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P. N. KAUSHAL ETC.

v.

UNION OF INDIA

August 16, 1978

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[V. R. KRISHNA IYER, D. A. DESAI AND O. CHINNAPPA REDDY, JJ.]

Punjab Excise Act 1 *of* 1914, *Section* 59(*f*)(v) *and Punjab Liquor Licence Rules* 1956—*Rule* 37—*Constitutional Validity of—Business in intoxicants—State if has power to prohibit absolutely every form of activity relating thereto.*

C

Constitution of India, 1950—*Part IV of the Constitution must enter the soul of Part III and the laws made by the State—Articles* 38 *and* 47—*Progressive implementation of the policy of prohibition.*

The Punjab Excise Act 1914 contemplates grant of licences for trading in (Indian) foreign and country liquor. Section 59(f)(v) of the Act provides for the fixing of the days during which any licensed premises may or may not be kept open for sale of liquor and the closure of such premises on special occasions. The conditions of the licence includes restrictions of various types including obligation not to sell liquor on certain days and during certain hours. Rule 37(a) as it originally stood prohibited sale of liquor on Tuesdays upto 2 p.m. and also on the 7th day of every month. This rule was amended by a notification whereby in place of "Tuesdays upto 2 p.m. plus the 7th of every month" "Tuesday and Friday in very week", was substituted as the days when liquor vending was prohibited. "Note" appended to the said rule exempted tourist bungalows and rest-houses run by the Department of the State Government from the operation of the condition regarding closure. Consequent upon the change of days, the licence fee payable by a vendor was reduced from Rs. 12,000/- to Rs. 10,000/- to compensate for the marginal loss caused by two days' closure.

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The petitioners who were licensed vendors of liquor in the State challenged the constitutionality of section 59(f)(v) and the vires of Rule 37 on the ground that section 59(f)(v) vested an unguided, uncanalised, vague and vagarious power in the Financial Commissioner to fix the days or number of days and hours or number of hours without laying down any guidelines, indicators or controlling points.

G

The State on the other hand contended that the subject-matter of the legislation being a deleterious substance (liquor), requiring restrictions in the direction of moderation in consumption, regulation regarding the days and hours of sale and appropriateness in the matter of location of the places of sale, reasonableness and arbitrariness must be tested on the touchstone of principled pragmatism and living realism.

Dismissing the writ petitions,

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HELD : (a) Section 59(f)(v) of the Punjab Excise Act 1914 is valid. [158 C]

(b) The regulation of the number of days and the duration of the hours when supply of alcohol by licensees shall be stopped is quite reasonable whether it be two days in a week or more. [158D] A

(c) The exercise of the power to regulate, including to direct closure for some days every week, being reasonable and calculated to produce temperance and promote social welfare, cannot be invalidated on the imaginary possibility of misuse. The test of the reasonableness of a provision is not the theoretical possibility of tyranny. [158E] B

(d) There is enough guideline in the scheme and provisions of the Punjab Excise Act to govern the exercise of the power under sections 58 and 59. [158E]

(1) (a) The Constitutional test of reasonableness, built into Article 19 and of arbitrariness implied in Article 14 has a relativist touch. The degree of constitutional restriction and the strategy of meaningful enforcement will naturally depend on the Third World setting, the ethos of our people, the economic compulsions of today and of human tomorrow. While scanning the rationale of an Indian temperance measure it would be useful to remember the universal evil in alcohol and the particularly pernicious consequences of the drink evil in India. Societal realities shape social justice. [133H, 134A-B] C

(b) "We, the people of India" have enacted Article 47 and "we the Justices of India" cannot 'lure it back to cancel half a life' or 'wash out a word ot it', especially when progressive implementation of the policy of prohibition is, by Articles 38 and 47, made fundamental to the country's governance. [138H] D

(c) The Constitution is the property of the people and the court's know-how is to apply the Constitution not to assess it. In the process of interpretation Part IV of the Constitution must enter the soul of Part III and the laws. [138H, 139A] E

State of Kerala & others v. *N. M. Thomas & others* [1976] 1 S.C.R. 906 referred to.

(d) Even restrictions under Article 19 may, depending on situations be pushed to the point of prohibition consistently with reasonableness. While the police power as developed in the American Jurisprudence and Constitutional law, may not be applicable in terms to the Indian Constitutional law, there is much that is common between that doctrine and the reasonableness doctrine under Article 19 of the Indian Constitution. There is also a close similarity in judicial thinking on the subject. [148F, G] F

South Western Law Journal-Annual Survey of Texas Law Vol. 30 No. 1. Survey 1976 pp. 725-26. G

Idaho Law Review Vol. 7 1970 p. 131, *Fatehchand Himmatlal* v. *Maharashtra* [1977] 2 SCR 828 at 839-848 referred to.

(e) The statutory scheme of the Act is not merely fiscal but also designed to regulate and reduce alcoholic habit. While commodities and situation dictate whether power, in given statutory provisions, is too plenary to be other than arbitrary or is instinct with inherent limitations, alcohol is so manifestly deleterious that the nature of the guidelines is written in invisible ink. [151 G-H] H

A (f) The subject-matter of the legislation is a deleterious substance (alcohol) requiring restrictions in the direction of moderation in consumption, regulation regarding the days and hours of sale and appropriateness in the matter of the location of the places of sale. If it is coal or mica or cinema, the test of reasonableness will be strict, but if it is an intoxicant or a killer drug or a fire-arm the restrictions must be stern. Just as the difference between bread and brandy is felt in the field of trade control, coal and gold are as apart B from whisky and toddy as cabbages are from kings. Life speaks through law. [154D-F]

Nashirwar v. *M.P. State* [1975] 2 SCR 861 at 869-71 referred to.

(2) Even if section 59 and Rule 37 were upheld *in toto* that does not preclude any affected party from challenging a particular executive act pursuant thereto on the ground that such an act is arbitrary, malafide or unrelated to the C purposes and the guidelines available in the statute. To illustrate, if the Financial Commissioner or the Excise Commissioner as the case may be declares that all liquor shops shall be opened on his birthday or shall remain closed on his friend's death anniversary, the executive order will be invalid. The law may be good, but the executive action may be corrupt and then it cannot be sustained. [145G-H]

D (3) The most significant social welfare aspect of the closure is the prevention of the ruination of the poor worker by drinking down the little earnings he gets on the wage day. Any government with worker's weal and their families' survival at heart will use its 'police power' under Article 19(6) read with section 59(f)(v) of the Act to forbid alcohol sales on pay days. To save the dependent women and children of wage-earners the former unamended rule had forbidden sales on the 7th day of every month the day the monthly pay-packet E passes into the employees' pocket. While bringing in the Tuesday-Friday forbiddance of sales, the ban on sales on the seventh of every month was entirely deleted. The victims of the change are the weeping wives and crying children of the workers. All power is a trust and its exercise by governments must be subject to social audit and Judas exposure. [146E-H]

(4) The liquor trade is instinct with injury to individual and community and has serious side effects recognised everywhere in every age. Not to control F alcohol business is to abdicate the right to rule for the good of the people. Not to canalize the age and sex of the consumers and servers, the hours of sale and cash-and-carry basis, the punctuation and pause in days, to produce partially the 'dry' habit it to fail functionally as a welfare state. The whole scheme of the statute proclaims its purpose of control in time and space and otherwise. Section 58 vests in government the power for more serious restrictions and laying down of principles. Details and lesser constraints have been left to the G rule-making power of the Financial Commisisoner. The complex of provisions is purpose-oriented, considerably reinforced by Article 47. Old statutes get invigorated by the Paramount Parchment. Interpretation of the text of pre-constitution enactments can legitimately be infused with the concerns and commitments of the Constitution as an imperative exercise. It is impossible to maintain that no guidelines are found in the Act. [147D-F]

H (5) While the forensic problem is constitutional, the Constitution itself is a human document. The Court has justified the ways of the Constitution and the law to the consumers of social justice and spirituous potions. [128D, 158G]

(6) As between temperance and prohibition it is a policy decision for the Administration. Hopefully it is expected of the State to bear *true* faith and allegiance to that Constitution orphan, Article 47. [158A, G] A

The Collected Works of Mahatma Gandhi pp 29-30.

Society and the Criminal by M. J. Sethna 3rd Edn. P. 165, 166 & 168-169

Society, Crime and Criminal Career by Don C. Gibbars p. 427-428. B

Har Shankar & Others etc. v. *Dy. Excise & Taxation Commissioner & others* [1975] 3 S.C.R. 254 at 266-267 referred to.

Report of the Study Team on Prohibition Vol. I pp. 344, 346, 347.

ORIGINAL JURISDICTION : Writ Petitions Nos. 4021-4022, 4024-4025, 4027-4032, 4037, 4040-4041, 4045-4047, 4049-4075, 4078-4092, 4099, 4103-4111, 4120-4126, 4129-4140, 4142-4143, 4155-4157, 4184, 4187, 4188-4190, 4192, 4202, 4203, 4205, 4206, 4212, 4214, 4217, 4223, 4231, 4234-4235, 4245, 4250, 4252, 4300, 4308 of 1978 and 4226 of 1978. C

(Under article 32 of the Constitution of India.) D

AND

Writ Petitions Nos. 966-971, 3643-3650, 3884-3896, 3900-3921, 3965, 3975-3990, 4001-4020, 4034, 4100, 4127 to 4128, 4186, 4193, 4208, 4271, of 1978 and 3968-3971, 4191, 4221 and 4272-4275 of 1978. E

(Under article 32 of the Constitution of India.)

AND

Writ Petitions : 4154, 4209, 4242, 4243, 4247, 4248, 4253, 4254, 4310 and 4314 of 1978.

(Under article 32 of the Constitution of India.) F

A. K. Sen and *Mrs. Rani Chhabra* in W.P. 4021/78 for the Petitioners.

Yogeshwar Parshad and *Mrs. Rani Chhabra* in W.P. Nos. 4022, 4024, 4025, 4027-4032, 4037, 4040, 4041, 4045, 4047, 4046, 4064-4067, 4078, 4079, 4092, 4142, 4143, 4187, 4090, 4092 and 4231 of 1978. G

V. C. Mahajan and *Mrs. Urmila Sirur* for the Petitioners in W.P. 4049-63, 4080-91, 4108 to 4111/78.

K. K. Mohan, S. K. Sabharwal, Pramod Swarup and *Shreepal Singh* for the Petns. in W.P. Nos. 103, 4140, 4184, 4202 and 4234 of 1978. H

A *O. P. Sharma, N. N. Sharma, A. K. Srivastava, Amlan Ghosh* and *P. K. Ghosh,* in W.P. Nos. 4190-92 and 4226 of 1978.

O. P. Sharma for the Petitioner in W.P. 4226/78.

K. B. Rohtgi for the Petitioners in W.P. 3975-76 and 4274-75/78.

B

O. P. Singh in W.P. 966-71 of 1978 for the Petitioners.

A. L. Trehan for the Petitioner in W.P. 4100/78.

S. K. Sabharwal for the Petitioner in W.P. 4214/78.

M. Qamaruddin for the petitioner in W.P. 4193 of 1978.

C *R. K. Jain, K. K. Mohan* and *Rajiv Dutt, L. R. Singh* for the Petitioners in W.P. 4271-73/78.

S. N. Kacker, Sol. Genl,, O. P. Rana for the State of U.P.

Soli J. Sorabjee Addl. Sol. Genl. of India and *Hardev Singh* for the State of Punjab,

D *J. D. Jain* and *B. R. Kapoor* in W.P. Nos. 4242-4244, 4247-4228, 4209 and 4308 of 1978.

B. R. Kapoor and *S. K. Sabharwal* for the Petitioners in W.P. 4150-4254/78.

M. P. Jha for the Petitioner in W.P. 4252/78.

E *S. K. Sabharwal* for the Petitioner in W.P. 4245, 4253 and 4310/78.

Shreepal Singh for the Petitioners in W.P. 4235/78.

Hardev Singh on behalf of *R. N. Sachthey* for the State of Punjab.

F The Judgment of the Court was delivered by

KRISHNA IYER, J.—*What are we about*? A raging rain of writ petitions by hundreds of merchants of intoxicants hit by a recently amended rule declaring a break of two 'dry' days in every 'wet' week for licensed liquor shops and other institutions of inebriation in the private sector, puts in issue the constitutionality of section 59(f)(v) G and Rule 37 of the Punjab Excise Act and Liquor Licence (Second Amendment) Rules, (hereinafter, for short, the Act and the Rules). The tragic irony of the legal plea is that Article 14 and 19 of the very Constitution, which, in Article 47, makes it a fundamental obligation of the State to bring about prohibition of intoxicating drinks, is pressed into service to thwart the State's half-hearted prohi- H bitionist gesture. Of course, it is on the cards that the end may be good but the means may be bad, constitutionally speaking. And there is a mystique about legalese beyond the layman's ken !

To set the record straight, we must state, right here, that no frontal attack is made on the power of the State to regulate any trade (even a trade where the turn-over turns on tempting the customer to take reeling rolling trips into the realm of the jocose, belliocose, lachrymore and comatose). Resort was made to a flanking strategy of anathematising the statutory regulatory power in S. 59(f)v) and its offspring, the amended rule interdicting sales of tipay ecstasy on Tuesdays and Fridays, as too naked, unguided and arcane and, resultantly, too arbitrary and unreasonable to comport with Arts. 14 and 19.

Our response at the first blush was this. Were such a plea valid, what a large communication exists between lawyer's law and judicial justice on the one hand and life's reality and sobriety on the other, unless there be something occultly unconstitutional in the impugned Section and Rule below the visibility zone of men of ordinary comprehension. We here recall the principle declared before the American Bar Association by a distinguished Federal Judge—William Howard Taft—in 1895 :

> "If the law is but the essence of common-sense, the protests of many average men may evidence a defect in a legal conclusion though based on the nicest legal reasoning and profoundest learning."

The Facts

The Punjab Excise Act, 1914, contemplates grant of licences, *inter alia*, for trading in (Indian) foreign and country liquor. There are various conditions attached to the licences which are of a regulatory and fiscal character. The petitioners are licence-holders and have, on deposit of heavy licence fee, been permitted by the State to vend liquor. The conditions of the licences include restrictions of various types, including obligation not to sell on certain days and during certain hours. Under the former rule 37 Tuesday upto 2 p.m. was prohibited for sale; so also the seventh day of the month. The licences were granted subject to rules framed under the Act and Section 59 is one of the provisions empowering rule-making. Rule 37 was amended by a notification whereby, in the place of Tuesdays upto 2 p.m. plus the 7th day of every month, Tuesdays and Fridays in every week were substituted, as days when liquor vending was prohibited. Under the modified rules a consequential reduction of the licence fee from Rs. 12,000/- to Rs. 10,000/- was also made, probably to compensate for the marginal loss caused by the two-day closure. Aggrieved by this amendment the petitioners moved this

A Court challenging its *vires* as well as the constitutionality of S. 59(f)(v) which is the source of power to make rule 37. If the Section fails the rule must fall, since the stream cannot rise higher than the source. Various contentions based on Art. 19(g) and (6) and Art. 14 were urged and stay of operation of the new rule was granted by this Court.
B

We will presently examine the tenability of the argument and the alleged vice of the provisions; and in doing so we adopt, as counsel desired, a policy of non-alignment on the morality of drinking since law and morals interact and yet are autonomous; but, equally clearly, we inform ourselves of the plural 'pathology' implicit
C in untrammelled trading in alcohol. He who would be a sound lawyer, Andrea Alciati, that 16th century Italian humanist jurist, long ago stressed, should not limit himself to the letter of the text or the narrow study of law but should devote himself also to history, sociology, philology, politics, economics, nostics and other allied sciences, if he is to be a jurist priest in the service of justice or legal
D engineer of social justice.(1) This is our perspective because, while the forensic problem is constitutional, the Constitution itself is a human document. The integral *yoga* of law and life once underlined, the stage is set to unfold the relevant facts and focus on the precise contentions. Several counsel have made separate submissions but the
E basic note is the same with minor variations in emphasis.

Why drastically regulate the drink trade ?—the Social rationale-on Brandies brief

Anywhere on our human planet the sober imperative of moderat-
F ing the consumption of inebriating methane substances and manacling liquor business towards that end, will meet with axiomatic acceptance. Medical, criminological and sociological testimony on a cosmic scale bears out the tragic miscellany of traumatic consequences of shattered health and broken homes, of crime escalation with alcohol as the hidden villain or aggressively promotional anti-hero, of psychic
G break-downs, insane cravings and efficiency impairment, of pathetic descent to doom *sans* sense, *sans* shame, *sans* everything, and host of other disasters individuals, familial, genetic and societal.(2)

We need not have dilated further on the deleterious impost of unchecked alcohol intake on consumers and communities but Shri
H Mahajan advocated regulation as valid with the cute rider that even

(1) Encyclopaedia of the Social Sciences, Vol. I-II p. 618.
(2) Ibid p. 619-27.

water intake, if immoderate, may affect health and so regulation of liquor trade may not be valid, if more drastic than for other edibles. The sequitur he argued for was that the two-day ban on liquor licensees was unreasonable under Art. 19(g) read with Art. 19(6). He also branded the power to restrict the days and hours of sale of liquor without specification of guidelines as arbitrary and scouted the submission of the Addl. Solicitor General that the noxious nature of alcohol and the notorious fall-out from gentle bibbing at the beginning on to deadly addiction at the end was inherent guideline to salvage the provision from constitutional casualty. Innocently to equate alcohol with acqua is an exercise in intoxication and straining judicial credibility to absurdity. We proceed to explain why alcohol business is dangerous and its very injurious character and mischief potential legitimate active policing of the trade by any welfare State, even absent Art. 47.

The alcoholics will chime in with A.E. Houseman(1) :

> "And malt does more than Milton can to justify God's ways to man....."

But the wisdom of the ages oozes through Thomas Bacon who wrote :

> "For when the wine is in, the wit is out."

Dr. Walter Reckless, a criminologist of international repute who had worked in India for years has in "The Crime Problem" rightly stressed :(2)

> *"Of all the problems in human society, there is probably none which is as closely related to criminal behaviour as is drunkenness.* It is hard to say whether this close relationship is a chemical one, a psychological one, or a situational one. Several different levels of relationship between ingestion of alcohol and behaviour apparently exist. A recent statement by the National Council on Crime and Delinquency quite succinctly describes the effect of alcohol on behaviour : Alcohol acts as a depressant; it inhibits self-control before it curtails the ability to act; and an individual's personality and related social and cultural factors assert themselves during drunken behaviour....Although its dangers are not commonly understood or accepted by the public, ethyl alcohol can have perhaps the most serious consequences of any mind-and-body-altering drug. It causes

(1) Makers of Modern world by Louis Untermeyer p. 275.
(2) The Crime Problem (Fifth Edition) Walter C. Reckle Page 115, 116 & 117.

A addiction in chronic alcoholics, who suffer consequences just as serious, if not more serious than opiate addicts. *It is by far the most dangerous and the most widely used of any drug.*" (emphasis added).

The President's Commission on Law Enforcement and Administra-
B tion of Justice made the following pertinent observation :

> The figures show that crimes of physical violence are associated with intoxicated persons.....Thus the closest relationship between intoxication and criminal behaviour (except for public intoxication) has been established for
C criminal categories involving assaultive behaviour. This relationship is especially high for lower class Negroes and whites. More than likely, aggression in these groups is weakly controlled and the drinking of alcoholic beverages serves as a triggering mechanism for the external release of aggression. There are certain types of key situations located
D in lower class life in which alcohol is a major factor in triggering assaultive behaviour. A frequent locale is the lower class travern which is an important social institution for the class group. Assaultive episodes are triggered during the drinking situation by quarrels that center around defaming personal honor, threats to masculinity, and ques-
E tions about one's birth legitimacy. Personal quarrels between husband and wife, especially after the husband's drinking, frequently result in assaultive episodes, in the lower-lower class family."

The steady flow of drunkenness cases through the hands of the
F police, into our lower courts, and into our jails and workhouses has been labelled the "revolving" door, because a very large part of this flow of cases consists of chronic drinkers who go through the door and out, time after time. On one occasion when the author was visiting a Saturday morning session of a misdemeanor court, there was a case of an old "bum" who had been in the local workhouse
G 285 times previously."

An Indian author, Dr. Sethna dealing with society and the criminal, has this to say :(1)

> Many crimes are caused under the influence of alcohol
H or drugs. The use of alcohol, in course of time, causes a great and irresistible craving for it. To retain the so-called

(1) Society and the Criminal by M. J. Sethna 3rd Edn. P. 164.

'satisfaction', derived from the use of alcohol or drugs, the drunkard or the drug-addict has got to go on increasing the quantities from time to time; such a state of affairs may lead him even to commit thefts or frauds to get the same otherwise. If he gets drunk so heavily that he cannot understand the consequences of his acts he is quite likely to do some harmful act—even an act of homicide. Every often, crimes of violence have been committed in a state of intoxication. Dr. Hearly is of the opinion that complete elimination of alcohol and harmful drug habits would cause a reduction in crime by at least 20 per cent; not only that, but there would also be cumulative effect on the generations to come, by diminishing poverty, improving home conditions and habits of living and environment, and perhaps even an improvement in heredity itself.

Abstinence campaigns carried out efficiently and in the proper manner show how crime drops. Dr. Hearly cites Baer, who says that Father Mathew's abstinence campaigns in Ireland, during 1837-1842, reduced the use of spirits 50 per cent, and the crimes dropped from 64,520 to 47,027. According to Evangeline Booth, the Commander of the Salvation Army, "In New York before prohibition, the Salvation Army would collect from 1,200 to 1,300 drunkards in a single night and seek to reclaim them. Prohibition *immediately* reduced the gathering to 400 and the proportion of actual drunkards from 95 per cent to less than 20 per cent". And "a decrease of two thirds in the number of derelicts, coupled with a decrease in the number of drunkards almost to the Vanishing point, certainly lightened crime and charity bills. It gave many of the erstwhile drunkards new hope and a new start". So says E. E. Covert, in an interesting article on Prohibition.

The ubiquity of alcohol in the United States has led to nationwide sample studies and they make startling disclosures from a criminological angle. For instance, in Washington, D.C. 76.5% of all arrests in 1965 were for drunkenness, disorderly conduct and vagrancy, while 76.7% of the total arrests in Atlanta were for these reasons(1)

Of the 8 million arrests in 1970 almost one-third of these were alcohol-related. Alcohol is said to affect the lives of 9 million persons

(1) Society, Crime and Criminal Careers by Don C. Gibbons p. 427-428.

A and to cost 10 billion in lost work time and an additional 15 billion in health and welfare costs."(1)

Richard D. Knudten stated "Although more than 35% of all annual arrests in the United States are for drunkenness, additional persons committing more serious crimes while intoxicated are included B within the other crime categories like drunken driving, assault, rape and murder.(2)

President Brezhnev bewailed the social maladies of increasing alcoholism. Nikita Krushchev was unsparing :

> "Drunks should be 'kicked out of the party' not moved C from one responsible post to another."(3)

Abraham Lincoln, with conviction and felicity said that the use of alcohol beverages had many defenders but no defence and intoned :

> "Whereas the use of intoxicating liquor as a beverage is productive of pauperism, degradation and crime, and D believing it is our duty to discourage that which produces more evil than good, we, therefore, pledge ourselves to abstain from the use of intoxicating liquor as a beverage."(4)

In his famous Washington's birthday address said :

> "Whether or not the world would be vastly benefited E by a total and final banishment from it of all intoxicating drinks seems to me not now an open question. Three-fourths of mankind confess the affirmative with their lips, and I believe all the rest acknowledge it in their hearts."(5)

Jack Hobbs, the great cricketer, held :

F > "The greatest enemy to success on the cricket field is the drinking habit."

And Don Bradman, than whom few batsmen better wielded the willow, encored and said :

G > "Leave drink alone. Abstinence is the thing that is what made me."(6)

(1) Current perspectives on Criminal Behaviour edited by Abraham S. Blumberg P. 23.
(2) Crime in a complex Society by Richard D. Knudten P. 138.
(3) Report of the study Team on Prohibition Vol. L. P. 344.
(4) Ibid p. 345.
(5) Ibid p. 345.
(6) Report of the Study Team on Prohibition Vol. I. P. 347.

Sir Andrew Clark, in Lachrymal language spun the lesson from hospital beds :

> "As I looked at the hospital wards today and saw that seven out of ten owed their diseases to alcohol, I could but lament that the teaching about this question was not more direct, more decisive, more home-thrusting than ever it had been."(1)

George Bernard Shaw, a provocative teetotaller, used tart words of trite wisdom :

> "If a natural choice between drunkness and sobriety were possible, I would leave the people free to choose. But then I see an enormous capitalistic organisation pushing drink under people's noses of every corner and pocketing the price while leaving me and others to pay the colossal damages, then I am prepared to smash that organisation and make it as easy for a poor man to stay sober, if he wants to, as it is for his dog.
>
> Alcohol robs you of that last inch of efficiency that makes the difference between first-rate and second-rate.
>
> I don't drink beer—first, because I don't like it; and second, because my profession is one that obliges me to keep in critical training, and beer is fatal both to training and to criticism.
>
> Only teetotallers can produce the best and sanest of which they are capable.
>
> Drinking is the chloroform that enables the poor to endure the painful operation of living.
>
> It is in the last degree disgraceful that a man cannot provide his own genuine courage and high spirits without drink.
>
> I should be utterly ashamed if my soul had shrivelled up to such an extent that I had to go out and drink a whisky.(2)

The constitutional test of reasonableness, built into Art. 19 and of arbitrariness implicit in Art. 14, has a relativist touch. We have to view the impact of alcohol and temperance on a given society; and

(1) Ibid P. 347.

(2) Report of the study Team on Prohibition Vol. 1 p. 346.

A for us, the degree of constitutional restriction and the strategy of meaningful enforcement will naturally depend on the Third World setting, the ethos of our people, the economic compulsions of today and of human tomorrow. Societal realities shape social justice. While the universal evil in alcohol has been indicated the particularly pernicious consequence of the drink evil in India may be useful to B remember while scanning the rationale of an Indian temperance measure. Nearly four decades ago, Gandhiji, articulating the inarticulate millions' well-being, wrote :

> "The most that tea and coffee can do is to cause a little extra expense, but one of the most greatly felt evils of the C British Rule is the importation of alcohol.....that enemy of mankind, that curse of civilisation—in some form or another. The measure of the evil wrought by this borrowed habit will be properly gauged by the reader when he is told that the enemy has spread throughout the length and breadth of India, in spite of the religious prohibition for even the D touch of a bottle containing alcohol pollutes the Mohamedan, according to his religion, and the religion of the Hindu strictly prohibits the use of alcohol in any form whatever, and yet alas ! the Government, it seems, instead of stopping, is aiding and abetting the spread of alcohol. The poor there, as everywhere, are the greatest sufferers. It is they E who spend what little they earn in buying alcohol instead of buying good food and other necessaries It is that wretched poor man who has to starve his family, who has to break the sacred trust of looking after his children, if any, in order to drink himself into misery and premature death. F Here be it said to the credit of Mr. Caine, the ex-Member for Barrow, that, he undaunted, is still carrying on his admirable crusade against the spread of the evil, but what can the energy of one man, however, powerful, do against the inaction of an apathetic and dormant Government."(1)

Parenthetically speaking, many of these thoughts may well be G regarded by Gandhians as an indictment of governmental policy even to-day.

The thrust of drink control has to be sudied in a Third World country, developing its human resources and the haven if offers to the poor, especially their dependents. Gandhiji again :

H "For me the drink question is one of dealing with a growing social evil against which the State is bound to

(1) The Collected Works of Mahatma Gandhi pp. 29-30

provide whilst it has got the opportunity. The aim is patent. We want to *wean the labouring population and the Harijans from the curse.* It is a gigantic problem, and the best resources of all social workers, especially women, will be taxed to the utmost before the drink habit goes. The prohibition I have adumbrated is but the beginning (undoubtedly indispensable) of the reform. We cannot reach the drinker so long as he has the drink ship near his door to tempt him."(1)

Says Dr. Sethna in his book already referred to :

"And in India, with the introduction of prohibition we find a good decline in crime. There are, however, some persons who cannot do without liquor. Such persons even go to the extent of making illicit liquor and do not mind drinking harmful rums and spirits. The result is starvation of children at home, assaults and quarrels between husband and wife, between father and child, desertion, and other evils resulting from the abuse of alcohol.

The introduction of prohibition in India actually caused a considerable fall in the number of crimes caused by intoxication. *Before prohibition one often had to witness the miserable spectacle of poor and ignorant persons—mill-hands. labourers, and even the unemployed with starving families at home—frequenting the pithas (liquor and adulterated toddy shops) drinking burning and harmful spirits, and adulterated* toddy, which really had no vitamin B value; *these persons spent the little they earned after a hard day's toil, or what little that had remained with them or what they had obtained by some theft, trick, fraud or a borrowing they spent* away all that, *and then, at home, left wife and children starving and without proper clothes, education, and other elementary necessaries of life."*(2)

(*emphasis added*)

The Labour Welfare Department of the State Governments and of the Municipalities are rendering valuable service, through their labour welfare officers who work at the centres assigned to them, impressing upon the people how the use of alcohol is ruinous and instructing them also how to live hygienically; there are lectures on the evils of drug and drink habits.

(1) The Collected Works of Mahatma Gandhi. Vol. 66 P. 47.
(2) Society and the Criminal by M. J. Sethna 3rd Edn. p. 165, 166 & 168-169.

A Partial prohibition of hot country liquors was introduced by the Congress Ministries in Bombay, Bihar, Madras (in Salem, Chittor, Cuddaph and North Arcot Districts) when they first came into power. In C. P. and Berar, prohibition covered approximately one-fourth of the area and population of the State. In Assam, prohibition is B directed mainly against opium. In Deccan Hyderabad on 3rd January, 1943, a *Firman* was issued by his Exalted Highness the Nizam, supporting the temperance movement. Jammu and Kashmir came also on the move towards prohibition. Since 1949 State Governments determined the policy of introduction of total prohibition.

C On April 10, 1948, the Central Advisory Council for Railways, under the Chairmanship of the Hon'ble Dr. John Matthai, agreed to the proposal to ban the serving of liquor in refreshment rooms at railway stations and dining cars.

In Madras, prohibition was inaugurated on 2nd October, 1948, by the Premier, the Hon'ble Mr. O. P. Ramaswami Reddiar who D pronounced it a red letter day.

In 1949, West Punjab took steps for the establishment of prohibition. In 1949, nearly half the area of the Central Provinces and Berar got dry, and it was proposed to enforce prohibition throughout the State.

E

In Bombay the Prohibition Bill was passed and became Act in 1949, and Bombay got dry by April 1950.

The number of offences under the Abkari Act is notoriously high. It shows the craving of some persons for liquor in spite of all good F efforts of legal prohibition. The remedy lies in making prohibition successful *through education* (even at the school stage), suggestion re-education.

The Tek Chand Committee(1) surveyed the civilizations from Babylon through China, Greece, Rome and India. X-rayed the G religions of the world and the *dharmasastras* and concluded from this conspectus that alcoholism was public enemy. Between innocent first sour sip and nocent never-stop alcoholism only time is the thin partition and, inevitability the sure nexus, refined arguments to the contrary notwithstanding(2).

H In India, some genteel socialities have argued for the diplomatic pay-off from drinks and Nehru has negatived it :

(1) Report of the Study Team on Prohibition. (2) Ibid p. 345. (Vol. 1).

"Not only does the health of a nation suffer from this (alcoholism), but there is a tendency to increase conflicts both in the national and the international sphere."

I must say that I do not agree with the statement that is sometimes made—even by our ambassadors—that drinks attract people to parties and if there are no drinks served people will not come. I have quite frankly told them that if people are only attracted by drinks, you had better keep away such people from our missions.....I do not believe in this kind of diplomacy which depends on drinking.... and, if we have to indulge in that kind of diplomacy, others have had more training in it and are like to win.(1)

Of course, the struggle for *Swaraj* went beyond political liberation and demanded social transformation. Redemption from drink evil was woven into this militant movement and Gandhiji was the expression of this mission.

"I hold drink to be more damnable than thieving and perhaps even prostitution. Is it not often the parent to both? I ask you to join the country in sweeping out of existence the drink revenue and abolishing the liquor shops.

Let me, therefore, re-declare my faith in undiluted prohibition before I land my self in deeper water. If I was appointed dictator for one hour for all India, the first thing I would do would be to close without compensation all the liquor shops, destroy all the toddy palms such as I know them in Gujarat, compel factory owners to produce humane conditions for their workmen and open refreshment and recreation rooms where these workmen would get innocent drinks and equally innocent amusements. I would close down the factories if the owners pleaded for want of funds."(2)

It has been a plank in the national programme since 1920. It is coming, therefore, in due fulfilment of the national will definitely expressed nearly twenty years ago.(3)

Sociological Journey to interpretative Destination.

This long excursion may justly be brought to a close by an oft repeated but constitutionally relevant quotation from Field, J. irresistibly attractive for fine-spun feeling and exquisite expression.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, if it is true, first falls upon

(1) Report of the Study Team on Prohibition Vol. 1 P. 345.
(2) Ibid P. 344.
(3) Collected Works of Mahatma Gandhi Vol. 69 P. 83.

A him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with or dependent upon him. By the general concurrence of opinion of every civilised and Christian community, there are few sources of crime and misery
B to society equal to the dram shop, where intoxication liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at those retail liquor saloons than to any other source. The
C sale of such liquors in this way has therefore, been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days
D of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of Public Expediency and public morality, and not of federal law. The police power of the State fully competent to regulate the business to mitigate its evils or to suppress it entirely, there is no inherent right in a citizen to thus sell intoxicating liquors by retail, it is not a privilege of a citizen
E of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the Governing authority. That authority may vest in such officers as it may deem proper and power of passing upon
F applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."(1)

The Panorama of views, insights and analyses we have tediously projected serves the socio-legal essay on adjudicating the reasonableness and arbitrariness of the impugned shut down order on Tuesdays
G and Fridays. Whatever our personal views and reservations on the philosophy, the politics, the economics and the pragmatics of prohibition, we are called upon to pass on the vires of the amended order. "We, the people of India', have enacted Art. 47 and 'we, the Justices of India' cannot 'lure it back to cancel half a life' or 'wash out a word of it', especially when progressive implementation of the policy of
H prohibition is, by Articles 38 and 47 made fundamental to the country's governance. The Constitution is the property of the people

(1) Crowely v. Christensen, 34, Law Ed. 620, 623.

and the courts know-how is to apply the constitution, not to assess it. In the process of interpretation, Part IV of the Constitution must enter the soul of Part III and the laws, as held by the Court in *State of Kerala & Anr.* v. *N. M. Thomas & Ors.*(1) and earlier. The dynamics of statutory construction, in a country like ours, where the pre-Independence Legislative package has to be adapted to the vital spirit of the Constitution, may demand that new wine be poured into old bottles, language permitting. We propound no novel proposition and recall the opinion of Chief Justice Winslow of Wisconsin upholding as constitutional a Workmen's Compensation Act of which he said :

> "when an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind surrounded by eighteenth century conditions and ideals? Clearly not. This were a command of half the race in its progress, to stretch the state upon a veritable bed of procrustes. Where there is no express command or prohibition, but only general language of policy to be considered, the conditions prevaling at the time of its adoption must have their due weight but the changed social, economic and governmental conditions of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation."(2)

In short, while the imperial masters were concerned about the revenues they could make from the liquor trade they were not indifferent to the social control of this business which, if left unbridled, was fraught with danger to health, morals, public order and the flow of life without stress or distress. Indeed even collection of revenue was intertwined with orderly milieu; and these twin objects are reflected in the scheme and provisions of the Act. Indeed, the history of excise legislation in this country has received judicial attention earlier and the whole position has been neatly summarised by Chandrachud J. (as he then was) if we may say so with great respect, as a scissor-and-paste operation is enough for our purpose :

(1) [1976] 1 S.C.R. 906.

(2) Borgnis v. The Falk Co. 147 Wisconsin Reports P. 327 at 348 et See (1911). That this doctrine is to be deemed to apply only to "due process' and "police. Power" determinations, see especially concurring opinions of Marshalle, and Barness, J.

"Liquor licensing has a long history. Prior to the passing of the Indian Constitution, the licensees mostly restricted their challenge to the demand of the Government as being in excess of the condition of the licence or on the ground that the rules in pursuance of which such conditions were framed were themselves beyond the rule-making power of the authority concerned.

The provisions of the Punjab Excise Act, 1914, like the provisions of similar Acts in force in other States, reflect the nature and the width of the power in the matter of liquor licensing. We will notice first the relevant provisions of the Act under consideration.

Section 5 of the Act empowers the State Government to regulate the maximum or minimum quantity of any intoxicant which may be sold by retail or wholesale. Section 8(a) vests the general superintendence and administration of all matters relating to excise in the Financial Commissioner, subject to the control of the State Government. Section 16 provides that no intoxicant shall be imported, exported or transported except after payment of the necessary duty or execution of a bond for such payment and in compliance with such conditions as the State Government may impose. Section 17 confers upon the State Government the power to prohibit the import or export of any intoxicant into or from Punjab or any part thereof and to prohibit the transport of any intoxicant. By section 20(1) no intoxicant can be manufactured or collected, no hemp plant can be cultivated no tari producing tree can be tapped, no tari can be drawn from any tree and no person can possess any material or apparatus for manufacturing an intoxicant other than tari except under the authority and subject to the terms and conditions of a licence granted by the Collector. By sub section (2) of section 20 no distillery or brewery can be constructed or worked except under the authority and subject to the terms and conditions of a licence granted by the Financial Commissioner. Section 24 provides that no person shall have in his possession any intoxicant in excess of such quantity as the State Government declares to be the limit of retail sale, except under the authority and in accordance with the terms and conditions of a licence or permit. Sub-section (4) of section 24 empowers the State Government to prohibit the posses-

sion of any intoxicant or restrict its possession by imposing such conditions as it may prescribe. Section 26 prohibits the sale of liquor except under the authority and subject to the terms and conditions of a licence granted in that behalf.

Section 27 of the Act empowers the State Government to "lease" on such conditions and for such period as it may deem fit or retail, any country liquor or intoxicating drug within any specified local area. On such lease being granted the Collector, under sub-section (2), has to grant to the lessee a licence in the form of his lease.

Section 34(1) of the Act provides that every licence, permit or pass under the Act shall be granted (a) on payment of such fees, if any, (b) subject to such restrictions and on such conditions, (c) in such form and containing such particulars, and (d) for such period as the Financial Commissioner may direct. By section 35(2), before any licence is granted for the retail sale of liquor for consumption on any premises the Collector has to ascertain local public opinion in regard to the licensing of such premises. Section 36 confers power on the authority granting any licence to cancel or suspend it if, *inter alia,* any duty or fee payable thereon has not been duly paid.

Section 56 of the Act empowers the State Government to exempt any intoxicant from the provisions of the Act. By section 58 the State Government may make rules for the purpose of carrying out the provisions of this Act. Section 59 empowers the Financial Commissioner by clause (a) to regulate the manufacture, supply, storage or sale of any intoxicant.

xxx xxx xx

The Prohibition and Excise Laws in force in other States contain provisions substantially similar to those contained in the Punjab Excise Act. Several Acts passed by State Legislatures contain provisions rendering it unlawful to manufacture export, import, transport or sell intoxicating liquor except in accordance with a licence, permit or pass granted in that behalf. The Bombay Abkari Act 1878; the Bombay Prohibition Act 1949, the Bengal Excise Acts of 1878 and 1909; the Madras Abkari Act 1886;

A the Laws and Rules contained in the Excise Manual United Province, the Eastern Bengal and Assam Excise Act 1910; the Bihar and Orissa Excise Act 1915; the Cochin Abkari Act as amended by the Kerala Abkari Laws Act 1964; the Madhya Pradesh Excise Act 1915, are instances of State legislation by which extensive powers are conferred on the B State Government in the matter of liquor licensing.(1)

In this background, let us read S. 59(f)(v) and Rule 37 before and after the impugned amendment :

"59(f)(v). The fixing of the days and hours during C which any licensed premises may or may not be kept open, and the closure of such premises on special occasions;

Rule 37(9). *Conditions dealing with licensed hours.*—

Every licensee for the sale of liquor shall keep his shop closed on the seventh day of every month, on all Tuesdays D upto 2 p.m. on Republic day (26th January), on Independence day (15th August), on Mahatma Gandhi's birthday (2nd October) and on such days not exceeding three in a year as may be declared by the Government in this behalf. He shall observe the following working hours, hereinafter called the licensed hours, and shall not, without the sanc- E tion of the Excise Commissioner, Punjab or other competent authority, keep his shop open outside these hours The licensed hours shall be as follows :

XX XX XX

F *After amendment*

37(9). *Conditions dealing with licensed hours.*—

Every licensee for the sale of liquor shall keep his G shop closed on every Tuesday and Friday, on Republic Day (26th January), on Independence day (15th August), on Mahatma Gandhi's birthday (2nd October) and on such days not exceeding three in a year as may be declared by the Government in this behalf. He shall observe the following working hours, hereinafter called the licensed H hours, and shall not, without the sanction of the Excise

(1) *Har Shankar & Ors. etc.* v. *Dy. Excise & Taxation Commr., and Ors.* [1975] 3 S.C.R. 254 at 266-267.

Commissioner, Punjab or other competent authority, keep his shop open outside these hours. The licensed hours shall be as follows : A

* * *

Note : The condition regarding closure of liquor shops on every Tuesday and Friday shall not be applicable in the case of licenses of tourist bungalows and resorts being run by the Tourism Department of the State Government. B

Before formulating the contentions pressed before us by Shri A. K. Sen, Shri Mahajan and Shri Sharma, we may mention that Shri Seth, one of the Advocates who argued innovatively, did contend that the Act was beyond the legislative competence of the State and if that tall contention met with our approval there was nothing more to be done. To substantiate this daring submission the learned counsel referred us to the entries in the Seventh Schedule to the Constitution. All that we need say is that the argument is too abstruse for us to deal with intelligibly. To mention the plea is necessary but to chase it further is supererogatory. C D

The main contention

E

The primary submission proceeded on the assumption that a citizen had a fundamental right to carry on trade or business in intoxicants. The learned Addl. Solicitor General urged that no such fundamental right could be claimed, having regard to noxious substances and consequences involved and further contended that, notwithstanding the observations of Subba Rao, C.J. in *Krishna Kumar Narula etc.* v. *The State of Jammu & Kashmir & Ors.*(1) the preponderant view of this Court, precedent and subsequent to the 'amber' observations in the aforesaid decision, has been that no fundamental right can be claimed by a citizen in seriously obnoxious trades, offensive businesses or outraging occupations like trade in dangerous commodities, trafficking in human flesh, horrifying exploitation or ruinous gambling. Even so, since the question of the fundamentality of such right is before this Court in other batches of writ petitions which are not before us, we have chosen to proceed on the footing, arguendo, that there is a fundamental right in liquor trade for the petitioners. Not that we agree nor that Shree Sorabjee concedes that there is such a right but that, F G H

(1) [1967] 3 S.C.R. 50.

A for the sake of narrowing the scope of the colossal number of writ petitions now before us, this question may well be skirted. The Bench and the Bar have, therefore, focussed attention on the vires of the provision from the standpoint of valid power of regulation of the liquor trade *vis-a-vis* unreasonableness, arbitrariness and vacuum of any indicium for just exercise. Essentially, the point pressed was B that S. 59(f)(v) vested an unguided, uncanalised, vague and vagarious power in the Financial Commissioner to fix any days or number of days and any hours or number of hours as his fancy or humour suggested. There were no guidelines, no indicators, no controlling points whereby the widely-worded power of the Excise Commissioner C (on whom Government has vested the power pursuant to Sec. 9) should be geared to a definite goal embanked by some clear-cut policy and made accountable to some relevant principle. Such a plenary power carried the pernicious potential for tyrannical exercise in its womb and would be still born, judged by our constitutional values. If the power is capable of fantastic playfulness or fanciful D misuse, it is unreasonable, being absolute, tested by the canons of the rule of law. And if, arguendo, it is so unreasonably wide as to imperil the enjoyment of a fundamental right it is violative of Art. 19(1)(g) and is not saved by Art. 19(6). Another facet of the same submission is that if the provision is an arbitrary armour, the power-wielder can act nepotistically, pick and choose discrimina- E torily or gambol goodily. Where a law permits discrimination, huff and humour, the guarantee of equality becomes phoney, flimsy or illusory Art. 14 is outraged by such a provision and is liable to be quashed for that reason.

An important undertaking by the State

F

We must here record an undertaking by the Punjab Government and eliminate a possible confusion. The amended rule partially prohibits liquor sales in the sense that on Tuesdays and Fridays no hotel, restaurant or other institution covered by it shall trade in liquor. But this prohibition is made non-applicable to like institutions G run by the Government or its agencies. We, *prima facie,* felt that this was discriminatory on its face. Further, Art. 47 charged the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce prohibitionist restraints on others and itself practise the opposite and betray the constitutional mandate. It suggests dubious dealing by State Power. Such hollow H homage to Art. 47 and the Father of the nation gives diminishing credibility mileage in a democratic polity. The learned Additional Solicitor General, without going into the correctness of propriety of

our initial view—probably he wanted to controvert or clarify-readily agreed that the Tuesday-Friday ban would be equally observed by the State organs also. The undertaking recorded, as part of the proceedings of the Court, runs thus :— A

> "The Additional Solicitor General appearing for the State of Punjab states that the Punjab State undertakes to proceed on the footing that the 'Note' is not in force and that they do not propose to rely on the 'Note' and will, in regard to tourist bungalows and resorts run by the Tourism Department of the State Government, observe the same regulatory provision as is contained in the substantive part of Rule 37 Sub-rule 9. We accept this statement and treat it as an undertaking by the State. Formal steps for deleting the 'Note' will be taken in due course." B C

Although a Note can be law, here the State concedes that it may not be treated as such. Even otherwise, the note is plainly severable and the rule independently viable. Shri A. K. Sen who had raised this point at the beginning allowed it to fade out when the State's undertaking was brought to his notice. The vice of discrimination, blotted out of the law by this process, may not be sufficient, if the traditional approach were to be made to striking down; but if restructuring is done and the formal process delayed, there is no reason to quash when the correction is done. Courts try to save, not to scuttle, when allegiance to the Constitution is shown. D E

In short, Tuesdays and Fridays, so long as this rule remains (as modified in the light of the undertaking) shall be a holiday for the liquor trade in the private or public sector throughout the State. We need hardly state that if Government goes back on this altered law the consequences may be plural and unpleasant. Of course, we do not expect, in the least, that any such apprehension will actualise. F

One confusion that we want to clear up is that even if S. 59 and Rule 37 were upheld *in toto* that does not preclude any affected party from challenging a particular executive act pursuant thereto on the ground that such an act is arbitrary, *mala fide* or unrelated to the purposes and the guidelines available in the Statute. If, for instance, the Financial Commissioner or the Excise Commissioner, as the case may be, declares that all liquor shops shall be opened on his birthday or shall remain closed on his friend's death anniversary, whatever our pronouncement on the vires of the impugned provisions, the executive order will be sentenced to death. The law may be good, the act may be corrupt and then it cannot be saved. G H

A The only question seriously canvassed before us is as to whether the power under S. 59(f)(v) unguided and the rule framed thereunder is bad as arbitrary. We will forthwith examine the soundness of that proposition.

B An irrelevant controversy consumed some court time viz., that the two-day shut-down rule meant that a substantial portion of the year for which the licence was granted for full consideration would thus be sliced off without compensation. This step was iniquitous and inflicted loss and was therefore 'unreasonable'—therefore void. The Additional Solicitor General refuted this charge on facts and C challenged its relevance in law. We must not forget that we are examining the vires of a law, not adjudging a breach of contract and if on account of a legislation a party sustains damages or claims a refund that does not bear upon the vires of the provision but belongs to another province.

D Moreover, the grievance of the petitioners is mere 'boloney' because even their licence fee has been reduced under the amended rule to compensate, as it were, for the extra closure of a day or so. We do not delve into the details nor pronounce on it as it is not pertinent to constitutionality. But a disquieting feature of the rule, in the background of the purpose of the measure, falls to be noticed. E Perhaps the most significant social welfare aspect of the closure is the prevention of the ruination of the poor worker by drinking down the little earnings he gets on the wage day. Credit sales are banned and cash sales spurt on wage days. Any Government, with workers' weal and their families' survival at heart, will use its 'police F power' under Art. 19(6) read with Sec. 59(f)(v) of the Act to forbid alcohol sales on pay days. Wisely to save the dependent women and children of wage-earners the former unamended rule had forbidden sales on the seventh day of every month (when, it is well-known, the monthly pay packet passes into the employees' pocket). To permit the tavern or liquor bar to transact business that tempt- G ing days is to abet the dealer who picks the pocket of the vulnerables and betray the Gandhian behest. And yet, while bringing in the Tuesday-Friday forbiddance of sales, the ban on sales on the seventh of every month was entirely deleted—an oblique bonus to the liquor lobby, if we look at it sternly, an unwitting indiscretion, if we view it indulgently. The victims are the weeping wives and crying child- H ren of the workers. All power is a trust and its exercise by governments must be subject to social audit and Judas exposure. 'For whom do the constitutional bells toll ?' this court asked in an earlier

judgment relating to Scheduled Castes.(1) We hope Punjab will rectify the error and hearten the poor in the spirit of Art. 47 and not take away by the left hand what the right hand gives. We indicated these thoughts in the course of the hearing so that no one was taken by surprise. Be that as it may, the petitioner can derive no aid and comfort from our criticisms which are meant to alert the parliamentary auditors of subordinate legislation in our welfare State.

The Scheme and the subject matter supply the guidelines

We come to the crux of the matter. Is Section 59(f)(v) bad for want of guidelines? Is it over-broad or too bald? Does it lend itself to naked, unreasonable exercise? We were taken through a few rulings where power without embankments was held bad. They related to ordinary items like coal or restrictions where guidelines were blank. Here, we are in a different street altogether. The trade is instinct with injury to individual and community and has serious side-effects recognised everywhere in every age. Not to control alcohol business is to abdicate the right to rule for the good of the people. Not to canalise the age and sex of consumers and servers, the hours of sale and cash-and-carry basis, the punctuation and pause in days to produce partially the 'dry' habit—is to fail functionally as a welfare State. The whole scheme of the statute proclaims its purpose of control in time and space and otherwise. Section 58 vests in Government the power for more serious restrictions and laying down of principles. Details and lesser constraints have been left to the rule-making power of the Financial Commissioner. The complex of provisions is purpose-oriented, considerably re-inforced by Art. 47. Old statutes get invigorated by the Paramount Parchment. Interpretation of the text of pre-constitution enactments can legitimately be infused with the concerns and commitments of the Constitution, as an imperative exercise. Thus, it is impossible to maintain that no guidelines are found in the Act.

We wholly agree with the learned Additional Solicitor General that the search for guidelines is not a verbal excursion. The very subject-matter of the statute intoxicants—eloquently impresses the Act with a clear purpose, a social orientation and a statutory strategy. If bread and brandy are different the point we make argues itself. The goal is promotion of temperance and, flowing there out, of sobriety, public order, individual health, crime control, medical bills, family welfare, curbing of violence and tension, restoration of the addict's mental, moral and physical personality and interdict on

(1) [1977] 1 S.C.R. 906.

A impoverishment, in various degrees, compounded. We have extensively quoted supportive literature; and regulation of alcohol *per se* furnishes a definite guideline. If the Section or the Rule intended to combat an evil is misused for a perverse, ulterior or extraneous object that action, not the law, will be struck down. In this view, discrimination or arbitrariness is also excluded.

B

A final bid to stigmatize the provision [Sec. 59 (f) (v)] was made by raising a consternation. The power to fix the days and hours is so broad that the authority may fix six out of seven days or 23 out of 24 hours as 'dry' days or closed hours and thus cripple the purpose of the licence. This is an ersatz apprehension, a caricature C of the provision and an assumption of power run amok. An Abkari law, as here unfolded by the scheme (chapters and Sections further amplified by the rules framed thereunder during the last 64 years) is not a Prohibition Act with a mission of total prohibition. The obvious object is a to balance temperance with tax, to condition and curtail consumption without liquidating the liquor business, to experi- D ment with phased and progressive projects of prohibition without total ban on the alcohol trade or individual intake. The temperance movement leaves the door half-closed, not wide ajar; the prohibition crusade banishes wholly the drinking of intoxicants. So it follows that the limited temperance guideline writ large in the Act will monitor the use E of the power. Operation Temperance, leading later to the former, may be a strategy within the scope of the Abkari Act.

Both may be valid but we do not go into it. Suffice it to say that even restrictions under Art. 19 may, depending on situations, be pushed to the point of prohibition consistently with reasonableness. The chimerical fear that 'fix the days' means even ban the whole F week, is either pathological or artificial, not certainly real under the Act. We are not to be understood to say that a complete ban is without the bounds of the law—it turns on a given statutory scheme.

While the police power as developed in the American jurisprudence and constitutional law, may not be applicable in terms to the G Indian Constitutional law, there is much that is common between that doctrine and the reasonableness doctrine under Art. 19 of the Indian Constitution. Notes an American Law Journal :

> "The police power has often been described as the "least limitable" of the governmental powers. An attempt to define its reach or trace its outer limits is fruitless for H each case turns upon its own facts.....The police power must be used to promote the health, safety, or general welfare of the public, and the exercise of the power must be

"reasonable". An exercise of the police power going beyond these basic limits is not constitutionally permissible. A

Noxious Use Theory: This theory upholds as valid any regulation of the use of property, even to the point of total destruction of value, so long as the use prohibited is harmful to others."(1) B

In a Law Review published from the United States 'police power' with reference to intoxicant liquors has been dealt with and is instructive :

"Government control over intoxicating liquors has long been recognized as a necessary function to protect society from the evils attending it. Protection of society and not the providing of a benefit of the license holder is the chief end of such laws and regulations. There is no inherent right in a citizen to sell intoxicating liquors as retail. It is a business attended with danger to the community and it is recognised everywhere as a subject of regulation." C D

As to the legislative power to regulate liquor, the United States Supreme Court has stated :

"If the public safety or the public morals require the discontinuance of the manufacture or traffic (of intoxicating liquors) the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." E

The States have consistently held that the regulation of intoxicants is a valid exercise of its police power. The police power stands upon the basic principle that some rights must be and are surrendered or modified in entering into the social and political state as indispensible to the good government and due regulation and well being of society. F G

In evaluating the constitutionality of a regulation within the police power, validity depends on whether the regulation is designed to accomplish a purpose within the scope of that power."(2)

(1) South Western Law Journal—Annual Survey of Texas Law, Vol. 30 No. 1, Survey 1976 pp. 725-26. H

(2) Idaho Law Review, Vol. 7, 1970 p. 131.

A It is evident that there is close similarity in judicial thinking on the subject. This has been made further clear from several observations of this Court in its judgments and we may make a reference to a recent case, *Himmatlal,*(1) and a few observations therein :

B "In the United States of America, operators of gambling sought the protection of the commerce clause. But the Court upheld the power of the Congress to regulate and control the same. Likewise, the pure Food Act which prohibited the importation of adulterated food was upheld. The prohibition of transportation of women for immoral C purposes from one State to another or to a foreign land was held valid. Gambling itself was held in great disfavour by the Supreme Court which roundly stated that 'there is no constitutional right to gamble'.

Das, C.J., after making a survey of judicial thought, D here and abroad, opined that freedom was unfree when society was exposed to grave risk or held in ransom by the operation of the impugned activities. The contrary argument that all economic activities were entitled to freedom as 'trade' subject to reasonable restrictions which the Legislature might impose, was dealt with by the learned Chief E Justice in a sharp and forceful presentation;

"On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on F a business of hiring out goondas to commit assault or even murder, of house-breaking, of selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstances be G regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words. Learned Counsel has to concede that there can be no 'trade' or H business in crime but submits that this principle should not be extended....."

(1) *Fatehchand Himmatlal* v. *Maharashtra* [1977] 2 S.C.R. 828 at 839-840.

We have no hesitation, in our hearts and our heads, to hold that every systematic, profit oriented activity, however sinister, suppressive or socially diabolic, cannot, ipso facto, exalt itself into a trade. Incorporation of Directive principles of State policy casting the high duty upon the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political—shall inform all the institutions of the national life, is not idle print but command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an adequate means of livelihood to its citizens and to see that the health and strength of workers men and women, are not abused, that exploitation, normal and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognised as trade or business. At this point, the legal culture and the public morals of a nation may merge, economic justice and taboo of traumatic trade may meet and jurisprudence may frown upon day dark and deadly dealings. The Constitutional refusal to consecrate exploitation as 'trade' in a socialist Republic like ours argues itself."

A precedentral approach to the ultra vires argument.

The single substantive contention has incarnated as triple constitutional infirmities. Counsel argued that the power to make rules fixing the days and hours for closing or keeping open liquor shops was wholly unguided. Three invalidatory vices flowed from this single flaw viz. (i) excessive delegation of legislative power, (ii) unreasonable restriction on the fundamental right to trade in intoxicants under Art. 19(1)(g), and (iii) arbitrary power to pick and choose, inherently violative of Art. 14.

Assuming the legality of the triune lethal blows, the basic charge of uncanalised and naked power must be established. We have already held that the statutory scheme is not merely fiscal but also designed to regulate and reduce alcoholic habit. And, while commodities and situations dictate whether power, in given statutory provisions, is too plenary to be other than arbitrary or is instinct with inherent limitations, alcohol is so mainfestly deleterious that the nature of the guidelines is written in invisible ink.

A brief reference to a few rulings cited by counsel may not be inept.

It is true that although the enactment under consideration is more than five decades old, its validity can now be assailed on the score of unconstitutionality :

> "When India became a sovereign democratic Republic on 26th January, 1950, the validity of all laws had to be tested on the touchstone of the new Constitution and all laws made before the coming into force of the Constitution have to stand the test for their validity on the provisions of Part III of the Constitution."(1)

This is why the principle of excessive delegation, that is to say, the making over by the legislature of the essential principles of legislation to another body, becomes relevant in the present debate. Under our constitutional scheme the legislature must retain in its own hands the essential legislative functions. Exactly what constitutes the essential legislative functions is difficult to define.

> "The legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function", was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct. Thus where the law passed by the legislature declares the legislative policy and lays down the standard which is enacted into a rule of law, it can leave the task of subordinate legislation which by its very nature is ancillary to the statute to subordinate bodies, i.e., the making of rules, regulations or bye-laws. The subordinate authority must do so within the frame-work of the law which makes the delegation, and such subordinate legislation has to be consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case."(2)

(1) *Suraj Mall Mohta and Co.* v. *A. V. Visvanatha Sastri and another* [1955] 1 S.C.R. 448 at 457.

(2) *Municipal Corporation of Delhi* v. *Birla Cotton, Spinning and Weaving Mills Delhi & Anr.* [1968] 3 S.C.R. 251 at 261.

In *Vasanthlal Maganbhai Sajanwal* v. *The State of Bombay*(1) the same point was made :

> "A statute challenged on the ground of excessive delegation must therefore be subject to two tests, (1) whether it delegates essential legislative function or power and (2) whether the legislature has enunciated its policy and principle for the guidance of the delegate."

Likewise, if the State can choose any day or hour for exclusion as it fancies and there are no rules to fix this discretion, plainly the provision [Sec. 59(f)(v)] must offend against Art. 14 of the Constitution. (See *Saghir Ahmed's case*) (2)

Another aspect of unguided power to affect the citizen's fundamental rights lies in the province of Art. 19 since imposition of unreasonable restrictions on the right to carry on business is violative of Art. 19(1)(g). Patanjali Sastri, C.J., in *V. G. Row's case* observed : (3)

> "The test of reasonableness, wherever prescribed should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent or urgency of the evil sought to be remedied thereby, the disproportion of imposition, the prevailing conditions at the time should enter into the judicial verdict."

This Court, in *R. M. Seshadri*,(4) dealt with unreasonable restrictions on showing of films by theatre owners and struck down the provisions. Similarly, in *Harichand*(5) an unreasonable restriction on the right to trade was struck down because the regulation concerned provided no principles nor contained any policy and this Court observed :

"A provision which leaves an unbridled power to an authority cannot in any sense be characterised as reasonable. Section 3 of the Regulation is one such provision and is therefore liable to be struck down as violative of Art. 19(1)(g)".

(1) [1961] 2 S.C.R. 341.
(2) [1955] 1 S.C.R. 707.
(3) [1952] S.C.R. 597.
(4) [1955] 1 S.C.R. 686.
(5) *Lala Hari Chand Sarda* v. *Mizo District Council & Anr.* [1967] 1 S.C.R. 1012 at 1021.

A

Other decisions in the same strain were cited. Indeed an annual shower of decisions on this point issues from this Court. But the essential point made in all these cases is that unchannelled and arbitrary discretion is patently violative of the requirements of reasonableness in Art. 19 and of equality under Art. 14, a proposition with which no one B can now quarrel. It is in the application of these principles that disputes arise as Patanjali Sastri, C.J. clarified early in the day in *V. G. Row's case* (cited supra). Reasonableness and arbitrariness are not abstractions and must be tested on the touchstone of principled pragmatism and living realism.

C It is in this context that the observations of this Court in *Nashirwar*(1) become decisive. While considering the soundness of the propositions advanced by the advocate for the petitioners the Additional Solicitor General rightly shielded the statutory provisions in question by drawing our attention to the crucial factor that the subject-matter of the legislation was a deleterious substance requiring restrictions in the direction of moderation in consumption, regulation regarding the days and hours of sale and appropriateness in the matter of the location of the places of sale. If it is coal or mica or cinema, the test of reasonableness will be stricter, but if it is an intoxicant or a killer drug or a fire-arm the restrictions must be stern. When the public purpose is clear and the policing need is manifest from the nature of E the business itself, the guidelines are easy to find. Shri Mahajan's reliance on the *Coal Control Case*(2) or Shri A. K. Sen's reliance on the *Gold Control case*(3) is inept. Coal and gold are as apart from whisky and toddy as cabbages are from kings. Don't we feel the difference between bread and brandy in the field of trade control? Life F speaks through Law.

Counsel after counsel has pressed that there is no guideline for the exercise of the power of rule-making and the Addl. Solicitor General has turned to the history, sociology and criminology relating to liquor. In support of his contention, Shri Soli Sorabjee for the State has drawn our attention to the following passages in *Nashirwar* which are quoted G *in extenso* because of the persistence of counsel on the other side in pressing their point about unbounded power :

> "In our country the history of excise shows that the regulations issued between 1790-1800 prohibited manufacture or sale of liquors without a licence from a Collector. In H 1808 a regulation was introduced in the Madras Presidency

(1) [1975] 2 S.C.R. 861.
(2) A.I.R. 1954 S.C. 224.
(3) A.I.R. 1970 S.C. 1453.

which provided that the exclusive privilege of manufacturing and selling arrack should be farmed in each district. In 1820 the law was amended to authorise the treatment of toddy and other fermented liquors in the same way as spirits by allowing Collectors to retain the manufacture and sale under direct management if deemed preferable to farming. In 1884 a Committee was appointed to investigate the excise system. The recommendations of the Committee were adopted. Under the new system the monopoly of manufacture was let separately from that of sale. The former was granted on condition of payment of a fee per shop or a number of shops, or on payment of a fee determined by auction. In the Bombay Presidency the monopoly of the retail sale of spirits and the right to purchase spirits was formed. In 1857 the Government declared its future policy to be the letting by auction of each shop, with its still, separately. In 1870-71 a change was made. The rule at that time was that the Collector would fix the number and locality of the different shops and determine their letting value according to the advantages possessed by each. It was not intended that they should, as a rule, be put up to public competition; but competition might be resorted to by the Collector and taken into account in determining the same at which each would be leased. This rule remained in force for many years. The practice of putting the shops up to auction was, thereafter followed. The history of excise administration in our country before the Independence shows that there was originally the farming system and thereafter the central distillery system for manufacture. The retail sale was by auction of the right and privilege of sale. The Government of India appointed an Excise Committee in 1905. The measures recommended by the Committee were the advances of taxation, the concentration of distillation the extended adoption of the contract distillery system. The Committee suggested among other things the replacement of the then existing excise law by fresh legislation on the lines of the Madras Abkari Act. (See Dr. Pramatha Nath Banerjee : History of Indian Taxation P. 470 seq.).

Reference may be made to the Taxation Enquiry Commissioner Report 1953-54 Vol. 3. At page 130 following there is a discussion of State excises. Among the major sources of revenue which are available to the State Government there is a duty on alcoholic liquors for human consumption. At page 132 of the Report it is stated that in addition

to the excise duties, licence fees are charged for manufacture or sale of liquor or for tapping toddy trees etc. Similarly, several fees like permit fees, vend fees, outstill duties are also levied. Manufacture or sale of liquor is forbidden except under licences which are generally granted by auction to the highest bidders. The manufacture of country spirit is done in Government distilleries or under the direct supervision of the excise staff. All supplies are drawn from Government warehouses which ensures that the liquor is not more than of the prescribed strength. The licensed sellers have to sell the country spirit between fixed hours and at fixed selling rates. As in the case of country spirit, the right of tapping and selling toddy is also auctioned. In addition to the licence, in some States the licensee has to pay a tree tax to Government.

Traditionally tobacco, opium and intoxicating liquors have been the subject matter of State monopoly. (See section IV of the Madras Regulation XXV of 1802 relating to permanent settlement of land revenue). Section IV states that the Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads *inter alia* of the abkary, or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption, of all taxes personal and professional, as well as those derived from markets, fairs, or bazars, of lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited.

* * *

The excise revenue arising out of manufacture and sale of intoxicating liquors is one of the sources of State revenue as is customs and excise. In England sale of intoxicating liquors although perfectly lawful at common law is subject to certain statutory restrictions. These restrictions are primarily of two kinds; those designed for the orderly conduct of the retail trade and those designed to obtain revenue from the trade whether wholesale or retail.

Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible with other trades are lawful and reasonable so far as the trade

in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, *viz.*, manufacture, collection, sale and consumption. The State has right in order to raise revenue. That is the view of this Court in *Bharucha's* case (supra) and *Jaiswal's* case (supra). The nature of the trade is such that the State confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government." (pp. 869-871)

The guide-lines.

Now that we have held that the provision [Section 59(f)(v)] is valid on a consideration of the criteria controlling the wide words used therein there is a minor matter remaining to be disposed of. The extract from the Section, as will be noticed, contains a clause which runs : "and the closure of such premises on special occasions". Thus, rules may be made by the Financial Commissioner for fixing the closure of licensed premises on 'special occasion'. Shri Mahajan insisted that 'special occasions' may mean anything and may cover any occasion dictated by humour, political pressure or other ulterior considerations. It is thus a blanket power which is an unreasonable restriction on the licensee's trade. Certainly if 'special occasions' means any occasion which appeals to the mood of the Financial Commissioner or has other casual fascination for him the rule may suffer from arbitrary and unreasonable features. Gandhiji's birthday and also Vinobaji's birthday have been included in the licence itself. 'Special occasions' contemplated by Sec. 59(f)(v) are not stricken by such a vice for the obvious reasons we have elaborately given in the earlier part of our argument. The occasion must be special from the point of view of the bread considerations of national solemnity, public order, homage to national figures, the likelihood of eruption of inebriate violence on certain days on account of *melas*, festivals or frenzied situations or periods of tension. Bapuji's birthday, election day, hours of procession by rival communities when tensions prevail or festivals where colossal numbers of people gather and outbreak of violence is on the agenda, are clear illustrations. 'Special occasions' cannot be equated with fanciful occasions but such as promote the policy of the statute as expounded by us earlier. There is no merit in this argument either and we reject it.

A As between temperance and prohibition it is a policy decision for the Administration. Much may be said for and against total prohibition as an American wit has cryptically yet sarcastically summed up(1) :

> "The chief argument against prohibition is that it does not prohibit. This is also the chief argument in favour of it."

B This survey of the law-ways of Art. 19 and the police power is sufficient in our view to clinch the issue.

Our conclusions may now be set out.

(a) Section 59(f)(v) of the Punjab Excise Act, 1914, is perfectly valid;

C

(b) The regulation of the number of days and the duration of the hours when supply of alcohol by licensees shall be stopped is quite reasonable, whether it be two days in a week or even more. We leave open the question as to whether prohibition of the number of days and the number of hours, if it reaches a point of substantial destruction of D the right to vend, will be valid, since that question arises in other writ petitions;

(c) The exercise of the power to regulate, including to direct closure for some days every week, being reasonable and calculated to produce temperance and promote social welfare, cannot be invalidated on the imaginary possibility of misuse. The test of the reasonableness E of a provision is not the theoretical possibility of tyranny; and

(d) There is enough guideline in the scheme and provisions of the Punjab Excise Act to govern the exercise of the power under Secs. 58 and 59.

In a few beer bar cases the grievance ventilated is regarding the F manipulation of hours of sale. Nothing has been made out to hold that the r-adjustment of the hour of beer-bidding is unrelated to the statutory guidelines or destructive of the business. We reject the objection.

We have reasoned enough to justify the ways of the Constitution and the law to the consumers of social justice and spirituous potions. The G challenge fails and the Writ Petitions Nos. 4108-4109 etc., of 1978 are hereby dismissed with costs (one hearing fee). May we hopefully expect the State to bear *true* faith and allegiance to that Constitutional orphan, Art. 47 ?

N.V.K. *Petitions dismissed.*

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(1) "Reconsiderations H. L. Mencken—Anti All Kinds of Blah by Lila Ray appeared in "Span" Aug. 1978 p. 41.