

Coelho v. State of Tamil Nadu,³⁷ making even the right to grant pardon by the Governor and the President subject to judicial review.³⁸ Even in the United States, that boasts of a living constitution, the Supreme Court has not gone to such an extent while adopting a creative interpretation of the law. It does not matter greatly whether we operate under constitutional instruments which fetter legislative action or under statutes which must yield to unambiguous legislation. We should all work to convince by reason, if we are to retain the confidence of the communities we serve. Ultimately, we are all accountable to the fundamental values underlying the Constitution. Our decisions have to fall within the contours of our Constitution.

Notwithstanding these judgments, there are certain questions that we seek answers for. This paper ends with these open questions:

1. How may we ensure that, in the making of new Indian global cities, and the enclaves/fortresses of special economic zones, the same range of human rights to the migrant and urban impoverished citizens?
2. How may we pour democratic and Constitutional content into the borrowed and imposed languages of good governance?
3. How long can the masses of impoverished Indian citizens be treated as mere objects of the development of policies that reproduce the lives of Indian citizens as receptacles of obscene political waste?
4. And finally, how may we all endeavour together for the restoration of the glory of the Indian Supreme Court, which finally converted itself, in the halcyon days of the democratization of access, as the Supreme Court for all hapless Indian citizens?

³⁷ (2007) 2 S. C. C. 1 [S. C.].

³⁸ *Epuru Sudhakar v. Andhra Pradesh*, (2006) 8 S. C. C. 161 [S. C.].

SHORT ARTICLES

PRIVILEGE, POLICE POWER AND *RES EXTRA COMMERCIIUM* – GLARING CONCEPTUAL ERRORS

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In this article, the author critiques the Indian Supreme Court's understanding of the concepts of privilege, police power and res extra commercium and suggests that these have been incorrectly applied in the context of trade in noxious substances. After tracing the evolution of these concepts through Indian case law and in other jurisdictions, he argues that the principles of privilege and police power originated in the United Kingdom and United States respectively in specific contexts. Therefore, they cannot be applied to the Indian constitutional scheme as the Constitution has other provisions to regulate the same subject matter. The author also contends that the Supreme Court has misinterpreted and misapplied the res extra commercium doctrine, and cannot use it to restrict the fundamental right to trade granted to all citizens in the Constitution.

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I. INTRODUCTION

For the last six decades, the Supreme Court has applied the concepts of privilege, police power and *res extra commercium* incorrectly. While the concept of privilege and police power is legally correct, it has no application to a Republic which has a Constitution. *Res extra commercium* has been completely misunderstood by all of us (including the present writer). This Latin expression has been held to be the foundation to declare that there is no fundamental right to trade in liquor

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or any other noxious or harmful substance. As this article later shows, this Latin maxim does not have the remotest connection with alcohol, drugs or any other harmful activity. It is indeed ironic that while the Supreme Court has repeatedly remarked that liquor and gambling are harmful activities, the major source of revenue of most States is the sale of potable alcohol or what is paradoxically called "Indian-made Foreign Liquor". Article 47 promotes total prohibition as a desired goal although history shows that prohibition, in its wake, does more harm than good. Similarly, large sums of money are generated through State-run lotteries.

The Supreme Court has been considerably influenced by morality while delineating the boundaries of trade in our Constitution. States, in their desire to have the cake and eat it too, have conveniently fallen back on terms such as police power and *res extra commercium* to justify capricious action on their part in matters such as auctioning of privilege and imposition of license fee.

In this article, I have examined three important constitutional concepts relied on by the Supreme Court of India, which form the bedrock of our constitutional jurisprudence on trade in noxious substances. They are the privilege theory, the doctrine of police power, and the *res extra commercium* principle. Of these, the privilege theory finds application mainly in cases concerning regulation of the liquor trade. The police power doctrine has been used as the foundation for laws that concern public health and safety, including zoning regulations. The *res extra commercium* principle excludes any noxious substance, as so understood by the Court, from the ambit of trade and the rights conferred by Articles 19(1)(g) and Articles 304. I have explored the historical foundation of each of these concepts and analysed their relevance, if any, in the Indian constitutional scheme. Trade in liquor has been specifically used to illustrate the pitfalls of applying each of these concepts, since this is one trade where all of them have been interchangeably used by the Supreme Court of India.

II. "PARTING WITH PRIVILEGE": A TALE OF LIQUOR REGULATIONS

Over the last 50 years, one principle that has been consistently applied in the context of trade in liquor or potable alcohol is the privilege theory. The Supreme Court has continuously observed that there is no right to trade in liquor and this is exclusively the state's privilege.

The finest discussion on the theory of privilege is contained in the judgment of the Division Bench of the Madras High Court in *C.S.S. Motor Services v. State*.¹ The Division Bench consisted of two outstanding judges: Chief Justice Rajamannar and Justice Venkatarama Iyer. Chief Justice Rajamannar and Chief Justice Chagla have often been referred to as the finest amongst the Chief Justices that India has ever had. Their judgments are remarkable for felicity of expression and outstanding

¹ A. I. R. 1953 Mad. 279 [Madras High Court].

scholarship. Justice Venkatarama Iyer later went to the Supreme Court and delivered several historical judgments including the judgment in *Madras v. Gannon Dunkerley*² and *R.M.D. Chamarbaugwala v. Union*.³ Quite ironically, his judgment in the latter case has given birth to the application of the *res extra commercium* doctrine in wholly inapplicable contexts, as is pointed out subsequently in this article.

C.S.S. Motor Services questioned the validity of several provisions of the Motor Vehicles Act, 1939. It was submitted that the public roads belong to the State and no citizen can claim as a matter of right that they are entitled to carry on business on the roads and streets and use them for earning profit. When the State permits the streets to be used for the purpose of business, it is a privilege and not a right. This submission made by Shri M.K. Nambiar was supported by numerous American authorities. This argument was countered by contending that the American law relating to business, etc. was different from the right conferred under Article 19(1)(g). The fundamental right to carry on business in the Indian Constitution was not one of the freedoms expressly protected by the American Constitution. The grant of a monopoly to a corporation that was challenged by the butchers of New Orleans in 1873 was used as an example. Here, the argument was that the butchers had the right to carry on business as part of the due process clause introduced by the Fourteenth Amendment to the United States Constitution in the year 1868. In this case, Justice Bradley delivered a dissenting judgment where he observed that the rights of life, liberty and property permit an individual citizen to be free to adopt such calling, profession or trade as may be seen as most conducive to him. Without this right, a citizen cannot be a free man.⁴ Four years later, the right to carry on business was treated as part of the due process clause by Justice Field.⁵

Justice Venkatarama Iyer pointed out that the right to carry on business came to be recognized in the United States as one of the liberties protected by the Constitution but it did not have the full status of the freedoms specifically mentioned in the United States Constitution such as freedom of speech, of person and of religion. Justice Iyer remarked that the right to carry on business was viewed somewhat in the light of an interloper or *parvenu*⁶ among them. He went on to add that the right to carry on business did not occupy an exalted position like the other freedoms. On the other hand, under the Indian Constitution, the

² A. I. R. 1958 S. C. 560 [S. C.].

³ A. I. R. 1957 S. C. 628 [S. C.].

⁴ Slaughter-House Cases, (1873) 27 L. Ed. 394, 421, 423.

⁵ *Munn v. Illinois*, (1877) 24 L. Ed. 77, 90. Similar views were expressed in *Butchers Union v. Crescent City Co.*, (1880) 28 L. Ed. 585, 591, *Powell v. Pennsylvania* (1888) 32 L. Ed. 253, 256, *Allgeyer v. Louisiana* (1897) 41 L. Ed 832.

⁶ The Oxford Dictionary defines *parvenu* as "a person of obscure origin who has gained wealth, influence, or celebrity". When used as an adjective, it means "having recently achieved, or associated with someone who has recently achieved, wealth, influence, or celebrity despite obscure origins".

right to carry on business was a freedom expressly protected under Article 19(1)(g) and it was placed on the same footing as the freedom of speech. Therefore, the decisions of the American Courts on the right to carry on business and the observations therein, had to be used with reserve.

The Madras High Court then discussed the origin of franchise or privilege and remarked that it had an English origin. Franchise was a grant made by the sovereign in exercise of the royal prerogative. Indeed, Blackstone defined “franchise” as “Royal Privilege or branch of the King’s prerogative subsisting in the hands of a subject”. The conception of franchise was, therefore, bound with the prerogative of the Crown and, by its very nature, could have no place in America or in India. Justice Iyer then pointed out that franchise continued to live on in America with an altered complexion. Granting exclusive right to a particular company by a legislature was treated as a franchise. With the passage of time, the view that monopoly rights conferred by statutes might be treated as being in the nature of franchises became a part of American jurisprudence.

Justice Story had, however, expressed a dissenting view in *Charles River Bridge v. The Warren Bridge*,⁷ and observed that the American legislature never had any royal prerogative. This prerogative was based on the divine rights of the king and on a sense of their exalted dignity and pre-eminence over all subjects. It was also founded upon the notion that they were entitled to special favours for the protection of their rights and office. This view was followed by the Madras High Court and it was held that Article 19(1)(g) made no distinction between common law trades which could be carried on by all persons and prerogative trades which could be carried on only under state grants.

This view taken by the Madras High Court was approved by the Supreme Court. Justice B.K. Mukherjee complimented the analysis made by Justice Iyer in the 1954 decision by a five-judge bench in *Saghir Ahmad v. Uttar Pradesh*,⁸ and till date no one has taken a contrary view.

III. PRIVILEGE AND POLICE POWER

In *West Bengal v. Subodh Gopal Bose*,⁹ Chief Justice Patanjali Sastri referred to some of the observations made in *A.K. Gopalan v. Madras*.¹⁰ In the latter case, Justice Das had observed that the content of due process of law had to be narrowed down by the enunciation and application of the new doctrine of “police power” as an antidote or palliative to the former. Justice Sastri in the *Bose* case raised a question whether the antidote doctrine of police power could have any existence

⁷ (1837) 9 L. Ed. 773.

⁸ A. I. R. 1954 S. C. 728 [S. C.].

⁹ A. I. R. 1954 S. C. 92 [S. C.].

¹⁰ A. I. R. 1950 S. C. 27 [S. C.].

when the Constitution had rejected the doctrine of due process of law. After due process of law was brought into our Constitution by *Maneka Gandhi v. Union of India*,¹¹ could police power automatically follow? To answer this question, it is necessary to study the origin of police power in the United States.

A. Police Power in the United States

In the United States, the doctrine of police power is recognized as a distinct and specific legislative power and is taken as the basis for exercising social control and regulation of private rights and freedom for the common good.¹² A term visibly absent in the United States Constitution, it was coined by Chief Justice John Marshall in *Brown v. Maryland*.¹³ This was certainly not so much of a break from the past, as the power of the States had been visualised along similar lines even before the United States Constitution came into force. Santiago Legarre has, in a recent article, traced the historical foundations of this doctrine.¹⁴ According to him, the interchangeable use of the words “police” and “policy-making” in early common law played a significant role in the later coinage of the expression “police power”. One strong reason for this use was the perception of the King as a *pater familias*, one who had the additional responsibility of taking care of the community and spearheading the pursuit of the common good.¹⁵ This wider conception of “police”, which included the preservation of public morals, continued till the nineteenth century. It still continues in American constitutional jurisprudence through the police power doctrine but no longer finds any place in other common law countries.

From the earliest decision in *Brown v. Maryland*,¹⁶ it is evident that the police power doctrine was considered important in preserving the power of the States in the federal structure of the United States.¹⁷ Congress could not rely on police power to justify any enactment since that would shift the balance of power to the

¹¹ A. I. R. 1978 S. C. 597 [S. C.].

¹² As held by the United States Supreme Court in *Barnes v. Glen Theatre*, 501 U. S. 560, 569 (1991), the traditional police power of the States is the basis for legislative authority to provide for “public health, safety, and morals”.

¹³ 25 U.S. (12 Wheat.) 419, 442-43 (1827).

¹⁴ Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007).

¹⁵ M. D. Dubber, ‘The Power to Govern Men and Things’: Patriarchal Origins of the Police Power in American Law, 52 BUFFALO L. REV. 1277 (2004).

¹⁶ 25 U. S. (12 Wheat.) 419, 442-43 (1827). In the words of Chief Justice Marshall, “[T]he power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States (emphasis supplied).”

¹⁷ Legarre cites the Federalist Papers as indicative of this intent. Alexander Hamilton in The Federalist No. 32 observed that since the Federal Convention aimed only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States.

Union and away from the States.¹⁸ The pivotal role played by this doctrine also necessitated prescription of its exact ambit, an area where there is absolutely no clarity or certainty.¹⁹

One view has been that police power is broad enough to embrace within its ambit familiar forms of the exercise of State sovereignty such as eminent domain, taxation, and administration of justice.²⁰ In contrast, some decisions of the United States Supreme Court have confined police power to the realm of public health, safety and morality.²¹ Strikingly, in *Gonzales v. Raich*,²² a majority of the Court held that the Federal Controlled Substances Act, which prevents ill people from possessing, obtaining, or manufacturing marijuana for their personal medical use, did not infringe the reserved police powers of California. The decision in *Lawrence v. Texas*²³ has been perceived as sounding the death knell for police power in the realm of enforcement of public morality. Thus, the traditional domain of this doctrine, even taking a narrow view of its ambit, has not been left unchallenged.

B. Relevance of Police Power in India

As rightly reasoned in *West Bengal v. Subodh Gopal Bose*,²⁴ in marked contrast with the United States, the legislative powers have been specifically enumerated and distributed in India. There is specific distribution of legislative power among the Union and State Legislatures through the three lists in the Seventh Schedule. Therefore, the power of eminent domain, which is assumed to be inherent in the sovereignty of the State by Continental and American jurists, though not expressly

¹⁸ United States v. Lopez, 514 U. S. 549, 566 (1995). In the words of the Supreme Court, “[t]he Constitution ... withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”

¹⁹ For the controversy surrounding this doctrine, see, Christopher Supino, *The Police Power And ‘Public Use’: Balancing The Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711 (2008).

²⁰ *Thurlow v. Massachusetts*, 46 U. S. (5 How.) 504, 583 (1847), *Mayor of New York v. Miln*, 36 U. S. (11 Pet.) 102, 103 (1837). See, D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

²¹ *Mugler v. Kansas*, 123 U. S. 623 (1887), *Butchers’ Union v. Crescent Live-Stock Co.*, 111 U. S. 746 (1884), *New Orleans Gas Light Co. v. La. Light Co.*, 115 U. S. 650 (1885). See, Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065 (2005).

²² 545 U. S. 1 (2005). Sandra Day O’Connor, J. dissented, taking the view that “[t]he States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”

²³ 539 U. S. 558 (2003). Here, the U. S. Supreme Court invalidated a Texas statute that criminalised homosexual sodomy and applied it to consenting adults acting in private.

²⁴ A. I. R. 1954 S. C. 92 [S. C.].

provided for in the American Constitution, is made the subject of an express grant in our Constitution.²⁵ The right to property is subject to limitations mentioned in Article 31. In the light of such specific articulation of the right and the permissible restrictions, Chief Justice Sastri concluded that the doctrine of police power was contrary to our Constitutional scheme. It was incorrect to interpret Article 31(1) as conferring police power on the legislature in relation to the right of property. He affirmed the observations of Justice B.K. Mukherjee in *Chiranjit Lal Chowdhuri v. Union*,²⁶ that “the importing of expressions like “police power”, which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult”.²⁷

Our Constitution guarantees the right to carry on business. Reasonable restrictions can be imposed to curtail this right on the grounds mentioned under Article 19(6). When the right and its extent are clearly spelt out in the Constitution, there is no necessity to rely on a vague and unwritten doctrine of police power to define the scope of this right.

C. Police Power Haunts Us till Date

Despite the decisive rejection of the theory of police power in *West Bengal v. Subodh Gopal Bose*,²⁸ this power has been relied on in a number of cases.

The judgment in *Cooverjee Bharucha v. Excise Commissioner, Ajmer*,²⁹ delivered on January 13, 1954,³⁰ dealt with auction of license to run a liquor shop.³¹ Chief Justice Mahajan adopted the police power theory to justify regulation of trade in liquor. Reference was made to a decision of the United States Supreme Court in *Crowley v. Christensen*.³² This judgment had pointed out the harmful effect of alcohol and held that “the police power of State” was broad enough to regulate the

²⁵ *West Bengal v. Subodh Gopal Bose*, A. I. R. 1954 S. C. 92 [S. C.].

²⁶ A. I. R. 1951 S. C. 41 [S. C.].

²⁷ *Chiranjit Lal Chowdhuri v. Union*, A. I. R. 1951 S. C. 41 [S. C.].

²⁸ A. I. R. 1954 S. C. 92 [S. C.].

²⁹ A. I. R. 1954 S. C. 220 [S. C.].

³⁰ This judgment was delivered after the decision in *Subodh Gopal v. West Bengal*, A. I. R. 1954 S. C. 92 [S. C.], which was rendered on 17.12.1953. However, it does not refer to the latter case.

³¹ The Petitioner had participated in the auction. The Fifth Respondent, who was the highest bidder, had to pay half the bid amount within a particular date, and he failed to do. Despite this, upon late payment, the license was confirmed in his name. The Petitioner challenged this confirmation as being in violation of his right under Article 19(1)(g). Instead of merely asking the Petitioner to approach the High Court to work out his remedy under Article 226, the Supreme Court went on to make certain observations on the applicability of the police power doctrine.

³² (1890) 34 L. Ed. 620.

business of liquor and even suppress it entirely. The Court had also held that there was no inherent right in the citizen to sell intoxicating liquors. The Indian Supreme Court fell into error by importing the ambiguous police power doctrine, when the conclusion arrived at by the United States Supreme Court in *Crowley v. Christensen*³³ could have been arrived at using the specific provisions of our Constitution.

It is submitted that the concept of prohibition on the sale of alcohol can be justified under Article 19(6) read with Article 47. The complete ban on the sale of ready-made garments, to give an example, could be challenged under Articles 14 and 19(1)(g). It could be a strong argument here that total prohibition of sale of garments would amount to an unreasonable restriction. However, in the case of liquor, the State can defend a total ban by relying on Article 47 which makes total prohibition a social goal. Despite this, the Supreme Court in *Cooverjee Bharucha v. Excise Commissioner, Ajmer*,³⁴ wrongly resorted to police power. This wrongful application of police power has continued till date. The police power doctrine has been repeatedly followed in a number of cases.³⁵

Unfortunately, the judiciary has not examined the relevance of police power under our constitutional scheme. In *P.N. Kaushal v. Union*,³⁶ Justice Krishna Iyer held that “any Government, with workers’ weal and their families’ survival at heart, would use its “police power” under Article 19(6) read with Section 59(f)(v) of the Act to forbid alcohol sales on pay days”. This observation was watered down in a later paragraph where the learned Judge conceded that police power, as developed in the United States, was inapplicable in terms to Indian Constitutional law. However, he held that there was a lot in common between

this doctrine and the power of regulation contained in Article 19(6). This supposed commonality was sought to be derived from the judicial frown on trade in noxious substances in both jurisdictions. It is submitted that this approach was wrong since the conceptual basis for these doctrines are quite different. While police power doctrine evolved in the United States to vest the residuary power of maintenance of peace, law and order in the States, Article 19(6) vested the power to impose reasonable restrictions on the right to carry on trade in the Centre as well as the States.³⁷ The very exercise of this power under Article 19(6) presupposed the existence of the right in the citizen to carry on trade in the regulated field, while the exercise of police power presupposed no such right. This distinction would in turn justify the observation in *Crowley v. Christensen*³⁸ that there was no inherent right to carry on trade in liquor, as well as underscore the inapplicability of this observation to the Indian Constitutional scheme.

Subsequent cases have blindly accepted this doctrine without deliberating whether the theory of police power would be necessary in the light of Articles 19(2) to 19(6) in India. From these provisions, it is evident that there is no absolute right even for the press. Every right is subject to reasonable restrictions and any regulation by the State does not need the assistance of police power to ban trade in liquor or create monopoly in favour of the State. This view has been accepted in *Kameshwar Prasad v. State of Bihar*.³⁹ Speaking for a five-judge bench, Justice Ayyangar held that American cases which subjected the freedom of speech to the operation of an imprecise police power were inapplicable when it came to resolving the questions arising under Articles 19(1)(a) and (b) of our Constitution because the grounds on which limitations might be placed on these rights were set out with definiteness and precision.

IV. LIQUOR AND FUNDAMENTAL RIGHTS

In *Nashirwar v. Madhya Pradesh*,⁴⁰ the Supreme Court observed:

³⁷ As correctly reasoned by Oza, J. in his concurring judgment in *Synthetics & Chemicals Ltd. v. Uttar Pradesh*, A. I. R. 1990 S.C. 1927 [S. C.],

the scheme of our Constitution is that there are no residuary powers which vest in the State and the scheme of our Constitution also reveals that in case of any conflicts it is the centre which prevails and not the State and therefore trying to apply the doctrine of police powers which has been conceived of in the American decisions with the Government of a State in the United States and to apply it to a State under Indian Constitution, will only mean to do violence to the scheme of our Constitution.

³⁸ (1890) 34 L. Ed. 620.

³⁹ A. I. R. 1962 S. C. 1166 [S. C.].

⁴⁰ A. I. R. 1975 S. C. 360 [S. C.].

³³ *Crowley v. Christensen*, (1890) 34 L. Ed. 620.

³⁴ A. I. R. 1954 S. C. 220 [S. C.].

³⁵ *Khoday Distilleries v. Karnataka*, (1995) 1 S. C. C 574 [S. C.], *Punjab v. Devans Modern Breweries*, (2004) 11 S. C. C 26 [S. C.], *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*, (2004) 12 S. C. C 809 [S. C.] (It was erroneously stated in this case that the police power of the State was founded on the theory that when there was conflict between the rights of individual and the interest of the society, the interest of the society must prevail. Based on such observation, police power was considered as authorising restrictions on freedom of religion), *Jilubhai Nanbhai Khachar v. Gujarat*, (1995) 1 S. C. C 596 [S. C.] (The police power doctrine was used to authorise acquisition of property), *Friends Colony Dev. Comm. v. Orissa*, (2004) 8 S. C. C 733 [S. C.] (“power to plan development of city and to regulate the building activity therein flows from the police power of the state”).

³⁶ A. I. R. 1978 S. C. 1457 [S. C.]. Here the challenge was to the constitutionality of Section 59(f)(v) of the Punjab Excise Act and Rule 37 of the Liquor Licence (Second Amendment) Rules framed under this section. The impugned rule provided for a total ban on the sale of liquor for two days of the week.

There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor.

It is submitted that all the three reasons are untenable. It has already been explained that the theory of police power has no place under our Constitution. The State can trace its legislative power to enforce public morality to Articles 245 and 246 and the three Lists in Schedule VII. For instance, the entire trade of liquor can be controlled in exercise of the powers contained in Entry 8 of List II. Similarly, betting and gambling can be regulated in exercise of powers contained in Entry 34 of List II. The second reason is also not correct. After the first amendment, the State has the right to create monopoly in any business. Till recently, there was absolute prohibition on the right of any citizen to set up a television channel, an airline or carry on an insurance business. The State monopoly automatically implies absolute prohibition on carrying on of a particular activity by a citizen or any other person. Article 47 will be an additional ground, and a very strong one, to justify total prohibition but Article 47 cannot be the reason for holding that there is no fundamental right to carry on trade or to do business in liquor. The third reason is also incorrect. There is nothing in the history of excise law to support the argument that there was exclusive right or privilege to manufacture or sale of liquor. Prohibition was first introduced in the Province of Madras by late C. Rajagopalachari in 1937. It was part of the legislative power of the State to ban any particular activity that was injurious to health. Like alcohol, betting and gambling were also prohibited but this was not on the basis of any privilege or police power. The State has legislative competence to ban any activity which is harmful to public health or public morality.

In *Krishnan Kumar Narula v. Jammu & Kashmir*,⁴¹ a five-judge bench held that none of the earlier decisions had held that the right to do business in liquor was not a fundamental right, but this decision was distinguished in *Nashirwar v. Madhya Pradesh*.⁴² This case held that the decision in *Narula* cannot be interpreted to mean

⁴¹ A. I. R. 1967 S. C. 1368 [S. C.].

⁴² A. I. R. 1975 S. C. 360 [S. C.].

there is fundamental right to do business in liquor, but gave no reasons to support this holding.

In *Kerala v. P.J. Joseph*,⁴³ the Supreme Court proceeded on the basis that the State could not collect a commission of 20% without passing an appropriate statutory order. The imposition, which was not authorized by law, was held to infringe the right to carry on business under Article 19(1)(g). Similarly, in *Amar Chandra Chakraborty v. Collector of Excise, Tripura*,⁴⁴ it was conceded by a five-judge bench that dealing in liquor was business, and a citizen had the right to do business in that commodity. It was added that the State could make a law imposing reasonable restrictions on the said right in public interest. Despite this, in *Har Shankar v. Deputy Excise & Taxation Commissioner*,⁴⁵ another five-judge bench wrongly treated this case as taking a view contrary to the earlier view expressed in *Krishna Kumar Narula v. Jammu & Kashmir*.⁴⁶ It is unfortunate that the bench in *Har Shankar* failed to make the conceptual distinction between an *absolute* right and a *fundamental* right. There is no right in Part III of the Constitution, apart from that contained in Article 20, which is absolute in its wording or content. This does not take away the fundamental character of these rights. It only means that reasonable restrictions can be placed on their exercise. After noting that the earlier Constitution bench decisions had emphasised that no person has an *absolute* right to deal in liquor, Justice Chandrachud concluded that a citizen had no *fundamental* right to carry on trade or business in liquor. This conclusion did not logically follow from the precedents cited, but has now become the law of the land.

It is submitted that Article 19(1)(g) has been wrongly understood in the context of liquor trade and, unfortunately, moral considerations have distorted its interpretation. Once sale of liquor is permitted by a State Government, every citizen has a fundamental right to apply for permission to trade in liquor. If he satisfies the prescribed statutory conditions, there is no justification for denying that citizen the right to manufacture or sell liquor.

In the *Madhya Pradesh v. Nandlal Jaiswal*,⁴⁷ it was pointed out that once privilege is parted with, Article 14 would apply. This, in the background of our discussion, is partly incorrect since there is no question of parting with any privilege. However, the Supreme Court is right in stating, "when the State decides to grant such right or privilege to others, it cannot escape the rigour of Article 14.

⁴³ A. I. R. 1958 S. C. 296 [S. C.].

⁴⁴ A. I. R. 1972 S. C. 1863 [S. C.].

⁴⁵ A. I. R. 1975 S. C. 1121 [S. C.].

⁴⁶ A. I. R. 1967 S. C. 1368 [S. C.].

⁴⁷ A. I. R. 1987 S. C. 251 [S. C.].

It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting exclusive right or privilege of manufacturing or selling liquor". Therefore, it is submitted that once the State decides to allow persons to manufacture or sell liquor, it has consciously abandoned the provisions of Article 47. It is a policy decision for each Government to prohibit or regulate trade in liquor. Once trade is permitted, the applicability of Articles 14, 19 and even Article 301 cannot be excluded. In *Punjab v. Devans Modern Breweries*,⁴⁸ it was recently held that the permissive privilege to deal in liquor was not a trade and therefore, Articles 301-304 were not attracted. This decision is clearly incorrect.

A. Liquor – Impact on Articles 301-304

The Supreme Court did not pause to consider the severe repercussions of such a view. *First*, once the State permits trade in liquor, the citizen has the right to carry on business in potable alcohol although his right may be more regulated than any other business or trade. As long as he carries on the business, the citizen is exercising his right to carry on business in liquor. It would be absurd to suggest that the running of liquor shops with statutory foundation is not a trade. Licence to manufacture or sell liquor given under the relevant Prohibition or Abkari Act is the basis of this trade. Merely giving label of permissive privilege will not mean that the business is carried on without any right. *Secondly*, Article 301 is an important provision to maintain and safeguard the federal structure of our Constitution. Indeed, the entire Part XIII is an important part of the federal structure of our Constitution. The object of Part XIII is to prevent creation of trade barriers and permit free flow of goods. It would be improper to suggest that trade barriers could be created in liquor on the basis that no one has the right to trade in liquor.

The view of the Supreme Court in *B.R. Enterprises v. Uttar Pradesh*⁴⁹ shows the absurdity of holding that trade in noxious substances is outside the purview of Part XIII. This case concerned the constitutional validity of the Lotteries (Regulation) Act, 1998. One of the contentions taken up was that States could not have run their own lotteries extra-territorially unless this activity qualified as "trade and business" under Article 298. If lotteries were indeed trade and business for the purpose of Article 298, there was no reason to hold otherwise when it came to Articles 301-304. Faced with this paradoxical situation, the Supreme Court held that "trade and business" as used in Article 298 had a meaning different from, and wider than, the expression "trade, commerce and intercourse" in Article 301. This leads to the absurd result that the State has the right to carry on trade in lotteries but no freedom to do so across State borders.

⁴⁸ (2004) 11 S. C. C. 26 [S. C.].

⁴⁹ (1999) 9 S. C. C. 700 [S. C.].

V. RES EXTRA COMMERCIIUM – MORALS TRUMP LAW

The theory of privilege and the police power doctrine are often taken as the basis to justify the power of the State to prohibit or regulate trade in liquor. It is used to justify the manner and extent of levy or duty by merely stating that such amount is a consideration for the State parting with its privilege.

On the side of the citizen, his claim to carry on business in liquor is rejected by invoking the Latin phrase, *res extra commercium*. Before analyzing the correctness of this approach, it would be instructive to examine the genesis of this phrase.

The *res extra commercium* doctrine traces its conceptual roots to Roman law. *Res in commercio*, in Roman law, were things capable of ownership and hence, the subject of property rights, while *res extra commercium* were things incapable of ownership.

Certain kinds of property were incapable of private ownership or acquisition because such ownership would be contrary to their natural purpose. Such kinds of property were known as *res extra commercium*. Within this broad category, there were sub-categories. A resource which by its nature could only be used in common was called *res communes*. Fish, wild game, rivers, and the sea fell into this category. Property set aside for public use by public functionaries or the political community was categorized as *res publicae*. Public buildings and the furniture within them exemplified this category. In the present day context, the Parliament building can be considered so. Then there was a third category, *res divini*, which may no longer be relevant since its subjects, *res sacrae* (churches) and *res religiosae* (cemeteries) are now subjects of ownership. The fourth category was *res universitatis* which included things held by a corporate body, and the last was *res nullius*, meaning those things or places that belonged to no one.⁵⁰ It is clear from these categories that morality had no role to play in the classification of property as *res extra commercium*. In fact, no one individual could claim any right over such property because it was meant for the common benefit of all.

If we now examine the kinds of goods and activities classified as *res extra commercium* by the Indian Supreme Court, including liquor and prize competitions, conceptually there is no difficulty at all in pin-pointing an owner who carries on such activity or sells such commodity for private benefit. As succinctly expressed by Justice Subba Rao (as he then was) in *Krishan Kumar Narula v. Jammu & Kashmir*,⁵¹ "if the activity of a dealer in ghee is business then how does it cease to be business if it is in liquor?"

⁵⁰ Gerald Torres, *Who Owns the Sky*, 19 PACE ENVTL. L. REV. 515 (2002).

⁵¹ A. I. R. 1967 S. C. 1368 [S. C.].

Justice Das is credited with the usage of this expression for the first time in *Bombay v. R.M.D Chamarbaugwala*.⁵² This case was concerned with the constitutional validity of the Bombay Lotteries and Prize Competition Control and Tax Act, 1948. When dealing with the challenge to this Act on the ground of infringement of Articles 19(1)(g) and 301-304, Justice Das held that gambling and betting do not fall within the ambit of trade, commerce and intercourse. The learned judge then goes on to hold that Article 19(1)(g) would not include criminal activities. By a strange logic, Justice Das observed that if Article 19(1)(g) included gambling and betting, there would equally be a guaranteed right to hire goondas to commit assault or even murder, to sell obscene books, and to indulge in trafficking of women. The learned judge then proceeds to refer to Rigveda which, in certain verses, condemns gambling and betting. Various other provisions from scriptures and statutes are referred to show the harmful effect of gambling and betting. Finally, we come to the sentence that introduced the phrase “*extra commercium*” and became the genesis of the application of a non-existent principle for over 50 years.

We are, however, clearly of the opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(g) or Article 301 of our Constitution.

Chief Justice Das did not use the expression *res extra commercium*. Despite this, his judgment has been understood in later cases as laying down the doctrine of *res extra commercium*.

In fact, in an early (and solitary) decision by the Supreme Court of India, this expression was correctly used. In *Angurbala Mullick v. Debabrata Mullick*,⁵³ Justice Chandrasekhara Aiyar, in his concurring judgment held that the *shebaitship* of an idol was *res extra commercium* as it was generally inalienable. The emphasis was clearly on the absence of private ownership over this title, and thus in line with the concept of *res extra commercium* in Roman law.

The incorrect usage of this expression, on the other hand, can be attributed to the judgment of Justice Venkatarama Aiyar in *R.M.D. Chamarbaugwala v. Union*,⁵⁴

a case decided on the same day as *Bombay v. R.M.D. Chamarbaugwala*.⁵⁵ The learned judge unfortunately interpreted the latter judgment as holding that gambling was not trade but *res extra commercium*, when Das C.J. had actually held that “*gambling activities from their very nature and in essence are extra-commercium*”. There was a world of difference between the expression “*extra-commercium*” as used by Chief Justice Das and the phrase “*res extra commercium*”. This inadvertent error by Justice Venkatarama Aiyar has now become part of our constitutional jurisprudence, with the Supreme Court in later decisions wholeheartedly endorsing the “*doctrine of res extra commercium*” and using this doctrine to water down the scope and effect of Article 19(1)(g) as well as Article 301.⁵⁶ It is submitted that all these decisions are *per incuriam* as there was no such doctrine known to law.

It is important to note that not a single Australian case cited in *Bombay v. R.M.D. Chamarbaugwala*⁵⁷ had held that gambling or betting would amount to *res extra commercium*. They have only held that the right to carry on gambling and betting cannot be treated as trade, commerce or intercourse under Section 92 of the Australian Constitution. This is completely different from calling it *res extra commercium*.

It is submitted that this expression has been wrongly used in the last sixty years by the Supreme Court and other High Courts. No activity can be called “*res extra commercium*”. It is either permitted or not. Even if gambling is harmful to society, there is nothing that prohibits the State Government from allowing gambling casinos to function. Indeed, several State lotteries are nothing but a form of betting and gambling. In certain countries, sale of drugs and even prostitution is legalized. In those countries, such activities, even though harmful to society, are as much an activity of trade as running a beauty parlour or selling electric pumps. It is indeed unfortunate that this expression has been freely used over the last several years. The incorrect use of this expression underscores the importance of relying on the language used in our Constitution and shows the pitfalls of importing doctrines and theories from other jurisdictions. It is submitted that judicial decisions must primarily be given on the basis of our own Constitution. It is only when the Constitution is silent or has not contemplated a particular problem that foreign doctrine can be applied. Even then, it is necessary to subject them to strict scrutiny.

The erroneous view that Article 19(1)(g) does not apply to noxious substances unduly widens the power of the State in two important respects. *First*,

⁵⁵ A. I. R. 1957 S. C. 699 [S. C.].

⁵⁶ The subsequent decisions which firmly entrench this doctrine in our legal landscape are *Nashirwar v. Madhya Pradesh*, A. I. R. 1975 S. C. 360 [S. C.], *Khoday Distilleries v. Karnataka*, (1995) 1 S. C. C. 574 [S. C.], *B.R. Enterprises v. Uttar Pradesh*, (1999) 9 S. C. C. 700 [S. C.], *Punjab v. Devans Modern Breweries*, (2004) 11 S. C. C. 26 [S. C.].

⁵⁷ A. I. R. 1957 S. C. 699 [S. C.].

⁵² A. I. R. 1957 S. C. 699 [S. C.].

⁵³ A. I. R. 1951 S. C. 293 [S. C.].

⁵⁴ A. I. R. 1957 S. C. 628 [S. C.].

it is possible for the State to affect detrimentally the trade in such substances by the use of mere executive power.⁵⁸ *Second*, it is also possible for the State to impose unreasonable restrictions on those employed in distilleries or in lottery agencies since they have no right to be there.

VI. CONCLUDING REMARKS

From the above discussion, the following principles emerge:

1. The theory of privilege is of English origin and cannot be linked with the concept of police power.
2. The privilege theory has no place in the Constitution of a Republic, even if it follows the Westminster model. Indeed, the privilege theory is wholly unnecessary in interpreting any part of our Constitution.
3. The police power has been referred to in the United States decisions to justify State regulation of business and other activities. In our country, the power to regulate business is not found on any theory of police power. The Central and State Legislatures have inherent right to pass laws that can regulate even the sphere of commercial or other activities. These regulations would however have to satisfy the test of legislative competence and non-violation of Part III, or other Constitutional provisions.
4. The right to trade in liquor is not the consequence of any parting of privilege. It is an activity that is permitted or regulated by the respective prohibition laws. If there is no concept of privilege in the Constitution, there is no question of parting with it.
5. Once trade in liquor is permitted, it is as much a business as any other commercial activity. Citizens who have obtained the right to trade in liquor are entitled to the protection of Articles 14, 19, and 301 to 304.
6. *Res extra commercium* does not have the remotest connection to trade in liquor. It is a maxim used in a totally different context.

⁵⁸ *Khoday Distilleries v. State of Karnataka*, (1995) 1 S. C. C. 574 [S. C.].

THE LOCKERBIE TRIAL AND THE RULE OF LAW

Hans Koechler*

The Lockerbie trial weaves together some of the most interesting notions in municipal criminal law with public international law concepts of state responsibility and personal criminal liability. Employing it as a case study, Professor Koechler analyses the criminal justice system from the perspective of international politics. He outlines the major problems plaguing such trials by highlighting the encumbrances caused by overarching political concerns. Professor Koechler, thus, provides a compelling analysis of the Lockerbie trial effectively bringing forth the controversial issues, raised thereby, which are going to beset the criminal justice paradigm for a considerable time.

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I. INTRODUCTION

At the time of this writing (November, 2008) – almost twenty years after the mid-air explosion of Pan Am flight 103 over Lockerbie, Scotland – the mystery of what caused the catastrophic disintegration of the American jumbo jet on that fateful night in December, 1988 is still not resolved and the hearings of the new appeal of the only person convicted in the case are further delayed into 2009¹ – amidst revelations that the Appellant is terminally ill with cancer in an advanced stage.²

The trial of the two Libyan suspects at a special Scottish Court sitting in the Netherlands (which lasted from May, 2000 until January, 2001) has become an exemplary case for the evaluation of the problems and prospects of criminal justice in the framework of international politics,³ especially when the issue of personal criminal responsibility is related to questions of terrorism, including

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¹ So far, only procedural hearings have been held (altogether nine public hearings by 28 November, 2008). As of November, 2008, the actual appeal hearings were expected to take place in spring and summer 2009.

² *Bomber appeal to be fast-tracked*. HERALD (Glasgow, U. K.), Nov. 28, 2008.

³ See, the author's analysis of the Lockerbie trial in regard to the evolving concept of international criminal justice in HANS KOECHLER, *GLOBAL JUSTICE OR GLOBAL REVENGE? INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS* 110 (Manak Publishers 2005).