restrictions, judges often abdicated judicial review. While express deference may be visible in less than ten per cent of the cases, implicitly by not applying norms of review to cases, judges abdicated their duty to review the restrictions and protect the fundamental right. Cryptically, quietly or deferentially, the Court upheld the restrictions. The argument that trade restrictions stand on a distinct footing, has no textual basis. Other versions of this argument are: State must be allowed wide latitude to experiment with the economy; judges lack the expertise to comprehend the complex economic reality; and the legislature knows better than the judiciary. One thing neglected in these arguments is the fundamental right. That is what judiciary is responsible for safeguarding.

Secondly, general public interest has become a dead word. Unaware of the framers' intent and its meaning, the Court almost never applied the test of general public interest in any case. Except once it did, but unfortunately later it overruled that judgment. The jurisprudence on general public interest is exactly the opposite of what the framers intended. It means nothing for the Court, every restriction including those favouring sectional interests are routinely upheld.

Third, the Court did not appreciate the nuances of reasonableness. Nexus test overlaps with article 14. The Court rarely applied necessity and balancing. In 94 per cent cases, it did not. Reasonableness became a toothless ground. The Court in many judgments upheld the restriction based on mere object or procedural safeguard. It did not bother to check it for substantive reasonableness. Out of sixteen cases wherein the judges applied one of these tests, thirteen cases (eighty per cent) went in favour of citizens. Amongst the rest (necessity and balancing not applied), the percentage of pro-citizen outcome was less than 10. The application of necessity/ balancing test enhances the probability of a favourable outcome for a citizen by eight times.

Fourth, the presumption of constitutionality is supposed to shift to the State in case of drastic restriction. The Court that once laid down this rule almost forgot about it and later abandoned it. It is not overruled. Almost twenty judgment post-emergency dealt with drastic restrictions could have applied the rule, but they did not.

Apart from the deviance discussed above, the chapter identified many recurring logical fallacies in the judgments, employed to favour the State. One, the Court upheld a law relying on the validity of an unconnected executive scheme in one case, and a court-framed scheme in another case. Two, the Court treated prohibition in terms of product substitutability, segmentation and the mere possibility of survival of trade. This is incorrect. Merely because a business might switch to another product and survive does not legitimize prohibition and does not absolve the State from justification. Third, in certain cases, the Court declared the restrictions to be valid but did not undertake any review at all. Fourth, the Court rejected the challenge stating that the loss is too small.

Although it sounds logical, but it was not. Had it been insignificantly trivial, the Court should not have admitted the matter at all; and whether it is small or not, requires a comparison with other alternatives or a balancing assessment or both, that the Court did not do. Fifth, the Court rejected challenges to certain restrictions based on traders' or citizens' prior consent and conduct, which should have no irrelevance for the constitutional validity of a law. Whether the petitioner lobbied for the law or complied with it for years is also immaterial. Sixth, in certain cases, the Court discounted the unguided discretion merely because it was vested in a higher authority.

Undertaking a judicial review does not necessarily mean the fundamental right is protected. Overall, judicial review under article 19(6) has been a shoddy legal project. Abdication of constitutional duty, disregard of norms, poor reasoning – all combined led to petitioners losing and the State winning in most cases.

Overall, it indicates a change in the judicial behaviour post-emergency: more deference, less adherence to the norms of review.

CHAPTER 5

JUDICIAL OVERREACH

5.1 Introduction

Bishwanath Roy - a roadside tea vendor wanted to switch over his business to garments.[1] He applied to the New Delhi Municipal Council (NDMC) for a permission to change his business.[2] But NDMC refused to decide the application on the ground that it could not decide the application until the Supreme Court-appointed Thareja Committee would allow it to do so.[3] Thareja Committee suggested to the Supreme Court that NDMC should not have had absolute discretion for permitting a change of trade.[4] Discretion corrupts and absolute discretion would corrupt absolutely. The Supreme Court allowed Bishwanath Roy to switch his business to garments - because the Court did not see garments as "luxury" or smuggled goods.[5] The Supreme Court emphasised that NDMC could reasonably restrict the right to carry on business and "in the matter of change of trade, if the NDMC's orders or the conditions imposed are unreasonable or arbitrary or contrary to any provisions of law, it would be open to the aggrieved parties to avail of all remedies at law."[6]

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[1] *Sodan Singh* v. *NDMC* (1998) 2 SCC 727, at 740.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*

The case is a small illustration of the prevailing large-scale institutional chaos for three reasons. One, a roadside vendor had to go all the way to the Supreme Court for switching his business. Two, the Supreme Court became the regulator of street vending - neither the municipal authority nor the Court- appointed committee could decide this trivial issue. Three, ironically and implicitly, above instance points at the Court's failure to perform its judicial functions. The Court should have instead reviewed the exercise of discretion or the byelaw allegedly conferring absolute discretion for excessive delegation. But the Court did not.

This chapter discusses the judicial overreach in the context of article 19(1)(g) of the Constitution of India. Identifying two sectors - street vending and cycle rickshaw plying as case studies of judicial overreach, the chapter argues that the Supreme Court abdicated judicial review and passed detailed directions thereby encroaching on the legislative and executive domain.Instead of reviewing the evictions on the grounds of excessive delegation, unguided discretion or the procedural fairness of the licensing terms, the Supreme Court encroached into the legislative and executive domain and assumed the regulatory role for street vending sector. The Court treated the writ petitions as public interest litigation, framed the schemes directly or indirectly and set up committees to implement or monitor the implementation of schemes.

It was similar for cycle rickshaw plying. In the first case involving the constitutional challenge, the Court upheld the "owner-must-be-puller" provision without any review and instead focused on financial assistance scheme.[7]

The Supreme Court justified its managerial interventions in the street vending sector on two grounds: legislative void and constricted approach to fundamental rights. Both the justifications were patently false. One, there was no legislative void because the statutory provisions in the municipal laws had licensing provisions for hawking. Municipal authorities had framed terms and conditions for *tehbazari* under those statutory provisions. Two, legislative void does not make street vending illegal. Street vending would have been legal. As discussed in Chapter 2, no activity is illegal unless statutorily and reasonably prohibited in the general public interest. The Constitution allows for restrictions, not constrictions. Hence, any eviction unless it is in accordance with byelaws or statutory rules would be illegal.

For the purpose of the thesis, a normative critique would suffice to merely point out the abdication of judicial review and procedural deviance. The chapter proceeds to examine the jurisprudence using the conceptual lens of constitutional avoidance. Ahmad and Khaitan[8] looked at *Maharashtra Ekta Hawkers Union*[9] and other landmark social rights judgments to argue that the Court did not need to constitutionalise the administrative issues and pass specific directions. Although the dataset is different for this study, the paper

[7] *Azad Rickshaw Pullers Union* v. *Union of India* (1980) 1 SCC 601.
[8] Farrah Ahmed and Tarunabh Khaitan, "Constitutional Avoidance in Social Rights Adjudication" 35(3) *Oxf. J. Leg. Stud.* 607 (2015).
[9] *Maharashtra Ekta Hawkers Union* v. *Municipal Corporation, Greater Mumbai* (2014) 1 SCC 490

broadly agrees with their claim. Except a minor caveat: the problem was not constitutionalising the administrative question; the problem was abdication coupled with overreach.

The chapter findings also challenge and dispel the teleological viewpoints. It is important to understand what consequences the judicial overreach led to and whether those outcomes were positive or negative for vendors. Subsequent judgments indicate that the Court's overreach paved the way for further exploitation of already vulnerable vendors and rickshaw pliers by police and state officials. The Court itself in subsequent judgments has either in subtle ways admitted the impropriety of its earlier course of action or overturned its past approach.

Next two sections will map the chronology of events in the two sectors respectively. Section 6.3 provides a detailed account of street vendor jurisprudence and section 6.4 tracks the Supreme Court decided cases on cycle rickshaw plying. Section 6.5 offers a jurisprudential critique based on the separation of powers and the rule of law. In addition, it examines the jurisprudence in context of constitutional avoidance.

5.2 Bombay Hawker's Union: Adjudication or Conciliation?

In 1983, Bombay hawkers approached the Court challenging Sections 313[10], 313-A,[11] 314(3)[12] and 497 of the Bombay Municipal Corporation Act, 1888 on the grounds of delegation of arbitrary and unguided power to refuse to grant or renew licenses for hawking and to remove the goods without hearing the hawkers.[13] Section 313-A specifically dealt with street hawking and the provision offered no guidance whatsoever on what the terms of a license should be.

Moving the Goalposts

Ideally, the Supreme Court should have looked at the terms and provisions of the license and then scrutinised the terms and conditions for procedural safeguards - whether the municipal authority needs to give reasons for rejections or has to hear the affected party or it mandates a deadline for deciding on the licensing applications. The Supreme Court could also have checked the statutory provisions particularly section 313-A for vesting power in the Commissioner - sweeping and unguided.

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[10] 313. (1) No person shall, except with the written permission of the Commissioner— (a) place or deposit upon any street or upon any open channel, drain or well, in any street 1[or in any public place] any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction thereto or encroachment thereon ; (b) project, at a height of less than twelve feet from the surface of the street, any board, or shelf, beyond the line of the plinth of any building, over any street or over any open channel, drain, well or tank in any street ; (c) attach to, or suspend from, any wall or portion of a building abuting on a street, at a less height than aforesaid anything whatever. (2) Nothing in clause (a) applies to building-materials

[11] 313A. Except under and in conformity with the terms and provisions of a licence granted by the Commissioner in this behalf, no person shall hawk or expose for sale in any public place or in any public street any article whatsoever, whether it be for human] consumption or not.

[12] 314. The Commissioner may, without notice, cause to be removed—

[...]

[(c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of section 313A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale.]

[13] *Bombay Hawkers' Union* v. *Bombay Municipal Corporation* (1985) 3 SCC 528, at 529.

But the Supreme Court instead explored the possibilities "for evolving a satisfactory solution to the problems faced by both the sides".[14] However compassionate and gracious it may sound; this was the iniquitous beginning of the Supreme Court derailing from the constitutional tracks.

Negotiating a Scheme

The Municipal Commissioner proposed a scheme to the hawkers vide letter dated 6 May 1983 while the case was pending.[15] The state counsel told the Supreme Court that the hawkers had not responded to the proposed scheme, the Supreme Court tried to push for a settlement between the Corporation and the hawkers and passed an order on 5 Aug 1983:[16] "If the members of the Hawkers' Committee do not come to any decision by consensus, the Commissioner of Bombay Municipal Corporation will be free to frame a scheme."

The Hawkers' Committee discussed the proposals and conveyed its apprehension about certain provisions.[17] The Municipal Commissioner modified the scheme in response to the concerns raised.[18]

In its final order dated 3 July 1985, the Supreme Court noted that judicial review of the statutory provision for excessive delegation had then become unnecessary.[19] The

[14] *Id.* at 530.
[15] *Id.* at 530.
[16] *Id.* at 530.
[17] *Id.* at 530.
[18] *Id.* at 530.
[19] *Id.* at 531.

Court added that such a challenge had anyways "no substance" because the right to carry on trade or business is subject to reasonable restrictions.[20] The Court was now "primarily concerned to consider the merits and feasibility of the scheme".[21]

These observations are not justifiable. First, the Court trivialised the question of judicial review. Calling the challenge devoid of any substance implied that the Supreme Court assumed reasonableness and general public interest without any judicial scrutiny. A conclusion without any deliberation on the validity was uncalled for.

Secondly, the problem with Supreme Court mediating or negotiating in a writ petition can be a potential encroachment on the jurisdiction of legislature or executive. The statement - "primarily concerned to consider the merits and feasibility of the scheme" seemed like a judicial review of the proposed scheme that was not a law yet. Ironically, the Supreme Court did not review the prevailing licensing terms and conditions or the statutory provisions challenged before it.

Guidelines, Conditions or Scheme?

The Supreme Court referred to the eight restrictions or conditions - enlisted in Commissioner's letter dated 30 Sep 1983 - as the "scheme"[22] (the original version of the proposed scheme may be called "scheme 1.0" hereinafter). The Court discussed the final draft of proposed scheme (hereinafter "scheme 1.1") and modified some provisions such as the timings for vending and allowing the sale of cooked food on street.[23]

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[20] *Id.* at 531.
[21] *Id.* at 531.
[22] *Id.* at 531–534.
[23] *Id.* at 535–536.

For spatial zoning, the Court allowed the Municipal Commissioner to fix no-vending zones in consultation with the Bombay Municipal Corporation.[24] Further, the Court directed the Commissioner to follow stakeholder participation before making any changes in the scheme.[25] Finally, the Court set a deadline of 31 Oct 1985 for finalising the scheme.[26] The final scheme was to be binding on all.[27]

Full of ambiguities, the final order (3 July 1985) would have confounded the readers rather than "evolving a satisfactory solution". For example, if the Commissioner was to facilitate drafting a fresh scheme, does that imply that scheme 1.1 wasn't the final scheme? Would scheme 1.1 be binding on BMC or merely act as a guideline? To what extent could the final scheme afford to be different from the scheme 1.1 after following the consultative and participatory decision-making procedure?

Scheme: Perpetual Work-in-progress?

On August 12, 1986, the Bombay Municipal Corporation (BMC) issued some guidelines and then constituted an advisory committee having representatives of concerned stakeholders.[28] It took ten years for this advisory committee to frame a draft scheme (hereinafter "scheme 2.0").[29] The scheme entailed 488 hawking zones and accommodation

[24] *Id.* at 535.
[25] *Id.* at 536.
[26] *Id.* at 536.
[27] *Id.* at 536.
[28] *Maharashtra Ekta Hawkers Union* v. *Municipal Corporation, Greater Mumbai* 2004 1 SCC 625, at 627.
[29] *Id.* at 627.

of 49,000 hawkers.[30] However, as per the official census, total number of vendors was 1,03,000 - only 15,000 were licensed vendors.[31] Around 22,000 vendors paid an unauthorised-occupation-cum-refuse-removal charge to BMC on a regular basis, generating a revenue collection of more than Rs. 2.7 crores for BMC within eight months between Aug 1998 to Apr 1999.[32]

Scheme 2.0 was challenged before the High Court of Bombay.[33] On 30 Nov 1988, BMC made a statement before the High Court of Bombay that it would consider all representations and modify the scheme accordingly.[34] BMC further reduced the hawking zones to 377, number of vending licenses to 38,000 and deleted the proposal for 28 hawking plazas.[35] BMC filed this modified scheme (hereinafter "scheme 2.1") before the High Court on 31 July 1999.[36] On 1 March 2000, the High Court constituted another committee to decide on zoning.[37] The High Court-appointed committee reduced hawking zones further down to 187 in its version of the scheme - "scheme 2.2".[38]

On 5 July 2000, the High Court "sanctioned the scheme with a few modifications and adjourned the matter to enable BMC to consider the manner in which it proposed to implement the scheme".[39] Some of the key features of the High Court-modified scheme,

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[30] *Id.* at 627.
[31] *Id.* at 627.
[32] *Id.* at 627.
[33] *Id.* at 627.
[34] *Id.* at 627.
[35] *Id.* at 627.
[36] *Id.* at 627.
[37] *Id.* at 627–628.
[38] *Id.* at 628.
[39] *Id.* at 628.

now “scheme 2.3” were: hawkers would have no fixed spots; certain areas such as arterial roads, pavements, carriageways, approaches to railway stations, places of worship and schools and narrow roads (<8.5 m) would be no-hawking zones; no trading/ commercial activities in residential zones; prohibition on the sale of solid food items and expensive goods; and no hawking plazas.[40] On 7 Sep 2000, the High Court also allowed the sale of cooked food.[41]

While the hawkers challenged the High Court-framed scheme before the Supreme Court, BMC moved the Bombay High Court for certain modifications.[42] The High Court passed an order allowing BMC to propose only minor changes.[43] However, on 31 Jan 2001, when BMC actually proposed some changes, the High Court rejected those changes on the ground that the proposed changes would almost reframe the High Court-approved-scheme.[44]

Now the Supreme Court had to review the scheme 2.3 approved by the Bombay High Court.

Unasked Questions

[40] *Id.* at 629.
[41] *Id.* at 629.
[42] *Id.* at 629.
[43] *Id.* at 629.
[44] *Id.* at 629.

Evading any discussion on the above questions in its order dated 9 Dec 2003, the Supreme Court emphasized the sanctity of conditions laid down by it on 3 July 1985: "so far as Mumbai is concerned, the scheme must comply with the conditions laid down in *Bombay Hawker's Union* case. These conditions have become final and there is no changed circumstance which necessitates any alteration."[45]

If the conditions - as modified by the Supreme Court in *Bombay Hawkers Union* - were binding and final, then why did the Court direct the Commissioner to constitute another advisory body and invite stakeholder participation? How should the Supreme Court proceed to judicially review the High Court-framed scheme now and on what grounds?

What warranted modification in each of the report and why none of these reports attained finality - was also not clear from the orders. It was not clear, probably, even to the Supreme Court or the Bombay High Court as well.

Full Circle Jurisprudence

The Supreme Court revised those conditions once again by adding more specific scenarios and exceptions.[46] Here was scheme 3.0. So, the Court's own formulation of licensing conditions was not good enough for itself. These conditions were administrative restrictions/ guidelines prescribed by the Supreme Court without any judicial reasoning.

[45] *Id.* at 633.
[46] *Id.* at 635–637.

Scheme 3.0 were more detailed than Scheme 1.1 as approved in *Bombay Hawker's Union*. For example, no hawking permitted on road less than 8 m wide; sale of cooked food permitted but no cooking permitted on street; no hawking permitted within 100 m from any place of worship, holy shrine, educational institutions and hospitals or within 150 m from any municipal or other markets or from any railway station; no hawking on footbridges or overbridges; a family cannot have two vending licenses; ban on vending of expensive items.[47]

Without mincing its words this time, the Court ruled that scheme 3.0 would be binding on all.[48]

The Conundrum of Zoning

Mindful of its capacity constraints, the Supreme Court chose to approve certain road/ streets for hawking and leave the rest to a committee to be appointed.[49] As a tentative measure, it invited the parties to suggest additional areas for hawking.[50] BMC agreed to include 49 more roads and the Court approved these 49 roads in addition to 187 roads as hawking zones.[51] However, it approved those roads with a caveat: subject to approval from the traffic police.[52] The Supreme Court-appointed committee could further decide whether

[47] *Id.* at 635–637.
[48] *Id.* at 637.
[49] *Id.* at 634.
[50] *Id.* at 634.
[51] *Id.* at 634.
[52] *Id.* at 634.

to permit hawking on arterial roads.[53] The Committee could permit hawkers only if hawking would not cause too much hindrance to vehicular and pedestrian traffic.[54]

The Committee could extend the no-hawking zones on grounds of public health, sanitation, safety, public convenience and the like.[55] For hawking zones, the Court observes: [56]

> In areas other than the non-hawking zones, licences must be granted to the hawkers to do their business on payment of the prescribed fee. [...] Hawking licences should not be refused in the hawking zones except for good reasons. The discretion not to grant a hawking licence in the hawking zone should be exercised reasonably and in public interest.

Note that in the above quote, the Supreme Court initially used "must" for granting licenses in hawking-zones. Then, it curtailed the pro-vendor mandate with "should" and "except for good reasons" and finally allowed for reasonable discretion to not grant licenses in public interest. It leaves a lot of ambiguity in what those good reasons could be and hence, leaves the vendors at the mercy of municipal officials once again.

Two, the Supreme Court entirely evaded a judicial discussion around zoning - what parameters or principles for zoning would be reasonable, relevant and statutorily permitted, and therefore legal. Instead, the Supreme Court mediated a *panchayati* bargain among the

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[53] *Id.* at 637.
[54] *Id.* at 637.
[55] *Id.* at 636.
[56] *Id.* at 636.

parties for hawking zones as a tentative solution and left the rest to a committee to decide on the zoning status street-by-street.

Three, the tentative solution too had ifs and buts. 49 zones were subject to traffic police approval.

Four, the Supreme Court here did make a value judgment. Amongst the various private activities in public space, the Court puts vehicular and pedestrian movement at a higher pedestal over hawking.

Five, the Court intuitively came up with grounds for determination of zoning such as public health, sanitation, safety and public convenience without analysing these grounds judicially.

Welcome the Committee

Since the Supreme Court, mindful of its capacity constraints gave up on the street-by-street zoning determination, it - like its directions in *Sodan Singh*[57] - decided to appoint a committee and lay down the powers and functions of the Committee. The Committee was to have a retired Judge of the Bombay City Civil Court at Bombay, as the Chairman of the Committee along with a senior officer of BMC and a senior police officer from the Traffic

[57] *Sodan Singh* v. *New Delhi Municipal Committee* (1989) 4 SCC 155.

Department.[58] These officers were to be deputed full time.[59] BMC would provide all facilities such as office space and secretarial staff to the committee and a chauffeur-driven car to the Chairman.[60] The Chairman's decision would prevail over other members.[61] Committee's decision would be final and binding on all.[62]

The Committee would decide on the zoning status of any particular street after hearing the interested parties and considering their representations.[63] For major, trunk and arterial roads, the Committee could examine permitting hawking, without inconvenience to vehicular and pedestrian traffic.[64] The Committee was to charge the applicants for the determination of zoning status of any street road.[65] BMC would have to contribute an equal amount and the total of Rs 3000 per road/street would go to the Chairman of the Committee as his honorarium.[66] The Committee would invite suggestions and objections on that proposal, visit the road/street, also hear all stakeholders and then decide on the zoning status of the street.[67] The Committee could also rule on the vending capacity as well as alter the zoning plan subject to Scheme 3.0.[68] If the Commissioner proposed, the Committee could also alter the scheme after considering views of all stakeholders.[69] The Committee also had supervisory and penal powers. In case of inaction by the ward officer

[58] *Id.* at 638.
[59] *Id.* at 638.
[60] *Id.* at 638.
[61] *Id.* at 638.
[62] *Id.* at 638.
[63] *Id.* at 638.
[64] *Id.* at 638.
[65] *Id.* at 638.
[66] *Id.* at 638.
[67] *Id.* at 638.
[68] *Id.* at 638.
[69] *Id.* at 638.

against encroachment in no-hawking area, the Committee could ask the police to remove the hawker.[70] The Committee's adverse remarks against a ward officer would be entered in the confidential record of the ward officer.[71] More than three entries would be a ground for withholding promotion and more than six such entries would be a ground for termination of service.[72] BMC was to pay Rs. 10000 to the Chairman for handling complaints.[73]

For allocation of spots in the hawking plazas, as and when BMC would set them up, the Committee Chairman would have the draw of lots.[74]

The Committee would also be responsible for license-allocation based on draw of lots. BMC would invite applications with details - area preferred, pitch sought, the type of items proposed to be sold and three location in the order of preference.[75]

So, the City of Bombay had a super-regulator - without any legislation or government approved-budget - to implement the Supreme Court orders and schemes. The Committee was accountable to the Supreme Court only.

5.3 Delhi - A Parallel Story

[70] *Id.* at 636–637.
[71] *Id.* at 638.
[72] *Id.* at 637.
[73] *Id.* at 637.
[74] *Id.* at 637.
[75] *Id.* at 639.

Sodan Singh was a poor hawker selling readymade garments near Janpath Lane, New Delhi.[76] Although NDMC had granted a license to him earlier, it refused to renew his license.[77] NDMC disclosed in its counter-affidavit that Sodan Singh had not sought permission for change of trade and started selling garments instead of chana and moongphali, and secondly, he occupied a fixed spot at Janpath instead of selling goods on a vehngi around the bus stop as per the licensing terms.[78] On these two grounds, NDMC refused to renew his license.[79] Sodan Singh's counsel contended that both the municipal authorities - MCD as well as NDMC had allocated specific spots to vendors from time to time as per the records.[80]

Anchoring on the Wrong Question

Sodan Singh and many other vendors challenged the denial of renewal of license and evictions. The Supreme Court should have reviewed whether NDMC gave reasons to Sodan Singh for non-renewal, heard him before passing an adverse order and whether those reasons were legally and constitutionally tenable. Nowhere in the entire judgment, the Supreme Court asked what the terms and the procedure of licensing were, whether the act of denial and the reasons cited for such a denial are valid under any bye-laws or statutory provisions, and if so, whether those bye-laws or the statutory provisions are constitutional.

[76] *Sodan Singh. Supra* note *57*, at 161.
[77] *Id.* at 161.
[78] *Id.* at 161.
[79] *Id.* at 161.
[80] *Id.* at 162.

The case was no different from the *Bombay Hawkers Union* case where the vendors challenged the statutory provisions for excessive delegation and unguided discretion. Although the Supreme Court in *Sodan Singh* found the statutory provisions too skeletal to offer any guidance for framing detailed byelaws but the finding was a mere observation and not a comment on the validity of the provisions.[81]

NDMC denied the existence of any right to occupy exclusively a particular area on the road pavements for hawking.[82] However, the petitioner showed documents that both the NDMC and the Delhi Municipal Corporation had been allocating specific spots for vending.[83] It was really a case of discriminatory treatment accorded to some hawkers situated in similar circumstances. NDMC officials made huge money abusing the discretion, petitioners alleged.[84] The judgment records the allegation of large-scale corruption and extortion: "A serious concern was shown in the argument of the other learned advocates also alleging that corruption at large scale was rampant and huge amounts of money were being realised illegally by some of the servants of the municipalities from the poor hawkers. No rules have been framed with respect to the choice of the persons, the area to be allowed to them or the rate of Tehbazari charges. The permission to squat was being granted on daily basis or for very short periods to the great inconvenience to the hawkers and no machinery was available to hear their grievances."[85]

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[81] *Id.* at 177–178.
[82] *Id.* at 160–161.
[83] *Sodan Singh* (1989), *supra* note 57 at 162.
[84] *Id.* at 172.
[85] *Id.* at 172.

Apart from a judicial review based on procedural safeguards in the *tehbazari* terms, the Supreme Court should have at least directed an inquiry to address those allegations.

Instead the Supreme Court misdirected its attention to whether there is any right to conduct private business in public streets. NDMC relied on *Pyarelal* v. *NDMC*[86] where the Supreme Court had held - vendors did not have a fundamental right to pursue street trading and the NDMC under Section 173 of the Punjab Municipal Act could evict the petitioner.[87] NDMC could not have allowed any trade on public streets on a permanent basis and a permission for vending could only be temporary.[88]

The issue was flawed. If there was no right to conduct private business in public street, NDMC and MCD could not have issued licenses to vendors for vending in public streets. But they did. The question should have been: could the municipality arbitrarily deny licenses or evict a vendor based on onerous terms of licenses?

Petitioners had to challenge the correctness of the *Pyarelal* and so a larger bench was to decide the validity of *Pyarelal* first.[89]

Public Space, Private Use

[86] 1967 3 SCR 747.
[87] *Sodan Singh* (1989), *supra* note 57 at 160, 162, 169.
[88] *Id.* at 162.
[89] *Id.* at 160.

The Supreme Court in *Sodan Singh*[90] (30 Aug 1989) clarified that article 19(1)(g) covers street vending and a reasonable restriction under article 19(6) can restrict such a right. The Constitution Bench found several analogous private use of public streets and public spaces other than street vending such as the right to drive private automobile on public roads, the right to hold processions in public streets, the right to hold public meetings.[91] All these uses were held to be protected under common law.[92] The Bench also quoted the *Saghir Ahmed* case that thoroughly explained the nature of article 19 liberties, - "all pucca streets and roads vest in the State but the State holds them as trustee on behalf of the public and the members of the public are beneficiaries entitled to use them as a matter of right".[93] The Bench ruled that the municipal authorities can permit hawkers and squatters on the sidewalks; hawkers cannot assert permanent occupation or a specific spot.[94] Private business on the street to the advantage of the general public can invite no objection if done without any inconvenience to others.[95]

It indeed was the already prevailing practice for the municipal agencies.[96] Not only the municipalities licensed vendors to carry on private business in public streets, in several instances, they also allocated specific spots for hawking, the petitioners contended.[97] So, if the licensing terms allow some hawkers to occupy fixed spots but deny the same to others, whether that was legally tenable - the judgment skipped this issue.

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[90] *Id.* at 168.
[91] *Id.* at 166–168, 177.
[92] *Ibid.*
[93] *Sodan Singh* (1989), *supra* note 57 at 165.
[94] *Id.* at 168–169, 173.
[95] *Id.* at 168.
[96] *Ibid.*
[97] *Id.* at 162.

Impulsive Overreach

The Supreme Court in *Sodan Singh*[98] directed the municipalities to prohibit the sale of smuggled goods, electronic goods and expensive goods. Smuggled goods were by definition prohibited under other existing laws. But the *diktat* to ban electronic goods and expensive goods had no jurisprudential or legal basis. The Court did not define "expensive" articles. It simply outlawed the sale of certain goods that the legislature never intended.

The municipal authorities could not have done the same in the absence of a statutory mandate. As per the fundamentals of administrative law, the subordinate legislation can merely provide details of the mechanism or the procedure and cannot go beyond that to prohibit or outlaw certain actions without the legislative mandate.

Legislative Void

The Constitution Bench noted that except few licensed vendors, most were unlicensed squatters.[99] The Court blamed it on the inadequacy of law - "practically" no law regulated street trading in Delhi/New Delhi.[100] Although the Delhi Municipal Corporation Act, 1957 and the Punjab Municipal Act, 1911 had provisions for framing bye-laws for street vending, the Supreme Court found them insufficient for "the enormous and complicated

[98] *Id.* at 173.
[99] *Id.* at 177–178.
[100] *Ibid.*

problem of street trading".[101] The Court was of the view that the State must designate the streets and earmark the places for hawking and not doing so would frustrate the civil liberties of the vendors.[102]

The observation is legally and constitutionally not tenable. Municipal laws had provisions authorising the municipal authorities to frame detailed bye-laws or the licensing terms and conditions. Whether the municipal officials were arbitrarily and deliberately denying licenses to vendors to exploit them, or whether the municipal authorities had framed any bye-laws at all, whether those statutory provisions allowed unguided and sweeping discretion for framing the bye-laws or whether the prevailing licensing conditions were *ultra vires* of the parent Act - it was for the Supreme Court to review, decide and signal to the Executive and Legislature what was wrong with the regulatory framework. But the Constitution Bench did not undertake such exercise.

Instead, the Court asked the state to frame a detailed scheme covering the following aspects: number of squatters to be allowed on a pavement, what portions of the pavement to be left free for pedestrians, selection criterion for vendors, goods to be sold, charges to be levied.[103]

The Constitution Bench left the individual cases for the division bench to decide.[104] It was not clear how a Division Bench was to deal with those individual cases since the

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[101] *Ibid.*
[102] *Ibid.*
[103] *Id.* at 172–173.
[104] *Id.* at 161.

Constitution Bench merely decided that street vending was covered under article 19(1)(g) and offered no insights on what was to be reviewed and how. On the question of the legal validity of the denial of licenses, eviction and procedural safeguards, the Constitution Bench unfortunately did not utter a word. The order mentioned the word "poor" seven times but it failed to come to their rescue.

Scheme and Committee

NDMC framed a detailed scheme vide Resolution no. 28 on 10 Nov 1989, categorised its area into five zones and identified the vending spots as well in each zone.[105]

Although in *Sodan Singh* the Constitution Bench order dated 30 Aug 1989 directed that a division bench would decide the individual cases, the Supreme Court constituted a *Lok Adalat* and it seems that the Court forwarded all the individual vendor cases to it.[106] *Lok Adalat* had two members - a Supreme Court judge and a retired Judge of the Allahabad High Court.[107]

Subsequent judgments merely recorded that the *Lok Adalat* on 19 Nov 1989 recommended that the Court should constitute a committee with a judicial officer and two representative of the civic agency for spot allotment to vendor claimants and the decisions of such a committee should be binding and final.[108] It is not clear what happened to the

[105] *Id.* at 723.
[106] *Ibid.*
[107] *Ibid.*
[108] *Sodan Singh* (1998), *supra* note 1.

individual writ petitions. Most likely the procedural novelty frustrated the constitutional mandate.

On 21 Dec 1989, the Supreme Court asked the District Judge, Delhi to nominate a Judicial Officer.[109] On 1 Feb 1990, the Supreme Court directed the Thareja Committee to begin the allotment work with 100 cases first.[110] On 9 Feb 1990, the Supreme Court expanded the powers of the judicial officer and empowered him to make surprise inspections and work on a whole-time basis.[111]

While the NDMC had passed a scheme vide Resolution no. 28, the Supreme Court hearing another groups of petitions on 23 Feb 1990 permitted hawking in some areas until the Thareja Committee submits its allocation plan - "until the scheme drawn up pursuant to the directions of the Constitution Bench is finalised".[112] The Supreme Court probably referred to the allocation plan as the scheme.

Subsequently, the Committee reported to the Supreme Court that several vendors hired wooden tables on rentals for Rs 300 to Rs 1000 per day and delegated the hawking business to an employee.[113] Some of the spots or tables were in fictitious names - they obtained favourable court orders in fake names.[114]

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[109] *Id.* at 730.
[110] *Ibid.*
[111] *Ibid.*
[112] *Saudan Singh* v. *NDMC* (1992) 2 SCC 458, at 458.
[113] *Id.* at 465–466.
[114] *Id.* at 465.

The Committee reacting to the scam raised its standard of proof and asked for a statement on oath with original genuine documents in support of it.[115] The Committee would visit the site to verify the claim or ask for proof of challan, fine receipts or *tehbazari* receipts.[116]

The Supreme Court favoured a seniority-based allocation for vendors and asked the Committee to survey the sites, the vendors and their past experience.[117] In a typical aristocratic style, it marched on a singular assumption that seniority-based allocation would be the fairest allocation. The Court did not compare it to other methods of allocation or did not think about the consequences of seniority-based allocation. Whether seniority-based allocation would prejudice the seasonal rural migrants - the Supreme Court did not consider. The Supreme Court could have compared the regulations for automobile licensing, cycle rickshaw permits or parking spots. For example, did the authority regulate the number of automobiles or cycle rickshaw on roads? If so, how do they calculate that number? Is the allocation of license for cycle rickshaw based on seniority, first-come-first-serve, lottery or auction? Do the authorities allow car parking based on the duration of ownership? Does the municipal authority have any policy for parking? If so, how does it allocate spaces for car parking? Was there one-family-one license policy in any other sector?

[115] *Id.* at 466.
[116] *Ibid.*
[117] *Id.* at 472–473.

The Court never questioned the rationale for licensing. Because it never did, it could not see clearly what wrong it was going to perpetuate.

On the Way to Autocracy

On 29 Jan 1991 the Supreme Court sacked the two NDMC representatives and made it into a one-member committee.[118] On 28 Oct 1991, the Supreme Court rejected NDMC proposal for the timings 4.00 p.m to 9.00 p.m and approved 12.00 noon to 7.00 p.m for vending.[119]

Thus, the Supreme Court became the *de facto* sole regulator of the street vending sector in Delhi.

In the second *Saudan Singh*[120] case (13 Mar 1992), the Supreme Court, while hearing the challenge to strict standards of proof demanded by Thareja Committee - now a one-man committee, passed nine directions.[121] It asked the Committee to review its rejection of claims based on a lenient standard of proof in certain cases where the vendors claimed that they were never issued *challans*.[122] The Committee was also to prepare a list of vendors based on seniority and identify additional sites for vending.[123] The Court barred filing of any cases from the NDMC jurisdiction in context of street vending and it barred other courts from entertaining any such case.[124]

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[118] *Sodan Singh* (1998), *supra* note 1, at 730.
[119] *Ibid*.
[120] *Saudan Singh* (1992), *supra* note 112.
[121] *Id.* at 469–471.
[122] *Id.* at 469.
[123] *Id.* at 470.
[124] *Ibid.*

The Thareja Committee Report (May 1996) examined 5627 claims in five years and found only 760 claimants as eligible vendors.[125] The voluminous report had details such as the names of eligible applicants, their trade, and their seniority and details of the area occupied (size of the kiosk) along with the photograph of the particular claimant.[126] The allotment by Thareja Committee was held to be tentative as the Committee had recommended a procedure for allotment.[127] With respect to identification of sites, Thareja Committee identified 14 sub-areas in five zones.[128] The Thareja Committee dealt with the NDMC objections in respect of each site, and rejected most of the objections.[129]

For the final allotment, the Court in *Sodan Singh* (1998) nominated another Judicial Officer Shri V.C Chaturvedi to undertake various duties and functions such as the issuance of public notice inviting applications with three preference for vending sites, the allocation of vending spots/ licenses and hearing.[130] The Court barred any appeal or reviews to be entertained by any authority, tribunal, court including the High Court and the Supreme Court against the decision of Chaturvedi Committee.[131] Only the Committee could seek a direction or clarification from the Supreme Court.[132]

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[125] *Sodan Singh* (1998), *supra* note 1 at 731.
[126] *Id.* at 732.
[127] *Ibid.*
[128] *Id.* at 731.
[129] *Id.* at 733–734.
[130] *Id.* at 740–741.
[131] *Id.* at 743.
[132] *Id.* at 743.

Who is an Unauthorised Squatter?

On 25 Aug 2005, the Supreme Court noted that the municipal authorities had been removing or displacing the *tehbazari* holders and in some cases, the authorities had not given them the possession.[133] Vendors were aggrieved that their matters had been pending for a long time without any decision.[134] The Supreme Court recorded - "a large number of applications were made for settlement of the *tehbazari* rights under the scheme as formulated by MCD and NDMC. But unfortunately, most of them have not been disposed of and only about three thousand and odd applications were decided by the committee concerned."[135] The Court asked the MCD and NDMC to file a statement stating: (1) whether the municipal authorities have made necessary arrangement for the implementation of 2004 Policy, for example, constitution of committee; (2) number of applications for license received, decided and pending; (3) number of grantees dislocation or possession not given; (4) estimated time for application disposal; (5) number of IAs pending before the Court for grant of alternative sites, *tehbazari* rights or squatting rights; (6) number of squatters or hawkers to be accommodated.[136]

On 3 Mar 2006, the Supreme Court stated that the information required was given but the Court did not record the details of the information in the order.[137] Instead, it directed the authorities to remove "those persons, who are carrying on hawking activities or who

[133] *Sudhir Madan* v. *MCD* (2009) 16 SCC 460.
[134] *Ibid.*
[135] *Ibid.*
[136] *Ibid.*
[137] *Sudhir Madan* v. *MCD* (2009) 17 SCC 332.

are squatting on public land without any authority, even in accordance with the present day scheme in force".[138]

While the order dated 25 Aug 2005 noted that thousands of vendors had applied for licenses and were waiting for a decision on their applications, the Court on 3 Mar 2006 directed the authorities to remove unauthorised persons squatting on public places. Such a direction was blatantly unjust. It made no exemption for those who had applied for a license and then sincerely petitioned the Supreme Court asking for a timely decision on their applications.

It raises an important jurisprudential question particularly having regard to the position that street vending is considered to be protected under article 19 (1) (g) of the Constitution. The question is whether the vendors should be deemed authorised unless denied permission, or unauthorised unless permitted? It depends upon the presumption of liberty that our Constitution indeed has. All citizens are free, and the Constitution empowers the State to impose reasonable restrictions on the citizens.

As a matter of procedural safeguard, the Supreme Court should have directed the municipal authorities to decide the applications within a set timeframe failing which the applications should be deemed approved.

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[138] *Ibid.*

5.4 National Policy on Urban Street Vendors, 2004

The Central Government had framed a National Policy on Urban Street Vendors in 2004 (para 37).[139]

As per para 10 of the Policy, State Governments were to ensure that institutional arrangements, legislative frameworks and other necessary actions, achieve conformity with the National Policy for Street Vendors.[140]

Delhi

On 26 Oct 2004, the MCD Counsel informed the Supreme Court about "a high-level policy decision" and he would place on record a detailed scheme in accordance with the 2004 National Policy within a couple of weeks.[141]

On 3 Mar 2006, the Supreme Court directed the municipal authorities (NDMC and MCD) to frame a scheme as per the 2004 Policy within eight weeks.[142] The order is mindful of NDMC-framed scheme 1989 and the order directed the NDMC to modify or revise the scheme as per the 2004 Policy.[143]

The Supreme Court repeated the *Sodan Singh* overreach. The Court could only review the existing scheme or the byelaws either for procedural propriety, legality or for

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[139] *Sudhir Madan* v. *MCD* (2009) 16 SCC 626.
[140] *Maharashtra Ekta Hawkers Union* v. *Municipal Corporation, Greater Mumbai* (2009) 17 SCC 151.
[141] *Sudhir Madan, supra* note 139.
[142] *Sudhir Madan, supra* note 137.
[143] *Ibid.*

constitutionality.[144] It was none of Court's business what changes the executive or the legislature had *intended* to bring in the prevailing bye-laws. 2004 Policy was not a legislation. It was at best a guiding document for municipalities or the states to modify their byelaws. The Constitution allows the Constitutional Courts to review a law for its adherence with fundamental rights, not with policy guidelines. Central Government prescribed the 2004 Policy for the subordinate executive agencies and as per section of the Policy, the Central Government, in case of Union Territories or the respective State Governments were to ensure its implementation, not the judiciary.

Further, the Supreme Court tried to influence the content of the scheme-to-be-framed that "[t]he scheme need not be populist in its appeal, but must be practical and consistent with the rights of citizens, who have a fundamental right to use the roads, parks and other public conveniences provided by the State."[145] The Supreme Court asked the authorities: (a) to adduce the reasons for the provisions made in the scheme to have a "useful discussion and all persons interested may be able to participate with their own constructive suggestions"; and (b) the details on the manner of implementation of the scheme and the practical difficulties faced by NDMC in implementing these schemes.[146]

NDMC and MCD framed schemes as per the 2004 Policy. On 17 May 2007, the Court while rejecting the hawker's demands to have the sites re-identified, approved the schemes and directed the municipal authorities to implement the scheme. Since the NDMC

[144] An alternative view may be that the Court could have applied the doctrine of legitimate expectation. *See*, Ahmed and Khaitan, *supra* note 9.
[145] *Sudhir Madan*, *supra* note 137.
[146] *Ibid.*

area had three legislative constituencies, this Court accordingly directed the setting up of three Zonal Vending Committees. On 23 Jan 2008 the Court asked NDMC and MCD to file status reports about the implementation of the scheme.[147]

On 8 May 2008, Delhi High Court nominated Mrs Sukhvinder Kaur, a member of the Delhi Higher Judicial Services as the Presiding Officer of the Zonal Vending Committees in NDMC area.[148] The main function of the Vending Committees was to verify the vending sites and hawking zones in NDMC area.[149] Its other function was to scrutinise applications for allotment of the sites.[150]

Contents of the scheme

Order dated 6 Feb 2007 recorded that MCD proposed a scheme to the Court for grant of *Tehbazari*. It had constituted 12 zonal vending committees and 134 ward vending committees.[151] The Court in this order discussed several provisions of the scheme and suggested modifications. Not all these modifications were pro-vendor. Here is a list of modifications the Supreme Court asked for: (a) proposed Scheme allowed a transfer of vending spot but the Supreme Court asked the MCD to make non-transferable except to the legal heir in case of death or permanent insanity; (b) licenses should be cancelled in case of change or alteration in the vending structure; (c) cooking should be totally

[147] *Gainda Ram* v. *MCD* (2010) 10 SCC 715 at para 34.
[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.* at para 35.
[151] *Sudhir Madan* v. *MCD* (2007) 15 SCC 497.

prohibited on the street except cooked and packaged food may be sold.(d) instead of Rs. 45000 per annum - income criteria, an allottee must be a "needy" person.[152] The Supreme Court did not define needy person and did not agree with Rs. 45000 per annum definition either. (e) cancellation of license if the vendor is found to be vending in a no-hawking zone and weekly bazaars to be prohibited in no-hawking zones.[153] For NDMC scheme, the Supreme Court asked the NDMC to exclude the parks from vending areas and disagreed with the provision - RWAs may permit additional space for *tehbazari* in residential areas.[154] The Court directed that vending in residential areas to be permitted only if there is a shopping area clearly demarcated with space available for *tehbazari*.[155]

NDMC scheme also had a provision to regulate private taxi stands.[156] The order briefly mentioned NDMC's rationale for having a provision to deal with the private taxi stands but the Court did not elaborate on what the provision was and whether it agreed with it.[157]

The Supreme Court directed both the municipal authorities to incorporate its "observations" in the Scheme "with clarity".[158]

Maharashtra

[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.*

A year later, on 12 Feb 2007, the Supreme Court in *MEHU*[159] case brought up the duty of the state governments to ensure regulatory conformity with the National Policy for Street Vendors.[160] The State Counsel appraised the Supreme Court that the Maharashtra State Government had constituted a committee to look into compliance with the policy.[161] The Supreme Court directed the Maharashtra Government to file an affidavit explaining their position and the time-framework for compliance.[162]

In *MEHU* matter, the Court appears to be more cognizant of its constitutional limits.[163] It did not impose any deadline for ensuring conformity with the 2004 Policy, instead it asked the Government for the time-framework.[164] Additionally, the Court asked the Court to file an affidavit explaining its position.[165] Most importantly, the Court clarified that its scheme and directions would be valid only till the executive frames a scheme in conformity with the 2004 Policy.[166]

However, in the Delhi matter, the Supreme Court retained its tight controls over the street vending sector despite the 2004 Policy. It directed the municipal bodies to frame schemes and imposed deadlines on them. Not only the Supreme Court gave detailed inputs on how the scheme should look like before its framing, it directed the municipal bodies to make specific modifications to the proposed scheme when asked for approval.

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160 *Maharashtra Ekta Hawkers Union* (12 Feb 2007) *supra* note 140.
161 *Ibid.*
162 *Ibid.*
163 *Ibid.*
164 *Ibid.*
165 *Ibid.*
166 *Ibid.*

The Legitimacy of these Schemes

In 1994, New Delhi Municipal Committee became New Delhi Municipal Council. The New Delhi Municipal Council Act, 1994 replaced the Punjab Municipal Act, 1911.[167] While section 260 validated the bye-laws enacted under the previous Act,[168] a fresh scheme if were to be enacted would have to conform to the statutory procedure under section 389.[169] So, the scheme framed in pursuance of 2004 policy was not a valid scheme because it was not laid before the Parliament for approval. In 1989 when the Supreme Court directed the NDMC to frame the scheme, NDMC adopted the scheme 1989-90 by passing Resolution no. 28 under the Punjab Municipal Act, 1911.

5.5 Course correction

[167] S.416, the New Delhi Municipal Council Act, 1994: Repeal and savings.—(1) As from the date of the establishment of the Council, the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911), as applicable to New Delhi, shall cease to have effect within New Delhi.

[168] 260. Power of the Central Government to make bye-laws.—(1) The Central Government may, by notification in the Official Gazette, make bye-laws for carrying out the provisions of this Chapter: Provided that all bye-laws made by the New Delhi Municipal Committee under sub-section (3) of section 189 of the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911) and in force immediately before such commencement, shall be deemed to have been made under the provision of this section and shall continue to have the same force and effect after such commencement until it is amended, varied, rescinded or superseded under the provision of this section.

[169] 389. Regulations and bye-laws to be laid before Parliament.—The Central Government shall cause every regulation made under this Act and every bye-law made under section 388 to be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or bye-law or both Houses agree that the regulation or bye-law should not be made, the regulation or bye-law shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation or bye-law

Delhi

The Supreme Court had a eureka moment in 2010 while reflecting on the history of judicial interventions in street vending cases. Article 19 right can only be restricted by a law and whether the licensing terms, byelaws and the schemes were valid laws - the Supreme Court wondered. Finally, after 25 years, the Supreme Court thought about the legality of the regulations, but unfortunately it did not get it right either. In *Gainda Ram* (8 Oct 2010), the Supreme Court stated:[170]

> 56. Neither the said Policy nor the scheme framed by NDMC can be called law, except of course the provisions of Sections 225, 226, 330 and 369(2) of the NDMC Act mentioned hereinabove.
> 57. Section 388 of the NDMC Act empowers NDMC to frame byelaws. This power is categorised under different clauses of sub-section (1) of Section 388. Under clause (D) of the said sub-section there is a provision for making bye-laws relating to the streets. Section 388(1)(D)(5) of the NDMC Act provides as follows:
> 388. (1)(D)(5) the permission, regulation or prohibition or use or occupation of any street or place by it, itinerant vendors or hawkers or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall and the fees chargeable for such occupation;
> 58. The bye-laws have to be laid before Parliament under section 389 of the said NDMC Act. These bye-laws may have the status of subordinate or delegated legislation. Penalty has been provided for breach of bye-laws under Section 390 of the Act.
> 59. It does not appear that NDMC has made any bye-law under section 388 of the NDMC Act so as to regulate the fundamental right of the hawkers to hawk or squat on the streets of Delhi. The schemes which have been framed under the direction of this Court or the 2004 Policy which has been framed by the Government, cannot be said to

[170] *Gainda Ram* v. *MCD* (2010) 10 SCC 715.

> be framed under the said power to frame bye-laws and do not have the status of law or even subordinate legislation.

As per section 389 of the New Delhi Municipal Council Act 1994, NDMC ought to lay byelaws before the Parliament for its approval. The Court noted that NDMC had not come out with any byelaws under section 388 of the NDMC Act to regulate the fundamental right of the hawkers to hawk or squat on the streets of Delhi.[171] So, it was correct that the NDMC-scheme formulated in pursuance of 2004 Policy was not a law because it was not laid before the Parliament. However, the statutory requirement of laying the byelaws before the Parliament came in with NDMC Act 1994. New Delhi Municipal Committee before 1994 was under Punjab Municipal Act that did not have such a requirement for framing licensing conditions. The Supreme Court did not mention the Punjab Municipal Act 1911 at all. The Supreme Court also skipped the legality of MCD schemes; it did not deal with the Delhi Municipal Corporation Act, 1957.

This was perhaps the Supreme Court's first attempt to be out of the regulatory quagmire it created. Although the Court itself was to be blamed for the abdication, overreach and the unconstitutionality of NDMC-scheme, it had no other option but to blame it on the legislative vacuum and demand a structured legislation to regulate and control the fundamental right.[172]

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[172] *Id.* at para 70.

The Court could have instead directed NDMC to frame byelaws and lay those byelaws before the Parliament as per the statutory procedure. The Court should have absolutely refrained from giving any inputs on the byelaws during the framing stage to be able to undertake a judicial review at a later stage if petitioned. Those statutorily authorised byelaws would have been law.

Maharashtra

Three years later, the Supreme Court in *MEHU* case confessed its failure and capacity constraints:[173]

> The learned counsel for the parties are ad idem that the orders passed by this Court from time to time have not solved the problems of the street vendors/hawkers and the residents of the cities of Delhi and Mumbai and almost every year they have been seeking intervention of this Court by filing interlocutory applications. The experience has, however, shown that it is virtually impossible for this Court to monitor day-to-day implementation of the provisions of different enactments and the direction contained in the judgments noted hereinabove.

The *MEHU* Court acknowledged the new National Policy on Urban Street Vendors, 2009 dated 17 June 2009 and the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, 2012.[174] The Court, therefore, directed that until the bill becomes

[173] *Maharashtra Ekta Hawkers Union* v. *Municipal Coroporation, Greater Mumbai* (2014) 1 SCC 490.
[174] *Ibid.*

a law, the 2009 Policy should be implemented throughout the country and lifted the embargo on the High Courts to deal with the street vending matters.[175]

A direction to implement the 2009 Policy violated the separation of powers again - the Executive had put forward the 2009 Policy, not the legislature. No judicial direction could convert an executive policy into a law.

5.6 Cycle Rickshaw Pulling and the Wheels of Justice: A Chronology

Genesis

In *Azad Rickshaw Pullers Union*,[176] rickshaw pullers from Amritsar challenged the vires of the Punjab Cycle Rickshaws (Regulation of Licence) Act, 1976. The statement of objects and reasons of the Act was as follows: [177]

> In order to eliminate the exploitation of rickshaw pullers by the middlemen and for giving a fillip to the scheme of the State Government for arranging interest-free loans for the actual pullers to enable them to purchase their own rickshaws, it is considered necessary to regulate the issue of licences in favour of the actual drivers of cycle rickshaws, plying within the municipal areas of the State.

Section 3 of the Act provided: [178]

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[175] *Ibid.*
[176] *Azad Rickshaw Pullers' Union (Regd) Ch. Town Hall, Amritsar* v. *State of Punjab* (1980) Supp SCC 601.
[177] *Ibid.*
[178] *Ibid*, at para 3.

> 3. (1) Notwithstanding anything contained to the contrary in the Punjab Municipal Act, 1911, or any rule or order or bye-law made thereunder or and other law for the time being in force, no owner of a cycle rickshaw shall be granted any licence in respect of his cycle rickshaw nor his licence shall be renewed by any municipal authority after the commencement of this Act unless the cycle rickshaw is to be plied by such owner himself.
> (2) Every licence in respect of a cycle rickshaw granted or renewed prior to the commencement of this Act shall stand revoked, on the expiry of a period of thirty days after such commencement if it does not conform to the provisions of this Act.

The judgment delivered by Justice Krishna Iyer recorded no grounds of challenge. It merely mentioned the Act, the statement of objects and reasons and the impugned provision i.e., section 3 of the Act.[179] But why the cycle rickshaw pullers challenged the Act and the provision, and what their contentions were, the judgment did not mention at all.

Justice Krishna Iyer observed that prima facie, there was nothing wrong with the Act and the matter did not require any judicial review for the following reasons: [180]

> We might have been called upon to examine from this angle of constitutionalised humanism, the vires of the Punjab Cycle Rickshaws (Regulation of Licence) Act, 1976 (Punjab Act 41 of 1976) (the Act for short), designed to deliver the tragic tribe of rickshaw pullers, whose lot is sweat, toil, blood and tears, from the exploitative clutches of cycle rickshaw owners by a statutory ban on non-owner rickshaw drivers. But negative bans, without supportive schemes, can be a remedy aggravating the malady.

[179] *Ibid.*
[180] *Ibid.*

> For, the hungry human animal, euphemistically called rickshaw puller, loses, in the name of mercy, even the opportunity to slave and live. So, the success of such well-meant statutory schemes depends on the symbiosis of legislative embargo on exploitative working conditions and viable facilities or acceptable alternatives whereby shackles are shaken off and self-ownership substituted. Judicial engineering towards this goal is better social justice than dehumanised adjudication on the vires of legislation. Court and counsel agreed on this constructive approach and strove through several adjournments, to mould a scheme of acquisition of cycle rickshaws by licensed rickshaw pullers without financial hurdles, suretyship problems and, more than all, that heartless enemy, at the implementation level of all progressive projects best left unmentioned. Several adjournments, several formulae and several modifications resulted in reaching a hopefully workable proposal. In fairness to the State, we must mention that when the impugned legislation was enacted Government had such a supportive financial arrangement and many rickshaw pullers had been baled out of their economic bondage. Some hitch somewhere prevented several desperate rickshaw-driver getting the benefit, which drove them to this Court. Anyway, all is well that ends well and judicial activism gets its highest bonus when its order wipes some tears from some eyes. Here, the Bench and the Bar have that reward.
>
> 2. These prefatory observations explain why a pronouncement on the validity of the Act is not called for, although prima facie, we see no constitutional sin in the statute as now framed.

Justice Iyer's reasons are full of grandiloquence but low on clarity as to why the case did not deserve a judicial review. The order strategically ignored crucial information and contentions to justify what it set out to do. A non-party to the case would not understand from the judgment as to why the rickshaw pullers challenged the provision that was *intended* to favour and protect them. A subsequent judgment *Man Singh* captured the

relevant details.[181] Comparing *Azad Rickshaw Pullers* to *Man Singh*, here are the three points that Justice Krishna Iyer did not clearly record in his judgment.

One, he did not clearly define what the nature of problem was. Justice Pathak explained in detail that most cycle rickshaw pullers hired rickshaws for the day from the rickshaw owners and paid a daily rental.[182] Most pullers were seasonal migrants from rural Punjab, Jammu and Kashmir, Himachal Pradesh and Uttar Pradesh.[183] They would pull rickshaws in cities for about eight months in a year and go back during agricultural season.[184] Government alleged that the owners exploited the cycle rickshaw pullers by charging higher than fair amount.[185] So, the Government decided that the cycle rickshaw pullers should own their own rickshaw.[186] For this purpose, the State Government sought to arrange interest free loans for the pullers and the Punjab legislature enacted the Punjab Cycle Rickshaws (Regulation of Licence) Act, 1976.[187] It mandated that a rickshaw would get the license if the cycle rickshaw is to be pulled by himself. A breach of the rule was punishable with imprisonment.[188]

Two, Justice Pathak recorded the contention why the pullers found themselves in much worse situation after this Act.[189] Earlier they could hire the rickshaws from the

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[181] *Man Singh* v. *State of Punjab* (1985) 4 SCC 146.
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid*, at para 3.
[189] *Ibid.*

owners, now it was illegal to do so. They could not buy the rickshaw as they did not have the funds or any collateral or guarantor for loan.[190]

Three, although Justice Iyer did mention the interest-free loan options extended to rickshaw pullers, he did not mention at all about the failure of loan option. Justice Pathak noted that some interest-free loan options were offered to the rickshaw pullers.[191] Later the banks denied the interest-free facility to cycle rickshaw pullers because the banks were unable to recover about eighty per cent of the amount loaned to cycle rickshaw pullers".[192]

It is in this context that one should read Krishna Iyer's *Azad Rickshaw Pullers' Union* judgment and scrutinize his decision to frame a scheme instead of undertaking a judicial review.

Some main features of the scheme were:[193]

(1) A licensee puller can apply to the Municipal commissioner for a certificate of rickshaw pulling after verifying the records.

(2) A puller can then approach the Credit Guarantee Corporation of India (Small Loans) to

stand guarantee to the Punjab National Bank for a rickshaw loan.

(3) Subject to a Rs. 50 deposit with the Bank, the bank would advance the amount to the manufacturer or vendor for purchase of rickshaw.

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[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid*, at para 4.
[193] *Ibid.*

(4) Post-delivery of the vehicle, the applicant would submit the voucher of purchase and delivery to the bank and execute hypothecation in favour of the Bank.

(5) State-government framed scheme would govern the rate of interest for loans to rickshaw pullers.

(6) The loan would be paid back in15 months. In cases of delayed payment, higher rates of interest would be levied; otherwise the Government would reimburse the entire interest if all instalments are paid as per schedule.

(7) The Municipality will allow the Union to run a workshop and a service station for rickshaw repair.

(8) During agricultural season, a rickshaw puller may nominate another unemployed person to ply the rickshaws.

(9) The Municipal Commissioner would consider preparing a group life insurance scheme for the Rickshaw Pullers.

(10) The Municipal Commissioner would consider replacing cycle rickshaws by scooters in successive phases.

Extrapolating the Scheme to Delhi

There were two other writ petitions from Delhi that the Court decided on the same day passing a common order referring to the above judgment.[194] Justice Iyer once again did not mention either the prayer or the contentions made in these two writ petitions.[195] Justice Iyer merely noted the submission of the Solicitor General representing the Delhi Administration

[194] *Nanhu* v. *Delhi Administration* 1980 Supp SCC 613.
[195] *Ibid.*

that a similar scheme would be extended to Delhi.[196] Further, Justice Iyer noted that another problem raised in those two cases from Delhi was a quantitative licensing on cycle rickshaws.[197] Whether the petitioners challenged quantitative restriction as well, and if so, on what grounds – he did not discuss. Here is the excerpt from the *Nanhu* order: [198]

> 2. There is another problem which arises in these two cases and that is that the Delhi Administration has put a ceiling on the total number of cycle rickshaws permissible to be plied within its territory. Perhaps we do not know for certain this number may not accommodate all the applicants for cycle rickshaws applying (sic) licencees. We are told that apart from the applicants in this Court under Article 32 of the Constitution, there are numerous petitioners who have approached the High Court of Delhi under Article 226 of the Constitution and yet others who have filed suits in civil courts for the same relief. All that we can do is to accept the suggestion made by the learned Solicitor-General that the Delhi Administration will effectively publicize and notify applications for licencees for plying of cycle rickshaws and all those who apply will be considered on their merits including length of service as cycle rickshaw pliers. The criteria that the Delhi Administration will adopt must be reasonable and relevant; otherwise it will be open to the aggrieved parties to challenge the selection. Likewise we do not want to fetter the rights of parties aggrieved if the ceiling upon the total number of rickshaws permissible within the Delhi territory is arbitrary.

These observations are vague. It is not clear what the petitions before the High Court challenged.

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[196] *Ibid.*
[197] *Ibid.*
[198] *Ibid.*

Another subsequent case *All Delhi Cycle Rickshaw Operators' Union* v. *Municipal Corporation of Delhi*[199] confirmed that the issue in *Nanhu* v. *Delhi Administration* was indeed a challenge to validity of a similar owner-must-be-puller provision, bye-law 3(1) of the Cycle-rickshaw Bye-laws, 1960 framed under Section 481 of the Delhi Municipal Corporation Act, 1957.[200]

Round Two – Amritsar

Two years later, rickshaw pullers of Amritsar approached the Court again.[201] They were aggrieved that the Amritsar Municipal Corporation had not implemented the scheme well.[202] They sought a declaration that the Punjab Act violated Article 19(1)(g) of the Constitution to carry on their occupation or business and was therefore unconstitutional.[203] They contended that there was no such restriction on taxi drivers, cart load carriers, auto-rickshaw drivers and other public service vehicles.[204] They also cited the example of other cities, almost equally or more populated than Amritsar where pullers were legally free to hire rickshaws.

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[199] (1987) 1 SCC 371.
[200] 3. (1) No person shall keep or ply for hire a cycle-rickshaw in Delhi unless he himself is the owner thereof and holds a licence granted in that behalf by the Commissioner on payment of the fee that may, from time to time, be fixed under sub-section (2) of Section 430:
Provided that no person will be granted more than one such licence.
[201] *Man Singh* v. *State of Punjab* (1985) 4 SCC 146.
[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*

The petitioners alleged that the Municipal Administration did not implement the scheme well.[205] The Amritsar Municipal Corporation reiterated the purpose of the provision.[206] AMC believed that the rickshaw owners were exploiting the rickshaw pullers and the impugned provision would "protect poor and needy rickshaw pullers from such exploitation" and "enable rickshaw pullers to escape from the clutches of such middlemen".[207] AMC also informed that after the enactment and before the Court framed a scheme, AMC had renewed nine thousand licenses of rickshaw pullers-cum-owners.[208]

AMC contended that post-*Azad Rickshaw Puller* case, no rickshaw puller except Azad Rickshaw Pullers' Union applied to the Municipal Corporation for the certificates required for loan.[209]

Azad Rickshaw Pullers' Union deposited 1170 applications and alleged that AMC has kept the applications pending.[210] Disputing the authenticity of those applications, AMC informed the Court that it weeded out fake applications and prepared 785 certificates, invited the rickshaw pullers to collect the certificates in person but no one came.[211]

AMC claimed that Azad Rickshaw Pullers' Union sought land for a rickshaw repairing workshop, rickshaw sheds, rickshaw stands in five different parts of the city.[212]

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[205] *Ibid*, at para 9.
[206] *Ibid.*
[207] *Ibid.*
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid*, at para 10.
[212] *Ibid.*

First, AMC replied that no vacant land was available and then asked for alternative location.[213] AMC claimed that it reminded the union for alternative suggestion but received no reply.[214] The judgment did not record any rebuttal from the rickshaw pullers union.

The Court noted that rickshaw puller unions from other towns alleged rampant corruption in allocation of certificates.[215] Municipal committees granted multiple certificates to a single applicant.[216] Some interveners supported the writ petition and testified to processual difficulties in getting the certificate and loan.[217]

To sum up: there were broadly two counter claims. First by petitioners that AMC is unwilling to implement the scheme and deliberately making it difficult for the rickshaw pullers. Second by the AMC that the rickshaw owners wanted to get the law struck down to keep their hiring business running.[218]

The Court then framed two questions. One, whether the impugned Act is "an incomplete legislation", incapable of serving the intended purpose, and hence, the prohibition on hiring of rickshaws was an unreasonable restriction.[219]

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[213] *Ibid.*
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid*, at para 11.
[219] *Ibid.*

Two, whether the scheme framed by this Court in *Azad Rickshaw Pullers' Union* is incapable of proper implementation, and therefore of no legal effect.[220]

Rickshaw pullers contended that their freedom to ply rickshaws has been subjected to ownership of cycle rickshaws.[221] The constitutional validity of the impugned legislation cannot depend on an administrative scheme not framed under the same Act.[222] No provision in the impugned Act enabled rickshaw pullers to become the owners.[223] Merely by prohibiting ownership of multiple licenses, pliers would not become owners.[224] Petitioner cited *Maneka Gandhi* v. *Union of India*[225] 1978 1 SCC 248 to argue that for judicial review, the consequences or the impact of the impugned law on the fundamental right must stand the scrutiny rather than the object of the legislature or the form of action.[226] "The focal point during such examination is the fundamental right, and the duty of the Court must be to consider the quality and degree of the encroachment made by the operation of the statute on the citizen's exercise of that right."[227]

The Court observed that section 3 enables the rickshaw puller to become the owner of the vehicle.[228] The Act is a beneficial legislation "intended as a social welfare measure against the exploitation of the poor".[229]

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[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*
[225] 1978 1 SCC 248
[226] *Ibid.*
[227] *Ibid*, at para 14.
[228] *Ibid.*
[229] *Ibid.*

Regarding the impact on the owner's fundamental right to rent out rickshaws, the legislation is a reasonable restriction because, (a) the right is excluded by a social welfare legislation; and (b) rickshaw pullers are a "significant sector of the people, a sector so pressed by poverty and straitened by the economic misery of their situation that the guarantee of their full day's wages to them seems amply justified."[230]

The Court then discussed whether the impugned Act is an incomplete legislation. There was loan scheme in as early as 1970 to extend financial assistance to cycle rickshaw pullers.[231] Punjab National Bank – a public sector undertaking bank offered loans to rickshaw pullers in 1973.[232] Such loans were for certified pullers.[233] The financed rickshaw would be hypothecated with the bank and registered with the municipal authority.[234] The Credit Guarantee Corporation of India (Small Loans) Guarantee Scheme, 1971 extended the guarantee to cover the advance.[235] The Court observed that the legislature decided to give statutory recognition to the object underlying the Scheme.[236]

Whether the validity of a legislation can depend on an administrative scheme or an executive impost – the Court answered the question in affirmative for two reasons: one, both the legislation and the administrative scheme had a common object; and two, in case

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[230] *Ibid*, at para 15.
[231] *Ibid.*
[232] *Ibid.*
[233] *Ibid.*
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid*, at para 16.

of potential abrogation or modification in the scheme, the government can potentially lay down similar rules under the impugned Act.[237]

Other contentions such as comparative regulations in other public transport sectors was also rejected.[238] As per the Court, the Court-framed Scheme was a good scheme and poor implementation was a result of some avoidable circumstances.[239] The Court converted the criteria - rickshaw puller should have been a license holder within one year of passing of Punjab Act – from mandatory to preferential.[240] The Court also suggested to the AMC to fix the maximum number of licences.[241]

Round Two – Delhi

Now it was time for Delhi cycle rickshaw owners to approach the Court and once again challenge the validity of byelaw 3(1) of the Cycle-rickshaw Byelaws, 1960 framed under Section 481 of the Delhi Municipal Corporation Act, 1957.[242]

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[237] See the previous chapter for a detailed discussion. *Id.* at para 17-18.
[238] *Ibid,* at para 20.
[239] *Ibid.*
[240] *Ibid.*
[241] *Id.* at para 21.
[242] 3. (1) No person shall keep or ply for hire a cycle-rickshaw in Delhi unless he himself is the owner thereof and holds a licence granted in that behalf by the Commissioner on payment of the fee that may, from time to time, be fixed under sub-section (2) of Section 430:
Provided that no person will be granted more than one such licence.
No person shall drive a cycle-rickshaw for hire unless he holds a driving licence granted in that behalf by the Commissioner on payment of the fee that may, from time to time be fixed under sub-section (2) of Section 430.

The Court referred to *Nanhu* v. *Delhi Administration* and pointed out that *Nanhu* did not decide the issue of constitutional validity of the impugned provision.[243] Petitioner first contended that the rule was beyond the mandate of parent statute. Section 481(1)L(5) of the Act stated:[244]

> 481. (1) Subject to the provisions of this Act the Corporation may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters, namely:
> L. Bye-laws relating to miscellaneous matters
> (5) the rendering necessary of licences
> (a) for the proprietors or drivers of hackney-carriages, cycle-rickshaws, thelas and rehries kept or plying for hire or used for hawking articles;

Petitioners contended that the above provision did not mandate prohibiting hiring and renting of cycle-rickshaws.[245] There are two ways to approach the issue whether delegated legislation can create substantive rights and duties without express legislative mandate.[246] Petitioners contended that delegated could not do so unless expressly mandated.[247] The Court disagreed and took a contrary stand.[248] It held that "[a] licensing authority may impose any condition while issuing a licence which is in the interest of the general public unless it is either expressly or by necessary implication prohibited from imposing such a condition by the law which confers the power of licensing."[249] (para 5)

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[243] *All Delhi Cycle Rickshaw Operators' Union* v. *MCD* (1987) 1 SCC 371.
[244] *Id.* at para 2.
[245] *Ibid.*
[246] *Ibid.*
[247] *Ibid.*
[248] *Ibid.*
[249] *Id.* at para 5.

Regarding the constitutional validity of the provision, the Court referred to *Man Singh*, and observed that the issue was already decided, and the provision was upheld.[250]

Following the footsteps of Justice Iyer, Justice Venkatramaiah too passed similar instructions for the implementation of the scheme.[251]

5.7 Critique

This part identifies four problems with the jurisprudence on street vending and cycle rickshaw pulling judgments. One, the Court abdicated its responsibility to undertake judicial review on the touchstone of established principles. Two, the Court breached the separation of powers by issuing specific managerial and supervisory instructions in street vending and cycle rickshaw plying. Three, the justification for judicial overreach, particularly in street vending cases is inapt. Four, managerial orders being too specific and *ad hoc* were antithetical to finality and generality, and hence, also in breach of the rule of law.

Abdication

[250] *Ibid.*
[251] *Ibid.*

The Supreme Court did not do what it ought to have done. In *Azad Rickshaw Pullers Union,*[252] the issue was amply clear. The Court had to decide the constitutionality of the Punjab Cycle Rickshaws (Regulation of Licence) Act, 1976. But the Court did not. Subsequent judgments too followed the same path.

For street vending cases, the Court failed to review the *de jure* arbitrariness of the licensing requirements and the process, as well as the *de facto* abuse of discretion. Be it *Bombay Hawkers Union* or *Sodan Singh* (1989) - no order undertook a review of the terms and conditions for licensing or *Tehbazari* either on unguided discretion or constitutional grounds. Instead, the Supreme Court pushed the hawkers for non-adjudicatory settlement mechanisms.

Both in *Bombay Hawker's Union* and *Sodan Singh* (1989), vendors were the victims of unguided discretion. Both cases challenged the arbitrariness of evictions and denial of license. Delhi vendors also alleged harassment, rampant corruption and extortion by the state officials. Unfortunately, the Supreme Court addressed neither the *de jure* arbitrariness nor the *de facto* abuse of powers. The Court did not question the licensing terms either on substantive grounds or on procedural grounds. In *Bombay Hawker's Union*, the Court sidestepped the question of judicial review of the statutory provisions for unguided discretion and called the challenge devoid of any substance without undertaking any scrutiny. A conclusion without any deliberation on the validity was uncalled for.

[252] (1981) 1 SCC 366.

Although both Delhi and Bombay municipal laws had provisions for framing byelaws for street vending, the Court found them insufficient for "the enormous and complicated problem of street trading". The Court pretended that street vendors would not be exploited if detailed regulations restricted the street vendors and the State must designate the streets and earmark the places for hawking and not doing so would frustrate the civil liberties of the vendors. This was a blunder. The problem was not street vendors, the problem was arbitrariness. The Court ought to have reviewed the byelaws for procedural safeguards - reasoned order for denial of license, opportunity of being heard and time-bound decision on application for license. It did not ask the question whether there were any byelaws framed at all and what those byelaws were. After all, all municipal agencies had licensed some vendors under certain terms and conditions.

The Constitution bench in *Sodan Singh* (1989) merely dealt with the question whether street vending is a fundamental right, decided it in affirmative and then remitted the individual matters to Division Bench for adjudication. However, there is not even a single subsequent Supreme Court-reported judgment during 1990-2000 on street vending deciding an individual matter pertaining to denial of licenses or eviction.

Gainda Ram order noted that NDMC had placed a scheme (Resolution No. 28 dated 10-11-1989) before the *Lok Adalat* held at the Supreme Court on 19-11-1989.[253] *Sodan Singh* (1989) observed that the *Lok Adalat* recommended constituting a committee with two members of NDMC and a District Judge for allocation of vending spots.[254]

[253] (2010) SCC 10 715, at para 15.
[254] *Supra* note 57 at para 9.

The problem was: *Sodan Singh* judgment was inadequate. It did not decide whether and how the state action - be it denial of renewal of licenses or eviction is valid. A few years before *Sodan Singh*, the Supreme Court had already overstepped its limits in *Bombay Hawkers Union* and once again, it was inclined to repeat the mischief. This time, the Court delegated the monitoring of scheme-framing to the *Lok Adalat*.

It seems that the Court instead of deciding the individual matters, forwarded all the matters to *Lok Adalat*. *Lok Adalat* perused the NDMC-framed scheme and recommended constituting another committee for allocation of vending spots.

Indirectly, the Court frustrated all the writ petitions filed to challenge the validity of evictions and denial of licenses.

Judicial Overreach

The Supreme Court did what it ought not to have done. In *Azad Rickshaw Pullers Union*, the Court passed detailed directions framing a scheme to facilitate loan for rickshaw pullers. *Mansingh* judgment too referred, followed and modified the previous scheme.

In field of street vending, the Court violated the separation of powers to the extent that it became a sole sectoral regulator for street vending in Delhi and Mumbai - it laid

down the byelaws, constituted implementing and supervisory bodies and mediated the disputes.

Assuming the Court evaded the judicial review for allowing BMC to frame byelaws, the regulation-framing process for hawking was an executive function and involved a polycentric issue. Even if the Court genuinely felt that the byelaw making process needed a dialogue or negotiations, such a dialogue - whether in form of stakeholder consultation or participation, should have involved other stakeholders and taken place in the executive domain of policymaking. A statement - "primarily concerned to consider the merits and feasibility of the scheme" seemed like the Court was undertaking a judicial review of the proposed scheme that was not law yet. But what the Court did was not judicial review either because the Court did not comprehensively review the commissioner-proposed norms on reasonableness and general public interest. Even worse, the Court influenced the law-making process with its own inputs and made them binding.[255]

Even the alternative - the Court directing the BMC to hold consultations with all the stakeholders and frame byelaws - would not have been enough to absolve the Court unless accompanied with the judicial review of arbitrary eviction, harassment and denial of licenses. Or in case of Delhi vendors, ideally the Court's review of arbitrary evictions would have exposed the procedural deficits. A judicial review of the executive actions - arbitrary evictions and denial of licenses, as well as the statutory provision for unguided

[255] To what extent it was binding - is a separate story of ambiguity. Although the direction to BMC to frame the final scheme may give an impression that the Court-modified scheme was a mere guideline, the Court later held that court-modified scheme was binding.

discretion would have pushed the legislature and the executive to come up with constitutionally-aligned provisions and processes.

Bombay Hawker's Union laid down a poor precedent - it signalled to the potential petitioners that the Court would refrain from undertaking a judicial review of the skeletal statutory provisions and instead, it would prefer a scheme.

Unsurprisingly, the vendors in *Sodan Singh* (1989) themselves proposed a scheme to the Court. Both cases also signalled an approval to the idea of judiciary-negotiated law-making instead of an explicit judicial review to the high courts. No wonder, the Bombay High Court too constituted another committee when the BMC-constituted schemes were challenged before the High Court. In any case, the Bombay High Court could not have reviewed the scheme because it was based on the Court-modified scheme.

Legislative Void - An Inapt Justification

The Supreme Court's justification for its legislative overreach - legislative void and need for a valid law - was patently wrong. The municipal laws *had* statutory provisions for licensing the hawking activity. Whether those provisions offered enough guidance to exercise discretion or required a special procedure for framing bye-laws - these questions were for the judiciary to review. Instead of reviewing the provisions, the Court encroached the legislative and executive domain. Not to ignore, the Court never acknowledged the abdication and encroachment as deontological wrongs.

The Supreme Court's justification for its overreach was based on two premises: one, legislative vacuum - there was no law permitting street vending and that led to their exploitation; two, a constricted approach to fundamental rights - an activity is illegal unless expressly permitted by law.

If one breaks it down, the argument goes as follows:

- there was no law regulating street vending;
- an absence of a detailed law for permitting hawking and allocation of places/spaces implies that street vending is illegal;
- because street hawkers are illegal and hence, they face harassment and undue evictions.
- hence, the municipal agencies should frame detailed regulations regulating what to sell, where to sell, timings, duration and many more restrictions that did not exist earlier.

Gainda Ram (8 Oct 2010) noted the unconstitutionality perpetuated by the Supreme Court's overreach. Restrictions under article 19(6) can be imposed by the state only through a law. *Gainda Ram* (8 Oct 2010) realised both the 2004 policy as well as the schemes framed by NDMC were not law. NDMC Act provisions required framing of byelaws for regulation of street vending.[256] The byelaws had to be laid before the

[256] 388. Power to make bye-laws.—(1) Subject to the provisions of this Act, the Council may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters, namely:—
[...]

Parliament for approval. But NDMC never complied with the procedure. Hence, NDMC-framed schemes were technically not subordinate legislation, the Court observed.

This is half-truth. NDMC policy based on 2004 was not a law. It would have become law, had the Court while directing the NDMC to frame a policy, also asked it to lay the byelaws/ scheme before the Parliament for its approval. Alternatively, had the court adopted a strict judicial approach and reviewed the legal status of licensing norms, NDMC would have been more careful with the statutory compliance. Right from *Bombay Hawker's Union* and then in *Sodan Singh* (1989), the Court exhibited reluctance to undertake judicial review.

But NDMC Act 1994 was not applicable when NDMC framed the first scheme in 1989 guided by the *Sodan Singh* judgment. As per the Punjab Municipal Act, 1911 - applicable to NDMC before 1994, a committee could issue license without any bye-laws unless the State Government (Administrator, in case of Delhi) required it to do so.[257] But NDMC ought to have prescribed certain terms and conditions for the grant and revocation of such license. NDMC must have, since it had been issuing licenses for a long time. While

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D. Bye-laws relating to streets
[...]
(5) the permission, regulation or prohibition or use or occupation of any street or place by it, itinerant vendors or hawkers or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall and the fees chargeable for such occupation;

[257] 188. General bye-laws :- 4 [A committee may, and shall if so required by the State Government by bye-law, -
(a) ...
[...]
(t) render licenses necessary for hand carts employed for transport or hawking articles for sale, and for the persons using such hand-crafts, and prescribe the conditions for the grant and revocation of such licenses

Sodan Singh (1989) judgment directed the NDMC to frame a scheme, it failed to ask the prevailing terms and conditions for licensing and undertake a judicial review. The Court-directed scheme as the terms and conditions for hawking licensing could have had the status of law.

Same was the case in *Bombay Hawker's Union* case - the statutory provisions empowered the Commissioner to fix the terms and conditions for hawking licensing. But the Court did not ask BMC for its licensing terms and conditions or undertake a judicial review.

Later judgments - *Gainda Ram* (8 Oct 2010) and *MEHU* (9 Sep 2013) made "schemes-are-not-law" as one of the grounds for demanding legislative intervention. *MEHU* (9 Sep 2013) directed the municipal authorities to implement the 2009 policy as a law which was obviously not a law. Instead, it could have asked the NDMC to frame bye-laws based on 2009 policy and lay it before the Parliament to fill the void.

Breach of the Rule of Law

The Court-led policymaking characterized the absence of the rule of law. One, the regulatory regime lacked any predictability, certainty and finality. Two, the policymaking also lacked generality. Because the *ad hoc* regulatory arrangement lacked any constitutional propriety and validity, no outcome attained finality or could offer a sense of regulatory stability. From 1983 to 2013, it was a period of constant regulatory change. Substantively, the Court-evolved regulations were too specifically focused on street

vending instead of generally regulating the private use of public space. While the Supreme Court took note of alternative uses of public spaces, it never looked at the regulations governing those uses.

Let's look at the jurisprudence from finality perspective. The issue the Supreme Court dealt in 1985 in *Bombay Hawker's Union* case came back to it in 2002 in *MEHU* case - both cases were part of the same chain reaction. By then, the commissioner-proposed scheme had been modified five times - first by the Supreme Court, then by BMC-constituted Committee, then by BMC, then by the High Court-constituted Committee and then by the High Court. While dealing with the challenge in 2002 again, the Supreme Court should have raised the following questions:

- Why did the BMC modify the scheme once the BMC-appointed committee put forward a draft scheme? Could the BMC modify the scheme that was to be binding on all?
- As per the Supreme Court order dated 3 July 1985, the scheme drafted by BMC was to be binding on all, then could the scheme be contested before the High Court of Bombay?
- What were the grounds of challenge before the High Court? Were the issues framed by the High Court substantive in nature such as the total number of zones or spots identified, or were those issues procedural in nature such as non-compliance with the Court's direction to have a stakeholder participatory procedure for devising the scheme?

- Was it proper for the High Court to appoint another committee and on what grounds?
- Why did the Bombay High Court too did not adhere to the findings of the committee it appointed?

Ideally, the Supreme Court should have dealt with the legal nature of BMC-committee recommendations and whether the Supreme Court intended the committee recommendations to be binding. But the Court did not deal with this aspect. Instead, the Supreme Court modified the scheme again. What made the scheme final for now was the authority of the Supreme Court and not merit. Therefore as the Court became more and more interventionist, it barred even the high courts to entertain any street vending cases. It may be noted that barring the high courts from entertaining cases would amount to ousting the jurisdiction constitutionally vested in them.

Twenty years, two committees and six versions of the scheme - the Committee jurisprudence made a mockery of article 32 – "the heart and soul of Indian Constitution".

On 9 Dec, 2003, the Supreme Court in *MEHU* finalised the scheme or the conditions, leaving the zoning-related orders still tentative and subject to the Supreme Court-appointed Committee decisions. By 2007, the Court constituted multiple committees and kept issuing many more detailed directions to regulate street vending in Mumbai. In 2007 order, it acknowledged that the State Government wanted to implement the National Policy 2004. The Supreme Court clarified that the Government was free to do so and it

would not be subject to previous judicial schemes evolved. But within two years, there was another policy - 2009 policy. The Court on 9.09.2013 finally ordained the implementation of 2009 policy until the legislature enacted a law.

Similarly, in Delhi, the Court in 1989 first directed the NDMC and MCD to frame schemes, it appointed Thareja Committee for survey of vendors and vending spots and then appointed Chaturvedi committee (1998) to implement the allocation mechanism. By 2005, in *Sudhir Madan*, the Court faced the same issue - the local authorities wanted to implement the National Policy 2004.

While the Court became the sole regulator by 2004, it had to retreat when the Executive framed the 2004 policy and then the 2009 policy. However, these policies were also not binding. Schemes and policies were changing as per the whims and fancies of judges and bureaucrats without compliance with the procedural norms.

Further, it is pertinent to look at the generality aspect as well. While the Court in *Sodan Singh* (1989) identified many other private uses of the public spaces recognised in Indian law, it did not look into how those private uses are regulated. For example, the Court cited *Himat Lal K. Shah* v. *Commissioner of Police, Ahmedabad*[258] holding that Article 19(1)(a) and (b) of the Constitution of India protects the right to hold a public meeting on

[258] 1973 SCR 2 266.

a public street. State cannot arbitrarily deny this right. The Court cited *Manzur Hasan* v. *Mohd. Zaman*[259] that held:[260]

> In India, there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street by the public, and subject to lawful directions by the magistrates. A civil suit for a declaration lies against those who interfere with a religious procession or its appropriate observance.

The Court agreed with *Saghir Ahmad* judgment[261] that in India, the State acts as a trustee of public spaces on behalf of the public and in that capacity, it may impose reasonable restrictions to further the general public interest. The Court gave an example of limiting heavy traffic in a narrow lane - "it will be within the competence of the legislature to limit the use of the streets to vehicles which do not exceed specified size or weight".[262] Similarly, the State may even prohibit buses on streets in the interests of pedestrians.[263] But the State cannot deny entry to buses on the ground that it owns the roads or highways.[264] The Court stated that the same principle applied to hawkers as well.[265]

MEHU order 12 Feb 2007 quoted the following para from a committee report:[266]

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[259] AIR 1925 PC 36
[260] *Sodan Singh* (1989).
[261] *Saghir Ahmed* v. *State of UP* 1955 SCR 707.
[262] *Sodan Singh*, *supra* note 57.
[263] *Ibid.*
[264] *Ibid.*
[265] *Ibid.*
[266] *Supra* note 140 at para 37.

> The problem of unauthorised parking of vehicles/lorries/tempos/two-wheelers, etc. is the case of much greater nuisance for vehicular as well as pedestrian traffic as compared with the problem of unauthorised hawking. [...] Not only that, but the shopkeepers have allowed unauthorised parking for themselves and their customers near their shops and they have also extended the area of their shops in front of the shops and in some cases by keeping temporary stalls or stools for exhibiting their goods. Such was the position in practically all wards.

The above para highlights that the issue was regulation of public spaces for private use. However, the Court problematized street vending instead. This approach reflected in the court-framed schemes, comments on other proposed schemes and in its demand for regulation of street vending.

Gainda Ram order dated 8 Oct 2010 sought legislative intervention for balancing the hawkers' and squatters' or vendors' right to carry on hawking with the right of the commuters to move freely and use the roads without any impediment.[267] Clearly, the order missed all other private uses. In context of quantitative ceiling on the number of licenses to be issued, it is interesting to note an observation made in the same order:[268]

> No restriction has apparently been imposed by any law on such purchase of cars, three wheelers, scooters and cycles. There is very little scope for expanding the narrowing road spaces in the metropolitan cities and towns in India. Therefore, the problem is acute. On the one hand there is an exodus of fleeting population to metro cities and towns in search of employment and on the other hand with the ever increasing

[267] (2010) 10 SCC 715.
[268] *Ibid.*

> population of cars and other vehicles in the same cities, the roads are choked to the brim posing great hazards to the interest of general public.

Here the Court almost correctly identified the problem and still it advocated for "structured regulation and legislation ... to control and regulate the fundamental right of hawking of these vendors and hawkers."[269] While there was no limit on the total number of private vehicles a city could have, street vendors were vilified as a threat - who "... could hold the society to ransom by squatting on the centre of busy thoroughfares, thereby paralysing all civic life."[270]

Constitutional Avoidance

Looking at *Maharashtra Ekta Hawkers Union*[271] and other cases involving social rights, Ahmed and Khaitan argue that the Court should have adjudicated the social right matters under administrative law principles of consistency or legitimate expectations.[272] They claim that the Court should have avoided constitutionalizing the administrative issue and passing specific directions.[273] It led to three failures. One, the Court lost the opportunity to emphasize the administrative remedy.[274] Two, specific remedies breach the rule of

[269] *Ibid.*
[270] *Ibid.*
[271] *Supra* note 8.
[272] Ahmed and Khaitan, *Supra* note 9.
[273] *Ibid.*
[274] *Ibid.*

generality and do not offer guidance to the administrators for future.[275] Three, it breaches the separation of powers.[276]

Ahmed and Khaitan's dataset comprised of various social right cases including *MEHU* case.[277] While the present dataset is all street vending and cycle rickshaw pulling cases, the chapter findings broadly resonate with their claim as well as the three failures listed by them. With a minor caveat. Here, the problem was not constitutionalizing the administrative question. The problem was managerial judging instead of judicial review.

The issues were a mix of administrative and constitutional in nature. In the *Bombay Hawkers' Union* as well as *Sodan Singh* (1989) case, vendors had indeed challenged the legislative provisions for over-delegation and unguided discretion. Having dealt with such issues under article 19(6) earlier, the Court should have ideally reviewed the statutory provisions as well as the byelaws for unguided discretion, excessive delegation and procedural propriety for license issuance and renewal. But the Court seemed to be reluctant to review the constitutionality of the statutory provision or the vires of the byelaws. *Bombay Hawkers* judgment did not even mention if there were any byelaws at all to guide the administrators for license issuance. Further, the Court in *Sodan Singh* (1989) was confused with the nature of right to vend on streets when the municipal authority claimed its power to arbitrarily deny renewal of license. But the Court chose to deliberate on whether street vending is a fundamental right or not. It decided the question in the

[275] *Ibid.*
[276] *Ibid.*
[277] *Ibid.*

affirmative. But what happened after declaring that street vending is indeed a fundamental right and it could be reasonably restricted? The Court still did not review the provisions or the byelaws for regulating street vending. Instead, it framed schemes – passed specific rules for regulating street vending and converted the administrative issue into a polycentric issue. The problem was not constitutionalizing the administrative question but making it into a polycentric question and stepping into a managerial regulatory role.

Mehta articulates it succinctly: [278]

> There is judicial overreach when the court interferes with policy, when it overrides expressly stated legislative intent without any constitutional warrant, when it interferes in day-to-day administration. There is no overreach when the court protects fundamental rights like liberty, when it upholds equality in the face of discrimination, when it upholds privacy in the face of encroachment by the state, when it protects the dignity of the individual against prejudice. This is the primary function of the court.

5.8 Conclusion

This case study depicts a Kafkaesque reality and a fit example of how "the road to hell is paved with good intentions".

[278] Pratap Bhanu Mehta, "Justice denied" *Indian Express*, December 12, 2013; *available at*: https://indianexpress.com/article/opinion/columns/justice-denied/ (last visited on June 19, 2019).

Many of the above-mentioned cases were listed as PILs even though the petitioners - be it individual vendors, or their associations had the *locus* and they brought specific disputes for adjudication. Those were not public-spirited citizens approaching the courts for third-party rights.

Petitioners were not claiming any entitlements or seeking to enforce any social right. The prayer was challenging the arbitrary evictions and harassment, terms and conditions of the *Tehbazari* scheme or statutory provisions for licensing for allowing sweeping and unguided discretion. Additionally, the Court could have reviewed the statutory provisions in the municipal laws for article 19(1)(g). The right under article 19(1)(g) is a civil liberty protecting the citizens from excessive and unreasonable state interference. The abdication was a denial of the guarantee contained in article 32 to enforce the fundamental right.

While the legislature curtailed the freedom of renting and hiring of cycle rickshaw pullers, the executive viewed the street vendors as encroachers, the judiciary encroached the executive and legislative space by issuing specific *ad hoc* regulations. Overall, all the three organs of State come across as naively oppressive.

Bhuvania's[279] research leaves an impression that except in two cases - *Pyarelal* and *Sudhir Madan*, the Supreme Court has had a benign tone and benevolent intentions in cases involving livelihoods of urban poor during 80s and 90s. Yet, its decisions were both

[279] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency (*Cambridge University Press, India, 2017*).*

procedurally as well as consequentially against the interests of vendor. Overall, the jurisprudence also is in derogation of principles of the rule of law, the separation of powers and judicial propriety.

CHAPTER 6

CONCLUSION

The thesis began with redefining the scope and contours of article 19(6). Most constitutional commentaries do not offer any clarity on the standard of review. Styled as mere compilations of the ratios of so-called landmark judgments, commentaries may not consider other sources such as constituent assembly debates and journal papers. In that sense, chapter two though a doctrinal exercise in laying down the conceptual framework for the empirical edifice also contributed to the literature.

6.1 Summary

Chapter two reviewed the existing literature on police powers in India. Article 19 freedoms can be *ex post* restricted and not be constricted. Indian Constitution does not envisage police powers. Freedom of trade implies no activity is excluded unless reasonably prohibited by law. This seemingly simple point originally contended to debunk the use of police powers doctrine in Indian jurisprudence has wider significance. Although echoed in several early precedents, this point was often missing, contradicted or ignored in many subsequent judgments. Chapter three found the Court denying the existence of the right to publish textbooks and get them certified because the state was free to act as a consumer or a competitor. The State did not consumer those books; it prescribed those books in schools including non-government schools. The State changed the regulation from certification to monopoly. This was the real issue. Similarly, in context of street vending, chapter five noted the municipal authority contending that it was free to issue, approve or reject licenses; there was no right to a

license. The real issue was administrative arbitrariness in the issuance and the renewal of licenses; instead, the Court forwarded the matter to a constitution bench to decide whether the right to vend on the street is a fundamental right. There are other examples too. Unable to appreciate the difference between restricted approach and constricted approach, the Court denied the right to open and administer educational institutions. It held that there is no fundamental right to get the college recognized. However, the right to recognition meant the right to be considered for recognition. In that sense, the right to open and run educational institutions is indeed a fundamental right.

What it implies is that the State must be a fair regulator. It must not act arbitrary. Administrative arbitrariness ought to be reviewed. By denying judicial review on the ground that there was no right, the right was curtailed. The right was not acknowledged and recognized. It was simply trampled over. Likewise, the executive as a regulator must not raise the level of regulation, for example, from registration to licensure, without the authority of law. A statute doing so must be reasonable and in general public interest, because it does curtail the fundamental right to do business. Chapter two exposes the judicial validation of constitutionally impermissible non-statutory monopolies. A set of convoluted fallacies based on constricted approach neatly hide the blatant wrong.

Chapter four examined the cases involving a judicial review, based on conceptual framework discussed in Chapter two. Chapter two was not mere a literature review or a compilation of norms of review from constitutional law textbooks and commentaries. It sourced and extracted the norms of reviews from a comprehensive and exhaustive study of all the reported judgments on article 19(1)(g). General public

interest and reasonableness are two conditions for a restriction to be valid. General public interest has no meaning for the Court. It uses the phrase to affirm all kinds of restrictions.

A *de novo* contribution made by chapter two is the theoretical construct of "general public interest". Chapter two put forwarded several arguments. One, contrary to popular perception, general public interest is not same as public interest. It excludes sectional interests and hence, it is not compatible with the distributive conception of common good. Existing literature did not differentiate between public interest and general public interest and treated the directive principles as synonymous with public interest. So, directive principles also signified general public interest. However, per the argument put forward here, it is not obvious that a restriction enacted in pursuance of directive principles would be in general pubic interest. It must be demonstrated that a restriction does not further section interests.

Two, for redistribution in furtherance of sectional interests, restrictions can be made under other non-obstante clauses such as article 15(5), article 19(6)(ii) or Ninth Schedule that trump the general public interest qualification in article 19(6).

Three, market transactions being consensual and mutually beneficial are often conducive to common good. There may be negative externalities and information asymmetry. Unless an impugned restriction is to remedy a negative externality or information asymmetry, it cannot pass the test of general public interest.

Per Chapter four, only one judgment adhered to the test of sectional interests. It was later overruled in two subsequent judgments that expressly promoted sectional interests in the name of brotherhood and tolerance. General public interest is dead text now.

Reasonableness is the other ground under article 19(6). Chapter two makes a case for *Chintaman* standards of review. It is like the proportionality standard of review. Apart from nexus, the Court must compare the available alternatives as well as compare the extent of intrusion into the freedom with its intended benefits.

Unfortunately, the Court rarely compares the available alternatives or examines the extent of intrusion into the fundamental right as compared to benefits.

Another norm of review is the reversal of presumption of validity for drastic restrictions. The State, not the citizen should prove its rationale. The Court applied or at least acknowledged this test in several judgments. It has not been overruled. Subsequently, the Court seems to have abandoned the rule. It did not apply the rule in many deserving judgments.

In many cases, the Court "defers" review to the legislature, experts, administrative authority or committees. Chapter two argued that it is constitutionally impermissible. The Court may defer on facts or intended benefits, but it must raise questions and scrutinize the justification. Not doing so is abdication. Abdication may be express or implied. For example, the Court not undertaking necessity and balancing tests in most instances is also abdication. But in some instances, it was express. The

Court deferred in only three instances out of 109 before emergency; post-emergency, it was fifteen instances out of 152.

Apart from lower standards of review, the Court also unduly upheld restrictions by adducing logically fallacious reasoning. Chapter four identified five such recurring fallacies employed to favour the State. One, the Court upheld a law relying on the validity of an unconnected executive scheme in one case, and a judicial scheme in another case. Two, the Court defined prohibition in terms of product substitutability, segmentation and the mere possibility of survival of trade. This is incorrect. Merely because a business might switch to another product and survive does not legitimize prohibition and does not absolve the State from justification. Third, in certain cases, the Court declared the restrictions to be valid without any deliberation. Fourth, the Court rejected the challenge stating that the adverse impact is too insignificant. Although it sounds logical, but it was not. Had it been insignificantly trivial, the Court should not have admitted the matter at all; and whether it is small or not, requires a comparison with other alternatives or a balancing assessment or both, that the Court did not do. Fifth, the Court rejected challenges to certain restrictions based on traders' or citizens' prior consent and conduct, which should have no irrelevance for the legal validity of a law. Whether the petitioner lobbied for the law or complied with it for years is also immaterial. Sixth, in certain cases, the Court discounted the unguided discretion merely because it was vested in a higher authority.

Chapter five deals with another genre of cases – cases involving judicial overreach. The Court does what the legislature or the executive ought to do. Not to forget, it does not do what it ought to. Existing literature looks at judicial activism in

isolation. But chapter five remained mindful of the Court's duty to undertake judicial review and highlighted that abdication and overreach were simultaneous phenomena.

Judicial overreach was rampant, particularly for street vending sector. The Court assumed the role of a regulator of street vending in Delhi and Mumbai. Initially the Court forwarded the writ petitions seeking administrative propriety in license renewal to *Lok Adalat.* Subsequent cases were styled as public interest hearings even though individual vendors, or their associations had the locus and their cases deserved adjudication.

Vendors had merely sought relief against the arbitrary evictions and harassment. They challenged the terms and conditions of the *Tehbazari* scheme or statutory provisions for licensing for allowing sweeping and unguided discretion. Additionally, the Court could have reviewed the statutory provisions in the municipal laws for sweeping delegation. The abdication was a denial of the guarantee contained in article 32 to enforce the fundamental right.

Instead, the Court framed extensive schemes and regulations convoluting the regulatory functioning. Regulations were ad hoc and oppressive. Vendors could not ask for a judicial review because the institution that ought to review the regulations had framed them. Certainty, finality and generality were missing in these regulations. Overall, it was a breakdown of the rule of law.

6.2 Findings

The Court miserably failed at its constitutional duty to adequately protect the fundamental right inherent in article 19(1)(g). It unduly allowed the non-statutory monopolies, employed much lower standards of review and even abdicated its duty to review the restrictions in many cases. Instead, it encroached the legislative and executive domain to frame ad hoc regulations. The Court has been pro-state and pro-restrictions overall.

Court's failures, omissions as well as overreach, were not legitimate. The illegitimacy of judicial behaviour is endogenous. For example, the Court laid down the rule of reversal of presumption, never overruled it, but in last thirty-five years (1981-2015), it did not apply it. General public interest can be in a different category here because the Court ignorant of framers' intent never attempted to investigate the meaning of general public interest. The precedent on general public interest was expressly overruled. Hence, the illegitimacy in this context is rather diluted. But for other norms, the illegitimacy and the impropriety are writ large.

The magnitude of non-adherence to norms of review is quite high. The Court did not apply the necessity and balancing test to 94 per cent instances of judicial review and did not apply the rule of reversal of presumption at all after 1981 even though there were at least 20 deserving cases. The Court mindful of the high degree of scrutiny does not apply these tests consistently. The probability of a pro-citizen outcome is eight times higher if these tests are applied.

There were fewer reported judgments in seventies. Express deference escalated eighties onwards. The Court abandoned the reversal rule after 1981. Post-emergency,

there seems to be a shift in judicial behaviour in the context of article 19(1)(g) judicial review.

It is not as if the Court merely abdicated the review based on necessity and balancing tests, proved nexus between object and means, and gave pro-state judgments. Abdication is coupled with fallacious and irrelevant reasons in favour of the state.

6.3 Implications

In the context of article 19(1)(g), the thesis presented four scenarios of the curtailment of freedom to carry on business and trade: one, where the legislature encroached the judicial domain by substantially blocking judicial review through immunity clauses; two, executive overreach abusing its regulatory powers to drive out private businesses from the market; three, legislative and executive excess validated by judicial abdication and poor reasoning; and four, judicial overreach into the legislative and executive domain, particularly in the street vending sector.

Non-obstante clauses such as article 19(6)(ii), article 15(5) and Ninth Schedule blocking judicial review of monopolies, reservations laws, price controls and other economic controls is an example of legislative overreach. Unfortunately, these clauses not only trump the communal conception of "general public interest" but also the reasonableness aspect of judicial review. An economic restriction becomes substantially immune from judicial review under article 19(6).[1] Populism prevails irrespective of its impact on the rights.

[1] The standard of review would then be violation of basic structure.

Executive overreach may heuristically be of two kinds: first, with authority of law. It may be about abuse of unguided discretion or overbroad regulations. Second is without the authority of law. It is relatively easy to spot. Ironically, quite a few restrictions furthering executive monopolies managed to evade judicial scrutiny. The Court also ignored the other regulations involving administrative arbitrariness in street vending cases.

Legislative and executive excess curtailed the economic freedom prevailed for want of due intervention and adequate protection by the Court.

Judicial overreach can be of three types: interpretational, legislative and executive.[2] Chapter five discussed the undue framing of regulations and enforcement of these regulations through ad hoc Court-appointed committees. Thus, judicial overreach into the legislative and executive domain is recorded and discussed.

Existing literature may be kind towards interpretational activism. However, the thesis emphasizes on abdication, deliberate application of lower standards of review and poor reasoning. Does that qualify for interpretational activism? Labels do not matter. Irrespective of teleological justification, judicial abdication like judicial activism is both normatively as well as consequentially reprehensible. Abdication allowed the truncation of economic freedom by not duly protecting it.

[2] TCA Anant and Jaivir Singh, "An Economic Analysis of Judicial Activism" 37(43) *EPW* 4433-4439 (2002).

Note that three out of the four scenarios presented above qualify for violation of separation of powers. Third scenario, judicial abdication is not violation of separation of powers. The thesis affirms the argument put forward by Singh and Anant that the violation of separation of powers truncates liberty and imposes huge social costs on the society.[3]

6.4 Scope for Future Research

As discussed above, fewer judgments were reported in seventies on article 19(1)(g). There were many more instances of express deference afterwards and the Court abandoned the reversal rule post-1981. Necessity and balancing tests were acknowledged and applied mostly either in sixties or post-2000. How did emergency and liberalization influence the judicial behaviour? Future research could investigate the reasons.

Similarly, why does the Court not comply with the norms of review? Why is the Court so pro-state? It could be mere error of reasoning, ideological bias, incompetence, corruption or a combination of these factors. Empirical findings anchored on the standards of review present an opportunity for researchers to probe into the judicial motives.

The thesis did not venture into linking individual judges with deference or standards of review. Data set per judge is not that big to carry out a correlation study.

[3] *Supra* note 2.

Still, the quality of reasoning and the choice of standards of reasoning does offer interesting insights into the judicial behaviour.

ANNEXURE I

List of Instances of Judicial Review under article 19(6) from 1950 to 2015

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
1	*Chintaman Rao v. State of MP*	1950 SCR 759	5	Mehrchand Mahajan	Prohibition on Bidi manufacturing during agricultural season	I
2	*T B Ibrahim, Proprietor, Bus Stand, Tanjore v. Regional Transport Authority, Tanjore*	1953 SCR 290	5	Ghulam Hasan	Non-renewal of license	S
3	*Harman Singh v. Regional Transport Authority Calcutta*	1954 SCR 371	5	Mehrchand Mahajan	Competition	S
4	*Harman Singh v. Regional Transport Authority Calcutta*	1954 SCR 371	5	Mehrchand Mahajan	Cheaper fare for other cabs	S
5	*Dwarka Prasad Laxmi Narain v. State of UP*	1954 SCR 803	5	Bijan Kumar Mukherjea	Clause 4(3) - Power to grant, renew, suspend, revoke, cancel or modify any license	I
6	*Dwarka Prasad Laxmi Narain v. State of UP*	1954 SCR 803	5	Bijan Kumar Mukherjea	Clause 7 and 8 - Compulsive/ Coercive sale and Price Control	S
7	*Shri Cooverjee B. Bharucha v. The Chief Commissioner, Ajmer*	1954 SCR 873	5	Mehrchand Mahajan	License	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
8	*State of Rajasthan v. Nath Mal and Mitha Mal*	1954 SCR 982	5	Ghulam Hasan	Freezing of stock	S
9	*State of Rajasthan v. Nath Mal and Mitha Mal*	1954 SCR 982	5	Ghulam Hasan	Stock expropriation	I
10	*Harishankar Bagla v. State of Madhya Pradesh*	1955 SCR 313		Mehrchand Mahajan	Permit for transport of cotton textiles	
11	*R. M. Seshadri v. District Megistrate, Tanjore*	1955 SCR 1 686	5	Ghulam Hasan	Compulsory exhibition of an approved film	I
12	*R. M. Seshadri v. District Megistrate, Tanjore*	1955 SCR 1 686	5	Ghulam Hasan	minimum length of an approved film	I
13	*Saghir Ahmed v State of UP*	1955 SCR 1 707	5	Bijan Kumar Mukherjea	Monopoly	I
14	*Bijay Cotton Mills Ltd v. State of Ajmer*	1955 SCR 1 752	5	Bijan Kumar Mukherjea	Minimum wage	S
15	*Sakhawat Ali v State of Orissa*	1955 SCR 1 1004	6	N H Bhagwati	Election contest criteria	S
16	*Madhya Bharat Cotton Association v. Union of India*	AIR 1954 SC 634	5	Vivian Bose	Prohibition on Futures and Options trading	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
17	*Ch. Tika Ramji v. State of U.P.*	1956 SCR 393	5	N H Bhagwati	Price control, supply control and other related issues	S
18	*Pannalal Binjraj v. Union of India*	1957 SCR 233	5	N H Bhagwati	Transfer of IT cases from one officer to other	S
19	*Bashiruddin Ashraf v. State of Bihar*	1957 SCR 1032	5	Syed Jafer Imam	Majlis's control over Mutawalli's financial powers	S
20	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Absence of criteria for wage fixation	S
21	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Inclusion of proof-readers in the definition of working journalists	S
22	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Period of notice	S
23	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Retrospective applicability	S
24	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Payment of Gratuity for voluntarily resigned journalists	I
25	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Hours of Work	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
26	*Express Newspaper v. Union of India*	1959 SCR 12	5	N H Bhagwati	Recovery through land arrears	S
27	*Mohd. Hanif Quareshi v. State of Bihar*	1959 SCR 629	5	Sudhi Ranjan Das	Cattle slaughter	S
28	*Mohd. Hanif Quareshi v. State of Bihar*	1959 SCR 629	5	Sudhi Ranjan Das	Slaughter of Breeding bulls and working bullocks	I
29	*MCVS Arunchala Nadar; VPSA Nadar; VK Chinnaswamy v. State of Madras, Union of India, State of A.P, State of Madras*	1959 Supp 1 SCR 92	5	Subba Rao	Licensing (Regulation of buying and selling of goods)	S
30	*Diwan Sugar and General Mills (P) Ltd. v. Union of India*	1959 Supp 2 SCR 123	5	K N Wanchoo	Price Control	S
31	*Lord Krishna Sugar Mills, Shiva Prasad Banarsi Das v. Union of India*	1960 SCR 1 39	6	M Hidayatullah	Export of sugar and levy & collect under special circumstances. Additional duty of excise on sugar produced specified	S
32	*Lord Krishna Sugar Mills, Shiva Prasad Banarsi Das v. Union of India*	1960 SCR 1 39;	6	Subba Rao	Export of sugar and levy & collect under special circumstances. Additional duty of excise on sugar produced specified	S
33	*Lord Krishna Sugar Mills, Shiva Prasad Banarsi Das v. Union of India*	1960 SCR 1 39	6	A K Sarkar (Dissent)	Export of sugar and levy & collect under special circumstances. Additional duty of excise on sugar produced specified	I

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
34	*Narendra Kumar v. Union of India*	1960 SCR 2 375	5	K C Dasgupta	Price control, supply control and other related issues	S
35	*Narendra Kumar v. Union of India*	1960 SCR 2 375	5	K C Dasgupta	Permit for sale and purchase	I
36	*Union of India v. Bhana Mal Gulzari Mal*	1960 SCR 2 627	5	P B Gajendragadkar	Price control	S
37	*Union of India v. Bhana Mal Gulzari Mal*	1960 SCR 2 627	5	Subba Rao (concurring)	Price control	S
38	*Hamdard Dawakhana (wakf) Lal Kuan, New Delhi*	1960 SCR 2 671	5	J L Kapur	Advertisements related to certain medicines banned	S
39	*Hathising Manufacturing Company Ltd., Ahmedabad v. Union of India*	1960 SCR 3 528	5	J C Shah	Not to pay compensation for closing undertakings u/s 25FFF	S
40	*Hathising Manufacturing Company Ltd., Ahmedabad v. Union of India*	1960 SCR 3 528	5	J C Shah	Recovery through land arrears	S
41	*Madhubhai Amathalal Gandhi vs. Union of India*	1961 SCR 1 191	5	Subba Rao	Limited membership to the Stock Exchange Bombay	S
42	*State of UP v. Basti Sugar Mills Ltd.*	1961 SCR 2 330	5	J R Mudholkar	Payment of bonus to workers	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
43	*Manohar Lal v. State of Punjab*	1961 SCR 2 343	5	N R Ayyangar	Compulsory closure of shop on a close day	S
44	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Certificate/licensing Procedure for slaughter (Rule 3, Bihar Act)	I
45	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Double criteria for Slaughter of bulls, bullock and she-buffaloes at the age of 25 (Bihar; s 3) or 20 years (UP and MP)	I
46	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Waiting period of 20 days and right to file appeal vested in any person (UP Act; 10 days in MP Act)	I
47	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Burden of proof on accused	S
48	*Kishan Chand Arora v. Commissioner of Police, Calcutta*	1961 SCR 3 135	5	K N Wanchoo	Renewal of License of Cafetaria	S
49	*Kishan Chand Arora v. Commissioner of Police, Calcutta*	1961 SCR 3 135	5	Subba Rao (Dissent)	Renewal of License of Cafetaria	I
50	*Burrakur Coal Co. Ltd.v. The Union of India*	1962 SCR 1 44	5	J R Mudholkar	Temporary ban on private mining lease/license	S
51	*The Prakash Cotton Mill (P) Ltd. v. State of Bombay*	1962 SCR 1 105	5	Sarkar (concurring)	Settlement/Award in an industrial dispute made binding on a non-party	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
52	*Durgah Committee, Ajmer v. Syed Hussain Ali*	1962 SCR 1 383	5	P B Gajendragadkar	administration and management of the Durgah endowment	S
53	*M. A. Rahman v. State of Andhra Pradesh*	1962 SCR 1 694	5	K N Wanchoo	licence cancelled on non-payment of tax	S
54	*U. Unichoyi v. State of Kerala*	1962 SCR 1 946	5	P B Gajendragadkar	Minimum Wage	S
55	*Collector of Customs, Madras v. Nathella Sampathu Chetty*	1962 SCR 3 786	5	N R Ayyangar	Gold smuggling	S
56	*Mohammad Hussain Gulam Mohammad v. The State of Bombay*	1962 SCR 2 659	5	K N Wanchoo	Declaration of Market area and establishment of a Market	S
57	*Mohammad Hussain Gulam Mohammad v. The State of Bombay*	1962 SCR 2 659	5	K N Wanchoo	Addition, amendment or cancellation of any items specified in the schedule	S
58	*Mohammad Hussain Gulam Mohammad v. The State of Bombay*	1962 SCR 2 659	5	K N Wanchoo	Power to fix any fee	S
59	*Ramchand Jagadish Chand vs. Union of India*	1962 SCR 3 72	5	J C Shah	Export License	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
60	*Raghubar Dayal Jai Prakash v. The Union of India*	1962 SCR 3 547	5	N R Ayyangar	Restrictions on Forward trading	S
61	*Mannalal Jain vs. The State of Assam*	1962 SCR 3 936	5	Sarkar (Dissent)	Rejection of License	S
62	*Mohammadbhai Khudabux Chhipa v. The State of Gujarat*	1962 Supp 3 SCR 875	5	K N Wanchoo	Licensing Conditions	S
63	*Mohammadbhai Khudabux Chhipa vs. The State of Gujarat*	1962 Supp 3 SCR 875	5	K N Wanchoo	Regulation of produce not grown within the market area, but sold in the market area	S
64	*Daya v. Joint Chief Controller of Imports & Exports*	1963 SCR 2 73	5	N R Ayyangar	Canalisation of export through Export Preferential treatment to STC - Clause 6(h)	S
65	*Daya v. Joint Chief Controller of Imports & Exports*	1963 SCR 2 73	5	Subba Rao (Dissent)	Canalisation of export through Export Preferential treatment to STC - Press notes	I
66	*Basti Sugar Mills Ltd. v. Ram Ujagar*	1964 SCR 2 838	5	K C Dasgupta	Termination of employment services of workers on contract by 3rd party	S
67	*Bhikuse Yamasa Kshatriya (P) Ltd. v. Union of India*	1964 SCR 1 860	5	J C Shah	Power to apply Welfare Provisions for Deemed Workers to any factory	S
68	*Corporation of Calcutta v. Calcutta Tramways Co. Ltd.*	1964 SCR 5 25	5	K N Wanchoo	Licensure condition	I

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
69	*Khyerbari Tea Co. Ltd v. State of Assam*	1964 SCR 5 975	5	P B Gajendragadkar	Tax	S
70	*Epari Chinna Krishnamurthy v. State of Orissa*	1964 SCR 7 185	5	P B Gajendragadkar	Retrospective Sales Tax	S
71	*Jan Mohammad Noor Mohammad Bagban v State of Gujarat*	1966 SCR 1 505	5	J C Shah	Market committee to regulate sale and purchase of agricultural produce	S
72	*Barium Chemicals Limited v. Company Law Board*	1966 Supp SCR 311	5	R S Bachawat	Appointment of a committee to investigate irregularities	S
73	*Barium Chemicals Limited v. company Law Board*	1966 Supp SCR 311	5	J M Shelat	Appointment of a committee to investigate irregularities	S
74	*Lala Hari Chand Sarda v. Mizo district Council*	1967 1 SCR 1012	3	J M Shelat	License to trade in tribal area	I
75	*Rashbihari Panda etc v. State of Orissa*	1969 SCR 1 414	5	J C Shah	Monopoly given to non-govt agents	I
76	*Mohammad Faruk v. State of Madhya Pradesh*	1969 SCR 1 853	5	J C Shah	Slaughter of Bulls and bullocks	I

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
77	*Messrs Virajlal Manilal and Co. v. State of Madhya Pradesh*	1969 SCR 2 248	5	J M Shelat	Transport license	S
78	*Nazeria Motor Service v. State of Andhra Pradesh*	1969 SCR 2 576	3	A N Grover	Tax on Automobiles	S
79	*State of Maharashtra v. Himmatbhai Narbheram Rao*	1969 SCR 2 392	4	J C Shah	Regulations on business of skinning carcasses	S
80	*Chandra Bhavan Boarding and Lodging Bangalore v. The State of Mysore*	1969 SCR 3 84		K S Hegde	Unguided discretion in fixing of minimum wage	S
81	*Rama Krishna Hari Hegde and Another v. the Market Committee, Sisri*	(1971) 1 SCC 349	3	P Jagan Mohan Reddy	Shifting of agricultural market without giving adequate time	I
82	*Shaik Madar Saheb v. State of Andhra Pradesh*	(1972) 4 SCC 635	5	G K Mitter	Tax enhancement	S
83	*Ms. KrishnaMurthy and Co. v. State of Madras*	(1973) 1 SCC 75	3	H R Khanna	Retrospective Sale tax	S
84	*State of Mysore and Another v. KG Jagannath*	(1973) 1 SCC 736	2	A Alagiriswami	Permission to alter seating capacity	S
85	*M/s Daruka and co v. Union of India*	(1973) 2 SCC 617	5	A N Ray	Canalisation of Mica exports	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
86	*Narayanan Sankaran Mooss v. State of Kerala*	(1974) 1 SCC 68	3	S N Dwivedi	Consultation with State electricity Board - whether mandatory	I
87	*Pyarali K. Tejani v Mahadeo Ramchandra Dange*	(1974) 1 SCC 167	5	Krishna Iyer	Ban on addition of saccharine and cyclamate to supari is unreasonable	S
88	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	Applicability to pending works	S
89	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	Canteen to be provided for contractual labour	S
90	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	Restrooms to be provided for contractual labour	S
91	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	Other amenities	S
92	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	License for number of contractual labour to be hired	S
93	*M/s Gammon India Limited and Others v. Union of India*	(1974) 1 SCC 596	5	A N Ray	Wage Parity	S
94	*Vishnu Dayal Mahender Pal and Others v. State of UP*	(1974) 2 SCC 306	5	P K Goswami	Constitution of Market committee - Only 8 out of 23 are producers	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
95	*Vishnu Dayal Mahender Pal and Others v. State of UP*	(1974) 2 SCC 306	5	P K Goswami	Power of licensing in Market Committee	S
96	*Vishnu Dayal Mahender Pal and Others v. State of UP*	(1974) 2 SCC 306	5	P K Goswami	Unguided discretion in Grant of licensing	S
97	*Vishnu Dayal Mahender Pal and Others v. State of UP*	(1974) 2 SCC 306	5	P K Goswami	provision of storage space	S
98	*Vishnu Dayal Mahender Pal and Others v. State of UP*	(1974) 2 SCC 306	5	P K Goswami	Open auction	S
99	*Ms/ Andhra Industrial Works v. Chief Controller of Imports*	(1974) 2 SCC 348	5	R S Sarkaria	Grant of licensing	S
100	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	5	A N Ray	S.3, 4 - Licensing applicable to contractors	S
101	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	5	A N Ray	S. 2(e), (f), (g), (m), (i) - Vicarious liability on manufacturers for acts/omissions of independent contractors	S
102	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	6	A N Ray	Leave and wages to be paid to home workers	S
103	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	7	A N Ray	One-month notice	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
104	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	8	A N Ray	Maximum rejection	S
105	*Manglore Ganesh Beedi works and others v. Union of India*	(1974) 4 SCC 43	9	A N Ray	Applicability of maternity benefits Act to home workers	S
106	*M/s S. Kodar v. State of Kerala*	(1974) 4 SCC 422	5	K K Mathew	Levy of sales tax prohibiting the dealer from collecting the same from the purchaser	S
107	*Naraindas Indurkhya v. The State of Madhya Pradesh*	(1974) 4 SCC 788	5	P N Bhagwati	Nationalisation of textbooks	S
108	*The Godhra Electricity Co. Ltd. v. State of Gujarat*	(1975) 1 SCC 199	2	KK Mathew	Postponement of payment of purchase price till the determination by the arbitrator	S
109	*State of Madhya Pradesh v. Galla Tilhan Vyapar Sangh*	(1977) 1 SCC 657	2	Fazal Ali	Liability of agent in storage of agriculture produce	S
110	*PN Kaushal v. Union of India*	(1978) 3 SCC 558	3	Krishna Iyer	Grant of licensing; Number of dry days	S
111	*Excel wear v. Union of India*	(1978) 4 SCC 224	5	N L Untwalia	Shutting down of industries	I
112	*M/s. Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*	(1980) 4 SCC 1	3	P N Bhagwati	Grant of license for resin extraction	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
113	*Ranjit Singh v. Union of India*	(1980) 4 SCC 311	2	R S Pathak	Manufacturing quota	S
114	*Srinivasa enterprises v. Union of India*	(1980) 4 SCC 507	3	Krishna Iyer	Prohibition on Prize chits	S
115	*M/s New Bihar Biri Leaves Co. v. State of Bihar*	(1981) 1 SCC 537	2	R S Sarkaria	Monopoly through tender	S
116	*Sri Sri Kalamata Thakurani and Sri Sri Raghunath Jew v. Union of India*	(1981) 2 SCC 283	2	Fazal Ali	Condition to reside near the land	S
117	*M/s. Laxmi Khandsari v. State of UP*	(1981) 2 SCC 600	2	Fazal Ali	Restriction on operation of power crushers	S
118	*Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala*	(1981) 4 SCC 391	3	A P Sen	Imposition of tax on Pharmaceutical use of alcohol	S
119	*Krishan Lal Praveen Kumar v. State of Rajasthan*	(1981) 4 SCC 550	3	Chinnappa Reddy	Ban on export of wheat except with permit	S
120	*Suraj Mal Kailash Chand v. Union of India*	(1981) 4 SCC 554	2	A P Sen	Maximum limit fixation	S
121	*Bishambar Dayal Chandra Mohan v. State of UP*	(1982) 1 SCC 39	2	A P Sen	Search and seizure of wheat at check-posts	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
122	*Bishambar Dayal Chandra Mohan v. State of UP*	(1982) 1 SCC 39	2	A P Sen	Maximum limit fixation	S
123	*PP Enterprises v. Union of India*	(1982) 2 SCC 33	2	RV Misra	Storage limit	S
124	*M/s. Sukhnandan Saran Dinesh Kumar v. Union of India*	(1982) 2 SCC 150	2	D A Desai	Fixation of rate of rebate for binding material	S
125	*Malwa Bus Service (Private) Limited v. State of Punjab*	(1983) 3 SCC 237	2	E S Venkataramiah	Increase in Motor Vehicle Tax	S
126	*Delhi Cloth and General Mill Company Limited v. Union of India*	(1983) 4 SCC 166	3	D A Desai	Requirement of ten percent deposit by companies for liquid finance	S
127	*The Transport commissioner, Andhra Pradesh, Hyderabad v. Sa. Sardar Ali, bus owner, Hyderabad*	(1983) 4 SCC 245	2	O Chinnappa Reddy	Power to detain vehicles without permit	S
128	*Sreenivasa General Traders v. State of Andhra Pradesh*	(1983) 4 SCC 353	3	AP Sen	Prohibition on sale/purchase of agricultural produce and livestock inside the notified market area but outside the market proper	S
129	*Sher Singh v. Union of India*	(1984) 1 SCC 107	3	DA Desai	Preference to State Transport over Private transport	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
130	*Indermal Jain v. Union of India*	(1984) 1 SCC 361	3	DA Desai	Conditions of eligibility	S
131	*Viklad Coal Merchant, Patiala v. Union of India*	(1984) 1 SCC 619	2	DA Desai	Preference treatment to Government in allotment of wagons/ coal transport - Order	S
132	*Viklad Coal Merchant, Patiala v. Union of India*	(1984) 1 SCC 619		DA Desai	Preference treatment to Government in allotment of wagons/ coal transport - section/ Act	S
133	*Bhaskar Textiles Mills Ltd. v. Jharsuguda Municipality*	(1984) 2 SCC 25	2	RB Misra	Octroi	S
134	*Manick Chand Pal v. Union of India*	(1984) 3 SCC 65	3	V D Tulzapurkar	S. 16(7) Requirement of making a declataion of possession of Gold	S
135	*Manick Chand Pal v. Union of India*	(1984) 3 SCC 65	3	V D Tulzapurkar	Grant of permission to change the partnership of the firm	S
136	*Manick Chand Pal v. Union of India*	(1984) 3 SCC 65	3	V D Tulzapurkar	Undefined extension of time for return of seized gold	S
137	*Manick Chand Pal v. Union of India*	(1984) 3 SCC 65	3	V D Tulzapurkar	Customer verification	S
138	*Manick Chand Pal vs. Union of India*	(1984) 3 SCC 65	3	V D Tulzapurkar	Withdrawal of facility of effecting peripatetic sales of gold ornaments	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
139	*M/s KM Mohamad Abdul Khader Firm v. State of Tamilnadu*	(1984) Supp SCC 563	3	Balakrishna Eradi	Additional tax; different tax slabs for different turnover	S
140	*Lingappa Pochanna Appelwar v. State of Maharashtra*	(1985) 1 SCC 479	3	AP Sen	Restrictions on advocate to appear before Revenue Tribunal, Commission and collector in any proceedings under the Act	S
141	*Empire Industries Limited v. Union of India*	(1985) 3 SCC 314	3	Sabyasachi Mukherjee	Retrospective operation of excise duty	S
142	*Krishna Bus Service Pvt Ltd v. State of Haryana*	(1985) 3 SCC 711	2	E S Venkataramah iah	PSU entrusted with regulatory functions	I
143	*Man Singh v. State of Punjab*	(1985) 4 SCC 146	3	RS Pathak	Licensing condition of pulling the rickshaw	S
144	*Shri Chand vs. Govt. of Up, Lucknow*	(1985) 4 SCC 169	2	E S Venkataramia h	Delay in administrative proceedings	S
145	*Phool Chand Gupta vs. Regional Transport Authority*	(1985) 4 SCC 190	2	E S Venkataramia h	Delay in publication of the scheme	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
146	*Brij Bhushan v. State of Jammu and Kashmir*	(1986) 2 SCC 354	3	P N Bhagwati	Disparity in supply of oleo resin by the government to the respondent	S
147	*Sodhi Transport Co. v. State of UP*	(1986) 2 SCC 486	2	E S Venkataramiah	Transit pass requirement for passage through the state and presumption of sales tax liability	S
148	*Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat*	(1986) 3 SCC 12	5	RB Misra	Ban on slaughter of Bulls and bullocks below 16 years of age	S
149	*Municipal Corporation of the City of Ahmedabad v. Jan Mohammad Usman Bhai*	(1986) 3 SCC 20	5	RB Misra	Slaughterhouses to be shut for 7 days in a year	S
150	*Bharat Sevashram Sangh v. State of Gujarat*	(1986) 4 SCC 51	2	E S Venkataramiah	Takeover of management by government	S
151	*Bharat Sevashram Sangh v. State of Gujarat*	(1986) 4 SCC 51	2	E S Venkataramiah	SC/ST Reservation for teaching staff	S
152	*Bharat Sevashram Sangh v. State of Gujarat*	(1986) 4 SCC 51	2	E S Venkataramiah	Committees for recruitment procedure	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
153	*Bharat Sevashram Sangh v. State of Gujarat*	(1986) 4 SCC 51	2	E S Venkataramiah	Conditions imposed on Dismissal, reduction in rank or removal of certain staff	S
154	*Karan Singh v. State of MP*	(1986) Supp SCC 305	2	E S Venkataramiah	Abolition of Commission agents	S
155	*All Delhi Cycle Rickshaw Operator'sUnion v. Municipal Corporation of Delhi*	(1987) 1 SCC 371	2	E S Venkataramiah	License to ply cycle rickshaw	S
156	*M/s. JK Cotton Spinning and Weaving Mills ltd. v. Union of India*	(1987) Supp SCC 350	3	M M Dutt	Retrospective applicability of the law	S
157	*Sadiq Bakery v. State of AP*	(1987) supp SCC 440	2	Sabyasachi Mukherji	Multiple Point Taxation	S
158	*Sant Lal Bharti v. State of Punjab*	(1988) 1 SCC 366	2	Sabyasachi Mukherji	Fixation of fair rent	S
159	*Minerva Talkies v. State of Karnataka*	(1988) Supp SCC 176	2	K N Singh	Limiting number of screenings to four	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
160	*Ujagar Prints v. Union of India*	(1989) 3 SCC 488	5	M N Venkatachaliah	Retrospective applicability	S
161	*Federation of Hotels and Restaurants Association of India, Etc. v. Union of India*	(1989) 3 SCC 634	5	M N Venkatachaliah	Levy of expenditure tax	S
162	*Express Hotels Pvt Ltd v. State of Gujarat*	(1989) 3 SCC 677	5	M N Venkatachaliah	Tax on mere provision of luxury	S
163	*Express Hotels Pvt Ltd v. State of Gujarat*	(1989) 3 SCC 677	5	M N Venkatachaliah	Vague definition of the subject to be taxed	S
164	*Express Hotels Pvt Ltd v. State of Gujarat*	(1989) 3 SCC 677	5	M N Venkatachaliah	Tax on accommodation provided for free or at concessional rates as if full charges deemed to be received	S
165	*Elel Hotels and Investments Limited v. Union of India*	(1989) 3 SCC 698	5	M N Venkatachaliah	Classification based on room charge; excessive	S
166	*Mahesh Travels & Tours v. Commissioner of Police*	(1989) Supp 2 SCC 303	2	R S Pathak	Roster system	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
167	*Shri Krishna Das v. Town Area Committee, Chirgaon*	(1990) 3 SCC 645	2	K N Saikia	Weighing dues to be charged; Exemption granted to products arriving by rail or motor transport	S
168	*Mithilesh Garg v. Union of India*	(1992) 1 SCC 168	3	Kuldip Singh	Permit system in Bus transport	S
169	*Peerless General Finance and Investment Co Ltd v. Reserve Bank of India*	(1992) 2 SCC 343	2	NM Kasliwal	Deposit conditions for NBCs	S
170	*Peerless General Finance and Investment Co Ltd v. Reserve Bank of India*	(1992) 2 SCC 343	2	K Ramaswamy	Deposit conditions for NBCs	S
171	*Goodwill Paint and Chemical Industry v. Union of India*	(1992) Supp 1 SCC 16	2	V Ramaswami	Thinner included in the list of poison	S
172	*Maharaja Tourist Service v. state of Gujarat*	(1992) Supp 1 SCC 489	2	Rangnath Mishra	Levy of additional tax	S
173	*Deepak Theatre, Dhuri vs. State of Punjab*	(1992) Supp 1 SCC 684	3	K Ramaswamy	fixation of rates of admission	S
174	*State of Tamilnadu v. M/s. Sanjeetha Trading Co.*	(1993) 1 SCC 236	2	NP Singh	Ban on export of timber	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
175	*Parvej Aktar v. Union of India*	(1993) 2 SCC 221	3	S Mohan	Exclusive production of certain articles by handloom	S
176	*T. Velayudhan Achari v. Union of India*	(1993) 2 SCC 582	3	S Mohan	Limiting the no. of depositor's by individual firms or unincorporated associations	S
177	*GTN Textiles Ltd v. Assistant Directors, ROT Commissioner*	(1993) 3 SCC 438	2	Kuldip Singh	certain percentage of yarn to be packed in the form of Hanks	S
178	*Raja Video Parlour vs. State of Punjab*	(1993) 3 SCC 708	2	S C Agrawal	Licensing condition	I
179	*Sukumar Mukherjee v. State of West Bengal*	(1993) 3 SCC 723	2	S Mohan	Prohibiting private practice for government doctors	S
180	*Ganpatraj Surana v. State of Tamilnadu*	(1993) Supp 2 SCC 565	3	L M Sharma	Extinguishing debts in case of private non-agricultural loans	S
181	*Razakbhai Issakbhai Mansuri v. State of Gujarat*	(1993) 2 Supp SCC 659	3	L M Sharma	Prohibition on possession of rotten jaggery	S
182	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.4 - Discretionary power in the govt to permit a chit	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
183	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.6(3)-Ceiling on the discount	S
184	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.9(1)-Filling a declaration with the registrar	S
185	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.12- Ban on carrying on any other business	S
186	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.13- Criterion fixed for Chit business	S
187	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S16-17- conditions for conducting chits; minutes of proceedings	S
188	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.20 - non-payment of interest to the foreman on the bank deposits	S
189	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.21- commission quantum	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
190	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.25 (not specified)	S
191	*Shriram Chits and Investment Pvt Ltd v. Union of India*	(1993) Supp 4 SCC 226	3	Yogeshwar Dayal	S.48-circumstances for winding up chits	S
192	*Bakshish Singh vs. M/s. Darshan Engineering Works*	(1994) 1 SCC 9	2	P B Savant	Eligibility criteria for gratuity	S
193	*State of Kerala v Joseph Antony*	(1994) 1 SCC 301	2	P B Savant	Prohibition of fishing by mechanised vessels	S
194	*Kerala Swathanthra Malaya Thozhilall Federation v. Kerala Trawlnet Boat Operators*	(1994) 5 SCC 28	2	B P Jeevan Reddy	Restriction on bottom trawling	S
195	*M/s. Pankaj Jain Agencies v. Union of India*	(1994) 5 SCC 198	2	N Venkatachaliah	Increase in custom duty	S
196	*Systopic Laboratory Pvt Ltd. v. Dr. Prem Gupta*	(1994) Supp 1 SCC 160	2	S C Agrawal	Prohibition on fixed dose combination of cortico-steroids	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
197	*Sri Ranga Match Industries v. Union of India*	(1994) Supp 2 SCC 726	2	B P Jeevan Reddy	Retrospective effect of Excise on matchstick production	S
198	*Papanasam Labour Union v. Madura Coats Limited*	(1995) 1 SCC 501	2	G N Ray	Prohibition on lay-off without prior approval	S
199	*State of Gujarat v. Vora Syedbhai Kadarbhai*	(1995) 3 SCC 196	2	N Venkatchaliah	Requiring creditors to return the security property	S
200	*M. J. Sivani v. State of Karnataka*	(1995) 6 SCC 289	2	K Ramaswamy	Regulation of Video Games	S
201	*Reserve Bank of India v. Peerless General Finance and Investment Company Ltd*	(1996) 1 SCC 642	2	S.C. Agrawal	Regulation of Non-Banking Financing Corporations (NBFCs)	S
202	*Dr Hansraj L Chulani v. Bar Council of Maharashtra & Goa*	(1996) 3 SCC 342	3	S.B. Majumdar	Whether a doctor can enrol as an advocate	S
203	*Hashmatullah v. State of MP*	(1996) 3 SCC 391	3	B.N. Kirpal	Ban on slaughter of bulls and bullocks	I
204	*J. K. Industries v. Chief Inspector of Factories & Boilers*	(1996) 6 SCC 665	2	A.S. Anand	Occupier in the factory	S
205	*Chint Ram Ram Chand v. State of Punjab*	(1996) 9 SCC 338	2	B.N. kirpal	Shifting of market yard; old licensee to compete for spots through auction	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
206	*Jayantilal Ratanchand Shah v. Reserve Bank of India*	(1996) 9 SCC 650	5	M.K. Mukherjee	Demonetisation of bank notes	S
207	*Dalmia Cement (Bharat) Ltd. v. Union of India*	(1996) 10 SCC 104	2	K. Ramaswamy	Compulsory use of Jute bags	S
208	*Sasadhar Chakravarty v. Union of India*	(1996) 11 SCC 1	3	Sujata V. Manohar	Pension	S
209	*A. Suresh v. State of Tamilnadu*	(1997) 1 SCC 319	2	B.P. Jeevan Reddy	Tax on cable television	S
210	*Mafatlal Industries Ltd. v. Union of India*	(1997) 5 SCC 536	9	S C Sen	Withholding refund wrongly realised from taxpayers	I
211	*Labha Ram and Sons v. State of Punjab*	(1998) 5 SCC 207	3	Thomas	shifting of Market Yard;Old licensee to compete for spots through auction	I
212	*SIEL Ltd v. Union of India*	(1998) 7 SCC 26	2	Sujata V. Manohar	Control on sale and supply of molasses	S
213	*M.R.F Ltd v. Inspector Kerala Govt.*	(1998) 8 SCC 227	2	S. Saghir Ahmad	Number of leaves increased	S
214	*Union of India v. Motion Picture Association*	(1999) 6 SCC 150	3	Sujata V. Manohar	Mandatory screening of approved films	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
215	*Union of India v. Motion Picture Association*	(1999) 6 SCC 150	3	Sujata V. Manohar	Cost incurred on showing the film and one percent rental	S
216	*Union of India v. Motion Picture Association*	(1999) 6 SCC 150	3	Sujata V. Manohar	Procurement of films	S
217	*Indian Drugs & Pharmaceuticals ltd. v. Punjab Drugs Manufacturers Association*	(1999) 6 SCC 247		Santosh Hegde	Preferential treatment to PS manufacturers for procurement	S
218	*Belsund Sugar Co. Ltd v. State of Bihar*	(1999) 9 SCC 620	5	S.B.Majumdar	Tax - APM	S
219	*Bhavesh D. Parish v. Union of India*	(2000) 5 SCC 471	2	B.N. Kirpal	Prohibition on Sharafi transactions	S
220	*B.S.E. Brokers Forum, Bombay v. SEBI*	(2001) 3 SCC 482	3	N. Santosh Hedge	Validity and Quantum of regulatory/ registration fee	S
221	*Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*	(2001) 4 SCC 139	5	G.B. Pattnaik	Taking over of management	S
222	*Orissa Textile & Steel Ltd. v. State of Orissa*	(2002) 2 SCC 578	5	S.N. Variava	Closing down of business	S
223	*M. Madan Mohan Rao v. Union of India*	(2002) 6 SCC 348	2	DP Mohapatra	Monopoly over bus routes	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
224	*National Agricultural Coop Marketing Federation of India Pvt. Ltd. v. Union of India*	(2003) 5 SCC 23	2	Ruma Pal	Exemption of tax of Coop Societies	S
225	*Indian Handicraft Emporium v. Union of India*	(2003) 7 SCC 589	3	S.B. Sinha	Ban on trade of ivory products	S
226	*Om Prakash v. State of UP*	(2004) 3 SCC 402		D.M. Dharmadhikari	Prohibition on sale of eggs	S
227	*Kurali Khandsari Udyog v. Excise Commissioner & Controller of Molasses, U.P.*	(2004) 4 SCC 580	2	S.N. Variava	Taxation on Molasses	S
228	*Godawat Pan Masala Products I.P. Ltd v. Union of India*	(2004) 7 SCC 68	2	B.N. Srikrishna	Prohibition	S
229	*Association of Registration Plates v. Union of India*	(2005) 1 SCC 679	3	D.M. Dharmadhikari	Eligibility criteria for bidding for monopolistic contract for HSRP	S
230	*State of UP v. Sukhpal Singh Bal*	(2005) 7 SCC 615	2	S.H Kapadia	Excessive penalty	S
231	*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamatand others*	(2005) 8 SCC 534	7	RC Lahoti	Cattle slaughter	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
232	*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*	(2005) 8 SCC 534		AK Mathur (Dissent)	Cattle slaughter	I
234	*Reliance Energy ltd. v. Maharashtra State Road Development Corp. Ltd.*	(2007) 8 SCC 1	2	S.H. Kapadia	Non-consideration of reconciliation method for bidding	I
235	*Udai Singh Dagar v. Union of India*	(2007) 10 SCC 306	2	S.B Sinha	Recognition of non-graduates	S
236	*Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India*	(2007) 12 SCC 210	2	S.B Sinha	Professional Misconduct	I
237	*Institute of Chartered Financial Analysts of India vs. Council of the Institute of Chartered Accountants of India*	(2007) 12 SCC 210	2	Markandey Katju	Professional Misconduct	I
238	*Hinsa Virodhak Sangh v. Mirzapur Moti Kureshi Jamat*	(2008) 5 SCC 33	2	Markandey Katju	Closure of municipal slaughterhouses during Paryushan	S
239	*V.Subramanium v. Rajesh Raghuvendra Rao*	(2009) 5 SCC 608	2	Markandey Katju	Rights of an unregistered partnership firm	I
240	*Ayurvedic Enlisted Doctors' Association v. State of Maharashtra*	(2009) 16 SCC 170	2	Dr Arijit Pasayat	Registration as medical practitioners	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
241	*Southern technologies Ltd v. Joint Commissioner of Income Tax, Coimbatore*	(2010) 2 SCC 548	2	S H Kapadia	Taxes on NBFC	S
242	*Rajasthan Pradesh Vaidya Samiti, Sardarshahar v. Union of India*	(2010) 12 SCC 609	2	B S Chauhan	Registration of Vaidya	S
243	*Academy of Nutrition Improvement v. Union of India*	(2011) 8 SCC 274	2	R V Raveendran	Compulsory iodisation of salt	S
244	*Sharma Transports v. State of Maharashtra*	(2011) 8 SCC 647	2	H.L Dattu	Luggage space in vehicle	S
245	*C. Venkatachalam v. Ajitkumar C. Shah*	(2011) 9 SCC 707	3	Dr Dalveer Bhandari	Right to represent as an agent in consumer forum	S
246	*Colvin School Society v. Anil kumar Sharma*	(2012) 1 SCC 200	2	H.L.Gokhale	Change of Board	S
247	*N.K.Bajpai v. Union of India*	(2012) 4 SCC 653	2	Swatanter Kumar	Right of CESTAT member to appear before the Tribunal post-retirement	S
248	*Society for Unaided Private Schools in Rajasthan v. Union of India*	(2012) 6 SCC 1	3	S.H Kapadia and Swatantra Kumar	Appropriation of 25% seats	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
249	*Society for Unaided Private Schools in Rajasthan v. Union of India*	(2012) 6 SCC 1		K S P Radhakrishnan (*dissent*)	Appropriation of 25% seats	I
250	*Society for Unaided Private Schools in Rajasthan v. Union of India*	(2012) 6 SCC 1		K S P Radhakrishnan	Curriculum autonomy	S
251	*State of Maharashtra v. Indian Hotels and Restaurants Association*	(2013) 8 SCC 519	2	S S Nijjar	Ban on dancing in bars	I
252	*State of Maharashtra v. Indian Hotels and Restaurants Association*	(2013) 8 SCC 519	2	Altamas Kabir	Ban on dancing in bars	I
253	*Christian Medical College Vellore v. Union of India*	(2014) 2 SCC 305	3	Anil R. Dave	NEET – a common entrance exam for all medical colleges	S
254	*ABP Private ltd. v. Union of India*	(2014) 3 SCC 327	3	P. Sathasivam	Minimum Wage	S
255	*State of Karnataka v. Associated Management of English Medium Primary and Secondary Schools*	(2014) 9 SCC 485		A K Patnaik	Medium of instruction in schools	I
256	*Security Association of India v. Union of India*	(2014) 12 SCC 65	2	Pinaki Chandra Ghose	Labour welfare	S

S. No.	Case Title	Citation	Bench	Judgment written by	Issue	Outcome
257	*Surendra Mohan Arora v. HDFC Bank ltd*	(2014) 15 SCC 294	2	Pinaki Chandra Ghose	Right to be represented through a proxy counsel	S
258	*Dharam Chand v. Chairman, New Delhi Municipal Council*	(2015) 10 SCC 612	2	M. Yusuf Eqbal	Eviction of street vendor	S
259	*Hindustan Zinc limited v. Rajasthan Electricity Regulatory Commission*	(2015) 12 SCC 611	2	V. Gopala Gowda	Renewable Energy Obligations	S
260	*The Kerala Bar Hotels Associations v. State of Kerala*	2015 SCConline SC 1385	2	Vikramjit Sen	Licensing based on star classification	S
261	*Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise*	(2016) 3 SCC 643	2	Rohinton Fali Nariman	Excessive Penalty	I

S = Outcome in favour of the State; I = Outcome in favour of Individual/ Citizen.

ANNEXURE II

List of Instances involving Deference

S . No.	Case Title	Citation	Judgment written by	Issue	Para	Comments
1	*T B Ibrahim, Proprietor, Bus Stand, Tanjore v. Regional Transport Authority, Tanjore*	1953 SCR 290	Ghulam Hasan	Non-renewal of license	12	Deference to Administrative Authority
2	*Khyerbari Tea Co. Ltd v. State of Assam*	1964 5 SCR 975	P B Gajendragadkar	Flat rate of Tax	40	Deference to Legislature; assumed to be reasonable
3	*Pyarali K. Tejani v. Mahadeo Ramchandra Dange*	1974 1 SCC 167	Krishna Iyer	Ban on addition of saccharine and cyclamate to supari is unreasonable	20	Deference to medical expertise
4	*Srinivasa Enterprises v. Union of India*	1980 4 SCC 507	Krishna Iyer	Prohibition on prize chits	2, 13	Deference to expertise
5	*Sadiq Bakery v. State of AP*	1987 supp SCC 440	Sabyasachi Mukherji	Multiple point taxation	2, 5	Deference in respect of taxation

S . No.	Case Title	Citation	Judgment written by	Issue	Para	Comments
6	*Elel Hotels and Investments Limited v. Union of India*	1989 3 SCC 698	E S Venkatachaliah	Classification based on room charge; excessive	20	Deference in respect of taxation
7	*Mahesh Travels & Tours v. Commissioner of Police*	1989 Supp 2 SCC 303	R S Pathak	Roster system	11	Deference with reasoning
8	*Shri Krishna Das v. Town Area Committee, Chirgaon*	1990 3 SCC 645	K N Saikia	Weighing dues to be charged; Exemption granted to products arriving by rail or motor transport	31	Deference in respect of taxation
9	*Peerless General Finance and Investment Co. Ltd v. Reserve Bank of India*	1992 2 SCC 343	N M Kasliwal	Deposit conditions for NBCs	38	Deference in economic matters; *RK Garg* cited
10	*Peerless General Finance and Investment Co. Ltd v. Reserve Bank of India*	1992 2 SCC 343	K Ramaswamy	Deposit conditions for NBCs	69, 71	Deference in economic matters
11	*T. Velayudhan Achari v. Union of India*	1993 2 SCC 582	S Mohan	Limiting the no. of depositor's by individual firms or unincorporated associations	29	Deference in economic matters *; RK Garg* cited

S . No.	Case Title	Citation	Judgment written by	Issue	Para	Comments
12	*Shriram Chits and Investment Pvt Ltd v. Union of India*	1993 Supp 4 SCC 226	Yogeshwar Dayal	S.4 - Discretionary power in the govt to permit a chit	32	*Srinivasa Enterprises* cited
13	*Dalmia Cement (Bharat) Ltd. v. Union of India*	1996 10 SCC 104	K Ramaswamy	Compulsory use of Jute bags	33-40	Deference in economic matters*;RK Garg, Peerless General Finance* among other judgments cited
14	*SIEL Ltd. v. Union of India*	1998 7 SCC 26	Sujata V. Manohar	Control on sale and supply of molasses	29	Deference in economic matters*;Dalmia Cement* cited
15	*Bhavesh D. Parish v. Union of India*	2000 5 SCC 471	B N Kirpal	Prohibition on Sharafi transactions	23, 24, 26	Deference in economic matters*;RK Garg, Peerless General Finance, Srinivasa Enterprises* among other judgments cited
16	*Union of India v. Elphinstone Spinning and Weaving Co. Ltd.*	2001 4 SCC 139	G B Pattnaik	Taking over of management	23	Deference to legislature
17	*State of U.P. v. Sukhpal Singh Bal*	2005 7 SCC 615	S H Kapadia	excessive penalty	13, 14	Deference in economic matters*; RK Garg, Bhavesh Parish* cited
18	*Southern Technologies Ltd v. Joint Commissioner of Income Tax, Coimbatore*	2010 2 SCC 548	S H Kapadia	levy of taxes on NBFC	71, 72, 74	Deference in economic matters*; RK Garg, Bhavesh Parikh and Barclays Mercantile Business Finance Limited* cited

ANNEXURE III

List of Instances involving Necessity and Balancing Tests for ascertaining Reasonableness

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome
1	*Chintaman Rao v. State of MP*	1950 SCR 759	5	Mehrchand Mahajan	Prohibition on Bidi manufacturing during agricultural season	I
2	*Lord Krishna Sugar Mills, Shiva Prasad Banarsi Das v. Union of India*	1960 SCR 1 39	6	A K Sarkar (Dissent)	Export of sugar and levy & collect under special circumstances. Additional duty of Excise on sugar produced specified	I
3	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Certificate/licensing Procedure for slaughter (Rule 3, Bihar Act)	I
4	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Double criteria for slaughter of bulls, bullock and she-buffaloes at the age of 25 (Bihar; s 3) or 20 years (UP and MP)	I
5	*Abdul Hakim Quraishi v. State of Bihar, MP, UP*	1961 SCR 2 610	5	Sudhanshu Kumar Das	Waiting period of 20 days and right to file appeal vested in any person (UP Act; 10 days in MP Act)	I
6	*Daya v. Joint Chief Controller of Imports & Exports*	1963 SCR 2 73	5	Subba Rao (Dissent)	Canalisation of export through export preferential treatment to STC - Press notes	I

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome
7	*Mohammad Faruk v. State of Madhya Pradesh*	1969 SCR 1 853	5	J C Shah	Slaughter of bulls and bullocks	I
8	*Messrs Virajlal Manilal and Co. v. State of Madhya Pradesh*	1969 SCR 2 248	5	J M Shelat	Transport license	S
9	*M/s S. Kodar v. State of Kerala*	(1974) 4 SCC 422	5	KK Mathew	Levy of sales tax prohibiting the dealer from collecting the same from the purchaser	S
10	*Excel wear v. Union of India*	(1978) 4 SCC 224	5	N L Untwalia	Shutting down of industries	I
11	*Godawat Pan Masala Products I.P. Ltd v. Union of India*	(2004) 7 SCC 68	2	B N Srikrishna	Prohibition of tobacco/ pan masala	S
12	*State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*	(2005) 8 SCC 534	5	AK Mathur (*Dissent*)	Cattle slaughter	I
13	*Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India*	(2007) 12 SCC 210	2	S B Sinha	Professional misconduct	I

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome
14	*Institute of Chartered Financial Analysts of India v. Council of the Institute of Chartered Accountants of India*	(2007) 12 SCC 210	2	Markandey Katju	Professional misconduct	I
15	*V Subramanium v. Rajesh Raghuvendra Rao*	(2009) 5 SCC 608	2	Markandey Katju	Rights of an unregistered partnership firm	I
16	*Shree Bhagwati Steel Rolling mills v. Commissioner of Central Excise*	(2016) 3 SCC 643	2	Rohinton Fali Nariman	Excessive penalty	I

ANNEXURE IV

List of Cases acknowledging/following the Rule of Reversal of Presumption of Constitutionality of a Drastic Restriction

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome	Comments
1	*Saghir Ahmed v. State of UP*	1955 1 SCR 707/ AIR 1954 SC 728	5	Bijan Kumar Mukherjea	Monopoly	I	Applied
2	*Khyerbari Tea Co. Ltd v. State of Assam*	1964 5 SCR 975	5	P B Gajendragadkar	Tax	S	Acknowledged
3	*Mohammad Faruk v. State of Madhya Pradesh*	1969 1 SCR 853	5	J C Shah	Slaughter of Bulls and bullocks	I	Acknowledged and applied
4	*Messrs Virajlal Manilal and Co v. State of Madhya Pradesh*	1969 2 SCR 248	5	J M Shelat	Transport license	PA	Acknowledged
5	*M/s. Laxmi Khandsari v. State of UP*	(1981) 2 SCC 600	2	Fazal Ali	Restriction on operation of power crushers	S	Applied

ANNEXURE V

List of Cases dealing with Drastic Restrictions that did not apply the Rule of Reversal of Presumption of Constitutionality

S. No.	**Case Title**	**Citation**	**Bench Strength**	**Judgment written by**	**Issue**	**Outcome - pro-state or pro-individual**
1	*Madhya Bharat Cotton Association v Union of India*	AIR 1954 SC 634	5	Vivian Bose	Prohibition on Futures and Options trading	S
2	*Burrakur Coal Co. Ltd. v. Union of India*	(1962) 1 SCR 44	5	J R Mudholkar	Temporary ban on private mining lease/license	S
3	*Pyarali K. Tejani v Mahadeo Ramchandra Dange*	1974 1 SCC 167	5	Krishna Iyer	Ban on addition of saccharine and cyclamate to supari	S
4	*M/s S. Kodar v State of Kerala*	1974 4 SCC 422	5	KK Mathew	Levy of sales tax prohibiting the dealer from collecting the same from the purchaser	S
5	*Naraindas Indurkhya v. The State of Madhya Pradesh*	1974 4 SCC 788	5	PN Bhagwati	Monopoly in textbooks publishing	S
6	*Srinivasa enterprises v. Union of India*	1980 4 SCC 507	3	Krishna Iyer	Prohibition – prize chits	S
7	*Krishan Lal Praveen Kumar v. State of Rajasthan*	1981 4 SCC 550	3	Chinnappa Reddy	Ban on export of wheat except with permit	S

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome - pro-state or pro-individual
8	*Sreenivasa General Traders v. State of Andhra Pradesh*	1983 4 SCC 353	3	AP Sen	Prohibition on sale/purchase of agricultural produce and livestock inside the notified market area but outside the market proper	S
9	*Ajoy Kumar Banerjee vs. Union of India*	1984 3 SCC 127	3	Sabyasachi Mukherji	Nationalisation of insurance business	
10	*State of Tamilnadu vs. M/s. Sanjeetha Trading*	1993 1 SCC 236	2	NP Singh	Ban on export of timber	S
11	*Razakbhai Issakbhai Mansuri v. State of Gujarat*	1993 2 Supp SCC 659	3	LM Sharma	Prohibition on possession of rotten jaggery	S
12	*Shriram Chits and Investment Pvt Ltd v. Union of India and Ors.*	1993 Supp 4 SCC 226	3	Yogeshwar Dayal	S.12- Ban on carrying on any other business	S
13	*Shriram Chits and Investment Pvt Ltd v .Union of India*	1993 Supp 4 SCC 226	3	Yogeshwar Dayal	S.20- Non-payment of interest to the foreman on the bank deposits	S
14	*State of Kerala v. Joseph Antony*	1994 1 SCC 301	2	PB Savant	Prohibition of fishing by mechanised vessels	S
15	*Systopic Laborartory Pvt Ltd. Vs. Dr. Prem Gupta*	1994 Supp 1 SCC 160	2	SC Agrawal	Prohibition on fixed dose combination of cortico-steroids	S

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome - pro-state or pro-individual
16	*Reserve Bank of India v. Peerless General Finance and Investment Company Ltd*	(1996) 1 SCC 642	2	S.C. Agrawal	Regulation of Non-Banking Financing Corporations	S
17	*Hashmatullah v. State of M.P.*	(1996) 3 SCC 391	3	B.N. Kirpal	Ban on slaughter of bulls and bullocks	I
18	*Jayantilal Ratanchand Shah v. Reserve Bank of India*	(1996) 9 SCC 650	5	M.K. Mukherjee	Demonetisation of Bank Notes	S
19	*Union of India v. Motion Picture Association*	(1999) 6 SCC 150	3	Sujata V. Manohar	Expropriatory screening of approved films	S
20	*Bhavesh D. Parish v. Union of India*	(2000) 5 SCC 471	2	B.N. Kirpal	Prohibition on Sharafi transactions	S
21	*Indian Handicraft Emporium v. Union of India*	(2003) 7 SCC 589	3	S.B. Sinha	Ban on trade of ivory products	S
22	*Om Prakash v. State of U.P.*	(2004) 3 SCC 402		D.M. Dharmadhikari	Ban on sale of eggs in certain districts	S
23	*Godawat Pan Masala Products I.P. Ltd v. Union of India*	(2004) 7 SCC 68	2	B.N. Srikrishna	Ban on tobacco	S
24	*Society for Unaided Private Schools in Rajasthan v. Union of India*	(2012) 6 SCC 1	3	S.H Kapadia and Swatantra Kumar	Appropriation of 25 per cent seats	S

S. No.	Case Title	Citation	Bench Strength	Judgment written by	Issue	Outcome - pro-state or pro-individual
25	*Society for Unaided Private Schools in Rajasthan v. Union of India*	(2012) 6 SCC 1	3	Radhakrishnan (dissent)	Appropriation of 25 per cent seats	I

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