

(2017) 01 KL CK 0082

In the High Court Of Kerala

Case No : WA. No. 1823 of 2016 in WP(C). 33709 of 2015

Anoop. M.S Manelil House

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:

Constitution of India, 1950 — Article 21 "

Citation : (2017) 1 ILRKerala 778 : (2017) 1 KerLJ 676 : (2017) 1 KLT 531

Hon'ble Judges : P.R. Ramachandra Menon and Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : Sri. S. Vinod Bhat and Sri. Legith T. Kottakkal, Advocates, for the Appellants/Petitioners in the Writ Petition; Sri. Bijoy Chandran, Government Pleader, for the Respondent No. 1; Sri. Naveen T., Advocate, for the Respondent No. 2; Sri. M. Sasindran, SC, Consumerfed, for the Respondent No. 3

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—Introduction:

To drink or not to drink. That is the Hamletian dilemma of Anoop, the appellant. He has chosen to drink. He rails at the rules that obstruct his passion for the pint, his right to choose, to be let alone, to privacy, and, of all, his right to life. He claims that the laws prohibiting alcoholic drinks fall foul of the fundamental rights guaranteed to a citizen, to him. Do they? Our answer: No.

Facts:

2. Anoop M.S., the appellant, has a profession: he taps rubber trees and extracts latex. He taps about 400 trees a day. For this he works from 6 in the morning till 2 in the afternoon. Anoop has a habit: given what he calls it to be his "hectic work schedule", he finds his solace in "consuming small quantities" of liquor purchased from the retail outlets of Kerala State Beverages Corporation (KSBC) and Kerala State Co-operative Federation; that is, the second and third respondents. Liquor is his "daily diet." This daily diet makes Anoop

"rejuvenated, relaxed," and even "physically fit," as if it were the elixir of his life. Anoop is KSBC's loyal consumer, so to say.

Grievance:

3. Before 2014-15, when the Government introduced a new Abkari Policy ("the New Policy"), Anoop took his daily diet from the "bar hotels". Because of the New Policy, now he could not have access to bar-hotels but is constrained to buy liquor from the Government outlets. It costs him more.

4. According to the Policy, the Government has decided to shut down the retail outlets in a phased manner - 10% of retail outlets to be closed annually as per Clause 2 of the Policy. Clause 2, Anoop accuses, was introduced with no "specific or scientific study." Though the consumption of liquor is not prohibited in Kerala, the Policy indirectly prohibits the consumption. The State cannot prohibit a lawful thing "by introducing a policy." It ought to be effected only by a positive legislative enactment. The Policy is bad in law.

5. The Government has monopolized the liquor trade. The State is "enriched by the sale of liquor." Though KSBC levies exorbitant taxes and duties on liquor, it provides no quality services to the customers. The retail outlets closed in a phased-manner, the remaining outlets struggle to cater to the customers. The queue lengthening, the consumers must spend over two hours "in unhealthy and unworthy circumstances" to purchase liquor. The policy, in fact, is against the KSBC's objectives.

6. Anoop sanctifies liquor: alcohol has "historical and religious importance" in Kerala. It is used in some temples and rituals of Hindu Community, so closing outlets will affect the religious sentiments of the Hindus who follow "Puliyampulli", a ritual observed among some sects within the Hindu community in Kerala to worship Goddesses Shakthi. Remediless, Anoop has filed W.P. No. 33709 of 2015 to have the New Policy quashed.

Writ Outcome:

7. Through a judgment, dated 6th August 2016, this Court, per a learned Single Judge, dismissed the writ petition: The courts, up to the apex level, have upheld the policy; so, the policy needs no interference.

Appeal:

8. Resolute and resilient, Anoop, the rubber-tree tapper, has filed this Writ Appeal, reiterating the same contentions that earned rejection earlier.

Submissions:

Appellant's:

9. Sri Legith T. Kottakkal, the learned counsel for the appellant, has passionately argued that the Government has misused its dominant position by introducing the policy, though it has no authority to prohibit a lawful activity, and indirectly at

that. According to him, Abkari Act ("the Act") has no provision to empower the Government to prohibit liquor. The liquor prohibition, even in a phased manner, is outside the purview of Abkari Act.

10. State cannot dictate to the individuals what they should eat and what they should drink, the counsel contends. Reasonable restrictions can only be imposed but only by a statute. The New Policy does not restrict the liquor sale; on the contrary, it prohibits the liquor. It militates against Article 21 of the Constitution of India. Clause 2 of the Policy, according to the learned counsel, is irrational and has no nexus to the objectives sought to be achieved. Clause 2 of the Policy is ultra vires because it offends the distribution of Legislative Power under Constitution of India and Act 65 of 1951.

11. The learned counsel contends that consumption is a personal choice, a facet of right to privacy and right to be let alone, as has been enshrined under the Articles 21 and 19(1)(a) of Constitution of India. To support his contention, Anoop relies on *Hinsa Virodhak Sangh v. Mirzapur Mou Kuresh Jamat*, AIR 2008 SC 1892

12. Given the change of Government, the Hon"ble Governor in his speech under Article 176 on the floor of the Assembly has observed that the New Policy has "not yielded the desired positive impact." (para 214 of the Address). Mr. Legith also submitted that, on 30.06.2016, the Government on the floor of the Assembly that the New Policy is a failure; the policy resulted in the rampant abuse of drugs and ganja in the society. Even after admitting that the policy has failed, the Government, complains, Anoop, is not rolling it back - officially.

13. Faced with numerous precedents on the same issue, though concerning liquor trade, Sri Legith asserts that the issue of right to choose or of privacy is sub silentio in those cases. Sri Legith, during his submissions, has cited a plethora of precedents, apart from relying on some international covenants. They will be referred to by and by if the need arises. Eventually, the learned counsel urges the Court to quash the New Policy.

The Respondents":

14. The learned Government Pleader, on the other hand, has submitted that the petitioner has brought a frivolous cause before the Court; he has no other intention than hogging the limelight by wasting precious judicial time. According to him, already many rounds of challenge were laid against the New Policy but were all successfully repelled, up to the level of the Supreme Court. So the writ petition, as rightly dismissed, is hit by constructive res judicata, asserts the learned Government Pleader.

Issue:

15. A self-proclaimed hardworking individual takes liquor on a daily-basis and claims that he thus finds his relaxation. The Government, in 2015, introduced a New Liquor Policy to usher in prohibition in a phased manner, though. It has

decided to close the liquor retail outlets, a State's monopoly, at 10% annually. Does the New Policy infringe on the petitioner's right to choose, right to privacy, or right to life?

Discussion:

Setting the Tone:

16. "Our rulers will best promote the improvement of the people by strictly confining themselves to their own legitimate duties - by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment by maintaining peace, by defending property, by diminishing the price of law and by observing strict economy in every department of the State. Let the Government do this: The people will assuredly do the rest," hoped Thomas Babington Macaulay (Selections from the *Edinburgh Review*, 1835, Vol.III, 134) Macaulay visualised a utopian state, a state of laissez-faire, too. But governance is much more.

17. Governance, according to the United Nations Engendering Economic Governance, United Nations Fund For Women (UNIFEM), is the exercise of political, economic, and administrative authority to manage a nation's affairs. It involves complex mechanisms, processes, relationships, and institutions through which citizens and groups articulate their interests, exercise their rights and obligations, and mediate their differences. Governance encompasses every institution and every organization in the society, from the family to the State; it embraces all methods - good and bad - that societies use to distribute power and manage public resources and problems. Good governance, a subset of governance, manages the public resources effectively, efficiently to cater to critical needs of society. True, effective democratic forms of governance rely on public participation, accountability, and transparency.

18. Article 37 in Part IV on Directive Principles of State Policy uses the expression "governance of the country." But good governance is writ large and implicit in several provisions of the Constitution, argues Madhav Godbole, a former civil servant espousing the cause of administrative reforms. Incidentally, it pays to note that Madhav Godbole and another former civil servant filed W.P. (Civil) No. 69 of 2004 (PIL) seeking the Supreme Court to declare a citizen's right to good governance a fundamental right. The Apex Court, while dismissing the writ petition, observed thus: if there was a specific case of grievance, the court could consider it, but it could not rewrite the Constitution or run the administration. To grant the relief sought, the Court must look into every aspect of governance. It is impermissible Good Governance, A Distant Dream by Madhav Godbole, EPW, Vol. 39, Issue No. 11, 13 Mar, 2004.

19. There may be jurisprudential justification for viewing the constitutional commands and statutory stipulations through a moral prism. But there is little legal justification for conflating morals with legislation and pontificating the adjudicatory process. Morality may inspire law and may even result in legislation,

but morality by itself is not law. But the metamorphosis is always from morality to law; that is, rights.

Constitutionally entrenched rights and penumbral rights:

20. An inherent dignity of an individual and the inviolable integrity of his or her personality give rise to the notion that certain human rights are immutable and not negotiable. The multidimensional morality of human rights transcends the enumerated fundamental rights; it imperceptibly, inexorably chips away at the legislative limits of the rights. It sends from its ranks the rights, initially hazy and nebulous, to stand by the peripherals of the enumerated rights - to the status of penumbral rights. With the judicial winds in their sails, they slowly travel towards the core of the constitutional rights, as we call them "fundamental rights", one day.

The New Policy:

21. The Abkari Act, 1077 was introduced, as noted in *Kerala Bar Hotels Association v. State of Kerala*, AIR 2016 SC 163, in the erstwhile State of Cochin in 1902 and, in 1967, came to be extended throughout the State of Kerala. The Foreign Liquor Rules were promulgated under Sections 10 and 24 to 29 of the Abkari Act; they deal with the sale of Indian Made Foreign Liquor (IMFL). As a matter of policy, the State has the monopoly. Earlier, the State of Kerala made a "futile foray into prohibition", but this was withdrawn in 1967.

22. With the State of Kerala accounting for almost 14% of the national consumption of alcohol, the Executive had felt the liquor consumption in the state a social malaise. So it formulated a policy to prohibit liquor in the State in a phased manner. Though since 2010 the policy initiative had been around, on 22.08.2015, the State issued its New Policy guidelines (Ext.P1), which read as under (As quoted in *Kerala Bar Hotels Assosn. (supra)*): The Government being convinced the fact that in order to achieve the goal of "Liquor-Free Kerala", strict and urgent measures are to be adopted, the Abkari Policy 2014-15 is hereby declared subject to the following criteria.

1. Hereinafter Bar licenses will be issued only to 5 star hotels. The licenses of existing bar hotels which are functioning on the basis of provisional renewal of licenses except the licenses of 5 star hotels will be cancelled. The Government has decided not to renew the licenses of 418 nonstandard bar hotels mentioned in the Judgment of the Supreme Court.

2. 10% of outlets out of 338 FL-1 outlets of Kerala State Beverages Corporation and 46 outlets of Consumer Fed will be closed each year from 2nd October, 2014 onwards.

3. The sale of high strength alcoholic liquor through Beverages Corporation will be gradually reduced.

4. In order to rehabilitate the employees who lose their job due to the closing of

bar and to rehabilitate the persons who are alcoholically addicted a special plan namely "Punarjani 2030" will be commenced. For that purpose, 5% Cess will be imposed on the liquor which selling through the K.S.B.C.

5. The Liquor-Free propaganda program will be strengthened in the society at large and especially in educational institutions.

6. All Sundays will be declared as dry-day. This will implement from the Sunday of 5th October, 2014.

7. The traditional toddy tapping business will be protected and job security will be ensured for toddy tappers.

8. In order to rehabilitate the employees of closing bars and employees engaged in the job of affixing stickers, measures will be adopted. Kerala Alcohol Education Research, Rehabilitation & Compensation Fund (KAERCF) Fund will be formed in order to protect the retrenched employees. The said fund will be utilised for the following purposes such as making propaganda against drinking of alcohol, for collection of data regarding this matter, to protect those who destroyed themselves by alcohol consumption, rehabilitation of the persons who lost job. The fund for this purpose will also be found out from public.

9. To implement the order urgently, the Excise Commissioner, K.S.B.C. Managing Director have to take measures to submit the recommendations urgently to the Government.

23. Clause 2 of the New Policy is the bone of contention. Anoop apprehends that its implementation will throw the State into chaos and anarchy, for fewer and fewer shops by the year lead to congestion and clamour for more.

The Liquor Spectre in the State:

24. In Kerala, the land of coconuts as the name very suggests, neera and toddy have held their place, first, culturally; later, economically. The nature of social consumption of alcohol in the 19th century reflected the societal pattern: there was none of the social stigma attached to alcohol consumption. But 20th century saw change. Varun Panickar in his article "State-Sponsored Alcoholism in Kerala" (EPW, Vol. 50, Issue No. 23, 06 Jun, 2015) has profiled the problem graphically. Here we draw from his research.

25. The change in societal response to liquor has led to two distinct trends: the increasing incursion of the Excise Department into the toddy trade; and the growth of social reform and temperance campaigns. New taxation policies caused the illicit trade of alcohol to flourish in rural areas. In the decade from 1915 to 1925, the levels of licit sale of toddy fell to record levels with illicit sales rising by 25%. The rise of social mores connected with alcohol abuse resulted in the conception of social reform movements. The most prominent among these movements was the one started in southern Kerala by Narayana Guru.

26. The proliferation of arrack shops in Kerala well up to the early 1980s had

given rise to sale of spurious alcohol causing serious public health concerns. On the recommendation of a judicial inquiry commission, set up to recommend a mechanism against spurious alcohol, the Government in 1984 set up Kerala State Beverages Corporation (KSBC). It has to procure spirit, blend, bottle, and distribute Indian made foreign liquor (IMFL). KSBC ran 337 liquor shops across the state till 2010.

27. The availability of liquor at prices much lower than those offered in other states is said to have induced a drinking culture in Kerala which has had telling consequences on social behaviour and institutions. By 2013, Kerala had emerged as the State with the highest alcohol consumption rate per person: 8.3 litres. It accounted for 16% of the total national alcohol sales.

28. The 1980s signalled the revival of the Kerala economy by way of tourism and the KSBC. The most recent estimates place the share of KSBC close to one-fifth of the state revenues. Between 2006 and 2010 the revenue from the KSBC showed a phenomenal 100% rise, year after year.

29. The most prominent outcomes of the intense alcohol consumption practices in Kerala, it is believed, have been the rise of mental illnesses, declining economic productivity, and the rise in divorce rates. In 2011 the State recorded the second highest suicide rate in the country. A survey conducted in 2010 put alcohol abuse as the cause for 80% of divorces in the State. In the period 2008 to 2009 nearly 4000 deaths were caused by road accidents where at least one of the parties involved was driving under the influence of alcohol.

30. The Alcohol and Drug Information Centre (ADIC) in Thiruvananthapuram has found that nearly 57% to 69% of crimes in Kerala were alcohol-induced. The other concern is the increased hospitalisation of alcohol drinkers, which has hit family incomes and employee productivity adversely. The ADIC found that nearly 19% to 27% of hospital beds in the State were occupied by patients suffering from alcohol-related problems.

The Policy Legitimacy:

31. In Kerala Bar Hotels Assosn., the Hon^{ble} Supreme Court has dealt with the issue elaborately. We need not recogitate for it binds us. The Apex Court, among other things, observes that so far as the trade in liquor is concerned, Article 47 of the Constitution places a responsibility on every State Government to at least contain if not curtail consumption of alcohol. The impugned Policy, therefore, is to be encouraged and is certainly not to be struck down or discouraged by the Courts. How this policy is to be implemented, modified, adapted or restructured is the province of the State Government and not of the Judiciary. Banning pubic consumption of this inebriate cannot be constrained as not being connected in any manner with the effort to control consumption of alcohol.

32. Kerala Bar Hotels Assosn., also observes that vulnerable persons, either because of age or proclivity towards intoxication or as a feature of peer pressure,

more often than not, succumb to this temptation. Banning public consumption of alcohol, therefore, cannot but be seen "as a positive step towards bringing down the consumption of alcohol, or as preparatory to prohibition."

33. As to the judicial interference into policy decisions, Kerala Bar Hotels Assosn., observes that judicial review is justified only if the policy is arbitrary, unfair, or violative of fundamental rights. Courts must be loath to venture into an evaluation of State policy; the policy must be given a reasonable time to pan out. If it proves to be unwise, oppressive, or mindless, the electorate has been quick to alert the Government of its folly. The Apex Court has found no illegality or irrationality with the intention of the State to clamp down on public consumption of alcohol.

Alcohol - The Evolutionary Essence:

34. Scientists speculate that the human ancestors' ability, acquired millions of years ago, to break down alcohol likely helped them make the most out of rotting, fermented fruit that fell onto the forest floor. One may wonder how innocuously the habit started, as usual, as part of our evolutionary mission: the survival. Alcohol is at best an acquired taste. Pernicious as it is, some scholars have attributed to alcohol the credit of advancing civilization, though we cannot be sure what "civilization" they meant. The ripest fruit is the sweetest, the most calorific; the sweetest fruit is the closest to getting rotten, fermented. So, the tell-tale scent of fermentation was the surest way to a food at its most calorific. That is how the journey began. Man has gone past the calorie count; an evolutionary device has outlived its utility; and, perhaps, reached a pernicious stage of futility.

Utility v Futility:

35. One of Anoop's principle contentions is that the liquor trade is the money-spinner; it generates enormous revenue. Prohibition, according to him, affects the State's economy.

36. A welfare State is multidimensional. Apart from its regular sovereign functions, it undertakes economic activities, too - with a profit motive, at that. It has a corporate persona. It competes, if necessary, like any other trader, but, of course, standing on ethical foundations. Sometimes, given the pernicious nature of a particular profession or trade, it may monopolize it, not that it has the sole prerogative to distribute evil but to contain the contagion. There are, in fact, some necessary evils the State must contend with - liquor being a case in point. As a sovereign, State taxes and exacts revenue. With limitless demands on its limited resources, State has to augment: it carries on trade. Liquor is the foremost trade undertaken, sometimes exclusively, given its pernicious nature and its potential, too.

(a) Utilitarian's View:

37. Professor Michael J. Sandel of Harvard University in Justice, What's The

Right Thing To Do (Farrar, Straus and Giroux, New York, 2010), his popular lecture series, discusses Bentham's utilitarianism, adding a touch of irony. He observes that the doctrine of utilitarianism has only limited utility, under limited or contrived circumstances.

38. Jeremy Bentham, the 19th century English moral philosopher, who founded the doctrine of utilitarianism, scoffed at the idea of natural rights that held sway during his time. He called it "nonsense upon stilts." Conceptually, utilitarianism is a calculus of pain and pleasure: the highest principle of morality is to maximize happiness - pleasure over pain. The essence of utilitarianism is its consequentialism. It therefore looks to the future. Bentham arrives at his principle by the following line of reasoning: We are all governed by the feelings of pain and pleasure. They are our "sovereign masters." They govern us in everything we do and also determine what we ought to do. The standard of right and wrong is "fastened to their throne." The doctrine, in fact, exerts a powerful hold on the thinking of policy-makers, economists, business executives, and ordinary citizens to this day (Raymond Wacks's *Understanding Jurisprudence*, 256, 2nd Ed. Oxford).

39. To expose the ugly underbelly of statistical application of utilitarianism, Prof. Sandel (*Justice, What's The Right Thing To Do*, ----) cites the economic analysis undertaken by Philip Morris, the tobacco multinational, on what it barbarously called "the benefits of lung cancer." The tobacco company does big business in the Czech Republic, where cigarette smoking remains popular and socially acceptable. Worried about the rising health-care costs of smoking, the Czech government considered raising taxes on cigarettes. In a hope to fend off the tax increase, Philip Morris commissioned a cost-benefit analysis of the effects of smoking on the Czech national budget. The study found that the government actually gains more money than it loses from smoking. The reason: although smokers impose higher medical costs on the budget while they are alive, they die early; so they save the government considerable sums in health care, pensions, and housing for the elderly. The cost-benefit analysis, of course, proved to be a public relations disaster for Philip Morris. Faced with public outrage and ridicule, Philip Morris apologized. The company acknowledged that the study showed "a complete and unacceptable disregard of basic human values." (Ibid)

(b) Revenue is not the Last Word:

40. Prohibition is a policy prerogative; regulation, short of prohibition, too, is Government's legitimate exercise of its power. Left to choose between money and menace, the Government of Kerala, earlier, announced the Abkari Policy on 17.8.2011 for the year 2012-13. The Government, then too, viewed with serious concern "the rising trend of alcoholism and the consequential social issues arising in the Kerala society." It has felt the "strong feelings" against the rampant alcoholism emanating from the civil society. Fully realising, the Government formulated a "stringent Abkari Policy." To Government's credit, in that policy it has declared that "it did not wish to view the liquor business as a source of

revenue."

41. Given the dubious utilitarianism and given the Government's policy resolve, the issue of revenue getting generated by liquor should evaporate, as exposed liquor does.

Does the Executive have the power to bring about the policy of regulating or prohibiting liquor in the State?

42. This issues stands answered, emphatically at that, on more than one occasion by, of all, the Apex Court. Repetition serves no purpose. In *State of Kerala v. B. Six Hotels Resort Private Ltd.*, 2010 (5) SCC 186, *State of Kerala v. Surendra Das*, AIR 2014 SC 2762, and *Kerala Bar Hotels Assosn.*, (supra), the issue has been elaborately and emphatically answered. The Government does have the power.

Is the right to consume alcohol is a fundamental right in the nature of "right to choose", "right to be let alone", "right to privacy", or of all, "right to life" under Article 21 of the Constitution?

(a) Constitutional Commands:

Article 21:

Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 37:

"37. Application of the principles contained in this Part. The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

Article 47

"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.--The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

The Penumbra Rights:

43. Recently we have an occasion to examine the constitutional gamut of penumbral rights. We have observed that a constitution of any republic, however steeped in antiquity, is not the tyrannical command of the dead past. It is a live instrument - organic. It is a collection of ideas and ideals for all times, deliberately designed to be amorphous and malleable, capable of adopting itself to suit the crisis it is called upon to address and redress. Thus the adept hand of

the nation's polity adopts it to changing circumstances. We have, as a truism, acknowledged that the society is complex, diverse, and changing, so shall its response be to the issues these changes bring in. What is not a right today may be a penumbral or peripheral right tomorrow, and it may further get elevated to be an entrenched central right the next day.

44. So, with strong winds of individual dignity, personal integrity, and inviolability, privacy may no longer be confined to the constitutional crevices: it is real and regnant as a right. Its time has come, perhaps. But can it bulldoze all other constitutional canons if at all any of those rights, perceivably, conflicts with the right to privacy? So, to answer it, we need to examine the interplay between the Fundamental Rights and the Directive Principles of State Policy. The Interplay between Article 21 and Article 47:

45. It brooks no contradiction that Article 21 is pregnant with meaning and, therefore, exponentially expansive in its scope and content. The constitutional courts have time and time declared that the provision is the cornerstone of our constitutional edifice. Its reach extends far beyond the limits the provision is semantically or syntactically permitted to travel. Almost all other fundamental rights get vitalized by and imbued with the spirit of this provision. The provision mocks at interpretational limitations. Nor does it leave any room for controversy as to its sweep: the provision is never static; as the society matures and progresses, rights not thought of earlier also get consecrated as core constitutional rights.

46. Article 37 contextualises the principles which otherwise remain mere pious wishes: constitutional morals or righteous exhortations. The provision declares that the principles propagated in Chapter IV of the Constitution are fundamental in the country's governance; the State has a positive duty to apply these principles in making laws. If Fundamental Rights are the Citizen's Charter; Directive Principles are Legislative's Charter. In other words, if the Fundamental Rights are individual-centric, the Directive Principles are society-centric. It is very rare, if ever, that one can successfully maintain a claim - as the appellant attempted here - that the directive principles come in a person's way his enjoying his fundamental rights.

47. Article 47 ordains the Legislature to regard as its primary duty raising the people's living standards, nutrition and public health inclusive. So stating in general, the provision particularises one solemn obligation: the State will endeavour to prohibit the consumption - except for medicinal purposes - of intoxicating drinks and of drugs which are injurious to health.

48. Nutrition and public health are two of the numerous facets of better living standards. To achieve this objective, the State may adopt myriad methods. But the constitution pins the State to one particular method, besides all others. Prohibit the consumption of intoxicating drinks and also drugs which are harmful to health. Categorical is the constitutional mandate that the endeavour is towards

prohibiting consumption of intoxicating drinks. Regulating or proscribing the manufacture and sale of liquor are intermediary steps, collateral or contributory, to achieve the main objective: prohibiting the consumption.

49. Of the two evils, intoxicating drinks, as a whole, face the axe, while only those drugs harmful to health get outlawed, for "drugs" is employed generically and followed asyndetically with the relative qualifier "harmful to health." The Constitution, therefore, presumes that any drink intoxicating is harmful. In other words, "intoxicating drinks" does not get qualified by "harmful to health." The canon of construction, we suppose, applicable is that of the last antecedent.

50. The Rule of the Last Antecedent, as per the Black's Law Dictionary, is an interpretative principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing. The lexicon exemplifies the canon: in the phrase "Texas courts, New Mexico courts, and New York courts in the federal system," the words "in the federal system" might be held to modify only New York courts and not Texas courts or New Mexico courts. This canon is variably termed "the doctrine of the last antecedent" "the doctrine of the last preceding antecedent."

51. As with any canon of statutory interpretation, the rule of the last antecedent, of course, "is not an absolute and can assuredly be overcome by other indicia of meaning. Further, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme (For an erudite exposition of two competing canons the canons of last antecedent and of series qualifier See *Lockhart v. United States* (US Supreme Court, 3 November 2016)). True that the last-antecedent rule "can assuredly be overcome by other indicia of meaning," but none is present here.

The Interplay of, or Contradiction Between, Fundamental Rights and Directive Principles:

52. Since the days of constitutional infancy, attempts have been made to project that the Fundamental Rights and Directive Principles, on occasions, take a collision course and that they could be mutually exclusive, if not destructive. The constitutional courts have, however, steered clear of this avoidable course. In *State of Madras v. Smt. Champakam Dorairajan*, AIR 1951 SC 226, 228 (S.R. Das, J, as his Lordship then was), the Supreme Court has declared that the Directive Principles of State Policy must conform and run subsidiary to the Fundamental Rights. Quoting *Champakam Dorairajan* with approval, *Mohd. Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731 (para 17) (S.R. Das, CJ) has held that the directive principles are fundamental in the governance of the country; they cannot, however, over-ride the fundamental rights. It has, in fact, advocated a harmonious interpretation: the State should certainly implement the directive principles, but it must do so in such a way that its laws do not take

away or abridge the fundamental rights.

53. Another Constitution Bench of the Supreme Court in *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, 654 (Y.V. Chandrachud, CJ), has reiterated that the goals set out in Part IV must be achieved without abrogating the means provided for by Part III. Both parts forming the constitutional core, the Apex Court has cautioned that anything that destroys the balance between the two will ipso facto destroy an essential element of the basic structure of our Constitution.

Fundamental Rights - Directive Principles: Ambivalent Approach

54. M.P. Jani in *Indian Constitutional Law* (1411-12, Lexis-Nexis, 7th Ed.) examines the inter-relationship between Chapters III and IV. The learned author observes that the question of the relationship between the Directive Principle and the Fundamental Rights has caused some difficulty, and the judicial attitude has undergone transformation on this question over time. The judicial view has veered round from irreconcilability to integration between the Fundamental Rights and Directive Principles and, in some of the more recent cases, to giving primacy to the Directive Principles.

55. Initially, the Courts adopted a strict and literal legal position in this respect. The Supreme Court adopting the literal interpretative approach to Article 37 ruled that a Directive Principle could not override a Fundamental Right, and, that in case of conflict between the two, the Fundamental Right would prevail over the Directive Principle. In course of time, a perceptible change came over the judicial attitude on this question. The Supreme Court came to adopt the view that although Directive Principles, as such, were legally non-enforceable, nevertheless, while interpreting a statute, the Courts could look for light to the ""lodestar"" of the Directive Principles.

56. Without making the Directive Principles justiciable as such, the Courts began to implement the values underlying these principles to the extent possible. The Supreme Court to assert that there is "no conflict on the whole"" between the Fundamental Rights and the Directive Principles. "They are complementary and supplementary to each other." In fact, the judicial attitude has become more positive and more affirmative towards Directive Principles: both Fundamental Rights and Directive Principles have come to be regarded as coequal.

57. In *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, 515 (Balakrishnan, C.J.), the Supreme Court has said that no distinction can be made between the two sets of rights. The Fundamental Rights represent the civil and political rights, and the Directive Principles embody social and economic rights. Merely because the directive principles are non-justiciable by the judicial process does not mean that they are of subordinate importance.

58. The message of *Kesavananda Bharati*, (1973) 4 SCC 225 is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging

the reasonability of restrictions imposed on fundamental rights the relevant considerations, according to *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534, 564, are not only those as stated in Article 19 itself or in Part III of the Constitution: the directive principles stated in Part IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any fundamental right, aimed at securing directive principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and second, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution.

59. From the above discussion, we may safely hold that the precedential proclivity is towards according the Directive Principles a pride of place. If conflict is inevitable, the common good takes the lead and subordinates the individual's inclinations, unless the fundamental right affected is nothing short of quintessence of the individual's being, his existence.

Right to Privacy - a Precedential Perspective: Precedential Position:

60. The learned counsel for the appellant has cited a plethora of precedents. Though most may not be relevant, we must, nevertheless, examine a few decisions which deal with Article 21:

61. In *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 the question was about surveillance of a suspect and its impact on right to freedom of movement, as a facet of right to life. On a six-Judge Bench, Subba Rao, J (as his Lordship then was) poignantly observes that if physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. This interference with a citizen's privacy infringes his right to life under Article 21 of the Constitution.

62. In *Gobind v. State of M.P.*, (1975) 2 SCC 148 a three-judge Bench of the Supreme Court, in the context of Madhya Pradesh Police Regulations, has held that provisions relating to domiciliary visits and surveillance have force of law. Mathew J, speaking for the Bench, approves of the observations made by Charles Warren and Louis D. Brandeis in their article, "The Right to Privacy" (4 Harvard Law Rev. 193) : the right to be let alone was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. This assertion emanates from the idea of a "private space in which man may become and remain "himself""

63. Gobind, in fact, cautions against too broad a definition of privacy for it raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. It, then, holds that rights and freedoms of citizens

are set forth in the Constitution in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference unless a reasonable basis for intrusion exists.

64. Definitional freedom, we reckon, does not readily translate into decisional freedom. Semantics may support but will not invent an intended meaning. In the end, Gobind aptly acknowledges this dilemma. It quotes Ely ("The Wages of Crying Wolf : A Comment on Roe v. Wade, 82 Yale L.J. 920, 932.), who says nothing prevents one from using the word "privacy" to mean the freedom to live "one"s life without governmental interference. But the Court in Gobind obviously does not so use the term. Nor could it, for such a right always is at stake.

65. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, 1981 (1) SCC 608, the matter concerns the detenu"s right to meet his legal adviser and the members of his family. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 permits only one meeting in a month. This restriction was held to be unreasonable and, so, violative of the constitutional provisions under Article 14 and 21 of the Constitution of India. Speaking for a Bench of Two Judges, P.N. Bhagawati, J (as his Lordship then was) has held that the fundamental right to life, which is the most precious human right and which form the arck of all other rights must be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of an individual and the worth of the human person.

66. R. Rajagopal v. State of Tamil Nadu, 1994(6) SCC 632 concerns the freedom of Press and what could be reasonable restrictions on that freedom. The Supreme Court acknowledges that the right to privacy is not an enumerated fundamental right, but has been inferred from Article 21. It has further held that once a matter becomes a matter of public record, the right to privacy no longer subsists; it becomes a legitimate subject for comment by press and media. The Court in the interest of decency carves out an exception: A woman who is the victim of sexual assault should not be further subjected to indignity of her name in the name of right to information by publishing her name and the incident.

67. In Peoples Union For Civil Liberties v. Union of India, (1997) 1 SCC 301, the matter concerns telephone tapping. The Supreme Court has held that a telephone conversation in the privacy of one"s home or office is an important facet of a man"s private life, unless it is permitted under the procedure established by law. Telephone tapping invades a person"s right to privacy, as is inferable from Article 21 of the Constitution of India. The Court, on facts, examined Section 5 of the Indian Telephone Act, 1885 to hold that the Statute prescribed no procedure for the authorities to tap private telephones.

68. In Hema Mishra v. State of Uttar Pradesh, (2014) 4 SC 453 the Supreme Court has interpreted Section 438 of the Cr.PC. The newly added Section 41A of the Code makes it compulsory for the police to issue a notice to an accused

where arrest does not have to be made under clause (b) of sub-Section (1) of the amended Section 41 of Cr.P.C. The Court has observed that the object of the anticipatory bail and the connected procedural mechanism is to relieve a person from being disgraced by trumped up charges, so that his liberty is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons, who may be in charge of the prosecution, for an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into the charges made or to be made against the person released on bail.

69. In *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, AIR 2008 SC 1892 the facts are that the Municipal Corporation ordered closure of municipal slaughter houses for a few days during festival. The disclosure was assailed as an unreasonable restriction under Articles 19(1)(g) and 19(6) of the Constitution of India. The Supreme Court has held that while considering what could be reasonable restrictions on the right to freedom of trade and occupation, the Court should consider not only the facets of restriction, such as the duration and the extend, but also the circumstances and how the imposition has been authorised. In para 26 of the judgment, the Apex Court has acknowledged the fact that many people in Allahabad are non-vegetarian and they cannot be compelled to become vegetarian for a long period. In that context, it has further observed that what one eats is one's personal affair and it is a part of his right to privacy included in Article 21 of our Constitution.

70. In *Peerless General Finance and Investment Company Ltd. v. Reserve Bank of India*, (1992) 2 SCC 343 the case concerns the residuary non-banking companies receiving and investing deposits and the manner of their disclosure in the Books of Accounts. The Supreme Court has elaborated on how to determine the reasonableness of restrictions under Article 19(6) of the Constitution of India. It has held that the subordinate legislation, if validly made, becomes part of the statute and has the same statutory force and effect. The Court has gone on to observe that wherever statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. It is the duty of the Court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon.

71. *Peerless* observes that when a law has imposed restrictions on the fundamental rights, what the Court must examine is the substance of the legislature without being beguiled by the mere appearance of the legislation: the legislature cannot disobey the constitutional mandate by employing an indirect method. It is, however, pertinent to observe that this further observation is resonant that the Court cannot question the wisdom, the need, or desirability of a regulation. The State can regulate the exercise of the fundamental right to save the public from a substantive evil.

72. The existence of the evil as well as the means adopted to check it are the matters for the legislative judgment. But the Court may consider whether the

degree and mode of the regulation is over the requirement or is imposed in an arbitrary manner. The Court must lift the veil of the form and appearance to discover the true character and nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained. So the legislature is not invested with unbounded power. Touching on Article 21, the Court has held that it guarantees the minimum of the needs of existence including a better tomorrow - perhaps, not a bibulous one.

73. In all the above decisions relied on by the learned counsel for the appellant, we find no proposition that right to privacy is unfettered and that it brooks no restrictions - even reasonable ones, at that. We regret that none lays down that privacy, an individual right, prevails over the social welfare, a collective right.

Does Total Prohibition Offend the Citizen's Fundamental Right under Article 21?

74. In *Khoday Distilleries Ltd. v. State of Karnataka*, (1995) 1 SCC 574, 607, 608 (P.B. Sawant, J) another Constitution Bench observes that when the State neither prohibits nor monopolises the liquor business, it cannot discriminate among the citizens while granting licences to them to carry on the business. But emphatic is the assertion that equal right cannot be elevated to the status of a fundamental right. In para 60 of the judgment, the Court has further declared unambiguously that if the "State decides to impose total prohibition in terms of Article 47, then, no citizen can make a grievance, for, it would be a reasonable restriction."

75. In *Krishan Kumar Narula v. State of Jammu & Kashmir*, AIR 1967 SC 1368, the Apex Court has dispelled the myth that dealing in liquor would not amount to business; and, therefore, it would not be a fundamental right under Article 19(1) of the Constitution. The Constitution Bench, speaking through Subba Rao J., has held that unless dealing in liquor is not trade or business, a citizen has a fundamental right to deal in that commodity. His Lordship has observed that "standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right. So too, a legislature can impose restrictions on, or even prohibit the carrying on of a particular trade or business."

76. In *Indian Handicrafts Emporium v. Union of India*, 2003 (7) SCC 589 the Hon'ble Supreme Court, while dealing with the case of a total prohibition, reiterated that "regulation" includes "prohibition" and in order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the directive principles in Part IV is within the expression of "restriction in the interests of the general public".

77. In *Confederation of Indian Alcoholic Beverage Companies v. State of Bihar*, 2016 (4) PLJR 369, the High Court of Patna was called upon to answer, among others, the question whether the right to consume alcohol is a fundamental right, and whether any infringement or intrusion into that putative right, with legislation or otherwise, would violate a citizen's right to privacy - a

constitutionally guaranteed right. In a judgment of much labour and learning, the two learned judges differed. As it allowed the writ petitions on other issues, this decisional cleavage remained in the academic realms.

78. Navaniti Prasad Singh J, who authored the lead judgment took a view that with "expanding interpretation of the right to privacy, as contained in Article 21 of the Constitution, a citizen has a right to choose how he lives, so long as he is not a nuisance to the society. State cannot dictate what he will eat and what he will drink." His Lordship has felt that we have to "view this concept in changing times, where international barriers are vanishing."

79. On the other hand, Iqbal Ahmed Ansari, C.J., has taken a contrary view: when the Constitution obliges the State to make endeavour to bring complete prohibition regarding consumption of intoxicating drink, consumption of intoxicating drink cannot be treated as a fundamental right.

80. As has been contended by Anoop, the appellant, Article 21 may have received, and still has been receiving, a liberal, progressive treatment in the hands of constitutional courts. Its content is capacious, and its scope enormous. But a right, however entrenched it is, is never unrestrained, much less unregulated. As with all other rights, right to privacy - if right to take intoxicating drinks were one - always subject to reasonable restrictions. More compelling is this conclusion not only because of Clause (6) of Article 19 but also because of the sweep of Article 47 of the Constitution. The judicial dictum is emphatic in *Indian Handicrafts Emporium*, *Krishan Kumar Narula and Khoday Distilleries Ltd.* (supra).

81. But, before parting with the matter, we acknowledge that "the times they are a-changing." What is today morally reprehensible and socially unacceptable may not be so tomorrow. Anoop, the appellant, may still have hope, but he seems to have raised his voice rather prematurely. We conclude with the lines of Bob Dylan, the Nobel laureate:

"[A]nd don't speak too soon

For the wheel's still in spin

And there's no telling who that it's naming

For the loser now will be later to win

Cause the times they are a-changing"

Result:

We, therefore, hold that the writ appeal should fail, and it failed. The appeal is dismissed. No order on costs.