
GAMBLING AND THE DOCTRINE OF RES EXTRA COMMERCIUM IN INDIA: A CONSTITUTIONAL ANALYSIS

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ABSTRACT

Indian courts have cited the legal principle known as *res extra commercium*, which literally translates to “things outside commerce,” to justify the imposition of prohibitions on some businesses that are regarded to be detrimental to the public good. These trades include gambling. It was originally a Roman law concept, but its use in India has brought up important constitutional concerns, notably with regard to Article 19(1)(g), which ensures the freedom to engage in any trade or profession. The purpose of this article is to provide a critical examination of the historical and judicial evolution of *res extra commercium* in Indian constitutional jurisprudence, with a particular emphasis on how it has been applied to gambling. It contends that the concept has been implemented in a manner that is contradictory and that it has frequently been utilised by the judiciary as a means of evading more stringent constitutional examination. Through an examination of significant precedents, the article raises the topic of whether or not gambling can be considered to be beyond the scope of Article 19(1)(g) of Indian Constitution in a contemporary economy that is subject to regulation.

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Introduction

Since the beginning of time, gambling and betting have been a part of the culture of Indian civilisation. As a result of the discovery of dice going back to 10,000 BC, it was regarded to be a kind of amusement even during the time of the Harappan Civilisation.³ A number of ancient texts, including Manusmriti and Arthashastra, include evidence of gaming and betting.⁴ On the other hand, the arrival of the British in India resulted in the introduction of horse racing, while all other kinds of gambling were deemed completely banned.

KPMG's analysis titled "Online gaming: A gamble or a sure bet (2010)" claimed that India's whole gambling business was worth \$60 billion. Despite the fact that gambling was rendered illegal, the practises and activities associated with gambling remained. According to estimates provided by the Federation of Indian Chambers of Commerce and Industry (FICCI), the illicit betting industry in India is believed to be somewhere around three hundred million rupees.⁵ There is a strong suspicion that the profits made from such an uncontrolled market are being utilised for terrorist operations, money laundering, and other illicit activities.⁶

Because of the ever-increasing size of the unregulated market, there are many who advocate for the legalisation of betting in the country. This is because legalised betting would not only generate revenue but also give employment opportunities and remove money from the illegal market. In the 276th report that it published, the Law Commission of India made the recommendation that gambling should be legalised in India. On the other hand, such rules ought to address difficulties that are related with gambling, such as demonstrating that the notion of *res extra commercium*, which has been utilised by the courts in order to criminalise gambling, is unjustified.

This article examines the legal framework governing gambling and betting in India, with a particular focus on precedents and the history of the *res extra commercium* doctrine. Subsequently, the author draws a conclusion on whether or not the application of the doctrine to gaming is acceptable or unreasonable owing to the scope of the theory.

³ JAN MCMILLEN, UNDERSTANDING GAMBLING- HISTORY, CONCEPT AND THEORIES (London: Routledge 1996).

⁴ *Ibid.*

⁵ Sakshi Pawar & Naman Lohiya, *Legalising Online Sports Betting in India: A Gamble unto Itself*, 4 Indian Journal of Law & Public Policy 35 (2017).

⁶ *Ibid.*

Law on Gambling in India

The prohibition on gambling in public was enacted by the British government in 1867 with Public Gambling Act of 1867 with the intention of preventing gambling in public and ensuring prohibition of common gaming houses.⁷ In addition to making it illegal to gamble for personal benefit in “common gaming houses,” the Act also made it illegal to maintain gambling houses, attend gambling houses, possess gambling devices, and run financial gambling operations.⁸

Following the Constitution coming into force, gambling and betting in India were brought under the jurisdiction of List II of Schedule VII, which grants the state governments the authority to create legislation pertaining to these subjects. However, despite the fact that the Public Gambling Act of 1867 was only applicable to a few states before to the country’s independence, a large number of states have adopted the Act under Article 252 of the Constitution, although with some minor modifications.⁹

It was stipulated in Section 12 of the Public Gambling Act of 1867 that the Act would not be applied to “games of mere skill.” This requirement, which states that games of skill are not considered gambling, is still being adhered to by the majority of states even at this very day. On the other hand, there are a few states, such as Assam, Orissa, and Telangana, that do not see the distinction between “games of chance” and “games of skill,” and therefore have outlawed all of these games.

The contrast between a “game of chance” and a “game of skill” is a topic that is brought up in every conversation about gambling and betting. The former is believed to be gambling, while the latter is a game of skill. The Public Gambling Act of 1867 did not define a game of skill, and it was the judiciary that evaluated this problem all the way back in 1957. In the two *Chamarbaugwala* cases¹⁰, the Supreme Court decided that contests that entail ‘substantial skill’ shall be protected under Article 19(1)(g) of the Constitution.

The two considerable cases that considered this distinction between game of chance and game

⁷ G Sethi, *SETHI’S LAW RELATING TO GAMBLING, BETTING, LOTTERIES AND CLUBS ETC.* (Allahabad India Law Publishers 2004).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *State of Bombay v. R.M.D. Chamarbaugwala*, [1957] 1 SCR 874. *R.M.D Chamarbaugwala & Anr v. Union of India* [1957], 1 SCR 930.

of skill are “*State of Andhra Pradesh vs. K. Satyanarayana*”¹¹ and “*Dr. K.R. Lakshmanan vs. State of Tamil Nadu*.”¹² In *Satyanarayana* case, the Supreme Court held that the card game ‘Rummy’ is a game of skill “because the fall of the cards has to be memorized and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill.”¹³ In *Lakshmanan* case, the Supreme Court held that “Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck... A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated - is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player... a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance.”¹⁴ In these two cases, the Supreme Court applied the ‘dominant factor test’ to determine this distinction.

The same test was applied by the Punjab & Haryana High Court in “*Varun Gumber vs. Union Territory of Chandigarh*”¹⁵ and held that fantasy sports, like Dream11, are similar to horse racing as “both of them require the same level of ‘skill, judgment and discretion’ and thus, they fall under the category of games of skill.”¹⁶ In another similar case, the Bombay High Court also held that fantasy sports involve substantial skill and thus do not fall under gambling.¹⁷

However, the courts developed the concept of *Res Extra Commercium* under the *Chamarbaugwala* cases and applied it in the area of gambling. It is pertinent to understand the true meaning and application of the said doctrine to analyse its applicability to gaming in India.

Concept of Res Extra Commercium

The Latin phrase “*Res extra commercium*,” which means “outside of commerce,” describes specific things or things that are not regarded to be part of trade or commerce. There is recognition of *res extra commercium*, which categorises particular things or subjects as not being transferable, in legal systems all across the world, including India. In order to better

¹¹ AIR 1968 SC 825

¹² AIR 1996 SC 1153

¹³ *State of Andhra Pradesh vs. K. Satyanarayana*, AIR 1968 SC 825

¹⁴ *Dr. K.R. Lakshmanan vs. State of Tamil Nadu*, AIR 1996 SC 1153

¹⁵ CWP No. 7559 of 2017

¹⁶ *Ibid.*

¹⁷ *Gurdeep Singh Sachar v. Union of India & Ors*, [2020]72GSTR75(Bom)

understand the concept of res extra commercium in Indian law, this essay will look at its historical development, legal foundation, and current significance.

The idea of res extra commercium has its origins in early legal traditions, such as Roman law. Roman lawyers divided between res in commercio, or things used in trade, and res extra commercium, or things not used in trade. These categorizations were made based on a variety of factors, including societal interests, public policy, and moral considerations. Later, the idea had an impact on legal systems all across the world, including India.

Legal Framework of Res Extra Commercium in India

In India, res extra commercium law has developed over time, incorporating colonial-era legislation, modern court interpretations, and traditional Hindu legal ideas. Res extra commercium is acknowledged and protected by the Indian Constitution through a number of provisions and judicial rulings.

The right to freedom of religion is protected by Article 25 of the Indian Constitution. This clause protects the res extra commercium status of religious sites and objects. Temples, mosques, cathedrals, and gurudwaras are examples of religious institutions that are protected as non-tradable organisations to maintain their sacredness and only be used for religious activities.

Additionally, cows and other milch and draught animals are protected and preserved under Article 48 of the Indian Constitution. Cows are cherished in Hinduism and are protected from being killed by being classified as res extra commercium, which ensures their wellbeing.

The Indian judiciary has also been instrumental in interpreting and broadening the definition of res extra commercium. In the case of *M.C. Mehta v. Union of India*,¹⁸ the Indian Supreme Court designated a number of locations as res extra commercium in an effort to preserve and safeguard the environment for both current and future generations.

Contemporary Significance of Res Extra Commercium

In India, the idea of res extra commercium still has a lot of current importance. It helps strike

¹⁸ 1996 SCC (4) 750

a balance between economic growth and the protection of environmental, cultural, and religious values.

First and foremost, the conservation and preservation of cultural heritage is ensured by the recognition of *res extra commercium* entities. Temples, mosques, and churches are among the sites of worship that are protected from commercial exploitation. This honours the people's religious beliefs while also preserving the sociocultural fabric of the country.

Second, *res extra commercium* is essential for protecting the environment. To prevent indiscriminate exploitation, natural resources including forests, rivers, and open spaces are classified as non-tradable entities. This recognition aids in preserving natural harmony, encouraging sustainable growth, and reducing the negative effects of environmental degradation.

Thirdly, the idea of *res extra commercium* serves as a legal instrument for addressing social and economic imbalances. It makes sure that resources are distributed fairly and prevents their concentration in the hands of a select few. For instance, classifying some agricultural lands as non-tradable entities safeguards farmers' interests by limiting the loss of their livelihoods as a result of widespread commercialization.

The idea of *res extra commercium* is significant, but it is not without difficulties in India. Finding the ideal balance between preservation and development is one of the major issues. To prevent obstructing legitimate economic progress and operations, the identification and classification of non-tradable entities must be done with great care.

Application of Res Extra Commercium to Gambling

As it has been mentioned above, there is limited application of *res extra commercium* to activities that predominantly safeguard cultural, religious and environmental resources of the state. This doctrine is derived from the concept of 'Police powers' of the state and extended to numerous economic activities without proper justification. The government in India is trying to apply the same doctrine to tobacco industry in order to control the activities.¹⁹ The consequence of such an act is to deprive the industry of their right to trade in that commodity

¹⁹ The Wire, "With Roman Law Doctrine, India Moves to Stub out Tobacco Industry Rights," January 31, 2018, Available at <https://thewire.in/government/roman-law-doctrine-india-stub-tobacco-industry-rights>

and it relies on the privilege granted by state. This raises the prominent question as to its relevance in India when we have reasonable restrictions under Article 19(2) of Constitution of India applicable to trade and commerce.

The author is of the view that there is unreasonable application of the doctrine to gaming industry in India as the scope of the doctrine is limited and the courts have extended its application to areas other than the domain of cultural protection, religion and environment. In a country with a lengthy written constitution that provides limitations on trade and commerce, there is no justification for unreasonable adoption of a Latin doctrine in the country.

Conclusion

In India, the idea of *res extra commercium* has a rich historical background and is still important today. While addressing social and economic imbalances, it safeguards and preserves entities related to culture, religion, and the environment. *Res extra commercium* guarantees a fine line between development and preservation through constitutional clauses and judicial rulings. To prevent impeding legal economic activity, though, a delicate approach is needed. The ongoing discussion about *res extra commercium* will be essential as India develops for upholding the nation's rich legacy, safeguarding the environment, and promoting a just and inclusive society. In order to achieve such result, the application of the doctrine should not be extended to other activities without justification.