BAN ON ENTRY OF LOCALS IN GOAN CASINOS: A CONSTITUTIONAL GAMBLE?

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Introduction

In the words of Dr. B. R. Ambedkar, "Equality may be a fiction, but nonetheless one must accept it as a governing principle" - This quote by the chief architect of the Indian Constitution serves a primer to the analysis undertaken by the authors in this Article, as they explore the legality of the ban imposed by the Government of Goa on the entry of Goan residents into off-shore and land-based casinos in Goa. In their critique of the decision of the Hon'ble High Court of Bombay at Goa upholding the restriction in a constitutional challenge on the touchstone of Article 14 of the Constitution, the authors argue that the High Court erred by coming to the conclusion that the discrimination between locals and tourists, who were exempted from the embargo, was justified. The authors submit that the High Court overlooked uncontroverted Supreme Court equality jurisprudence which does not permit a statute to be discriminatory in terms of its very purpose. Even when seen from the prism of the classical intelligible differentia test, the authors submit that in view of decisions of constitutional courts which, in the absence of supportive empirical evidence, have frowned upon selective applicability of laws to curtail what the legislature perceives to be vice, the 2012 Amendment to the Goa Public Gambling Act, 1976 which enforced the interdict was untenable. The authors conclude that the decision of the High Court fails to distinguish between morality and law, apart from leaving several salient jurisprudential issues of constitutional importance unanswered, such as the concept of state domicile, burden of proof and the standard of scrutiny in constitutional challenges; the fraught relationship between fundamental rights and directive principles; and the possibility of the existence of a fundamental right to gamble as an aspect of decisional autonomy under Article 21 of the Constitution.

In his autobiography, 'Roses in December', M. C. Chagla gives the reader an insight into his thought process while deciding cases during his tenure as a puisne judge and later as the Chief Justice of the Bombay High Court. His approach was to find out where justice lay or what a common sense view would dictate while bearing in mind that a court administers justice according to law, and not abstract justice.[1] Understandably so, considering that justice is often a perception on which opinions can genuinely differ[2], while the law or what is "legal", though seemingly unfair when viewed from the perspective of any one individual, must be tolerated if a system of laws whose application is certain and just in the grand scheme of things is to be devised, implemented, and maintained.[3]

This ontological tussle between legality and righteousness comes to the fore in the light of the notification[4] of the substantive provisions of the Goa Public Gambling (Amendment) Act, 2012[5], eight years after the statute was enacted by the legislative assembly of the state. Though a blanket ban on Goa's proliferating casino industry had been a consistent demand of the state's civil society for years[6], successive governments had refused to bell the cat[7], given the potential repercussions on the exchequer and the state's employment woes.[8] The 2012 Amendment, which made it unlawful for locals to enter the six gaming vessels anchored in the Mandovi

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[1] M.C. CHAGLA, ROSES IN DECEMBER, 158 (Bhavan's Book Univ., 12th Edn., 2011).

[2] FALI S. NARIMAN, BEFORE MEMORY FADES, 46 (Hay House Publishers [India] Priv. Ltd., 1st Edn., 2010) [hereinafter, *"Before Memory Fades"*].

[3] Miller v. United States, 42 F.3d 297 (5th Cir. 1995).

[4] Govt. of Goa, Dept. of Home, 21/1/2020-HD(G)/283 (Notified on Jan. 30, 2020) [Official Gazette, Series I, No. 44].

[5] The Goa Public Gambling (Amendment) Act, 2012, Act 8 of 2012, Acts of Goa State Legislature, (7th Sept., 2012) (India) [Hereinafter, *"2012 Amendment"*].

[6] *Non-Governmental Organizations Spit Fire Against Casinos, Gambling Act,* THE TIMES OF INDIA (May 2, 2012) https://timesofindia.indiatimes.com/city/goa/non-governmental-organizations-spit-fire-against-casinos-gambling-act/articleshow/12958290.cms; *NGOs Protest Against Casinos In Goa,* THE TIMES OF INDIA (Oct. 2, 2008,) https://timesofindia.indiatimes.com/city/goa/ngos-protest-against-casinos-in-goa/articleshow/3553130.cms; *NGO to Hold Rally Against "Rising" Casino Culture In Goa,* INDIA TODAY, (June 30, 2016) https://www.indiatoday.in/pti-feed/story/ngo-to-hold-rally-against-rising-casino-culture-in-goa-633820-2016-06-30.

[7] *See* Devika Sequeira, *After Fighting Against Goa's Casinos, Parrikar Gives Them What They Want,* THE WIRE (Aug. 7, 2017) https://thewire.in/politics/parrikar-gives-casinos-always-wanted-permanent-base-goa; *Both Congress, BJP Responsible for Goa Casinos*, INDIA TV (Apr. 18, 2013,) https://www.indiatvnews.com/politics/national/both-congress-bjp-responsible-for-goa-casinos-9564.html; Manasi Phadke, *The Big Issue Goa Parties Always Bet On to Win Power,* THE PRINT (May 17, 2019,) https://theprint.in/politics/the-big-issue-goa-parties-always-bet-on-to-win-power/236319/.

[8] *Casinos Have Provided Jobs, Revenue, Says Parrikar,* THE TIMES OF INDIA (July 21, 2017) https://timesofindia.indiatimes.com/city/goa/casinos-have-provided-jobs-revenue-says-parrikar/articleshow/5967348 6.cms; Sweta Dutta, *Casinos In Goa: Political Logic In Open-And-Shut Case,*THE INDIAN EXPRESS (Dec. 23, 2016,) https://indianexpress.com/article/explained/casinos-in-goa-political-logic-in-open-and-shut-case-laxmikant-parsekar -4440811/; *Goa Govt Earned Rs 411 Cr Revenue from Casinos In FY 19: CM*, BUSINESS STANDARD (Aug. 17, 2019, 17:15 IST) https://www.business-standard.com/article/pti-stories/goa-govt-earned-rs-411-cr-revenue-from-casinos-in-fy-19-cm-119080701145_1.html.

River which flows past the capital city, Panaji, as well as the dozen other run inside leading hotels[9], could be seen as a win-win manoeuver for the regime; it would protect the state's residents from the possible deleterious effects of gambling without completely stopping the revenue generation from the gaming centres, which would remain open to tourists.

In a decision[10] which has been the subject of very little scholarly discourse, the High Court of Bombay at Goa upheld the constitutional validity of the 2012 Amendment, which had been challenged as discriminatory on the ground that it selectively permits a certain class of the public to enter casinos and indulge in gambling while making it an offence for the rest to do so. The authors of this article argue, with utmost respect to the judges who delivered the judgment, that the verdict, though protective of the interests of the Goan public, with its moralistic undertones, is not constitutionally and jurisprudentially tenable and contributes to a rising trend in judicial interpretive thought which confuses between what is desirable and what is legal.[11]

The Goa Public Gambling Act: A brief legislative history

Under the framework of the Indian Constitution,[12] 'Gambling' finds a place in the State List of the Seventh Schedule to the Constitution[13] thereby conferring exclusive legislative powers on the respective states to frame laws to regulate gambling activities in their respective territories. The state of Goa enacted the Goa, Daman and Diu Public Gambling Act[14] in the year 1976 to provide for the punishment of public gambling and the keeping of common gaming houses in the then Union Territory[15], and it remained on the statute book in the same form for over 15 years, till a major exemption from the overall punitive scheme of the Act was carved out in the year 1992[16] by inserting section 13A[17] which empowered the government to permit the conduct

[9] Mayura Janwalkar, *Explained: The Politics and Economics Of Goa's River Casinos,* THE INDIAN EXPRESS (Feb. 24, 2021) https://indianexpress.com/article/explained/politics-economics-of-goas-river-casinos-7200124/.

[10] Usgaonkar vs. Goa, Writ Petition (Civil) No. 72/2021, order dt. 14.10.2021 (Bombay High Ct.) (India) [Hereinafter, *"High Ct. order*"].

[11] *See* Gautam Bhatia, *Uttarakhand High Court's Ban on Alcohol is as Flawed as The Supreme Court's Order On National Anthem,* SCROLL.IN (Dec. 9, 2016) https://scroll.in/article/823720/uttarakhand-high-courts-ban-on-alcohol-is-as-flawed-as-the-supreme-courts-order-on-national-anthem.

[12] The Constitution of India, 1950, Act 1 of 1950, (Nov. 26, 1949) [Hereinafter, *"India Const"*].

[13] *Id.*, 7th Schedule, List II, Entry 34 [State List].

[14] The Goa, Daman and Diu Public Gambling Act, 1976, Act 14 of 1976, Acts of Goa State Legislature (July 30, 1976) (India) [hereinafter, *"Gambling Act"*].

[15] Long title of The Goa, Daman and Diu Public Gambling Act, 1976.

[16] The Goa Public Gambling (Amendment) Act, 1992, Act. No. 11 of 1992, Acts of Goa State Legislature, (Aug. 24, 1992) [India].

[17] *Gambling Act*, *supra* note 14, § 13A.

of any game of electronic amusement in Five Star Hotels. The constitutional validity of section 13A was upheld in *Lalit Sehgal v. State of Goa*[18] on the ground that though gambling is otherwise prohibited, in view of the fact that it is economically advantageous to promote the state's tourism industry and provide entertainment activities in the form of slot machines in Five Star Hotels which generally cater to foreign tourists and high-income Indian tourists, such exceptions can be legitimately made. In its legislative wisdom, the government had taken a policy decision to confine these activities to such groups of people, which could not be questioned or said to be violative of Article 14 of the Indian Constitution, given that it had a nexus with the salutary object of the Act which was to prohibit gambling.

The years that followed saw the Act go through some major changes. A 1996 Amendment[19] liberalized the Act's preventive structure by adding an additional clause to section 13A which enabled the State to permit the conduct of table games on offshore vessels, only to be further curtailed by the 2012 Amendment by the insertion of a gamut of provisions which inter alia constituted the authority of a Gaming Commissioner[20], delisted its powers and duties[21], prescribed the conditions which must be fulfilled for a person to qualify as a tourist[22], restricted access to places where gambling is permissible to only tourists[23] while criminalizing the entry of those who do not have tourist permits.[24]

Setting up the contours of the constitutional challenge

The gravamen of the challenge[25] was that the classification made between tourists and non-tourists on the ground of their domicile and permanent residence within and without Goa, which served as the basis on which access to casinos was curtailed or allowed, fell foul of Article 14[26] of the Indian Constitution. The distinction made between the two categories of people by section 13G of the Act was ex facie discriminatory as it was a mere geographical classification not based on any intelligible differentia having a nexus with the object of the

[18] Sehgal v. Goa, 1996 (3) BomCR 105 (Bombay High Ct.) (India) [hereinafter, *"Lalit Sehgal"*].
[19] The Goa Public Gambling (Amendment) Act, 1996, Act No. 13 of 1996, Acts of Goa State Legislature (Sept. 11, 1996) [India].
[20] *Gambling Act*, *supra* note 14, § 13C.
[21] *Gambling Act*, *supra* note 14, § 13D.
[22] *Gambling Act*, *supra* note 14, § 2(7).
[23] *Gambling Act*, *supra* note 14, § 13G(1).
[24] *Gambling Act*, *supra* note 14, § 13G(2).
[25] *High Ct. order*, *supra* note 10, ¶ 7.
[26] *India Const.*, *supra* note 12, art. 14.

Act[27], thus failing the twin test laid down by a seven judge Bench of the Supreme Court in *Budhan Choudhry v. State of Bihar*[28]. If the avowed purpose of the Act was to indeed curtail gambling, it should have been forbidden for all sections of society, irrespective of their place of residence, for the simple reason that assuming a certain activity is harmful, it does not stop being so merely because the person is or is not a native of a certain place. To quote an old saying, "what is sauce for the goose is sauce for the gander."

It was further argued[29] that assuming that the intelligible differentia did have a nexus with the object of the Act, the object itself was discriminatory, apparent from the Statement of Object and Reasons contained in the Bill[30], presented by the Home Minister in the Legislative Assembly, which eventually on passage became the Amending Act. The Bill, in no uncertain terms, declared that it *"seeks to empower the State Government to permit only tourists to casinos"* and when the object itself was discriminatory, then the explanation that the classification is reasonable having a rational relation to the object sought to be achieved was immaterial[31] and consequently both the suspect provision as well as the object were liable to be struck down as ultra vires the Constitution.

The State's defence[32] was that no person has a fundamental right to carry on business in gambling which by its very nature is dangerous, harmful, and immoral and resultantly cannot be equated with the right to carry on any trade or commerce guaranteed to Indian citizens by Article 19(1)(g)[33], which itself is subject to reasonable restrictions under Article 19(6)[34]. As a welfare State, it is the duty of the government to ensure to every citizen adequate means of livelihood[35] and protect their families from the financial loss and poverty which may ensue on account of overindulgence in gaming activities involving chance or luck. The restrictions, imposed in the interest of people domiciled in Goa, are ultimately in the furtherance of the

[27] See Sonowal v. Union of India, (2005) 5 SCC 665, for the proposition that *"the mere making of a geographical classification cannot be sustained where the Act instead of achieving the object of the legislation defeats the very purpose for which the legislation has been made… For satisfying the test of Article 14, the geographical factor alone in making a classification is not enough but there must be a nexus with the objects sought to be achieved"* [emphasis supplied].

[28] Choudhry v. Bihar, AIR 1955 SC 191 (India).

[29] *High Ct. order*, *supra* note 10, ¶ 12.

[30] The Goa Public Gambling (Amendment) Bill, 2012, Bill No. 21 of 2012, Bills of Goa State Legislature, 2012 (India) [hereinafter, *"2012 (Amendment) Bill"*].

[31] Swamy v. Dir., Cent. Bureau of Investigation, (2014) 8 SCC 682 (India) [hereinafter, *"Swamy"*].

[32] *High Ct. order*, *supra* note 10, ¶ 9.

[33] *India Const.*, *supra* note 12, art. 19 § 1, cl. G.

[34] *Id.*, art. 19 § 6.

[35] *Id.*, art. 39 § a.

economic and social development of the State. The intelligible differentia between the locals and tourists hinges on the fact that tourists come to Goa for a short period for leisure and relaxation and thus have limited opportunities of access, whereas if the same concession is allowed to those domiciled in the state, it will have an adverse effect on Goan society. Hence, the classification based on domicile within and beyond the territorial boundaries of Goa was well-founded and did not violate Article 14 of the Constitution.

Analysing the verdict: More misses than hits

The reasoning of the court, holding that the impugned provisions do not suffer from the vice of discrimination, merits a close examination. The court, at the outset, while recording the submissions of the petitioner, does mention that the very object of the Amendment discriminates between tourists and non-tourists. But curiously, there is no further discussion on this contention.

Having its origins in the concurring judgment of Justice Vivian Bose in *Bidi Supply Company v. Union of India*[36], this strand of juristic thought believes that it is possible to conceive of classifications which are made in good faith, scientific, rational and have a direct and reasonable relation to the object sought to be achieved, yet are bad in law because despite all that the object itself cannot be allowed on the ground that it offends article 14.[37] In such a case, the object itself must be struck down and not the mere classification which after all, is only a means of attaining the desired end.[38] In reductionist terms, if the objective of the statute is illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable.[39]

Justice Vivian Bose's insistence on the requirement of lawful and non-discriminatory statutory objects found favour with a seven judge bench of the Supreme Court in *Nagpur Improvement Trust v. Vithal Rao*[40] wherein it was held that:

> The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified

[36] Bidi Supply Co. vs Union of India, AIR 1956 SC 479 [*per* Vivian Bose J.][Hereinafter, "*Bidi Supply Co."*].
[37] *Id.* p. 14.
[38] *Id.*
[39] Sibal v. Punjab Univ., AIR 1989 SC 903, (India) [Hereinafter, *"Sibal"*].
[40] Nagpur Improvement Trust v. Rao, AIR 1973 SC 689 (India).

> on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.[41]

Followed in *Deepak Sibal v. Punjab University*[42] and culminating with the Constitution Bench decision in *Subramanian Swamy v. Director, Central Bureau of Investigation*[43], this novel dimension of the equality jurisprudence, though binding and squarely applicable to the facts of the present case given that the very purpose sought to be achieved by introducing the Bill, evident from a plain reading of its Statement of Object and Reasons[44], was to discriminate between two sections of society, was completely ignored by the court,[45] which instead preferred to view the merits of the case from the lens of the traditional classification doctrine.

Even going by the two-pronged intelligible differentia test, it is difficult to defend the court's reasoning. In *State of Maharashtra v. Indian Hotel and Restaurants Association*[46], contentions, identical to that raised by the petitioner, apropos sections 33A and 33B of the Bombay Police Act, 1951[47] were accepted by the Supreme Court. Performance of all types of dances in eating houses, permit rooms, and beer bars was prohibited by section 33A whereas the same dance activity could be legitimately performed in hotels with three star and above ratings as well as in government associated places of entertainment by virtue of section 33B. In his leading judgment, Justice S. S. Nijjar did not find any substance in the argument that the embargo had been imposed to protect the women who perform in the establishments covered by section 33A from the patrons and struck down the provision on the ground that it runs afoul of Article 14, holding that:

> "We fail to see how exactly the same dances can be said to be morally acceptable in the exempted establishments and lead to depravity if performed in the prohibited

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[41] *Id.*

[42] *Sibal, supra* note 39.

[43] *Swamy, supra* note 31.

[44] *2012 (Amendment) Bill, supra* note 30.

[45] *See* Cent. Bd. of Trustees vs. Indore Composite Priv. Ltd., (2018) 8 SCC 44, ¶ 15 (India) - "Time and again, this Court has emphasized on the Courts the need to pass reasoned order in every case which must contain the narration of the bare facts of the case of the parties to the lis, the issues arising in the case, the submissions urged by the parties, the legal principles applicable to the issues involved and the reasons in support of the findings on all the issues arising in the case and urged by the learned counsel for the parties in support of its conclusion".

[46] State of Maharashtra v. Indian Hotel and Rest. Ass'n, (2013) 8 SCC 519 (India) [hereinafter, *"Indian Hotel and Restaurants Association - I"*].

[47] The Maharashtra Police Act, 1951, Act 22 of 1951, Acts of Maharashtra State Legislature, (June 11, 1951) §§ 33A, 33B (India) [hereinafter, *"Maharashtra Police Act"*].

> establishments. Rather it is evident that the same dancer can perform the same dance in the high class hotels, clubs, and gymkhanas but is prohibited from doing so in the establishments covered under Section 33A. We see no rationale which would justify the conclusion that a dance that leads to depravity in one place would get converted to an acceptable performance by a mere change of venue."[48]

The philosophical groundings of the decision, deeply rooted in a commitment to the intention of the Constitution makers who took pains to ensure that equality of treatment in all spheres is given to all citizens of this country[49] and that no person or class of persons is singled out as a special subject for discriminating and hostile legislation[50], align with an earlier judgment of the Andhra Pradesh High Court rendered in a similar factual matrix. In *Big Way Bar and Restaurant v. Commissioner of Police*[51] a policy decision not to grant amusement licences to any bars and restaurants in the State other than four star and five star hotels was declared unconstitutional on the ground that it created an unreasonable classification between the two sets of categories of hotels or restaurants as the activity in both categories of hotels and restaurants was one and the same, namely, music, singing and dancing.

In fact, soon after independence, a Full Bench of the Nagpur High Court was faced with a case[52] where differential treatment could be meted out in relation to issuance of permits for consumption of intoxicating liquor under Rule 7 of the Central Provinces & Berar Foreign Liquor Rules[53] on the basis of his social and economic status and habits. A bemused court struck down the rule observing that:

> "Where a law prevents the people in general from drinking intoxicating liquor, presumably on the ground that it is not desirable for anyone to do so, what justification is there to put in one class men of certain social & economic status & habits & allow them to drink? To give them this concession is not granting them a 'protection' but is just conferring a privilege on them."[54]

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[48] *Indian Hotel and Restaurants Association – I, supra* note 46, ¶ 101.
[49] *Id.*, ¶ 103.
[50] Chowdhury v. Union of India, AIR 1951 SC 41.
[51] Big Way Bar and Rest. v. Comm'r of Police, 2003 Cri LJ 1360 (Andhra Pradesh High Ct.) (India) [hereinafter, *"Big Way Bar and Restaurant"*].
[52] Sheoshankar v. Madhya Pradesh, AIR 1951 Nag 58 (Nagpur High Ct.) (India) [hereinafter, *"Sheoshankar"*].
[53] Central Provinces & Berar Foreign Liquor Rules, 1938, Rule 7 (India).
[54] *Sheoshankar, supra* note 52, p. 245 [*per* Mangalmurti, J.]

The court proceeded on the logical corollary that once the Government has placed an embargo upon the consumption of intoxicating liquor, it was absurd for it to relax the rigour of the law in the case of some because of their social and economic status and permit them to do that, considering that the very premise on which the legislature has legislated is contrary to the public good.

Foreign jurisprudence, too, has endorsed this equitable principle that there cannot be any 'pick-and-choose' policy when it comes to applying a law which intends to regulate what the legislature perceives as a vice. While the Supreme Court of Indiana in the United States invalidated a smoking ban which was extended to bars and clubs but from which riverboats were exempted[55], the Queen's Bench of Manitoba in Canada struck down[56] a part of the province's Non-Smoker's Health Protection Act[57] that bans smoking inside public places but excuses Aboriginal reserves on the ground that the exemption was discriminatory and violated the applicant's right to equality as guaranteed under section 15(1) of the Canadian Charter of Rights and Freedoms[58].

So how does the High Court reconcile these precedential authorities with the amendments to the Gambling Act? *Indian Hotel and Restaurants Association - I*[59] was distinguished[60] on the ground that the reasoning of the Apex Court was based on the fact that discontinuance of bar dancing in the non-exempted establishments would result in the loss of employment to a large number of women who would be forced into prostitution to earn a living since they did not have any other skills to earn a living. It is further observed[61] that the Apex Court in that case was concerned with an occupation or profession which was protected under Article 19 of the Constitution.

All this may be true, but what the court failed to consider was that *Indian Hotel and Restaurants Association - I* involved a two-fold constitutional challenge - firstly, that sections 33A and 33B of the Bombay Police Act discriminated against women employed to dance in eateries and bars

[55] *See* Paul Steiler Enter. v. Evansville, 2 N.E.3d 1269, (Sup. Ct. of Ind.) (U.S. of Am.).
[56] *See* R. v. Creekside Hideway Motel, 2006 MBQB 185 (Can.).
[57] The Non-Smokers Health Protection Act, C.C.S.M. c. N92, § 9 (4) (Can.).
[58] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act, 1982 (U.K.), c 11, § 15 cl. 1.
[59] *Indian Hotel and Restaurants Association - I, supra* note 46.
[60] *High Ct. order, supra* note 10, ¶ 20.

[61] *Id.*

in relation to those employed to dance in three star hotels and government establishments; and secondly, that they interfered with their right to work and right to earn a livelihood, both of which were accepted. Likewise, in *Big Way Bar and Restaurant*[62], the Andhra Pradesh High Court junked the government policy not to grant amusement licences to bars and restaurants other than four and five star hotels on the dual grounds of violation of Article 14 as well as Article 19. The policy not only amounted to an unreasonable restriction on the right of employer to carry on business but was also discriminatory. This selective interpretation of judgments amounts to ignoring the settled position of law that a judgment can have more than one ratio decidendi, all of which are binding on the subordinate courts.[63]

An attempt[64] was made by the Bombay High Court to distinguish *Sheoshankar*[65], and the authors submit incorrectly, by relying on the portion of the decision[66] where the Nagpur High Court upheld the prohibition on country liquor while permitting the consumption of foreign liquor on the ground that the classification between two objects was based on the footing that one is more harmful than the other. The court failed to realize that the degrees of harm test[67] would have been germane had two activities such as recreational drugs and gambling been under consideration and the legislature had proscribed any one of them, which according to it was more harmful. However, when the activity under consideration was one and the same, be it the consumption of a particular variety of liquor or gaming in casinos, and two categories of people are involved, and one of them is excluded on the basis of irrelevant criteria such as socio-economic standing or residential and domiciliary status, then the degrees of harm test has no application.

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[62] *Big Way Bar and Restaurant, supra* note 51.

[63] Bano v. Union of India, [2017] 9 SCC 1, ¶ 83 [*per* R. F. Nariman, J.] and footnote 65 of the judgement. *See also* Comm'r of Tax'n for N.S.W. v. Palmer, 1907 AC 179, ¶ 184 (PC) (appeal taken from N.S.W., Austl.) [*per* Lord Macnaghten, J.]; Jacobs v. London Cnty. Council, ¶ 741 (1950) 1 All ER 737 (HL) (appeal from Eng..); London Jewellers v. Attenborough (1934) 2 KB 206, ¶ 222 [*per* Greer, J.] (KB) (appeal from Eng.); Cheater v. Cater (1917) 1 KB 247, ¶ 252 [*per* Pickford, J.] (KB) (appeal from Eng.).

[64] *High Ct. order, supra* note 10, ¶ 24

[65] *Sheoshankar, supra* note 52.

[66] *Id.,* ¶ 264.

[67] *See* Dalmia v. Tendolkar, AIR 1958 SC 538, (India), ¶ 11 and Quareshi v. Bihar, AIR 1958 SC 731, (India) [for the proposition that "The legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest"]. *See also* Patsone v. Pennsylvania, 232 U.S. 138 (1914): "A State may direct its police regulations against what it deems the evil as it actually exists without covering the whole field of possible abuse."; Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224 (1914): "It is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see."

It is not entire out of place to state that the Supreme Court in *Indian Hotel and Restaurant Owners' Association - I*[68] struck a note of caution while applying the degrees of harm test holding that though the legislature is free to confine its restrictions to those cases where the need is deemed to be the clearest, such a conclusion has to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. The State of Goa failed to produce any objective evidence to support such a classification, though it was incumbent upon it to do so.

Incidentally, a comprehensive research study conducted by the non-governmental organization Sangath[69] suggests just the opposite. It revealed that only 1.1% of Goans visit casinos regularly, the most common form of gambling being the lottery at 67.8%, which can legally be run only by the government, whereas the gambling activity with the highest frequency was the outlawed "matka", with approximately 39.5% participants engaging in it at least once to thrice a week. Thus, when it has been proven that only a miniscule fraction of the local population is in the habit of frequenting casinos, the classification becomes scientifically dubious and merited a deeper level of scrutiny from the court.

The court's reliance[70] on *Lalit Sehgal*[71], which interestingly also involves multiple ratio decidendi dealing with discrimination as well as legitimate expectation, the former of which was followed, is misplaced given that it stands impliedly overruled by the decision of the Supreme Court in *Indian Hotel and Restaurants Association - I*[72] which has expressly rejected the argument that a presumably pernicious activity produces different effects on different people.

Thus, it was open for the State to either allow both tourists and non-tourists to access casinos or prohibit their functioning in totality, both of which are constitutionally permissible[73]. Moreover, the very fact that gambling is allowed for a certain category of people proves that

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[68] *Indian Hotel and Restaurants Association - I, supra* note 46, ¶ 120.

[69] Urvita Bhatia et al., *The Prevalence, Patterns, and Correlates of Gambling Behaviours In Men: An Exploratory Study From Goa, India,* 43 ASIAN J. OF PSYCHIATRY 143-149 (2019).

[70] *High Ct. order, supra* note 10, ¶ 27.

[71] *Lalit Sehgal, supra* note 18.

[72] *Indian Hotel and Restaurants Association - I, supra* note 46, ¶ 112: "We are of the firm opinion that a distinction, the foundation of which is classes of the establishments and classes/kind of persons, who frequent the establishment and those who own the establishments can not be supported under the constitutional philosophy so clearly stated in the Preamble of the Constitution of India and the individual Articles prohibiting discrimination on the basis of caste, colour, creed, religion or gender."

[73] *See* State of Gujarat v. Jamat, (2005) 8 SCC 534, ¶ 79 [*per* R. C. Lahoti, J.] (India).

the State does not consider it to be harmful, contrary to the stand taken by it in court.[74] Ironically, the government itself regularly conducts lotteries and maintains a separate department, entitled 'Directorate of Small Savings & Lotteries' for this purpose.[75]

Legislative duplicity of this kind, more so when it is incompatible with and contradictory to the professed objective, was disapproved by the Patna High Court in *Confederation of Indian Alcoholic Beverage Companies v. State of Bihar* when it struck down the Bihar government's notification imposing total prohibition in the state, as well as Section 19(4)[76] of the Bihar Excise Act of 1915[77], which was the statutory provision under which the notification was passed. Ostensibly, the purpose of the New Excise Policy, in furtherance of which the notification was issued, was primarily to combat alcohol addiction in poor and rural areas. However, the notification, while banning all alcohol, including foreign liquor, said nothing about banning toddy. Justice Navaniti Prasad Singh, in his concurring judgment, stuck down the Notification as violative of Article 14 observing that:

> "Curious to note that toddy (Tari), which is available in abundance and tapped freely without any licence or permit and sold freely not only in the rural areas but urban areas and which has alcohol content, undisputedly matching or above beer, has not been prohibited. It is freely available even today. There is no notification barring it. Then to say, that on one hand toddy can be freely tapped and sold unchecked, but foreign liquor or IMFL including beer cannot be sold or consumed does not stand to reason, if the true object of the State was to implement Article 47 of the Constitution."[78]

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[74] *See* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 US 328 (1986), ¶ 33 [*per* William J. Brennan, J. dissenting,]

[75] Directorate Of Small Savings and Lotteries, https://statelotteries.goa.gov.in/, (last visited May 13, 2022).

[76] Confederation of Indian Alcoholic Beverage Co.s v. Bihar, 2016 SCC Online Pat 4806 (Patna High Ct.) (India) [Hereinafter, *"COIAB"*].

[77] Bihar and Orissa Excise Act, 1915, Act. 2 of 1915, Acts of Bihar State Legislature, (Jan. 19, 1916) § 19, cl. 4, (India).

[78] *COIAB*, *Supra* note 76, *per* Navaniti Prasad Singh J. ¶ 184; *But see* Gautam Bhatia, *The Bihar High Court's Prohibition Judgment: Key Constitutional Issues – II: The Fundamental Right to Privacy*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 13, 2022,) https://indconlawphil.wordpress.com/2016/10/01/the-bihar-high-courts- prohibition-judgment-key-constitutional-issues-ii-the-fundamental-right-to-privacy/; State of Bombay v. Mali, AIR 1952 Bom 84, ¶ 30 (Bombay High Ct.) (India) [for the argument that the State can choose to initiate reform in a phased, sector-wise manner, and Article 14 is not attracted if the State has taken the first of many progressive steps towards reform].

Lastly, the court's reliance[79] on *The State of Bombay vs R. M. D. Chamarbaugwala*[80] and *B. R. Enterprises v. State of U.P.*[81] is equally misguided, as all three dealt with Article 19(1)(g), holding that there is no fundamental right to do business in an activity which is inherently vicious, i.e. which is *res extra commercium.*

Pertinently, opinions have been expressed that res *extra commercium* is an expression wrongly used in the last sixty five years by the Supreme Court and High Courts.[82] Having regard to its conceptual roots to Roman law, it would mean only those things which are incapable of ownership.[83] As far as businesses are concerned, no activity can be called *res extra commercium* - it is either permitted or not. As succinctly put by Justice Subba Rao in *Krishna Kumar Narula v. State of Jammu and Kashmir*[84], "if the activity of a dealer, say, in ghee is business, then how does it cease to be business if it is in liquor"?[85]

That apart, it was never the case of the petitioner that his right to carry on a business was violated - a fact acknowledged by the Court[86]. If that is so, the question of gambling being *res extra commercium* does not arise, which is material only in an Article 19(1)(g) challenge and not when the claim is of infringement of Article 14 as held in *Khoday Distilleries v. State of Karnataka*[87].

Another argument advanced by the State to justify the classification which was accepted by the Court was that the locals will have much greater opportunities for access to casinos as compared to tourists who visit the state for a limited period.[88] This might seem attractive and logical at first blush but is not entirely persuasive as it ignores the fact that there is nothing to prevent the tourists from making repeated trips to the state for the purpose of gambling related

[79] *High Ct. order*, *supra* note 10, ¶¶ 28, 29, 32.
[80] State of Bombay vs Chamarbaugwala, AIR 1957 SC 699 (India).
[81] B. R. Enter. v. Uttar Pradesh, (1999) 9 SCC 700 (India).
[82] *See* Arvind P. Datar, *Privilege, Police Power and Res Extra Commercium - Glaring Conceptual Errors*, 21(1) NLSI REV. 133 (2009).
[83] Action Comm., Unaided Priv. Sch. v. Dir. of Educ., Delhi (2009) 10 SCC 1, ¶ 59 [*per* S. B. Sinha, J., dissenting] (India).
[84] Narula v. Jammu and Kashmir, AIR 1967 SC 1368, ¶ 11 (India).
[85] *Id.*, ¶ 11.
[86] *High Ct. order*, *supra* note 10, ¶ 31
[87] Khoday Distilleries v. Karnataka, (1995) 1 SCC 574, ¶ 60 (India); *See also* Madhya Pradesh v. Jaiswal, (1986) 4 SCC 566, ¶ 33 (India); Meher Distilleries v. Maharashtra, (2002) 3 Mah LJ 36, ¶ 18 (Bombay High Ct.) (India); Kerala Samsthana Chethu Thozhilali Union v. Kerala, (2006) 4 SCC 327, ¶ 22 (India).
[88] *High Ct. order*, *supra* note 10, ¶ -.

indulgences. Though it was required to do so, no empirical evidence was produced[89] by the State to prove that the locals are more likely to frequent casinos and consequently splurge their earnings than tourists who, the State wrongly presumes includes only those who come for a jaunt. However, from a definitional perspective, the term tourist[90] encompasses all those who are not permanent residents of the state – students from other states who are studying in Goa, migrant workers and employees, and government servants on deputation, to name just a few – who will have far more accessibility and exposure to the alleged detrimental impact than a gallivant who has come for a brief frolic.

Similarly, the purported aim of safeguarding Goans and their families from the supposed financial loss, poverty, and mental trauma attributable to casinos falls flat on its face on another account - they are free to gamble on online platforms, which have not yet been illegalized.[91]

A weak case could be made to defend the legislation on the ground that it was made by the Government with the best intentions – to ensure the economic well-being of those who voted for it while simultaneously keeping the revenue flow into the treasury and the job prospects of those who worked in the casinos intact. But as H. M. Seervai puts it:

> Art. 14 confers a personal right by enacting a prohibition; and the only question which has to be determined when a law is said to violate the right is to inquire whether the prohibition has been violated. If the prohibition has been violated, the law will be void, however laudable the motives of its makers.[92]

The extent to which the State can exercise social control by way of legislation on the basis of what the State perceives as morality was discussed extensively by the Supreme Court in Indian

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[89] *See* State of Rajasthan v. Rao Manohar Singhji, AIR 1954 SC 297, ¶ 4 (India); Rajendran v. Madras, AIR 1968 SC 1012, ¶ 13 (India); Mane v. Maharashtra, (2000) 4 SCC 200, ¶ 6 (India) , Maheshkumar v. Maharashtra, (1986) 2 SCC 534, ¶ 6 (India); Sharma v. Rajasthan, (2002) 6 SCC 562, ¶¶ 23, 24, 27, 33 (India); *Indian Hotel and Restaurants Association - I, supra* note 46, ¶¶ 112, 120, 133.

[90] *Gambling Act*, *supra* note 14, § 2(7).

[91] Gaurav Laghate, *Indians flock to offshore betting sites in absence of legal platforms in the country,* ECONOMIC TIMES, (Apr. 12, 2022,) https://economictimes.indiatimes.com/news/sports/indians-flock-to-sites-like-parimatch-and-betaway-in-the-absence-of-legal-platforms-in-the-country/articleshow/90786734.cms?from=mdr.

[92] 1 H. M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 448 (M. J. Pocha, S. P. Madon, N. H. Seervai, 4th Edn. 1991) [Hereinafter, *"Seervai on India Const."*]; *See also Garg, infra* note 112, ¶ 46: "Legislation should not be only assessed on its proposed aims but rather on the implications and the effects."; *Johar, infra* note 120, ¶ 428: "Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights", [*per* Dr D. Y . Chandrachud, J.].

Hotel and Restaurant Association v. State of Maharashtra[93]. The court held that the standards of morality change with the passage of time and that a particular activity which was treated as immoral a few decades ago may not be so now, for the simple reason that societal norms keep changing. Thus, a practice which may not be immoral by societal standards cannot be thrust upon the society as immoral by the State with its own notion of immorality and in any case, a legislation of this kind cannot be contrary to constitutional provisions.

Relevantly, though the court was concerned with the activity of bar dancing, it also mentioned in passing that whether gambling is immoral per se or not has also become a debatable issue today.[94] Furthermore, and more importantly, it held that the State cannot take exception to the staging of dance performances per se on the notions that dance performances do not have moralistic values or that they give rise to exploitation as there was no material or empirical data to give rise to such a perception.[95]

It is troubling to note that despite the Apex Court's categorical statement that "Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience"[96] and its insistence on the necessity to base a perception of immorality on cogent material and objective evidence, the High Court chose to proceed on the basis of "common sense" rather than legal principles and precedents, bringing to the fore the famous words of the Earl of Halsbury, LC from Quinn v. Leathem[97]: "Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all". An over-reliance on such an approach sets a dangerous precedent, the perils of which were highlighted by the United States Court of Appeals in U.S. v. Foster[98] by observing that:

> "Even were employing common sense mandatory, different judges will almost surely have different notions of "common sense and experience", resulting in a totally

[93] Indian Hotel and Rest. Ass'n. v. Maharashtra, (2019) 3 SCC 429 (India) [hereinafter, *"Indian Hotel and Restaurants Association - II"*).

[94] *Id.*,¶ 79.

[95] *See Indian Hotel and Restaurants Association - II,* supra note 93, ¶ 105.

[96] *Indian Hotel and Restaurants Association - I, supra* note 46, ¶ 116.

[97] Quinn v. Leathem, 1901 AC 495, (HL) (appeal from N. Ir.) [*per* Earl of Halsbury LC].

[98] United States v. Foster, 674 F.3d 391 (4th Cir. 2012). *But see* Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545, ¶ 35 (India) - "It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Commonsense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants".

> subjective standard. The outcome of a "common sense inquiry" in any given case will therefore likely depend, at least in part, on the identity of the district court judge or the appellate panel members – a troubling consequence indeed."

Thus, it is clear that accidents of birth and geography cannot furnish the credentials for discrimination and authorize prejudicial treatment[99], more so when it has no nexus with the object sought to be achieved[100], and in the absence of any objective material to buttress such social divisiveness[101], the State's policy as well as the reasoning adopted by the Court to uphold it seems legally specious and judicially indefensible.

Clarifying hazy jurisprudence: An opportunity lost

The challenge involved several critical questions of constitutional importance on which the court could have shed light. Firstly, was the burden of proof on the petitioner to assail the classification or was it the duty of the State to show that it was non-discriminatory? Two constitutional benches in *Ram Krishna Dalmia v. Justice S. R. Tendolkar*[102] and *D. S. Nakara v. Union of India*[103] had taken diametrically opposite views, both of which have been followed by benches of lesser strengths.[104] However, there is no discussion on this aspect.

Secondly, is the concept of state domicile, an integral part of the definition of a tourist under the Act, recognized by Indian jurisprudence? While *D. P. Joshi v. State of Madhya Bharat*[105] answered the question in the affirmative[106], a subsequent decision of the Supreme Court in *Dr. Pradeep Jain v. Union of India*[107] has clarified that an Indian can have only domicile regardless of his residence and that is of India.[108] Both, jurists and courts have expressed divergent views

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[99] Lakshman v. Madhya Pradesh, (1983) 3 SCC 275, ¶ 3 (India) .

[100] *Gambling Act*, *supra* note 14, Objects and reasons.

[101] *See* Aashirwad Films v. Union of India (2007) 6 SCC 624, ¶ 15 for the proposition that *"In any case, it cannot be the object of any statute to be socially divisive in which event it may fall foul of the broad constitutional scheme"* (emphasis supplied); *see also* Skaria v. Mathew (1980) 2 SCC 752, ¶ 15 (India) - "Articles 14 and 15 do not recognise state frontiers or the cult of 'the sons of the soil".

[102] Dalmia v. Tendolkar, AIR 1958 SC 538, ¶ 11 (India).

[103] Nakara v. Union of India, (1983) 1 SCC 305, ¶ 16.

[104] *See e.g.* Bank of Baroda v. Devi (1989) 4 SCC 470, ¶ 13 (India): "The burden of showing that a classification is arbitrary is basically on the person who impeaches the law"; *but see* Rao. v. Andhra Pradesh, AIR 1986 SC 210, ¶ 20. (India) : "*As observed in Nakara, the burden of establishing the reasonableness of a classification and its nexus with the object of the legislation is on the State",* (emphasis supplied) [*per* O. Chinnappa Reddy, J.].

[105] Joshi v. State of Madhya Bharat, AIR 1955 SC 334 (India).

[106] *Id.*, ¶¶ 7-10 [*per* T. L. Venkatarama Aiyar, J].

[107] Jain v. Union of India, (1984) 3 SCC 654).

[108] *Id.*, ¶¶ 7, 8 [*per* P. N. Bhagwati, J.].

on this subject[109] and the court had a golden chance to clarify the law in this regard. Yet, this question remained unanswered.

Thirdly, what is the standard of scrutiny expected from a court when it is faced with an issue involving violation of the Fundamental Right to Equality? The traditional test of rational review which requires the government to show only a "rational connection" between the classification and the purpose has been subject to some criticism, described as an entirely free-floating concept which, in the end, becomes a plaything of individual judges[110], and the first decade of the twentieth century saw Indian courts evolve two new tests of judicial review, namely, the strict scrutiny test and the proportionality test.

In order to survive strict scrutiny, a law must not only be narrowly tailored to achieve a compelling government interest, but it must also be the least restrictive means for achieving that interest.[111] The proportionality test, which was held to be applicable to protective discrimination statutes, as in the present case, would also involve a two-pronged scrutiny – firstly, the legislative interference should be justified in principle, and secondly, the same should be proportionate in measure.[112] Academic as well as judicial opinion remained divided on the scope and applicability of these tests, primarily, the strict scrutiny test.[113]

The last decade saw the judicial endorsement of a newer version of the proportionality test by the Supreme Court, which mandates that a limitation of a constitutional right will be constitutionally permissible if firstly, it is designated for a proper purpose; secondly, the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment

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[109] *See* State v. Dayame, AIR 1958 Bom 69 (Bombay High Ct.) (India); Bharadwaj v. Union of India, (1990) 3 SCC 255, ¶ 14 (for the proposition that there is no such thing as domicile of a state and there is only domicile, i.e. domicile of India). *But see Seervai on India Const., supra* note 92, 316 - 328 (for the argument that there can be a state domicile in India).

[110] Gautam Bhatia, *Some thoughts on Article 14 Post-DSPE*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 26, 2014) https://indconlawphil.wordpress.com/2014/05/26/some-thoughts-on-article-14-post-dspe/.

[111] Chandra v. Delhi Subordinate Serv.s Selection Bd., (2009) 15 SCC 458, ¶ 88 (India).

[112] Garg v. Hotel Assoc. of India, (2008) 3 SCC 1, ¶ 50 (India) [hereinafter, *"Garg"*].

[113] *See* Chaudhri v. Union of India, (2003) 11 SCC 146, ¶ 36 [*per* V. N. Khare CJ, R. C. Lahoti J. and B. N. Agarwal, JJ] : "The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian Courts."; Thakur v. Union of India, (2008) 6 SCC 1 (*per* K. G. Balakrishnan CJ.] : "We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in Saurabh Chaudhri v. Union of India". *See also* Moiz Tundawala, *Invocation of Strict Scrutiny in India: Why The Opposition?* 3 NUJS L. REV. 465 (2010) [for an argument against a full-fledged embrace of the strict scrutiny doctrine by Indian courts]. *But see* Naz Foundation v. Government of Natn'l Cap. Territory of Delhi, (2009) 111 DRJ 1 (Delhi High Ct.) (India); Raag Yadava, *Taking Rights Seriously—The Supreme Court on Strict Scrutiny*, 22 NLSI REV. 147 (2010) [for an argument in favour of importing the strict scrutiny doctrine].

of that purpose; thirdly, the measures undertaken are necessary in the sense that there are no alternative measures that may similarly achieve the same purpose with a lesser degree of limitation; and finally, there needs to be a proper relation, a 'proportionality stricto sensu' or 'balancing' between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.[114]

The obvious question is: which of these tests should be applied in which scenario? An illuminating, authoritative opinion would have cleared up the waters which have been muddied by conflicting judicial decisions.

Then comes the interplay between the Directive Principles of State Policy, on the strength of which the State sought to defend the impugned legislation citing its duty to promote the welfare of the people[115] and the Fundamental Right to Equality, over which the petitioner claimed the State had ridden roughshod. The Directive Principles are not enforceable[116] and ordinarily cannot take precedence over Fundamental Rights unless the rigours of Article 31C[117] of the Constitution are attracted, which would require Presidential Assent of the State Legislation[118], admittedly not obtained in this case. The relationship between the two is complex[119] and judicial interpretation has wavered over time, from favouring the primacy of the fundamental rights[120] to striking a balance between the two[121]. Unfortunately, the court did not feel the need to express any views on this point.

And lastly, the issue arises as to whether the right to gamble is a fundamental right under Article 21 of the Constitution[122]. While this might have seemed like a no-brainer some years ago, with

[114] Mod. Dental Coll. and Rsch. Ctr. v. Madhya Pradesh, (2016) 7 SCC 353, ¶ 60 [*per* A. K. Sikri, J.](India) ; *See also* Puttaswamy v. Union of India (2019) 1 SCC 19, ¶¶ 148, 157, 158 [*per* A. K. Sikri, J.]. *See generally* Bhasin v. Union of India (2020) 3 SCC 637; Internet and Mobile Ass'n of India v. Rsrv. Bank of India (2020) 10 SCC 274 (India); Patel v. Rsrv. Bank of India (2022) 3 SCC 694 (India); State of Tamil Nadu v. Nat'l South Indian River Interlinking Agriculturist Ass'n, Civil Appeal No. 6764 of 2021, order dt. November 23, 2021 (Sup. Ct.) (India).

[115] *High Ct. order*, *supra* note 10, ¶ 9

[116] *India Const.*, *supra* note 12, art 37.

[117] *India Const.*, *supra* note 12, art. 31C.

[118] *Id.*

[119] *See generally* Gautam Bhatia, *Directive Principles of State Policy: Theory and Practice*, (Mar. 18, 2014) available at https://ssrn.com/abstract=2411046.

[120] *See* State of Madras v. Dorairajan, AIR 1951 SC 226 (India).

[121] *See* Qureshi v. Bihar, AIR 1958 SC 731 (India); Mills v. Union of India (1980) 2 SCC 591; State of Kerala v. Thomas (1976) 2 SCC 310 (India).

[122] *India Const.*, *supra* note 12, art. 21.

the widening confines of the right to privacy, recognized as a part of the right to life[123], it can no longer be dismissed as a laughable proposition. The Patna High Court has held that the right to privacy and its encompassing right to decisional autonomy includes the right to consume liquor[124] and an arguable case could be made for it to include the right of a man to spend the money earned by him the way he so pleases. Subject to constitutional interdicts, a man ought to be allowed to live his life on his own terms[125], and on the mere possibility of abuse by some persons, the right of others to responsibly gamble cannot be curtailed.[126] Again, the court did not consider it necessary to delve into this line of thought.

Conclusion: And justice for all… or is it?

Law reports are filled with rich encomiums heaped on the chapter on Fundamental Rights. Described as the heart and soul of the Constitution[127], and the North Star in the universe of constitutionalism in India[128], it is in their relation that the Courts have been assigned as the role of the sentinel on the *qui vive*[129], guarding the fortress of liberty and equality against a rampaging government.[130]

True it is that there is a always a presumption in favour of the constitutionality of a statute, premised on the basis that an elected government understands and is aware of the needs of the people[131] and a policy decision taken by it must be respected[132], but it is trite that the Constitution is the *suprema lex*, prevailing over all other forms of legislation.[133] After all, the very purpose of the chapter on Fundamental Rights was to withdraw the trinity of equality, liberty and dignity of the individual and place such subjects beyond the reach of majoritarian

[123] Puttaswamy v. Union of India, (2017) 10 SCC 1.
[124] *COIAB, supra* note 76, ¶¶ 171, 173, 183 [*per* Navaniti Prasad Singh, J.] ; *See also* Gautam Bhatia, *The Supreme Court's Judgment on the Sale of Liquor along National Highways,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (May 15, 2022)https://indconlawphil.wordpress.com/2016/12/17/the-supreme-courts-judgment-on-the-sale-of-liquor-along-national-highways/.
[125] *Garg, supra* note 112, ¶ 31.
[126] *COIAB, supra* note 76, ¶ 171 [*per* Navaniti Prasad Singh, J.].
[127] Coelho v. Tamil Nadu, (2007) 2 SCC 1, ¶ 109 (India).
[128] Johar v. Union of India, (2018) 10 SCC 1, ¶ 352 (*per* R. F. Nariman, J.) [hereinafter, *"Johar"*].
[129] State of Madras v. Row, AIR 1952 SC 196, ¶ 13.
[130] Gautam Bhatia, *Is the Supreme Court Abdicating its Responsibility?*, MUMBAI MIRROR (Aug 24, 2019) https://mumbaimirror.indiatimes.com/opinion/columnists/by-invitation/is-the-sc-abdicating-its-responsibility/articleshow/70812765.cms
[131] State of Bombay v. Balsara, AIR 1951 SC 318, ¶ 31 (India).
[132] *See* Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664, ¶ 234.
[133] Jain v. Indore Dev. Auth., (2005) 1 SCC 639, ¶ 31.(India)

governments.[134] If a constitutional court finds that a statute violates the Fundamental Rights, it is the duty of the court to strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution.[135]

The authors argue that the Court in the present case was erroneously influenced by yardsticks of what is moral or good for the people, which by its very nature is a vague and subjective concept, in stark contrast to the established principle that morality has no place in a court of law and cases are to be decided on legal principles and not on moral views.[136] If at all courts are concerned with any form of morality, it is constitutional morality which always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes.[137]

The result is that the 2012 Amendment will remain on the statute books. Rightly so, many would argue, as notwithstanding its many legal infirmities, it was a step in the right direction and made with good intentions. In the end, it would seem, justice was done, at least from the common man's point of view. But to quote the following passage from Fali Nariman's autobiography, 'Before Memory Fades',:

> "He was, in fact, the innovator of the idea that if justice cannot be done according to law, justice must be done despite the law. Incidentally, I think that we were fortunate to not have too many Desais on the bench because in a rule-of-law society, a surfeit of what is sometimes called 'palm-tree justice' is apt to be misunderstood, and justifiably so".[138]

In the final analysis, though the Amendment survived the constitutional challenge and the Hon'ble High Court's decision has attained finality, both might have been in the interest of the Goan populace but, in the authors' respectful view, do not pass constitutional muster.

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[134] *Johar, supra* note 128, ¶ 335.

[135] Indep. Thought v. Union of India, (2017) 10 SCC 800, ¶ 168 [*per* Deepak Gupta, J.] . *See also* State of Punjab v. Chand, (1974) 1 SCC 549, ¶ 167 [*per* H. R. Khanna J] (India).

[136] Quereshi v. Comm'r of Income Tax, (2007) 2 SCC 759, ¶ 16 (India). *See also* Ganpatrao v. Union of India, 1994 Supp. (1) SCC 191, ¶¶ 101 – 105 [*per* S. Ratnavel Pandian, J]; Garg v. Union of India, (1981) 4 SCC 675, ¶ 18 [*per* P. N. Bhagwati,J.,] *but see* ¶ 30 [*per* A. C. Gupta, J. dissenting]; 1 H. M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 494 (4th Edn. 2019).

[137] *Johar, supra* note 128, ¶ 335.

[138] *Before Memory Fades, supra* note 2, 357.