

INADEQUACY OF POLICY IN STATE OF TAMIL NADU V. K BALU: A LEGAL ANALYSIS

Written by *Shweta Surana** & *Dhananjay Khanna***

** 3rd Year BBA LLB Student, Christ (Deemed to be University), Bengaluru*

*** 3rd Year BBA LLB Student, Christ (Deemed to be University), Bengaluru*

ABSTRACT

‘Prevention is better than cure’, this is the ideology taken into consideration by the Supreme Court while giving the judgment on the Liquor Ban on Highways in India. The case of State of Tamil Nadu and Ors. v K. Balu and Anr. brings to light the increasing number of road accidents concentrated around highways brought about by the influence of liquor. Various reports given by the Ministry of Road Transport and Highways provide statistics for such accidents. In status quo, the judgment in this case is being upheld and a conditional ban has been imposed on the sale of liquor within a 500-metre radius from State and National highways since April 2017. This ban, however, does not extend to bars and outlets on Highways within Municipal Areas. This exemption brings forth lacunae in the law as it defeats the sole purpose of the imposition of the ban as easy availability of liquor at regular intervals in such areas allows the possibility to restock. This only imposes an added cost on the State with not much benefit. Through this paper the authors seek to analyze the judgment in lieu of the December, 2016 judgment in this case. The authors seek to determine the economic, social and legal implications of this judgement on various classes of the society. The paper also dwells into the aspect of Judicial Overreach by the Supreme Court with respect to Article 19(1)(g) of the Constitution of India. The paper therefore aims to provide a solution to these complications faced in the absolute implementation of the Ban on liquor on Highways.

KEYWORDS: Liquor Ban, National Highway, State Highway, Judicial Overreach

JUDGEMENT

With the increase in the number of road accidents taking place over the years, there has been a drastic negative effect of the same both to the individuals and to the society. There has been a loss of life through increased number of deaths owing to road accidents due to driving under the influence of alcohol. It needs to be established that no method of restitution through monetary instruments can undo the trauma of loss and the pain of suffering and that the law can only imperfectly alleviate the consequences of such accidents. The society has, as a result, been affected as it has lost productive social capital which would have been obtained through the work done by these persons.

There is undisputed importance given to minimization of accidents caused due to influence of alcohol and the Motor Vehicles Act furthers this cause with its policy of '*Zero Tolerance towards Alcohol*'. For the increasing number of such accidents caused due to driving under influence is where the need for policies to regulate and control comes in. The case of State of Tamil Nadu represented by its Secretary, Home, Prohibition and Excise Department vs. K.Balu¹ addressed this very issue of drunk driving and its social, economic and legal consequences. The issue that the Court addressed in the current case was one of sale of liquor by liquor vendors on National and State Highways all over the country.

The Ministry of Road Transport and Highways has made continuous efforts over the past decade by passing advisories to all states and Union Territories for stopping the sale of liquor on National Highways and to not issue fresh licenses to such vendors. These suggestions have been given after publishing statistics of increasing number of road accidents and analyzing their reasons in their publication titled '*Road Accidents in India*'. The court takes into consideration various policies and circulars to state governments passed by the National Road Safety Council established under the Motor Vehicles Act. Having been decided roughly 13 years ago in advisory policies and meetings, the court takes this view into consideration and imposes a total prohibition on sale of liquor on National and State Highways with a clear view to reduce accidents on highways being the main contention for the Supreme Court. The problem here arises where the ban is uplifted and removed for such highways falling within city limits and State Highways being denotified which defeats the purpose of the order

¹ State of Tamil Nadu v. K Balu, 2016 SCC OnLine SC 1487

altogether, and this is the main criticism that the paper brings forth and seeks to provide solutions to thorough analysis.

The judgement given in the case was as follows-

- i. All states and union territories shall forthwith cease and desist from granting licences for the sale of liquor along national and state highways.
- ii. The prohibition contained in (i) above shall extend to and include stretches of such highways which fall within the limits of a municipal corporation, city, town or local authority.
- iii. The states have time till the expiry of their excise year for the termination of the existing licenses latest by 30th September, 2017.
- iv. All signages and advertisements of the availability of liquor shall be prohibited and existing ones removed forthwith both on national and state highways.
- v. No shop for the sale of liquor shall be (i) visible from a national or state highway; (ii) directly accessible from a national or state highway and (iii) situated within a distance of 500 metres of the outer edge of the national or state highway or of a service lane along the highway. In the case of areas comprised in local bodies with a population of 20,000 people or less, the distance of 500 metres shall stand reduced to 220 metres.
- vi. All States and Union territories are mandated to strictly enforce the above directions. The Chief Secretaries and Directors General of Police shall within one month chalk out a plan for enforcement in consultation with the state revenue and home departments. Responsibility shall be assigned inter alia to District Collectors and Superintendents of Police and other competent authorities. Compliance shall be strictly monitored by calling for fortnightly reports on action taken.
- vii. These directions issue under Article 142 of the Constitution²

PRE-JUDGEMENT CONDITION

The reasoning behind this judgment is the alarming rate of road accidents owing to the easy availability of liquor on State and National Highways. National Road Safety Council (herein

² Ibid

after referred to as NRSC) is an apex body for road safety established under Section 215 of the Motor Vehicles Act, 1988 to reduce such accidents. This section provides for creation of National, State and District road safety bodies for the control and prevention of the increasing number of road accidents taking place in India in the road transport sector. This was formed in lieu of reducing the number of road accidents by forming different working groups within the Council for Education, Engineering of Roads, Engineering of Vehicles, Enforcement, and Emergency Care working in different fields for reducing such number of road accidents.

The role of NRSC in this context is of utmost importance. In a meeting 14 years ago on 15th January, 2004, the Council unanimously reached an agreement that no licenses shall be given to liquor vendors along National Highways. This advisory, given over a decade ago has now been given legal status through this order given by the Supreme Court for not issuing any new licenses to liquor vendors situated in proximity of either National or State Highways.

Along with NRSC, The Ministry of Road Transport and Highways (herein after referred to as MoRTH) is the primary organisation of the Central Government which is entrusted with the task of formulating policies for all States and Union Territories and all individuals and organisations therein for Road Transport, National Highways and Transport Research to improve the mobility and efficiency of the entire road and transport system within the nation. For these purposes, the work has been divided under two wings, namely- (i) Roads Wing (ii) Transport Wing.³

MoRTH has played an active part throughout the proceedings of this case through its advisories and publications being cited and referred to from time to time. MoRTH has through the past decade been issuing circulars advising the State Governments to take various steps to reduce the increasing number of road accidents over the years. Hence, it is very important to carefully examine such circulars issued by MoRTH.

➤ **26th October, 2007**

MoRTH advised State Governments to remove liquor shops along National Highways and not to issue fresh licenses to vendors along such Highways. This circular was confined only to National Highways and did not include State Highways as the Central

³ Ministry of Road Transport and Highways, <http://morth.nic.in/index1.asp?lang=1&linkid=133&lid=1933>
(last visited Feb 6, 2018)

Government does not have the power to make laws for the State Highways.

➤ **1st December, 2011**

In an advisory to the Chief Secretaries of all the States and Union Territories, MoRTH reported the alarmingly high rate of accidents in India, being higher than all other countries, and identified drunken driving as one of the most important cause for the same. The advisory brings to light Section 185 of the Motor Vehicles Act, 1988 which talks about driving under the influence of alcohol or drugs and prescribes penalties for the same. For this, MoRTH suggested the enforcement of the following actions-

- i. Strict enforcement of Section 185
- ii. Removal of liquor shops along National Highways
- iii. No fresh licenses to vendors located along such Highways
- iv. Review of existing licenses

➤ **18th March, 2013**

Section 185 of The Motor Vehicles Act indicates the Parliament's "*Zero Tolerance Policy*" towards driving under the influence of alcohol. This has been illustrated by MoRTH providing statistics that in 2011, 10553 deaths and 21148 injuries were caused due to drunken driving. Based on this, the advisory to remove liquor shops along National Highways was issued.

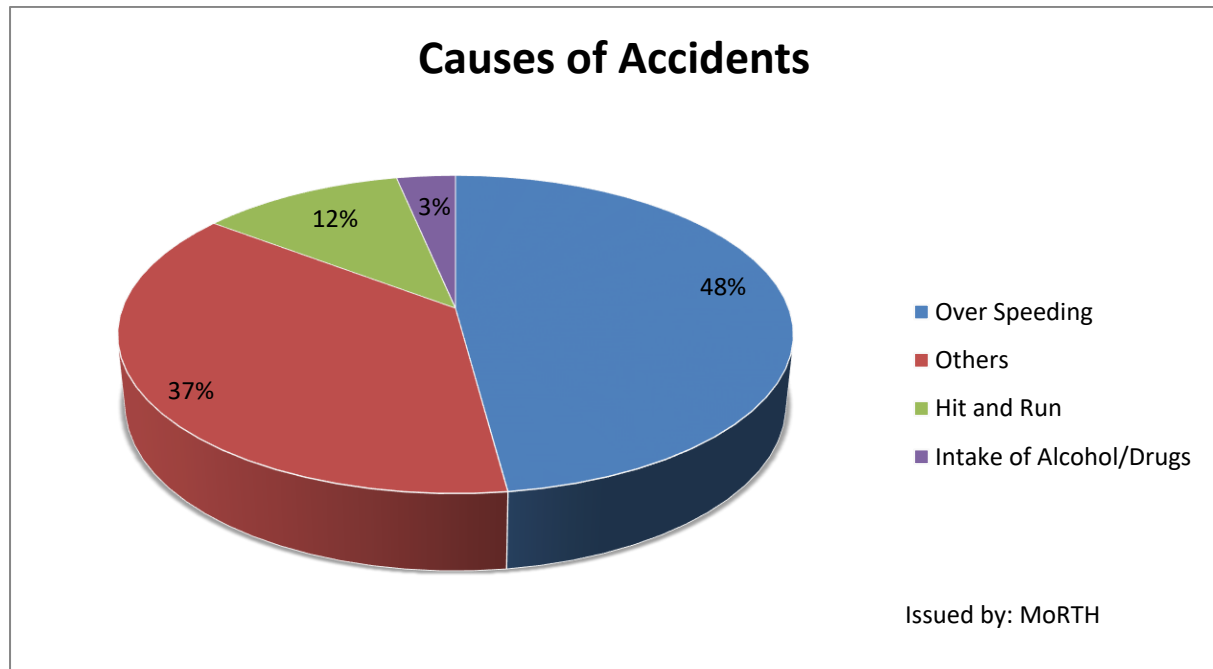
➤ **21st May, 2014**

MoRTH further provides statistics stating that there were 23979 road accidents caused due to drunk driving which resulted in 7835 deaths. These accidents also caused injuries to 23403 people throughout 2012.

➤ **23rd May, 2016**

The Transport Research Wing of MoRTH releases a report annually providing statistics on aspects of the Road Transport Sector in general. This also includes data on accidents that occurred in that specified year along with the specific categories and reasons for these accidents separately. The publication "*Road Accidents in India-2015*" has been

quoted in the judgement by the Hon'ble Supreme Court too to show the alarming increase in the number of accidents.



The above chart shows that out of the total accidents that take place, 3.3% are caused due to the intake of alcohol/drugs. Owing to this 3.3% of accidents, 6755 people died in the year 2015. ⁴

➤ **6th September, 2017**

The report “*Road Accidents in India-2016*” again gives statistics of road accidents in India which took place during 2016. We see that even before the implementation of any order, the number of accidents was reducing by itself as the number of deaths owing to influence of alcohol/drugs has fallen to 6131 in 2016 from 6755 in 2015. ⁵

⁴ Ministry of Road Transport and Highways, Road Accidents in India-2015 (Government of India) (2016), <http://www.morth.nic.in/showfile.asp?lid=2143> (last visited Feb 7, 2018)

⁵ Ministry of Road Transport and Highways, Road Accidents in India-2016 (Government of India) (2017), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=170577> (last visited Feb 7, 2018)

The Union government has constantly issued advisories setting out, as a matter of policy, its position. These advisories requested the removal of all liquor vendors on national highways and a ban on the issuance of fresh licenses on the ground that “*prevention is better than cure*”.

SOCIO-ECONOMIC IMPACT

The problem brought forth by this judgment is multi layered and has far reaching effects both on the economy of our country as well as on the society at large. In the case of State of Tamil Nadu vs. K. Balu⁶, even though the Supreme Court’s judgment was good in spirit for the society, it has caused much more collateral damage than it has done well. Through this chapter, the paper aims to highlight various social and economic problems that have arisen as a result of this Supreme Court judgement.

In a country as populated as India where there is a high level of unemployment and an even higher level of under-employment, this judgement makes the situation worse as it will further cause **unemployment**. Another problem that is intricately connected to the problem of unemployment is that of **loss of revenue** to the Government in this case. Implementing a ban on the sale of alcohol along National Highways, which cover nearly 110000 kilometres across India will result in the shutting down of nearly 1 Lakh shops. Shutting down of this humungous number of shops will cause gross levels of unemployment as it will leave all people working in such shops unemployed. This move will create a huge backlash with high levels of unemployment and an added pressure on the Government to provide employment to lakhs of people where it is difficult to provide employment to the already existing unemployed people. Amitabh Kant, CEO of NITI Aayog, criticised the ban on sale of liquor on highways, on a social platform, drawing light to its adverse impact on 1 million jobs and on the tourism industry. Apart from the problem of unemployment, there will be a loss of revenue to the exchequer to the amount of nearly Rs. 200000 Crores.⁷ These losses shall be in the tune of cost of relocation of such shops, compensations to effected parties etc. For a developing country

⁶ Supra note 1

⁷ Economic Times, Liquor ban impact: Rs 2,00,000 crore loss to exchequer, closure of more than 1 lakh establishments, 2017, <https://economictimes.indiatimes.com/industry/services/hotels/-restaurants/liquor-ban-impact-200000-crore-loss-to-exchequer-closure-of-more-than-1-lakh-establishments/articleshow/58126798.cms> (last visited Feb 7, 2018)

like India that needs maximum resources for development purposes, an added expenditure of such a high magnitude is a completely unwanted move and the same resources can be much more efficiently utilized to develop the industrial or IT sector of India or even to provide schemes for the poor in India that exist below the poverty line.

Another major problem faced by the society through this judgement is the **hit to supporting industries**. This order by the Supreme Court will not only have an effect on the liquor vendors but to various other industries too as a result. Generally, any liquor shop has, around it, a wide array of other vendors selling common FMCG products or even small scale food joints. These vendors will lose a lot of business through the passing of this order as a large share of their sales come from such persons who purchase alcohol and buy products from these vendors as a result. This order will cause a loss to several industries, namely-

- Fast Moving Consumer Goods
- Tourism
- Real Estate
- Hospitality

Real Estate Sector will also be affected by this judgement as resorts and vacation homes are usually built on the outskirts of the city, in or around a National Highway. As a result of this, the prices of properties around such a resort shoot up and gradually, the city expands and grows. This process will slow down as a result of this judgement as these resorts will not come into existence in the first place therefore hindering the process of development, which India is in dire need of. One of the most majorly hit industry through this judgement is the *Hospitality Industry* as the loss of business faced by the Hotels is the maximum in this case. Several premium hotels like Taj, Leela Palace, and Trident etc. located within 500 meters from National Highways are also hit by the judgement as they are not permitted to sell liquor either. This move will lead to a major loss of revenue and business as the footfall of people will reduce in such hotels and also, foreign travellers will totally rule out such hotels not providing alcohol. This is brought out in an example of two Oberoi Hotels hit by the order. The American Express global leadership was checking in at the twin hotels to honour its top two performers. From a corporate business point of view, it is a prestigious guest movement, but now there was panic from the American Express representatives as to where they could host their cocktail receptions as the current location was obviously not possible through this judgement. *"Is this what India*

means when it talks about the ease of doing business?" This is the question that is brought up by several hotel groups after this order prohibiting sale of liquor along National Highways. This point is also intricately related to the fall of tourism as foreign travellers require alcohol in a more frequent and routine manner. Hotels not selling alcohol will therefore also affect the *Tourism Industry*, and not just to the extent of foreign travellers but also Indian tourists as many consider alcohol as a recreational stress buster and is an important part for such people, not having which can reduce the number of such tourists.

As a result of this, restaurants, bars and hotel owners are using different methodologies and finding loopholes in the law to work their way around this ban. They are now resorting to changing their entrance to comply with the liquor ban on highways. Gurgaon's famous CyberHub that is home to several bars and pubs has changed its entrance to make it 1.2 km away from the Highway, in order to legally sell liquor. Another incident that took place in Kerala was of a bar that recently got a lot of attention. This was because its owner got a maze-like path constructed at its entrance, adding 250-300 meters to increase its distance from the highway. These incidents clearly show how people are working their way around the ban to continue selling liquor and effectively the ban, even if imposed, is not doing the good it was intended to and, on the contrary, ends up doing more net social loss and harming the economy.

LEGAL ISSUES

Apart from the various socio-economic problems brought forth by this judgement, there are certain legal complications and problems that arise as well. These legal issues are of primary importance and need to be analysed carefully in order to ascertain with surety the correct legal standpoint and come up with comprehensive solutions.

One of the most important problems and a matter of conflict in the given case of State of Tamil Nadu vs. K. Balu⁸ was the **relaxation of the ban on licensed establishments falling within municipal areas.**

"The purpose of the directions contained in the order dated 15 December 2016 is to deal with the sale of liquor along and in proximity of highways properly understood, which

⁸ Supra note 1

provide connectivity between cities, towns and villages. The order does not prohibit licensed establishments within Municipal areas. This clarification shall govern other Municipal areas as well. We have considered it appropriate to issue this clarification to set at rest any ambiguity and to obviate repeated recourse to IAs, before the Court.”⁹

This essentially means that the ban on sale of liquor 500 meters from the State and National Highways would be relaxed completely on patches of such highways falling within city limits in any municipal area. This is a highly contravening decision and defeats the entire purpose of the judgement banning sale of liquor around such Highways. Allowing establishments to sell liquor within the city in municipal areas annuls the motive to reduce accidents cause due to drunken driving on the highways as (i) these establishments provide an opportunity for the people to drink (ii) it also provides people with an opportunity to restock their alcohol for any later point during their journey. This relaxation given by the Supreme Court causes a nullifying effect and destroys the entire purpose of the judgement. As a result of this relaxation, the number of drunken driving cases may not reduce while staying the same. This may be because liquor is just as easily available after the judgement as it is in status quo as liquor can still be found just at a slightly increased distance. The main contention of the Supreme Court while implementing the ban was to reduce the number of road accidents caused due to drunken driving on Highways but this relaxation ruins the essence and motive of this ban in its entirety and the benefits, if any, might be negligible.

Additionally, in the judgement dated 31st December, 2016 in the K. Balu case, the Supreme Court said

“Once it is an accepted position that the presence of liquor vends along the highways poses a grave danger to road safety an exception cannot be carved out to permit the sale of liquor along a stretch of the highway which passes through the limits of a city, town or local authority. Such an exception would be wholly arbitrary and violative of Article 14.”¹⁰

Keeping this in mind, the Arrive Safe Society judgement where the Supreme Court relaxed the ban for vendors in municipal areas proves to be a massive contradiction by the Court in their

⁹ Arrive Safe Society of Chandigarh vs. The Union Territory of Chandigarh and Ors. (11.07.2017 - SC) : MANU/SC/1087/2017 Para 8

¹⁰ Supra Note 1

own stand and creates an entire aura of ambiguity and confusion by not taking a definitive stand.

Another issue identified through the proceedings of this case was the act of **changing the nomenclature of State Highways and Major City Roads**. Several cities, including Chandigarh, to avoid the 500 meter liquor ban around National and State Highways started changing State Highways to major city roads in order to make liquor available on such roads. This act too defeated the purpose of the judgement in the case of K. Balu as State Highways being changed to Major City Roads would remove all liquor vendors situated near such roads from the ambit of this judgement, not reducing the number of drunken driving cases in any manner. This act of denotifying State Highways by the States was declared within the powers of the State Government by the Supreme Court in the case of Arrive Safe Society vs. Union Territory of Chandigarh.

“Directions (i) and (ii) extracted earlier did not prevent the Administration from re-classifying inter-sectoral roads within the city from state highways to major district roads. The exercise carried out by Chandigarh Administration does not breach the directions issued by this Court, it is neither in violation of the terms of the order nor of the purpose and intendment behind those directions.”¹¹

The Court laid down that no direction in the case of K. Balu takes from the State Government the power to change the nomenclature of State Roads in any manner. This, however, does render the judgement in the same case infructuous and goes completely against the spirit of the judgement.

Further, the authors believe that in coming to this decision and passing orders in the case, the Supreme Court has overstepped on its powers by moving into the legislative domain. The authors consider these orders by the Court to be an act of Judicial Overreach. Now, to understand fully the issue of **Judicial Overreach** in this case by the Supreme Court, we need to understand the doctrine of separation of powers among the different wings of the Government. The 3 central pillars of democracy in India are- Legislature, Executive and Judiciary. The roles of all 3 of these are completely different and clearly divided. The Legislature has the power to make laws for the State, the Executive has the responsibility of

¹¹ Supra note 9 Para 6

implementation and execution of such laws and policies and the Judiciary safeguards the rights and also has the power of judicial review, keeping a check on other wings of the democracy. India has a dual system of governance, Union and the States. For smooth functioning, there is the doctrine of separation of powers which is followed. The 7th Schedule of the Constitution of India gives three lists laying down powers of the Union and State Governments. The Union has the exclusive rights to make laws over matters in List I. List II or the State List contains subjects in the exclusive domain of the States and List 3, the Concurrent List, is where both the Union and the State can make laws.

According to Lon Fuller, a legal philosopher, certain social issues involve complex interconnected relationships where changing one dynamic would cause adverse and far reaching changes to the others. Such issues, called polycentric issues, are like a spider web, where a pull on one strand would disturb the whole web. The judiciary is not equipped to solve such polycentric problems. The case of *State of Tamil Nadu v. K. Balu*¹² is an exact example of a polycentric problem. This is because the case talks about sale of liquor on highways. Now, Liquor is Entry 8, List II of the 7th Schedule whereas Highways are Entry 23, List I of the 7th Schedule. If directions are laid down for the sale of liquor on highways, it's a breach of the domain of both the Union and the State Lists, thereby causing it to be a polycentric problem.

The Supreme Court's order banning the sale of liquor on Highways is questioned on the grounds of it being an incidence of judicial overreach. Judicial overreach is an extreme form of judicial activism where the judiciary, instead of interpreting the law, encroaches upon the legislative's function of policy making. The top court, in addressing the claims of judicial overreach said

*"We must at the outset notice that this Court while exercising its jurisdiction has neither formulated policy nor (as we shall indicate) has it assumed a legislative function."*¹³

The Supreme Court has time and again referred to the circulars issued by the National Road Safety Council and the Ministry of Road Transport and Highways. The Court has relied on these documents to found its belief for banning the sale of liquor on National and State Highways. But the various circulars and documents have been issued in an '**advisory**' capacity.

¹² *State of Tamil Nadu vs. K. Balu*, MANU/SC/0350/2017

¹³ *Ibid* Para 14

The Union Government, in its circular dated 1st December 2011, merely advised the States and Union territories to ban liquor along National Highways and not issue fresh licenses to liquor vendors. Also, the circulars limited themselves to the National Highways. The Union government issued such directions in an advisory capacity as both liquor and state highways fall under the jurisdiction of the States as under List II of the 7th Schedule.

A crucial line of argument would be the Court's ignorance in increasing the 'proximity' distance to 500m. None of the circulars issued by the Union Government have any mention of 500m. The model policy framed by MoRTH uses 100m as its threshold. An expert committee appointed by the Court also recommended keeping the limit at 100m. The Court dismissed these recommendations saying the distance is 'inadequate' to stop people from accessing alcohol and increased the distance to 500m. In the opinion of the authors, even a distance of 500metres would seem pointless as such persons would find it easily within their capacity to cover such a distance for obtaining liquor.

For the above reasons, the authors strongly feel that the Supreme Court's reference to the 'expert determination' of the Union Government does not stand, as the question is if the judiciary is authorised to act upon such determination and not whether the Government's determination is right or not. The crux of the argument of judicial overreach is whether the Court is acting within its jurisdiction by regulating liquor licenses which fall within the jurisdiction of the state legislatures.

The last contention of the authors is the problem of regrading liquor as *res extra commercium* to be grossly incorrect. In paragraph 12 of the judgement dated 31st December 2016, the Supreme Court has regarded liquor to be **res extra commercium**. The apex court has held that there is no fundamental right under Article 19(1)(g) to trade in liquor.¹⁴ The Court has relied upon Article 47 of the Directive Principles of State Policy in doing so.

Res extra commercium literally translates to '*a thing outside commerce*'. The doctrine of *res extra commercium*, as originating from Roman Law, was understood to include things of the nature which cannot be traded between individuals. The scope of this doctrine has been stretched by the Indian Courts to identify those activities which subvert public morality and therefore must not be allowed to be traded. As introduced by Chief Justice Das in *R.M.D.*

¹⁴ Supra Note 1

Chamarbaugwala¹⁵, the doctrine has been used to constrict the scope of fundamental rights granted by Article 19(1)(g) by rendering as constitutional outcasts certain purportedly “immoral” or “noxious” activities such as sale of intoxicating liquor, gambling, rural debts etc. Such activities do not fall within the purview of protection of fundamental rights.¹⁶

In the following years, through a plethora of cases, the Supreme Court has tried to interpret the meaning of this doctrine. In *Krishna Kumar Narula v. State of Jammu and Kashmir*¹⁷, a Constitution Bench of five learned Judges sat to decide whether the right to carry on business of liquor is a fundamental right or not. The Hon’ble Supreme Court held that dealing in liquor was to be regarded as a trade and was well within the ambit of Article 19(1)(g). In another Supreme Court judgment, it was laid down that every citizen had a right to manufacture, sell and distribute liquor and would also have the protection of the fundamental rights guaranteed by our Constitution.¹⁸ However, there was a turn in the case of *Khody Distilleries Ltd. v. State of Karnataka*¹⁹, where the Court reverted back to its earlier decision, opining that there exists no right to trade in liquor based on immoral and illegal grounds. Through this maze of inconsistent and conflicting decisions, it is evident that a lot of ambiguity surrounds the application of the doctrine of *res extra commercium* and its validity in the India context. The lack of legal backing to this doctrine has given way for the judges to interpret the doctrine as they wish, giving scope for arbitrariness and incoherence.

Justice D.Y. Chandrachud observed that no individual can assert a right to the grant of a licence: trading in liquor is a privilege conferred by the state.²⁰ There exists no right under Article 19(1)(g). It is submitted that Article 19(1)(g) has been wrongly understood in the context of liquor trade. The authors opine that once sale of liquor is permitted by any state government through granting of liquor licenses, such citizen has a fundamental right to trade in liquor. If

¹⁵ *Bombay v. R.M.D. Chamarbaugwala* A.I.R. 1957 S.C.

¹⁶ POLICE POWERS AND THE CONSTITUTION OF INDIA: THE INCONSPICUOUS ASCENT OF AN INCONGRUOUS AMERICAN IMPLANT, 28 *Emory international law review* , 65-66 (2014), http://law.emory.edu/eilr/_documents/volumes/28/1/articles/datar-swaminathan.pdf (last visited Feb 10, 2018))

¹⁷ MANU/SC/0034/1967

¹⁸ *Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura and others* MANU/SC/0375/1972

¹⁹ AIR 911 (SC.1996); (1975) 1 SCC 29; *Har Shankar and others etc. v. The Dy. Excise and Taxation Commissioner and other* MANU/SC/0321/1975; *State of Punjab v. Devans Modern Breweries Ltd.* 2004 13 ILD 481 SC

²⁰ *State of Tamil Nadu vs. Balu*, MANU/2017/SC/0350 Para 15

the citizen satisfies the laid down statutory requirements for the obtainment of such licenses, then there lies no question of denying the citizen the right to trade in liquor and the protection provided along any trade, as under Article 19(1)(g). Hence, the authors strongly believe that once the State decides to allow citizens to trade in liquor and provides licenses for the same, it has consciously abandoned the provisions of Article 47. Once the trade is permitted and licenses are issued, Article 14, Article 19 and also Article 301 cannot be excluded.²¹

Dwelling upon the doctrine in *Khody Distilleries case*²², the court denied constitutional legitimacy to the liquor trade, laying down that '*There cannot be a business in crime*'. But in the same judgement the court said that if a government permits the trade, it is constitutionally obliged to regulate it in a fair manner along with reasonable restrictions as provided under Article 19(6) and thus the State cannot make any discrimination between the citizens who are qualified to carry on the trade or business. Keeping in view the above judgment, let us look at this from another angle- If the Supreme court has time and again, vehemently held that No right to trade in liquor exists under Article 19(1)(g), then how can the Hon'ble Court regulate the same through Article 19(6)? The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. The qualifications provided by Article 19(6) regulates only the rights conferred by Article 19(1)(g). Further, only the rights recognised under Article 19(1)(g) can be regulated by the Parliament through Article 302, or by the legislatures of a state through Article 304. Hence, to permit fair and reasonable regulation it is imperative that the courts recognise the right to trade in liquor as a fundamental right.

Another contention put forth by the authors is that of morality and law. In the 21st century where India has progressed as not only a developing nation economically but also a progressive judiciary, making laws based solely on morality is unacceptable. Trade and business cannot depend on morality. While the authors agree to the fact that morality and law goes hand in

²¹ PRIVILEGE, POLICE POWER AND RES EXTRA COMMERCIUM - GLARING CONCEPTUAL ERRORS, National Law School of India Review, 143-144, 2009
<http://docs.manupatra.in/newsline/articles/Upload/8DE9E7DE-8DDA-48FE-9682-1C0F0B185AF3.pdf> (last visited Feb 10, 2018)

²² Supra Note 9

hand, but if the meaning of trade or business depends and varies upon the general acceptance of standards of morality prevailing at a particular point of time, it would lead to incoherence and chaos. Standards of morality can indeed provide guidance for imposing restrictions but cannot restrict the entire scope of the right. It would be a gross mistake to take away a right completely based on moral grounds. As discussed previously, the doctrine of *res extra commercium* has been interpreted very variedly. This is due to the different ideologies of the judges based on their moral beliefs. Moral deliberations have distorted its meaning and significance, which has led to arbitrariness and thus a gross violation of Article 14.

CONCLUSION

After taking all these issues into consideration, the question that arises here is that- if the judgement in the case of *State of Tamil Nadu vs. K. Balu*²³ is not the solution to the rate of accidents caused due to drunken driving on national and state highways, what is? Through this paper, the authors seek to bring to light the problems created due to this judgement and provide comprehensive solutions for this problem. In the opinion of the authors, the entire judgement in the given case in light of the relaxation provided for in the case of *Arrive Safe Society*, along with the legal backing for denotifying State Highways renders the entire judgement repugnant and destroys the very spirit of the judgement. The main contention of the courts while giving this judgement was to reduce the number of accidents caused due to drunken driving on National and State Highways but this may not happen in status quo as liquor will still be sold in licensed establishments within municipal areas and other State Highways which were converted to Major City Roads leading to the ban not being imposed on such shops at all. Due to these reasons, the judgement which aims at reducing the number of drunken driving cases might not have a comprehensive positive effect. Therefore, to further the contention of the court, the authors propose some counter methods and solutions to the problem of drunken driving and how they can be reduced.

The authors contend that the decision in this case therefore is Unconstitutional and inadequate in the opinion of the authors. In order to reduce the number of road accidents caused due to drunken driving, the authors suggest various solutions which can be implemented, but

²³ Supra note 1

primarily after an amended judgement which is legitimate and constitutional in nature. Therefore, to minimize the added costs that the State will bear through this judgement mentioned in Chapter III, the authors propose these solutions.

Further, the authors believe that there exist more comprehensive and effective methods for reducing the number of accidents caused due to drunken driving around such highways in their opinion which will impose a much lesser cost on the state in the place of massive unemployment and losses to tune of thousands of crores.

- The judgement rendered in the case, as discussed previously is *prima facie* unconstitutional as the Supreme Court has overstepped its function by taking up a legislative mantle. Despite the judgement being rendered for the welfare of society, the same cannot be allowed as it is a case of Judicial Overreach. To give the judgement legislative backing, the legislature needs to come up with a law or guidelines for the sale of liquor on highways so that the guidelines provided in the judgement can be implemented, while amending the drawbacks in the judgement.
- Another solution proposed by the authors is to bring the subject matter of Highways falling within the municipality to be included under the same law as national highways for clear and confusion free legislation and implementation.
- The authors seek a clear stand of the judiciary on *Res Extra Commercium* and establishment of a doctrine for the same, not leaving room for individual opinions on the same. Further, the authors seek for removal of liquor from within the ambit of *Res Extra Commercium* as morality should not influence law completely at the expense of Article 19 (1) (g).
- Further, the authors are of the opinion that as per judgement of the Supreme Court in the case *State of Tamil Nadu vs. K. Balu*²⁴ dated 23rd February, the State Government has been given the power to change the nomenclature of city roads and also define 'municipal areas'. These powers given to the state government enables them to circumvent the ban and therefore must be restricted.
- One of the easiest and most effective proposed way to reduce the number of road accidents caused specifically due to drunken driving is- more frequent checks. This, in the opinion of the authors, is the best way to reduce accidents at a minimal cost by

²⁴ *State of Tamil Nadu vs. Balu*, 2018 3 SCC 336

merely **setting up more check posts**. In this manner, there can merely be a checking done of the vehicles and any persons driving under the influence. This method will impose a minimal cost to the state as the law already provides for such checks and the authors recommend only a stricter implementation of the same. This cost shall include cost for setting up of such extra check post barricades, commissioning of constables on such check posts and breathalyzers to check the blood alcohol content (hereby referred to as BAC) of such persons to analyse whether such persons are capable of driving or not, most of which are already present with the authorities. History has painstakingly made it abundantly clear that prohibition has not succeeded. Therefore strict state regulation is imperative.

- Second, the authors also suggest a **more stringent punishment for drunken driving under Section 185 of the Motor Vehicles Act, 1988**. Currently, first time offenders are punished with imprisonment up to 6 months or fine up to the extent of Rs. 2000 or both. Subsequent offences are punished with imprisonment for a term of up to 2 years or fine up to Rs.3000 or both.

The authors suggest increasing this punishment.

First Time Offenders

- Imprisonment up to a period of 1 year
- Fine extending up to the value of Rs. 10000

Second Time Offenders

- Imprisonment up to a period of 3 years
- Fine extending up to the value of Rs. 20000

This will act as a deterrent for most people and will help in reducing the number of drunken driving cases in India. This is because the less punishment does not act as deterrence to the people so committing these offences.

- The authors also recommend, as a phased project, the implementation of **Alcohol Ignition Interlock** which is a mechanism which cuts off power from the engine and switches off the vehicle and locks it, preventing it from restarting if the BAC is more than usually 0.002%. This policy was implemented by the United States of America for repeat offenders and the authors recommend a modified version of the policy in India

to reduce drunken driving cases.²⁵This can be implemented by the Government instructing all car manufactures in India to install this device in every car at the time of manufacture, any car without which will not be allowed to be sold for the Indian roads. For cars sold before this rule, the manufacturers of such cars can be equipped with installing these devices in the car and the people will get a time period of 1 year for getting this device installed in their vehicle, at the failure of which such a vehicle shall be impounded till a fine of the value of the device is paid to the concerned authorities. Being a State initiative and in order to promote public good, the government shall allow a subsidy on these devices and the same shall be made available at a ratio of 60% cost being borne by the individual while the government provides a subsidy to the value of 40% of such a device.

- Finally, the authors also stress on **stricter implementation** of all existing and prospective rules and laws for the removal of the social evil of accidents caused due to drunken driving as in the absence of stricter implementation, any policy, rule and law made shall be rendered useless resulting in no social good being obtained from them.

²⁵ Centers for Disease Control and Prevention, Increasing Alcohol Ignition Interlock Use (2016)