

# COURTS VERSUS REGULATORS

I take the 2014 Subrato Sahara judgment as exemplifying a theory of regulation:

In Para 4. Justice Khehar says the following:

“Preservation of market integrity is extremely important for economic growth of this country and for national interest. Maintaining investors’ confidence requires market integrity and control of market abuse. Market abuse is a serious financial crime which undermines the very financial structure of this country and will make imbalance in wealth between haves and have nots” (emphasis added).

Note the following:

1. Market integrity is itself a constitutional value.
2. This means control over market abuse.
3. Market abuse is declared to be a serious ‘financial crime’ as adversely “affecting the financial structure of this country” and “investor confidence”
4. It also adversely affects the “imbalance in wealth between haves and have nots”.

The Court does not further elaborate the meaning of concepts deployed. If ‘market integrity’ is a virtue, does it follow that ‘market abuse’ is a crime, unless so defined by the legislature. May the justices and courts create new crimes and punishment not provided by the law?

The Supreme Court did not do any more than to follow the directions given by the SEBI and the SAT but asked for the refund to the small investors who had paid cash sums to the Sahara group of companies; this refund did “not include any business gains earned by the two companies during the subsistence of their enterprise”. According to the Court, “all the investors money collected through OFCDs, had mainly been invested with the other companies of the Sahara Group”( namely Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited.)

It is “... now their case, that these properties were sold to other Sahara Group companies to redeem the OFCDs.”

The SEBI and the Court merely asked Sahara to refund to investors the cash monies thus collected, There was “absolute illegality” in collecting cash deposits by promoter in small amounts not exceeding Rs 3000 from “petty peasants, laborers, cobblers, blacksmiths, woodcutters and other such like artisans “(Para 12).

Because each citizen stands to benefit from the exertion of the other—this “harmonious glory” of the idea of “rule of law” guides each Justice to grasp his or the “sacrosanct obligations” (Para 15) not merely the duties to decide( fortified by the terms of Judicial Oath under Schedule 111 of the Constitution)but also punish a manifest contempt of the Court. Any disobedience of the judicial order will lead to a loss of trust and confidence of people in whose faith institutional judicial power rests. Any “non-compliance of its orders, would dislodge the cornerstone maintaining the equilibrium and equanimity in the country’s governance. There would be a breakdown of constitutional functioning. It would be a mayhem of sorts” (Para 17).

The issue in Subrato is not just market abuse but also how far contempt power, though inherent, extend? Does it extend?