

NATIONAL JUDICIAL ACADEMY



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NATIONAL WORKSHOP ON PROHIBITION: SOCIAL AND LEGAL MODALITIES

18TH & 19TH DECEMBER, 2021

PROGRAMME REPORT

PROGRAMME COORDINATORS: MR. RAJESH SUMAN & MS. ANKITA PANDEY
FACULTY, NATIONAL JUDICIAL ACADEMY
BHOPAL

OVERVIEW OF THE PROGRAMME

The National Judicial Academy organized an online “National Workshop on Prohibition: Social and Legal Modalities” on 18th and 19th December, 2021. The participants were the High Court Justices from various High Courts across the country. The workshop aimed to facilitate deliberations among the participant justices on core thematic areas in prohibition and its various social and legal modalities. The workshop provided a platform for participating justices to share experiences, insights and suggestions with a panel of distinguished resource persons from the judicial branch and other relevant domain. The workshop involved deliberations on the topics including Jurisprudential Understanding on law of Prohibition vis-à-vis Constitutional Values and Ethos; Paradox of Entangled Governance: Need for Effective Judicial Scrutiny on Prohibition; Rationalizing Revenue Generation and Ways to Promote Health: An Equilibrium of Conflicting Interest; and Impact of Unregulated Liquor Supply & Consumption on Health and Society: Pragmatic and Utilitarian Approach.

DAY 1

Session 1 - Jurisprudential understanding on Law of Prohibition vis-à-vis Constitutional Values and Ethos

Session 2 - Paradox of Entangled Governance: Need for Effective Judicial Scrutiny on Prohibition

DAY 2

Session 3 - Rationalizing Revenue Generation and Ways to Promote Health: An Equilibrium of Conflicting Interest

Session 4 - Impact of Unregulated Liquor Supply & Consumption on Health and Society: Pragmatic and Utilitarian Approach

DAY – 1

Session 1

Theme - Jurisprudential understanding on Law of Prohibition vis-à-vis Constitutional Values and Ethos

Panel – Justice S.C. Dharmadhikari & Mr. Arvind P. Datar

The discussion commenced with a historical overview of prohibition while referring to the province of Madras as the first state to impose prohibition in 1937. At the outset it was clarified that though the social objective of prohibition may be welcomed as the harmful effects of liquor cannot be disputed but eradication of liquor through prohibition has not been much effective. The unsuccessful effect of the prohibition law whenever imposed from 1950-2021 was pointed out especially in terms of huge rise in criminal cases, bootlegging, etc. The Constituent Assembly debates were discussed wherein Dr. B.R. Ambedkar specifically stated that prohibition has been consciously placed under the Directive Principles of State Policy so that each state may decide whether or not to have such a law. Three legal principles in this context were discussed:

(1) **Privilege** is defined as a special right, advantage or immunity granted to an individual or group and it must be distinguished from rights. A very fine discussion on the meaning and scope of ‘privilege’ is available in *C.S.S. Motor Services v. State of Madras*¹ wherein the Court associated the term with monarchy and opined that there is no place for such a concept in a republican democracy. This view was later upheld in *Saghir Ahmed v. State of U.P.*² The speaker, therefore remarked that usage of the term ‘privilege’ while granting license in domains exclusively under the State monopoly is grossly erroneous.

(2) **Police Power** as a concept was first laid down by Chief Justice Marshall in *Brown v. Maryland*³. It was iterated that the states have inherent power to make laws in order to secure public peace, law and order in matters where the Constitution is silent. These inherent powers were

¹ AIR 1953 Mad 279

² AIR 1954 SC 728

³ (1827) 25 U.S. 419

clearly distinguished from legislative powers. Later, in *U.S. v. Lopez*⁴ it was held that these inherent powers can be exercised only by the states and not the Congress thereby preserving the federal structure. The speaker further remarked that prohibition is upheld on the basis of privilege and police power. In the Indian context, the decision in *Chiranjit Lal Chaudhuri v. Union of India*⁵ was referred wherein it was held that the concept of police power is not applicable as it has variable and indefinite connotations. Similarly, in *State of West Bengal v. Subodh Gopal Bose*⁶ it was observed that since the Constitution provides for specific and detailed list of subjects which can be legislated upon therefore there is no place for police power in India. In contrast to the abovementioned judgments, in *Cooverjee Bharucha v. Excise Commissioner, Ajmer*⁷ the court applied the principle of police power to uphold prohibition. Subsequently, in *P.N. Kaushal v. Union of India*⁸; *Commissioner of Police v. Acharya J. Avadhule*⁹; and *Friends Colony Development Committee v. State of Orissa*¹⁰ the concept of police power was brought into.

(3) *Res Extra Commercium* has its origins in Roman law holding that certain things may not be the object of private rights, and are therefore insusceptible to being traded. That is to say, under Roman law the doctrine has no commercial connotations. However, it has been applied by the courts in India to mean something which cannot be permitted as a commercial activity. In *Anugurbala Mullick v. Debarara Mullick*¹¹ Justice N.C. Aiyer opined that *Shebaitship* is non-transferable and is therefore *res extra commercium*. The doctrine was applied in terms of ownership or proprietorship. However, in *State of Bombay v. R.M.D. Chamarbaugwala*¹² it was observed that anything which is not be encouraged as a commercial activity (harmful activities such as liquor, betting, gambling etc.) is *res extra commercium*.

The discussion further explored upon the issue of right to trade in liquor vis-à-vis Article 19 (1) (g) of the Constitution. In *Krishna Kumar Narula v. State of Jammu & Kashmir*¹³ it was opined there exists as much right to trade in liquor as in any other commodity subject to grant of license.

⁴ (1995) 514 US 549

⁵ AIR 1951 SC 42

⁶ AIR 1954 SC 92

⁷ AIR 1954 SC 220

⁸ AIR 1978 SC 1457

⁹ (2001) 12 SCC 770

¹⁰ (2004) 8 SCC 733

¹¹ AIR 1951 SC 293

¹² AIR 1957 SC 699

¹³ AIR 1967 SC 1368

In *Kerala Bar Hotels Association v. State of Kerala*¹⁴ it was held that a right to trade in liquor exists under Article 19 (1) (g) subject to Article 19 (6) and 47 of the Constitution. Regulation of liquor appears to be a more objective and realistic approach in terms of banning advertisements, regulation of sale timings and other such restrictions. However, in a number of decisions the courts have observed otherwise with the most recent one being *Commercial Tax Officer & Anr. v. Mohan Breweries & Distilleries Limited*¹⁵.

Further, the issue of ban on sale of liquor on highways was discussed. In *State of Tamil Nadu v. K. Balu*¹⁶ the Supreme Court directed that all states and UTs should cease to grant license for sale of liquor on highways. It was humbly opined that such a matter falls exclusively within the domain of the state legislature. These are polycentric matters as the dispute is not just with respect to liquor but trade, transport, tourism etc. will also be impacted.

It was interestingly remarked that law cannot change human nature as historically prohibition has never succeeded in achieving its objective anywhere in the world. It can be subjected to restrictions without applying the principles of privilege, police power or *res extra commercium*. However, a divergent view on the panel maintained that to say that prohibition should not be imposed would negate the whole purpose of Part IV of the Constitution. Consistently, when there is an obligation upon the State to improve public health it equally obliges the State to make law on prohibition of consumption, sale etc. of liquor. Articles 19 (1) (g), 19 (6) and 47 must be read together to sustain law on prohibition. Additionally, Articles 21 and 51-A must be taken aid to establish that neither right to consume or trade in liquor can be assumed to be a fundamental right.

Session 2

Theme - Paradox of Entangled Governance: Need for Effective Judicial Scrutiny on Prohibition

Panel - Justice S.C. Dharmadhikari & Mr. N. Venkataraman

The session explored certain conceptual aspects which need to be weighed and navigated through in order to draw a vision map for prohibition and analyse ways to achieve uniformity and

¹⁴ (2015) 16 SCC 421

¹⁵ 2020 SCC OnLine SC 552

¹⁶ (2017) 2 SCC 281

consensus. The important provisions of the Constitution in this respect are Articles 14, 19 (1) (g), 21 and 47. Further, the ground realities involved herein were examined. It was remarked that governments raise enormous revenue from the sale of alcohol, and is therefore a money spinner. It was also pointed that alcohol is not part of the GST regime under the Constitution and is exclusively a state subject. Most of the states have manufacture and distribution of liquor at their dispensation. It was emphasized that lottery, gambling, tobacco and alcohol have huge impact in terms of health, society and revenue generation. The interplay between a public duty and social responsibility vis-à-vis a private right was deliberated. The concept of *res extra commercium* as applied by the courts arguably acts as a resistance to the exercise of the fundamental right to consume alcohol under Article 21. In contrast, Article 47 obligates the State to ensure public health. It was opined that removing the lid of *res extra commercium* Article 47 gets diluted. Therefore, balancing the right of the citizen against the obligation of the state assumes great significance for the courts.

The issue of right to privacy under Article 21 vis-à-vis right to consume alcohol was elaborately discussed. It is known that one can exercise fundamental right to the extent it does not infringes someone else's right. It was asserted that alcohol consumption can lead to intersecting or competing social rights of privacy. Statistically, alcohol consumption especially in the lower strata of the society creates ruckus in the family life, interference in married life and upheavals in society at large. The decision in *Khoday Distilleries Ltd. vs. State of Karnataka*¹⁷ was referred wherein it was observed that when state is involved in manufacture, distribution and sale of liquor it does not flow as a fundamental right under Article 19 (1) (g) or Article 14 for a private entity to claim license for the same. This distinction was made in view of Article 47 of the Constitution. However, where state grants license to one private player then Articles 14 and 19 (1) (g) will come into operation.

It was asserted that we are now at the cross roads to determine whether there must be total prohibition, restrictions, regulation or free trade of alcohol. More importantly, on the spectrum of total prohibition to free trade the role of judiciary in recommending either of these as a policy to be resorted by the State needs to be analysed. The involvement of huge sums of revenue and other stakes makes total prohibition an uphill task. Also, business of liquor cannot be made a free trade

¹⁷ (1995) 1 SCC 574

as it has number of social consequences. It was advised that liquor must either be regulated or restricted using the doctrine of 'privilege'. Further, the discussion also reflected upon the need and role of judiciary to delve in matters involving social regulation. In this regard, the concept of *ex ante restriction* and *ex post restrictions* was explained. The cautious or conservative view holds that there exists a direct link between criminal activities and products governed by *res extra commercium* and it will eventually dilute state's stand on illegal trafficking, drugs, etc. However, in contrast, another school of thought opines that alcohol must not be clubbed with other criminal activities and therefore, there must not be *ex ante restrictions*. In conclusion, it was suggested that alcohol consumption should not be brought within the purview of Article 21 of the Constitution under the apprehension that once made a fundamental right it would move towards becoming a free trade policy.

DAY – 2

Session 3

Theme - Rationalizing Revenue Generation and Ways to Promote Health: An Equilibrium of Conflicting Interest

Panel - Justice B.P. Dharmadhikari, Dr. Subhash Chandra Garg & Mr. Sujit Ghosh

The session was introduced by Hon'ble Director and it was opined that the entire discussion on the prohibition concern for rationalizing the two situations i.e. rationalizing revenue generation and ways to promote health. The implementation of prohibition is a challenging task to government therefore there should be balance of views on the policy regarding liquor trade. This is not only a moral and social issue but it is also an economic issue.

It was opined that there is some conflict of interest within State governments as the revenue is vital and income from this business contribute to government coffer. The trade must be regulated properly and in this regard judgments *Khoday Distilleries Ltd. v. State of Karnataka*¹⁸ and *P.N. Kaushal vs. Union of India*¹⁹ were referred. The courts have given importance to policy decisions taken by State government concerning prohibition. By referring these judgments it was emphasized that the progressive implementation of the policy of prohibition by virtue of Article 47 is fundamental to country's governance and Part IV of the Constitution must enter the soul of Part III and the laws. There is need to bring balance between concern for finance and health and Article 21 is vital in this respect. The important Articles including Article 38, Article 39, Article 41, Article 42, Article 43 and Article 47 were referred.

Then the judgment in *State of MP v. Nandlal Jaiswal*²⁰ was referred where the Apex Court has said that Article 14 must be kept in mind having regard to the nature of trade and courts will be slow to interfere in economic policy matters. Another judgement *State of Kerala v. B. Surendra*

¹⁸ Ibid

¹⁹ (1978) 3 SCC 558

²⁰ (1986) 4 SCC 566

*Das*²¹ was referred where the Apex Court reiterated that there is no fundamental right to trade in this matter.

The Wickersham Committee's report was referred which concluded that prohibition was not successful and it increased organized crime in United States. The golden path is regulation rather than prohibition and there must be efforts to balance the drinking in moderation. Then the data regarding the consumption of liquor in various states was discussed. The data regarding excise duty revenue was also highlighted. Then Entry 8 and Entry 51 of the State List and Article 47 of the Constitution were discussed. It was emphasized that while deciding the public health pragmatism should be adopted and the data on Gujarat and Rajasthan were highlighted to support the fact that total prohibition does not reduce liquor consumption in society. Rajasthan has only 2.1% of alcohol consumer population in age group 10-75 while Gujarat which has prohibition for decades has 3.9% of alcohol consumer population. It was emphasized that while one may have a right to consume liquor but no one has a right to drive in a drunkard state. So it also need to be considered that how a person will consume alcohol and he will not cause any trespass in social space. Prohibition has led to illegal sale and it promoted lot of illegal activities and burdened the State with additional expenditure like policing and checking smuggling.

Then the role of judiciary in regulating the role of State in controlling prohibition was discussed. Sometimes courts have adopted moralistic and social reformist positions. Supreme Court's decision in the case of *State of Tamil Nadu v. K Balu & Anr.*²², to ban sale of liquor within 500 meters of national and state highways was one such decision. This judgement caused major disruption in the conduct of excise policy and led to loss of revenues and also investments. As the judgement was based more on emotional considerations than rationale, there were severe deficiencies which the Court had to rectify subsequently.

The discussion then focused on the revenue structure of States. There are some sin goods where the consumer has to pay more such as pan masala, cigarette or liquor so that some deterrence can be there on people and State get money for social development. The doctrine of elasticity was discussed which states that a rise in the price may not deter the consumer from consuming the sin good. Same apply to liquor also and government collects good revenue from liquor. Then

²¹ (2015) 12 SCC 101

²² Supra Note 16

Bastable's Canon of Expediency was referred where tax on the basis of economic, social and political needs was explained and it was opined that taxes on alcohol should be viewed from the prism of economic, social and political needs.

The American jurisprudence in judgment *Gundling v. Chicago*²³ and *Philips vs. Mobile*²⁴ was referred and the judgment *Har Shankar v. Dy. Excise and Taxation Commr.*,²⁵ was also referred which dealt with the issue of how to deal with liquor business and right to trade in liquor. Then the judgment in *State of Bihar v. Shree Baidyanath Ayurveda Bhawan*²⁶ was referred. The judgment *George Walkem Shannon v. Lower Mainland Dairy Products*²⁷ was referred where it was held that license fees are charged to defray cost of administration of local regulation or to increase general funds of province or both i.e., regulation of trade and provision of revenue. The government needs to collect revenue and regulation goes hand in hand and both are integrally connected. So whatever collection of revenue happens is an incidence of the desire of the State to control. It was emphasized that neither fiscal nor regulatory attribute can be said to be more important than the other. Both are co-located and co-incidental and integrally connected so far as the social fabric is concerned. Fundamentally the State uses both fiscal and regulatory power to control production, use and consumption of alcohol.

Indian policy on the liquor has been very diverse. British in India was more interested in revenue generation through liquor trade rather than social control or morality. Some legislations which were brought in to regulate sale and manufacture of liquor were referred including Abkari Act, 1878, Mhowra Act, 1892 and Government of India Act, 1935. Then the Tek Chand Committee Report Vol. 1, 1964 was referred which says that dry States will lose liquor revenue and it is not certain that money that was available for consumption of liquor will create further revenue in other areas. So significant and substantial decrease in excise revenue will happen and there will be manifold increase in expenditure on enforcement of prohibition and it will not yield much benefit. It was emphasized that prohibition never works and to generate more income from sales and luxury tax revenue, the rate of tax ought to be increased to further dis-incentivizing expenditure on such commodities. Then the Budget Report, 2019 (RBI) was referred and as per this report excise duty

²³ 44 L Ed 728

²⁴ 52 L Ed 578

²⁵ (1975) 1 SCC 737

²⁶ (2005) 2 SCC 765

²⁷ 1938 AC 708

on alcohol accounts for 10-15% of total tax revenue of the state. This may be second or third highest source of revenue generation by the State. Other forms of taxes and fees are also imposed to collect revenue from liquor trade and total revenue from the liquor trade makes 20-25% of the total revenue of the State. This is the reasons that alcohol has been barred from the Goods and Services Tax regime. The trend of revenue collection from the sale of liquor and tax rates were discussed and it was highlighted that many States hiked taxes on the sale of liquor in the second wave of Covid pandemic and used that revenue to spend on health facilities to cope up with the demands put up by the pandemic. It was argued that revenue collection from the sale of alcohol is also a means for social justice where the money is collected from those who have the capacity to pay and it is spend on the welfare of the people.

Then the order of the Madras High Court *M. Thaha Mohamed v. District Collector, Madurai District*²⁸ was referred which showed the helplessness of the judiciary in matters of alcohol regulation and prohibition. That was a writ Petition seeking to direct the State to remove the TASMAL Shop opposite to Madurai Bench of Madras High Court and near a Girls School. The Madras High Court did lot of data analysis and found 1: 2 syndrome (Revenue from Liquor: Expenditure on Health) which means that for every one rupee which the State earns from alcohol, it ends up spending two rupees on health consequences. It was found that 5300 TASMAL outlets easily earn about Rs. 30,000 crores per year and Rs. 90,000 crores has to be spent by the Government towards health care expenses per year. Despite all the data analysis the court just appealed to the State to bring in prohibition in phased manner. It was opined that other than making an appeal to the conscious and wisdom of the legislature there is nothing else courts can do in this area.

Session 4

**Theme - Impact of Unregulated Liquor Supply & Consumption on Health and Society:
Pragmatic and Utilitarian Approach**

Panel - Justice B.P. Dharmadhikari, Dr. N. Girish & Dr. Monika Arora

The discussion was commenced by referring to Article 47 of the Constitution and it was opined that position prescribed by Article 47 still holds good. Explaining the objective of the session it

²⁸ WP (MD) No. 19278/2020

was emphasized that we must focus on what judges can do to mitigate the disaster and regulate and moderate consumption of alcohol. Then the definition of the term alcohol, spirits, beverage alcohol and liquor was discussed. The question at what stage Blood Alcohol Concentration (BAC) is permissible was highlighted and it was emphasized that no organ in the body is immune from the alcohol harm. The harmful use of alcohol encompasses the drinking that causes detrimental health and social consequences for the drinker, the people around the drinker and society at large. It was emphasized that there is serious effect on public health and it is the main risk factors for poor health. The degree of risk for harmful use of alcohol varies with age, sex and other biological characteristics of the consumer as well as with the setting and context in which the drinking takes place. Alcohol is the major avoidable risk factor for neuropsychiatric disorders and other noncommunicable diseases such as cardiovascular diseases, cirrhosis of the liver and various cancers. The harmful use of alcohol is also associated with several infectious diseases like HIV/AIDS, tuberculosis and pneumonia. A significant proportion of the disease burden attributable to harmful drinking arises from unintentional and intentional injuries, including those due to road traffic crashes and violence, and suicides. Fatal injuries attributable to alcohol consumption tend to occur in relatively young people. For some diseases there is no evidence of a threshold effect in the relationship between the risk and level of alcohol consumption.

Then the discussion focused on the emerging patterns of alcohol use in India. The harms from alcohol use to families were highlighted and the findings from the empirical studies were shared with the participants. The alcohol not only has serious health consequences but it also results in difficulty in buying ration and medicines and payment of rent and school fees. The occurrence of fights and altercations also increases. The trends in the alcohol consumption before and after disasters was discussed and the misuse of relief money was highlighted. The comparatively higher alcohol related costs on society and excise revenue was discussed. The insights from the data of the National Family Health Survey was shared with the participants.

Then the discussion focused on strategies to control the distribution and sale of alcoholic beverages. The limitations of some of the strategies to control the alcohol was also discussed. It was emphasized that sustained alcohol control measures in public health delivery systems, in addition to demand reduction measures is necessary. The questions such as can we isolate drinking behavior from other personal behaviors, can we put a control on drinking behavior without

controlling other aspects of human behavior and should drinking of alcohol be left only to the discretion of the individual as a private matter or should society set the norm were discussed.

The prevalence and consumption of alcohol in global context was discussed and it was highlighted that 25.5% of all alcohol consumed worldwide is in the form of unrecorded alcohol. In India, homemade spirits constitute the highest proportion of total alcohol consumed at 2.2 % of total alcohol volume. Alcohol association has been seen with approximately 230 diseases including 40 diseases that would not have existed without alcohol and is also one of the leading risk factors for noncommunicable diseases (NCDs). It was also pointed out that alcohol industry funding distorts findings about alcohol and heart disease. The data regarding the prevalence of current alcohol use in the age group of 16-75 years in India was shared with the participants.

India's National Action Plan and Monitoring Framework for Prevention and Control of Noncommunicable Diseases, 2012-2013 as well as India's National Multisectoral Action Plan for the Prevention and Control of NCDs 2018-2023 (NMAP) which have set targets for a relative reduction in 'alcohol use' as opposed to the global targets of relative reduction in the 'harmful use of alcohol' were discussed.

It was suggested that there is a need for a National Alcohol Control Policy that addresses all aspects of alcohol regulation as recommended by the World Health Organization and this policy needs to be developed with a public health lens. Various measures to reduce consumption of alcohol were also suggested including strict prohibition of alcohol advertising, sponsorship and promotions, restricting easy access and availability of alcohol products, ensuring availability and access only to legitimate alcohol products, obtaining better estimates of the size of the unrecorded market, including smuggled products and identifying the scope and scale of the potential health risk from unrecorded alcohol.
