THE CONCEPT OF BUSINESS: AN ANALYSIS

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I. INTRODUCTION

It is a matter of common knowledge that the law revolves round the power-liberty equation. The law gives a number of liberties to the individuals and a number of powers to the state. If the liberties are abused, the society tends to drift towards anarchy. If the power is abused, the society tends to drift towards monarchy. Existence and proper use of power ensures that there is no abuse of liberties. Existence and proper enjoyment of liberties ensures that there is no abuse of power. Non-abusive presence of both of them is necessary to attain a just order, which in turn can give an optimum quality of life to the individuals in the society. But the power has a potential to eat up the liberties and the liberties have a capacity to extinguish the power. Therefore, it becomes incumbent to maintain a proper balance between the power and liberties in the society. The power-liberty equation should always remain in equilibrium.

This equation can have many factors depending upon the nature of the liberty involved. There can be a liberty to speak and express oneself, or a liberty to form associations, or a liberty to move, so on and so forth; and in each case there will be a counter-balancing power with the Government to check the abuse of each type of liberty. Although in all these factors the power-liberty equation works in the same fashion yet in different factors we have different type of situations to deal with. Psychologically there is no difference in all these factors, but all of them give rise to different set of examples. They are different species of the same genesis. This paper deals with one specific liberty i.e. liberty to do business under Article 19(1)(g) of the Constitution. This liberty is subject to the reasonable restrictions which the State could impose under Article 19(6) of the Constitution. In this specific equation of liberty to do business and the power to control that, the concept of business assumes great importance.

II. OPTIONS

The term business is used under Article 19(1)(g) of the Constitution of India. That Article grants a freedom to the citizens of India. Article 19

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being a part of the fundamental rights granted under Part-III of the Constitution, freedom to do business becomes a fundamental right of the citizens of India. But the term "business' is not defined in the Constitution. Therefore there remains a scope of debate on the point as to which activities should be included in the concept of business and which should be excluded. The inclusion or exclusion of the activities in the concept of business shall expand or contract the fundamental rights of the citizens of India. The objective is not to make a list of the included and excluded activities. An attempt is made in this paper to find out the basis on which the activities are categorized inside or outside the scope of the term "business". The paper specifically deals with one activity i.e. dealing in liquor.

Every commercial activity has two aspects which can be termed as external aspect and the internal aspect. When there is a sale of something, the exchange of commodity, the transfer of property, the change in the ownership, the mode of payment etc. are the external aspects. And the nature of commodity is the internal aspect. Say for example when Mr. X sells a car to Mr. Y for Rs. 50,000/-, change in the ownership of the car, Mr. X, Mr. Y, Rs. 50,000/- are the external aspects of the dealing and the car is the internal aspect of the dealing. In case Mr. X sells his daughter to Mr. Y for Rs. 50,000/-, the entire external aspect remains the same but the internal aspect is changed. The parties remain the same, the consideration remains the same, the ownership shall change in the same fashion, but the nature of the commodity has changed. The car is replaced by a girl, and that makes a difference! Now, to include or exclude any commercial activity in the concept of business there are two options. One may be looking simply at the external aspect or one may be considering external as well as internal aspect. In other words the concept of business may be based solely on the external aspect or it may be based on external as well as internal aspect of the dealing. If the concept of business is based solely on the external aspect it will be said that both the transactions hereinabove mentioned are business. But if it is based on external as well as internal aspect it be said that the sale of the car is a business activity but the sale of a girl is not a business activity. In other words the concept of business can be based on either solely how the commodity is dealt with or how and what commodity is dealt with. How the thing is dealt with is external aspect and what the thing is the internal aspect.

When one starts looking at what is sold to determine whether that commercial transaction is business or not he, actually, is relying on his moral judgment, When someone says that sale of cars is business but not the sale of children he is looking at what is sold and he is creating a

distinction between cars and children. This distinction between cars and children is based on his moral values and nothing else. It is his moral sense which tells him that children should not be sold. Therefore, as soon as he sees what is sold is children he says that the transaction is not a business. So, looking at what is sold or considering the internal aspect of the transaction is nothing but inviting the moral values to play a part in conceptualizing the term 'business'. This involvement of morality may seem simple in some situations like sale of cars, toys, clothes, children, wives etc. where there can be a consensus on the morality of the transaction. Perhaps the sale of cars, toys, clothes etc. will be held moral and the sale of wives, children etc. will be held immoral consensually. But it will not be easy in other situations e.g. liquor, cigarettes, pornography etc. There will be divided opinions. Even assumingly simple situations may take complicated turn in some circumstances. Sale of children or prostitution is assumingly immoral. But sale of one child by an unemployed farmer during famine to feed the remaining four is moral or immoral? To indulge in a stray act of prostitution to keep the body and soul together is moral or immoral? Experience shows that morality is not only changeable with time and place but it also has a tendency to crack under crunch situations. Actually morality is a kind of an excellence. It is a higher virtue. It undoubtedly makes a person human. But this has a role in the second inning to play; it cannot be played in the first inning. The first inning is about existence. Only when the existence is secured the excellence could be aimed for. When one is confronted with the sale of one child to save the other four, one's rigid notion of morality starts loosening up. When the matter is related with life and death the morality takes a back seat. So few important questions arise—should such an un-objective criteria be allowed to play a part in the conceptualization of the term "business"? Should the concept of business be free from morality or not?

Before discussing what the Supreme Court of India thinks about this the legal difference this morality factor could make should be discussed. It is undoubtedly clear that if the concept of business is based on morality there will be many commercial transactions excluded from this concept and the concept shall be a narrow concept; but if it is free from moral factors there will be many commercial transactions included in this concept and the concept shall be a wider concept. It we adopt the wider approach all type of commercial activities shall become business and therefore there will be a fundamental right to do all type of commercial activities. If the State is willing to prevent those activities the State shall have to pass a law and that law, by virtue of Article 13 of the Constitution, shall have to pass the tests of reasonableness etc. given in Part-III of the Constitution. This

may amount to giving more liberties to the individuals than required to maintain the balance with power. On the other hand if the narrow approach is adopted there shall be activities which will never become a fundamental right and therefore if the State makes a law or passes some order to prevent those activities such law or order shall escape the tests of reasonableness etc. provided under Part-III of the Constitution. This may amount to giving more power to the State than required to maintain a balance with liberties. In other words, the narrow approach gives the State a power to prohibit the activity without justifying the prohibitions under part-III of the Constitution. And the wider approach gives the individuals a liberty to carry on any activity in the name of business howsoever immoral or unethical that may be. So, the narrow approach shifts the power-liberty equilibrium in favour of the State and the wider approach shifts the equilibrium in favour of the citizens. Such equilibrium should be maintained for a just order. Any shifting without counterbalancing creates an unjust order.

III. Judicial Response

The first case is *State of Bombay* v. *RMDC.*[1] The case deals with many aspects of the constitutional law. The paper deals only with one aspect i.e. the conceptualization of the term "business". In this case Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 was challenged as being violative of Article 19(1)(g) of the Constitution and not protected by Article 19(6) of the Constitution. The respondents in this case were carrying on a prize competition through a newspaper. The questions relevant for this paper were: (*a*) whether the activity is gambling or not? And (*b*) whether gambling is covered under Article 19(1)(g) or not? The first question was answered in affirmative. On facts it was found that the element of chance was too high in the prize competition and the element of skill was too low. Supreme Court adopted the view that if the element of chance is much more than the element of skill the activity takes the character of gambling. So on facts the Court decided that the prize competition in this case is nothing but gambling. The second question was answered in negative. The court held that gambling was not covered under Article 19(1)(g). The Supreme Court noted that the texts of Manu, Yajnavalka, Mahabharata,. and Kautilya etc. looked upon at gambling disfavourably. Some Australian and American judgments were also quoted to show the universality of the view that gambling is *res extra commercium* (outside the scope of commerce). The Supreme Court highlighted how this activity destroys the families, how the children, men and women are deprived of material comforts due to this activity. All in all

1. AIR 1957 SC 699.

the Supreme Court allowed the moral factor to play a decisive role in the judgment and decided against the respondent. It is noteworthy that ultimately, as a result of this decision, the imposition of a tax on the said immoral and res extra commercium activity was held valid.

The next case in point is *K.K. Narula* v. *State of J&K.*[2] The commodity involved this time was liquor. There was one restaurant called Glory Restaurant and one hotel called Bliss Hotel. Both of them had a license to sell liquor and both of them were situated in some congested locality of Jammu. There were some complaints against both of them with respect to their locality. Taxing and Excise Commissioner issued a notice to them to shift their business to some other place and refused to grant a renewed licence for the same place under Excise Act, 1958. The Act was challenged as being violative of Article 19(1)(g). It was contended that the right to do business includes a right to sell liquor. The court drew analogy between liquor and *ghee* and held that if dealing in one is business so it should be for the other. The court said that, the morality or otherwise of a deal should not affect the quality of the deal, though it may provide a ground for imposing a restriction on the said activity. Standards of morality should afford a guidance to impose restrictions but should not limit the scope of the right. The court decided that any real, substantial, systematic or organized activity is business. It is noteworthy that ultimately the court upheld the validity of the Excise Act, 1958, the restrictions imposed by that Act being reasonable.

Then comes *Nashrwar* v. *State of MP.*[3] In this case there was one M.P. Act and one Abkari Act, both prohibiting the trade in liquor except to the extent and subject to the conditions imposed by the legislature under them. The Acts were challenged on the basis of being violative of the right to do business under Article 19(1)(g). The court decided that:

(*a*) liquor is a commodity in a class different from other commodities and hence cannot be compared with other commodities;

(*b*) the framers of the Constitution did not intend to give a fundamental right to deal in liquor when they gave a freedom to do business under Article 19(1)(g) which is evidenced by Article 47 of the Constitution which says that the State shall endeavour to bring about a total prohibition on the consumption of intoxicating drinks except for medicinal purposes.

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2. AIR 1967 SC 1368.
3. AIR 1975 SC 360.

Then, recently in *Khoday Distilleries* v. *State of Karnataka*[4] constitutional bench of the Supreme Court has held:

> The right to practice any profession or to carry on any occupation, trade or business does not extend to practicing a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious and is condemned by all civilized societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious or injurious to health, safety and welfare of general public i.e. *res extra commercium* (outside commerce). There cannot be a business in crime....
>
> ...Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is therefore an Article which is *res extra commercium* being inherently harmful.

Almost the same sentiments are expressed in *State of A.P.* v. *Mc Dowell*.[5]

A not very extensive review reveals that the Supreme Court of India has consistently adopted the narrow approach in conceptualizing the term business. There is only one exception i.e. *K.K. Narula's* case in which the wider approach was adopted. Except in *K.K. Narula* some activities are considered *res extra commercium* consistently. Moreover the judgments were either based on moral consideration or legislative intent or medical reasons. So the law as pronounced by the Supreme Court of India could be summarized in these terms: Concept of business does not include commercial transaction in liquor (or even gambling). Therefore, there is no fundamental right to do business in liquor to the citizens of India. And this is so either because of the immorality of the transaction or because of the legislative intent to exclude the transaction from the scope of Article 19(1)(g) or because of the unhealthy effects of the commodity on human beings. In other words the concept of business of the Supreme Court is based upon three elements:

(*i*) morality;

(*ii*) legislative intent; and

(*iii*) health.

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4. (1995) 1SCC 575.
5. AIR 1996 SC 1627.

IV. EVALUATION

In this part the soundness of the basis of the concept of business of the Supreme Court shall be evaluated. The first factor to be evaluated is morality.

There is one clear advantage in introducing the element of morality while conceptualizing the term "business" under Article 19(1)(g) which is that some hard core immoral activities will be kept outside the scope of the fundamental rights thereby reducing the burden of the State to justify the prohibition of those activities. But as already discussed, there can hardly be any uniform opinion regarding the morality or immorality of any activity. The notion of morality is dynamic. It changes with time and place. Even within the same time frame and within the same geographical, cultural and economic limits the notion of morality takes a different colour but with the slightest change in the factual situation. It cracks under the crunch situations and we tend to classify the same activity as moral which we were hitherto been classifying as immoral. So an introduction of the moral factor creates a problem of drawing a line to divide the crunch situations and the normal situations. This distinction making process, in turn, adds a lot of subjectivity in the system. What situations are crunch situations and what are not could again be disputed. So a lot of uncertainty and subjectivity flows into the system as soon as the moral judgment is allowed to play a role in conceptualization process. This not only defeats one of the objectives of the law i.e. clarity and certainty, but this also gives arbitrary powers to the authorities to control the liberties. This will de-balance the power-liberty equation.

It is submitted that the moral factors should not play a role in the conceptualization process of the courts. This does not mean that immorality should be freely allowed in the society. Any legal concept should be free from morality does not mean that the law should include immorality. An immoral law cannot remain a law for a long period of time. Morality provides nourishment to the legal system. It is a driving force. Without morality the law is something like a body without soul. Morality is essential to keep the law alive. So, one should not be misunderstood as advocating the immorality in the legal system. People necessarily have to subject themselves to the moral views of the society. But the question is who should give voice to the moral view of the society? Judges or the legislators? Legislators are the elected representatives of the people of India and therefore they are more competent to declare the moral views of the society. Judges are appointed by the State so they do not represent the masses and therefore they are not competent to declare the moral views

of the society. So it should be the legislators who should decide the morality or otherwise of an activity. In other words the morality could be a ground for passing a law for the ban of any activity by the legislators. The courts should, then, check the reasonableness, arbitrariness etc. of the law (if challenged) under Articles 19(6), 14 etc. and then declare that law as valid or void. The courts should confine themselves to the technical job of testing the constitutionality of the laws. This will ensure a proper exercise of power by the legislators as well as by the courts. The former is there to give voice to the views (including moral) of the society by passing laws and the later is there to check the constitutionality of the enacted laws. This also maintains a division of power, which in turn ensures a check on the abuse of the power. If the judges decide cases on their moral considerations that would amount to a merger of the office of the legislator and that of the judge which would create an undesirable concentration of power.

Now one may ask that when the judge tests the reasonableness of a law he does so by allowing his moral consciousness to play a part in the testing process. So, if ultimately the judge would include his morality in testing the reasonableness of a law what's the harm in allowing him to do so in the conceptualization of the term "business." The answer is very simple. If the judge conceptualizes the term "business" on the basis of his morality he would keep those activities outside the scope of the term "business" which he would consider immoral and then he would not apply the tests of reasonableness vigorously to find out the *virus* of any law. In fact he may not apply the tests at all, and uphold the law, as a valid law only because of his conviction that the activity banned by that law is immoral. That means a law may be upheld as valid without being checked on the tests of reasonableness. One should remember that every law should not only be in conformity with the standards of morality of the society but it should also be in conformity with the standards of reasonableness of the Constitution. For example, if a law bans an activity declaring that as immoral, this is a voice given to the public morality by the legislators. It is then the duty of the judges to check whether there is a sufficient nexus between the objective of the law and the provisions of the law or not. It is their duty to check whether what is proclaimed by the legislators is actually done in the enactment or not. Whether crunch situations are taken into consideration or not. Whether the enacted law provides for the monitoring of the created authority or not. Whether relevant facts are considered and irrelevant ignored or not etc. This is the task the judges are supposed to perform while checking the reasonableness of the enacted laws. This task has to be performed without any reference to the morality or immorality of the activity banned in the law. If they allow the moral considerations to play

a role in conceptualizing they may conclude that the activity banned is immoral and therefore it is beyond the fundamental rights and hence there is no requirement of testing any further. So the law which is ideally required to conform to the standards of morality as well as reasonableness will conform only to the standards of morality. That way an unreasonable law may be held valid only because it was in conformity with the morality of the society. For example: the Central Government passes a law which prohibits homosexuality declaring that as immoral; and that law creates an authority which could put homosexuals to death without a fair trial. Now, such a law may be giving voice to the morality of the society; nonetheless this will be an unreasonable law for violating the principles of natural justice (no body should be condemned unheard). But if the judge allows his moral consciousness to play a role in conceptualizing homosexuality and is of the conviction that the activity is immoral, then he may not test the reasonableness of the punishment and the procedure given under the law vigorously. And he may uphold an unreasonable law as valid. On the other hand if he does not allow his moral judgement to intervene he, in all possibilities, will strike down the law as unreasonable in punishment and procedure, even if it was giving effect to the morality of the society.

The law should pass through the filter of morality as well as the filter of reasonableness. Both the filters are of different kind to separate different type of impurities. The filter of morality has to be applied by the legislators and the filter of reasonableness has to be applied by the judges. If the judges also apply the filter of morality and if the law happens to pass through that filter (which is very likely since the law has already passed through the same filter in the hands of legislators), it is feared that the judges, then, may not apply the filter of reasonableness properly or they may not apply the filter of reasonableness at all. Consequently, single filtered law may be served in the society where it should actually be double filtered law.

The result of serving single filtered law instead of double filtered law will be that the liberties of the individuals will not be properly protected. The liberties which should be curtailed on the basis of morality as well as reasonableness will then be curtailed solely on the basis of morality. This will result into more power in the hands of the State and relatively lesser liberties in the hands of the individuals thereby disturbing the much required balance between them.

There is one more thing worth noticing. It is clear from the above discussion that gambling, selling-liquor etc. is treated as immoral and therefore *res extra commercium*; but either a tax is imposed on that activity

and that is allowed to be carried on by the individuals or the State has taken over the activity and carried that on exclusively. This seems to be confusing. If an activity is immoral how that could be allowed to be carried on after paying taxes. Can the payment of taxes change the character of the activity? Moreover, if the activity is immoral why the State carries on the same activity unashamedly? That means if an individual is doing something then that is immoral but if the State is doing the same thing that becomes moral. It is difficult to digest. If something is *res extra commercium* being immoral it should be so for the individual as well as the State; it should be so notwithstanding payment or non-payment of taxes. There is no scope for the regulation of the immoral activities. They can't be regulated by imposing taxes on them or by taking them over by the State. There are only two choices viz. either ban them altogether or don't call them immoral. If some activities are called immoral and then are either allowed after receiving taxes or carried on by the State under it's ownership then that means the State is earning money through immoral activities.

Actually there is a lot of confusion in the mind of ordinary citizens of India; and the legislators and judges are no exception. People consume liquor and they feel guilty. Neither they stop consumption nor they accept it as any other food item. Consequently liquor becomes stigmatized but remains a lucrative item for earning profits. As far as the bad effects are concerned nobody understands that ghee, sweets, meat, rice, potatoes etc. have an equally bad effect on human health. Moreover, it is not the liquor alone which creates addiction. One can be addicted to any food item and the result will be equally harmful. So there is, practically speaking, no difference in liquor and other food items. But people don't accept this. The net result is that the commodity is treated *res extra commercium* but nevertheless sold by the State, it being a revenue generating item. The legislature and the judiciary should gather courage to treat liquor at par with other food items and perfectly moral. So they should pass the laws regarding liquor on the presumption that the commodity is not *res extra commercium* but dealing in liquor, nevertheless, requires regulations as all other perfectly moral activities require. And then the judges do amoral testing of laws with respect to liquor to find out whether they are reasonable or unreasonable.

The second factor to be evaluated is legislative intent. To base the judgment on the legislative intent is undoubtedly a sound technique of the interpretation of statutes. That meaning should be given to any law which the makers of that law intended to give. It is clear that the Supreme Court is trying to discover the legislative intent with respect to the scope of the term "business" under Article 19(1)(g) with the help of Article 47 of the

Constitution. Article 47 is a directive principle of State policy which requires the State to raise the level of nutrition and the standard of living and to improve public health. And for that purpose it requires the State to bring about the prohibition of the consumption of liquor except for medicinal purposes. The Supreme Court is reading Article 19(1)(g) with Article 47. Their logic is that since the legislators wanted the State to bring about a prohibition of the consumption of liquor except for medicinal purposes therefore they could never have intended to include the dealing in liquor in the term "business" under Article 19(1)(g). The interpretation is not free of controversy.

Article 47 is based on the understanding of the legislators of the effect of liquor on the health of human beings in 1940's. And their understanding was based on the scientific knowledge of that time. It should be kept in mind that all the statutes are meant to operate in continuum. They are presumed to remain valid in all the successive time frames. If in the time frames next to the making of the laws the knowledge or understanding of science improves we can't presume that the legislators intended to bind the successive generations with their outdated understanding. So, either the law should be adapted by giving a progressive interpretation to it or it should be changed.

The legislative intent in Article 47 was to improve the health of the public. Since their knowledge at the time told them that liquor deteriorates health they specifically mentioned that commodity to be prohibited in Article 47. Had they been aware of modern scientific understanding about liquor they would never have said so. Therefore, combined reading of Article 19(1)(g) and Article 47 can never give the meaning that liquor should be excluded from the concept of business even if that does not deteriorates health. And it does not always deteriorate health more than any other food item.

The legislative intent is clear from the State action. State never stopped selling liquor except for some time in some areas; then how can we say that the legislators intended to make that commodity *res extra commercium*. So the legislative intent is not properly found by the Supreme Court. The legislative intent cannot be said to exclude liquor from the concept of business.

As far as the third factor i.e. health is concerned, without going into the details of the medical journals, it may be pointed out that the modern scientific knowledge is clear on this point. 30 ml of liquor daily, relaxes the heart, brings down the cholesterol level and minimizes the risk of heart attacks. A moderate consumer of liquor is even more safe from heart-

attacks than a teetotaller. It also reduces the risk of kidney stones.[6] Therefore, the health factor relied upon by the court does not hold good in the conceptualization of the term "business".

V. Conclusion

The concept of business can be wide or narrow depending upon the exclusion or inclusion of the morality in the concept. The Supreme Court has generally adopted the narrow approach because of three reasons: morality, legislative intent and health. The following objections emerge:

1. subjectivity;
2. judges may be tempted not to test the reasonableness of the laws properly;
3. contradiction in the State actions.

The legislative intent is not correctly discovered inasmuch as moderate consumption of liquor is not a bad habit. Therefore, the foundation of the concept of business of the Supreme Court is fragile and has a potential to tilt the power-liberty equlibrium on the side of power. The concept of business should be kept free from moral considerations as far as possible. If it becomes inevitable to include morality it should be included by the legislators through laws. The judges should confine to the amoral testing of the laws. Morality should be included, if at all by the judges, in considering the reasonableness of the law and not in conceptualizing any term. The interpretation should be given to the law which is in accordance with the modern scientific knowledge. Legislative intent should be adapted so that the statutes may operate in continuum.

6. See Times of India, August 16, 1999.