

HAWKERS AND VENDORS: A REPORT

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HAWKERS AND VENDORS : THEIR RIGHTS

The various provisions of the constitution have been analyzed in the following section in great detail with a passing reference to the leading judgements to facilitate the research. The comparative analysis of the directive principle and the fundamental right has been provided so that the “law” can be comprehensively interpreted in a fair and a just manner. The cases and the critical summary which has been highlighted throughout the report is reflective of the fact that the time to question the all pervasive authority has been conceived due to the need of the society. It should be remembered that the courts and the statute have been provided for the convenience of society and cannot be used for exploitation.

It is in this view that the report has been formulated to hopefully provide a better insight into the positive aspects of the judicial system so that it can be used effectively by everyone.

If it is said that the directly principles have no legal force. I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law. The draft constitution as framed only provides machinery for the government of a particular country in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the test of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions, which are called directive principles. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time. What great value these directive principles possess will be realized better when the forces of right contrive to capture power.”

The Indian Constitution is first and foremost a social document and the majority of its provisions are aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement. Therefore the importance of Directive Principles in the scheme of our Constitution cannot ever be over emphasized. Those principles project the high ideal, which the Constitution aims to achieve. In fact the directive Principles of State Policy are fundamental in the governance of the country and the Attorney-General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man

seeks the realization of his aspirations. The promise of a better tomorrow must be fulfilled today; day after tomorrow it runs the risk of being conveniently forgotten. Indeed too many tomorrows have come and gone by without a leaf turning that today there is a danger that people will work out their destiny through the compelled cult of their own dirty hands. Words bandied about in marbled halls say much but fail to achieve as much.”

Directive Principles of State Policy are fundamental in the governance of the country and the Attorney-General is right that there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realization of his aspirations. The promise of a better tomorrow must be fulfilled today; day after tomorrow it runs the risk of being conveniently forgotten. Indeed too many tomorrows have come and gone by without a leaf turning that today there is a danger that people will work out their destiny through the compelled cult of their own dirty hands. Words bandied about in marbled halls say much but fail to achieve as much.”

Directive principles of State policy thus hold a position of great important in the Indian constitution. But as stated in Art 37 these principles are not enforceable by a court of law. The reason behind the legal non-enforceability and the non-justifiability of these principles is that they impose positive obligations on the state. While taking positive action government functions under several restraints the most crucial of these being that of resources. The constitution makers therefore taking pragmatic view refrained from giving enforceability to these principles. They believed more in awakened public opinion rather than court procedures as the ultimate sanction for the fulfillment of these principles. Nevertheless the Constitution declares these principles as fundamental in the governance of a country and the state has been placed under an obligation to apply them in making the laws. The courts however do not enforce the directive principles, as they do not create a justifiable right in favor of an individual. A court will not issue an order to enforce a directive principle. However fundamental rights create a negative obligation on the state i.e. the state is required to refrain from doing something and it is easier to enforce through the courts as oppose to a positive obligation. Accordingly Art 13 says that a law inconsistent with fundamental rights is void. There has never been such a provision with regards to directive principles. The directive principles guide the exercise of legislative power but do not control the same. Thus even if the grant of a virtual monopoly to a co-operative society infringes on Art 39 it cannot be declared unconstitutional. Directive Principles cannot confer any legislative competence on a legislature.

A very pertinent issue here is the relationship between the directive principles and fundamental rights. If the law enacted to give effect to a directive principle infringes on a fundamental right, what then? Initially the courts adopted a strict legal position in this respect and ruled that a directive principle cannot override a fundamental right and in case of conflict between the two the fundamental right would unquestionably prevail. The Supreme Court in Madras v. Chamakam Dorairajan settled this point.

Where a government order in conflict with Art.29(2), a fundamental right was declared invalid though the government did argue that it was made in pursuance of a directive principle. The court ruled that while fundamental rights were enforceable the directive principles were not and so the laws could not take away fundamental rights to implement directive principles. The directive principles could conform and run as subsidiary to the fundamental rights. The fundamental rights would be reduced to a mere rope of sand if they were to be overridden by the directive principles.

In the course of time the courts have started giving a great deal of value to the directive principles even from a legal viewpoint. They could conform to the principles as far as possible. "Where two judicial choices are available, the construction in conformity with the social philosophy", of the directive principles has preference. The courts therefore tried to interpret the statutes so as to implement the directive principles instead of reducing them to mere theoretical values. The courts also took the view that they should adopt the principle of harmonious construction and attempt to give effect to both fundamental.

Position before 1972 was that while from a legalistic point of view the directive principles had not made any profound impact on judicial pronouncements interpreting the constitution they were not meaningless or inert either. However after 1972 the value of the directive principles underwent a metamorphosis. The first step in the direction of giving these principles a significant position diuretically was the enactment of Art 31 © . The article gave primacy to Acts 39(b) and (c) as against the fundamental rights contained in Arts 14,19,31. The Supreme court held the amendment valid. The court emphasized that there is no disharmony between the directive principles and fundamental rights as they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state, which envisaged in the preamble. The courts therefore have a responsibility to interpret the constitution to implement the directive principles and not harmonize the social principles underlying them with individual rights. According to Justice Mathew: "In building up a social order it is sometimes imperative

that the Fundamental Rights should be subordinated to Directive Principles. Economic goals have an uncontestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only when men exist that there can be fundamental rights.

The next step in the direction of giving primacy to all the directive principles over the fundamental rights was taken in 1976 when all directive principles were given precedence over arts 14,19,31 the 42nd amendment. But the Supreme Court did not hold this as constitutional. The court said that the constitution is based on bedrock of balance between the directive principles and fundamental rights and not give absolute primacy to none over the other would be to disturb the balance. Both can coexist harmoniously. The goals set out in the principles are to be achieved without abrogating the fundamental rights.

Constitutional Provisions

Articles 36 to 51 of the Indian Constitution deal with the directive principles of State Policy.

Art 36 enacts that the definition of the word State in art 12 shall apply throughout Part 4 wherever it is used.

Art 37 says that Part 4 contains what may be described as the active obligations of the state. The state shall secure a social order in which social, economic and political justice shall inform all the institutions of national life. The directive principles possess two characteristics. Firstly they are not enforceable and therefore if a directive is not implemented by the state its implementation can not be secured through judicial proceedings. Secondly they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

Art 38 and 39 specifically requires the state to ensure for its people adequate means of livelihood, fair distribution of wealth, equal pay for equal work and the protection of children and labor. They contain the objectives of the building of a welfare society and an egalitarian social order in the Indian Union. When the constitution makers envisaged development in social, economic and political fields they did not desire that it should be a society where a citizen will not have the dignity of the individual.

Art 39 A says that the state shall see that the operation of the legal system provides equal opportunity of justice and shall provide free legal aid. This article has often been relied on in support of right to legal aid and legal aid programs. In pursuance of this article parliament has passed the Legal Services Authorities Act, 1987.

Under Art 40 the state is expected to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. But this directive is to be read with Art 50, which lays down the principle of separation of the executive from the judiciary. The organization of village panchayats must be carried out in practice consistently with Art 50 so as to maintain the fundamental principle of the rule of law. Power of the people which is the soul of the republic stands subverted if decentralization and devolution in Art 40 is ignored by the executive in action. The 73rd and 74th amendments in 1992 introducing Arts 243 to 243zg are major steps in this direction of implementing this directive principle.

The State is directed by Art 41 to ensure to the people within its economic capacity and development employment, education and public assistance in cases of unemployment, old age, sickness, disablement etc. These matters are called social security.

Art 42 relates to economic rights. The state is required to make provision for just and humane conditions of work and for maternity relief.

Art 43 requires the state to strive to secure to the worker work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

Art 43 requires the state to ensure the participation of workers in the management of industries. In upholding the rights of the workers to be heard in the winding up proceedings of a company the court drew support from this Art.

The constitution of India guarantees the right to equality through the articles 14 to 18 and for the present purpose article 14 is of special importance.

The article 14 runs as follows: “The state shall not deny to any person equality before the law or the equal protection before the law within the territory of India” Here two concepts are involved. The first is a negative concept wherein there is no special privilege for any one and that there is no person above the law, which is equivalent to the second corollary of the Dicean concept of rule of law. This is not an absolute rule and there are a number of exceptions to it like the foreign diplomats who enjoy the immunity and the President etc.

The second concept is a positive one, which provides for equal protection before the law. It does not mean that identical laws should be applied to everyone, or that all laws should have universal

application irrespective of different circumstances. It actually seeks to treat equals “equally” and there should be no discrimination of race, caste, religion social status and political influence as seen in the case of Jagan nath prasad v State of U.P. (AIR 1961 SC 1245). At the same time the legislature has the power to formulate reasonable classification based on the following as pointed out in the case of Laxmi khandarsi v. State of U.P. (AIR SC 873).

1. It should not be arbitrary, artificial and evasive and therefore should be based on intelligible differential, some real and substantial distinction.
2. The differential criterion adopted should have a close and sufficient nexus with the object is seeks to achieve.

This was explained by the Supreme Court in the following cases also:

Jaila singh v Rajasthan AIR 1875 SC 478 AND In re special courts bill 1978, AIR 1979 SC 478.

If a reasonable research is done then it can be easily observed that there is no rigid form of classification followed by the court and they usually show a great deal of deference to legislative judgement and do not hold a classification unreasonable lightly. It is also important to note that the onus in these cases is usually on the aggrieved party to ascertain the claim of unreasonableness to the court. A mere plea to impeach the validity of a law is not enough and it cannot be based on the discrimination of one individual only as seen in the case of Deena v. India AIR 1983 Sc 1154 and the case of A.V. Nancahe v. India, AIR 1982 SC 1126.

In most of the cases the primary purpose is to give the benefit of the doubt to the legislature and the classification made by it for at times it is an administrative necessity to uphold such categories. Therefore it can only be applied if the law is emerging from a single source and not from different legislatures. It has been explained by Bhagwati c.j. As follows in the case of Bachan singh v. State of Punjab: “ Wherever we find arbitrariness it denies the rule of law and that cannot be permitted and his dimension transcends the classificatory principle”.

To find out the discrimination the core of the test is that the subject and the object of the legislature has to analyzed rather than its phraseology and this proposition was illustrated in the case of K.T. Moopil Nair v. Kerala AIR 1961 SC 552.

It should be noted that the taxing statues do not fall within the scope of this article and therefore there are several exceptions to it, which can be summarized as follows:

1. *A monopoly created by the state in its favor does not fall within this category as it is done for the general welfare of the people.*
2. *Geographical differentiation is also allowed as seen in the leading judgement of Kishan Singh v. State of Rajasthan especially taking into consideration of the context of the state reorganization Act 1951 wherein the different laws continued from its conception.*
3. *Procedural differentiation such that special procedures are laid down for special class of people and as mentioned this has to maintained on reasonable criterion as seen in the case of Rehman Shagoo v. Jammu and Kashmir, AIR 1960 SC 1.*
4. *Legislation applicable to a single person is not unreasonable though it is not a class or an institution.*
5. *Administration discretion is one important aspect in which a number of discrepancies are found as the required safeguards are not sufficiently laid down as seen in the case of Chinta Lingam v. India, AIR 1971 SC 474 and Biswambar v. Orissa, AIR 1957 SC 329.*
6. *Finally the judicial discretion does not amount to any discrimination if there is shown that there is a "intentional and purposeful object" to it and this was seen n the case of Jagmohan Singh v U.P., AIR 1973 SC 947 and Inderjeet Singh v. U.P., AIR 1976 SC 1867.*

At this juncture it also becomes important to consider the implications of the article 21 which guarantees the right to life and personal liberty. In an American case munnv. Illinois it has been pointed out that the term life means more than a mere animal that and includes the concept that the deprivation of "life" would extend to all those faculties by which the life is enjoyed and similarly the idea of personal liberty also does not confine to the narrow definition of arrest and detention merely but much more than that.

This is revenant in the light of the fact that "livelihood" comes within the preview of this article and this can be seen through the case of In re sant ram, AIR 1960 SC 932.

The preview of this article can especially be use positively so that the constant deprivation " which takes place can be curtailed to a large extent.

Another judicial remedy is that of damages which is prevalent in the area of personal liberty. This is the manifestation of the "dynamic constitutional jurisprudence" which can be use

effectively to seek some form of relief. The aid in terms of compensation can be given against the state and other such rule making bodies as seen in the case of Radul Shah v. Bihar, AIR 1983 SC 1086 AND Sebastian H.M. v. India, AIR 1984 SC 1026. Where the court said, “any person can come to the court if has been deprived of his right under the article 21.

Thus we see that our Constitution protects equality and liberty in the strongest terms. And hawkers being a deprived and harassed section of our society can take protection and find justice under these ideals enshrined in our constitution. Article 14 that procedure followed by law should be fair, reasonable and non-arbitrary. Article 14 that procedure followed by law should be fair, reasonable and non-arbitrary. Article 19(1)(g) protects freedom of trade and profession. Article 21. Though there is strong tendency for the constitution being read in favor of the “authorities” yet there is hope for the common man on the streets.

CONSTITUTIONAL RAMIFICATIONS

Article 19(1) g guarantees to all the citizens the right to practice any trade and profession, subjected to certain “reasonable restrictions” for the general interests of the public. The power to do so has been conferred on the state as envisaged in article 12 wherein the government and the parliament along with the local authorities have been classified as the state. This leaves a large scope of ambiguous powers in the hands of the authoritative agencies. The article goes on further to say that this power can be applied in the following terms:

1. a law relating to the professional and the technical qualifications necessary for a particular form of trade, business and profession
2. a law relating to the carrying on by the state, or by any corporation, of any trade, business, industry or service, whether to the exclusion of the citizens completely or partially.

It can easily be inferred that there is a tendency of state monopoly in the Indian constitution itself and the right of the citizens has been subjected to this in the favor of the state obviously.

This can be further proved by the following provisions wherein the parliament can create monopolies vide entry 21 of the concurrent list and the state under article 29.

The twin tests are public interests and reasonableness which necessary has to be fulfilled. This not only covers those acts which might disturb the serenity of others but has a much

wider ambit of “State Security” “In a leading judgement of *Virendra v. the State of Punjab* says that, the tests of reasonableness has to be applied with caution and in the context of the surrounding circumstances as explained in other cases of *Ramji Lal Modi v. State of U.P.* And *Hari Shankar Bagla*. These cases further point out that the state government and the delegated authority can exercise the power only if it satisfied if that the particular situation requires it and another form of restriction is that such restrictions whether are partial or complete must be for a specified period of time or must be reevaluated at regular intervals. Though it necessarily provides for the subjective satisfaction if the state yet there is scope for positive balances.

At the same time it must be remembered that this also includes that those activities which even have a tendency of having a negative affect can be brough within its ambit as even have a tendency of having a negative affect can be brough within its ambit as explained in the 295 of the IPC in which the “deliberate and malicious intentions” along with the attempt and such calculated actions are punishable. However if the nexus between the restriction and the public order is farfetched then the former cannot be sustained. The court has clearly said that the fundamental rights cannot be controlled by “hypothetical and imaginary considerations”.

Therefore the concept of the state monopoly cannot be created in favor of a third person and this is completely different from the one created in its own favor. The test is that of public gain.

There is another difficulty of the interpretation of the word trade within this section. Art 19(1) g only protects the activities of the trading nature. Thus a judicial technique to promote rigorous control of some activities is to refuse them as trading or commercial due to the danger of the “public interests for example in the case of *Krishna Kumar v State of Jammu and Kashmir* the liquor business was not considered to be covered within this article. However where standards of morality can be a guiding factor it cannot be taken as an absolute test.

The Supreme Court has refused to characterize many other activities as trade for the purposes of 19 (g). It only believes in performing a negative classification e.g. money lending, prize-chits, gambling etc. have deemed not to be business activities. Even a contract between an individual and another is not protected by 19 1(g). A person can only sue for damages on specific performance but not on breach of contraction this context art. 301 and 304 can also

be referred to. It is said that a regulation of trade and commerce becomes changeable under 19 1(g) if it is directly approximately interfere with the exercise of freedom of trade. The burden is on those who seek the protection of the article and not on the citizen who challenges the restriction as invalid as seen in *Laxmi Khandhari v. State of Uttar Pradesh* AIR 1951 SC 860.

Reasonableness has to be seen from both the procedural and substantive aspects of law. There can be no hard and fast rules as it depends upon circumstances of each trade.

In the case of *P.P. Enterprises v. Union of India* AIR 1982 SC 1016. The Supreme Court held the view that:

1. Interests of the consumer are supreme.
2. Even if the producer bears a loss that can be compensated.

Therefore though it seems reasonable on the face of it yet these two are not being fully implemented. In *Daya v. Jt. Chief Controller* AIR 1962 SC 1796 it was seen that though administrative policy-making and its coercive power has tried again and again to create its monopoly in terms of reasonableness and welfare.

Another concept is one of compensation and confiscator taxes. Courts do not interfere unless the tax becomes a burden on trade. If the accounts of hawkers and vendors are observed that the “duties” and “rent” charged fall within this scope though not classifying as a ‘tax’ specifically. Some form of modification is definitely required.

Besides all these issues the question of administrative regulation is very important in the present context. An administrative order not authorized by the law under which it is made, and imposing a restriction on the right to carry on a business in 19(1) 9g) as seen in the case of *Tahir Hussain v. District Board*, AIR 1954 SC 630 and *Hamid Raza v. State of M.P.* AIR 1960 SC 994. This is based on the fundamental principle that the power conferred on the executive by a law to regulate trade and commerce should not be arbitrary ‘unregulated by any rule or principle.

The primary issue is that the procedural norms are usually “followed” when it comes to the other side of the stage but for the administrative regulations no paperwork is done though mandatory.

The administration enjoys a great deal of flexibility. It should also be remembered that the main consideration is primarily of economic nature which courts evaluate superficially and most of the time they defer to the administration judgements in this regard.

A regulatory power over trade and commerce of great significance in modern times conceded to administration several legal provisions.

Courts have not taken a comprehensive approach as it does not provide for any procedural safeguard as seen in the case of *Saraswati Syndicate v. Union of India* AIR 1975 SC 460. The interests of producers or manufacturers of an essential commodity is no doubt a factor to be taken into consideration but surely it is of much lesser importance and must yield to the interests of the general public who are the consumers. The judicial approach ostensibly seems to be colored by the prevalent socialist pattern without any practical results. In this report it was not possible to isolate the whole class of hawkers and vendors.

Through the above analysis the following questions emerge. The cases which have been dealt under Art 19(1) (g) do not classify the nature of occupation of hawkers and vendors; as to whether it falls within the purview of this article. Secondly, the usage of the word 'public interest' in the context of the interpretation of this article cannot isolate the whole class of hawkers and vendors. The bias of the court in favor of the executive should definitely have some procedural safeguard. The idea of general principle has to be given up as the test of reasonableness can only be judged on the basis of case-specific circumstances. The judiciary has laid more stress on social control and has devalued the individual interest of the trader. The ideal situation is that there is a balance between the public and private interests and this approach has been ignored in 19 (6).

A Study of the Constitutional amendments affecting the relationship between Part 3 and 4.

4th Fundamental Rights were held to be outside amendatory procedure by the doctrine of prospective overruling.

This was the first case where the relationship between fundamental rights and directive principles was discussed. The State said that in order to enforce the Directive Principles the Constitution was amended from time to time. Five judges took the view that laws to implement the directive principles have to be tested by the higher judiciary on the objective

criteria of legislative competence and whether they violate fundamental rights, whether the violate fundamental rights, whether the infringements amount to reasonable restrictions under public interest.

By this process of scrutiny the court maintains a balance between freedoms and social control. The judges considered this scheme to be so elastic that all the directive principles can be reasonably enforced without taking away or abridging fundamental rights. The minority of judges however expressed the contrary opinion and implied that to give effect the directive principles any part of the constitution was amendable. Justice Hidayatullah said that the protection of fundamental rights is necessary so that we may not walk in fear of democracy itself. The directive principles lay down the route of State action but such action must avoid the restrictions stated in the fundamental rights.

The 23rd Amendment 1969 amended Art 334 extending the period of reservation of seats for scheduled castes and tribes and the Anglo-Indian community in the Lok Sabha and in the legislative assemblies from twenty to thirty years.

The 25th Amendment act inserted art 31 ©. This was the first direct parliamentary attempt to give primacy to directive principles. This amendment was challenged in Keshavananda Bharati art 31 © subordinates fundamental rights to directive principles destroying thereby one of the foundations of the constitution. In effect eight judges upheld the validity of substantive part of art 31 © and seven judges held the conclusive declaration clause invalid. The court accepted the argument that Art 31 © was not excluding the application of certain fundamental rights for the first time for giving effect to Directive principles. Article 31 © was amended and the constitutional immunity made available against Art 14,19,31 by the 25th amendment to the laws relating to the Directives in Art 39(b) and © . Was extended to cover all the directive principles. One of the stated objectives of the amendments was to remove all hurdles and obstacles in the way of enactment of socio-economic legislation so that the pace of improvement of the condition of the masses may be accelerated and this could be achieved by declaring that the directive principles override fundamental rights.

Section 55 of the 42nd amendment Art 368 by inserting two new clauses which had the significant effect of validating even the conclusive declaration clause of Art 31 c as initially introduced by the 25th amendment but which had been declared unconstitutional by the

majority in Keshavananda Bharati. Directive Principle under Art 39(f) was enlarged and fresh directives were introduced.

The 44th amendment was passed in 1977 to remove several features of the 42nd amendment. Art 31 was deleted and became an ordinary legal right by the insertion of Art 300A. Similarly Art 19(f) was also deleted. Consequential changes were made in art 31 ©. The constitutional validity of the amended art 31c was challenged in the Minerva Mills case under Art 32. Four of the five judges held the section of the Act that amended art 31c is void. They said that it damaged the basic structure. The consequence was that the amended art 31c was declared void and the pre 42nd amendment position i.e. the position after Keshavananda was restored.

The government of India criticized the judgement of the Minerva case. The Law minister went on record to say it is the general policy of the government that directive principles have primacy over fundamental rights in so far as social rights of the people were concerned. In the event of any conflict the individual's right must yield to the social rights.

THE KARNATAKA PARKS, PLAYFIELDS, AND OPEN SPACES (PRESERVATION AND REGULATION) ACT, 1985.

This Act defines such terms as “open space”, “park field” and provides for their regulation.

An open space is defined as any land on which there are no buildings or of which not more than one-twentieth part is covered by buildings and the whole or remainder of which is used or meant for the purposes of recreation, air or light or set apart for civic amenity purposes.

Park is defined as piece of land on which there are no buildings or of which not more than one-twentieth part is covered by buildings and the whole or remainder of which is laid out as a garden with trees, plants or flower beds or as a lawn or as a meadow and maintained as a place for the resort of the public for recreation, air or light.

Play-field means a piece of land adapted for the purposes of play, game or sport and used by schools or colleges or clubs or general public and includes land set apart as a play-field by a local authority.

The Act provides that the local authority shall make a list of all the parks, open spaces and play-fields in the area, which will then be approved by the government. The power to include new lands in this list has been given to the government. The power to include new lands in

this list has been given to the government. There is a prohibition of the use of these lands for any purpose than that specified, and of the construction of any structure likely to affect the utility of the land, except with the permission of the local authority. The owners of these lands are obligated to remove or alter any projection, encroachment or obstruction in or over any such land and maintain it as directed by the local authority. The government may make rules controlling and regulating the admission of persons to, and the conduct of persons in and in the vicinity of parks, play fields and open spaces.

THE KARNATAKA PARKS, PLAYFIELDS, AND OPEN SPACES (PRESERVATION AND REGULATION) RULES, 1985.

When the list of places notified as parks play fields and open spaces is approved, the rules provide that they shall be published

By affixing on the notice board of the office of the concerned local authority;

By affixing in all reading rooms and other 'conspicuous places'

By affixing on the notice board of the BDA.

THE KARNATAKA HIGHWAYS ACT 1964.

This Act, under S.21, prohibits unauthorized occupation of highways. The highway authority in this behalf with due regard to the safety and convenience of traffic, and subject to such conditions and rules as may be prescribed by the state government, and on the payment of such rent or charges as may be prescribed under such rules, permit any person

to place a temporary encroachment on any highway in front of any building owned by him or make a temporary structure overhanging the highway, or

to put up a temporary awning or tent, pendal of other similar erection of a temporary stall or scaffolding on any highway, or

to deposit or cause to be deposited, building materials, goods for sale or other article on any highway, or

To make a temporary excavation for carrying out any repairs or improvements to the adjoining buildings.

No such permission shall be valid beyond a period of one year unless expressly renewed by the highway authority or the authorized officer.

The permission so granted is to clearly specify the date, up to which the person is authorized to occupy the highway.

At the end of the period specified in the permit, he shall release the land after restoring it to the same state as before the occupation by him.

The highway authority is to maintain a complete record of such permissions and also to check when the period of authorization expires.

The highway authority under the following conditions may cancel the permit:

If rent or charge is not duly paid.

If the purpose for which the permission was given has ceased to exist

If there is a breach of the terms and conditions of the permit by the holder.

If the land on which such encroachment has been made is required for any public purpose, or such encroachment is causing impediment or danger to traffic.

If the permission is canceled under the second or fourth reasons, any rent or charge paid in advance shall be refunded to the holder, deducting the amount due to the state government.

Under S.23, any person responsible for the encroachment or his representative shall be served a notice by the highway officer asking him to remove such encroachment and restore the land to its original condition before the encroachment, within the period specified in the notice. If the encroachment is not removed within the time limit and no valid cause is shown for this, prosecution may result.

However, the Section makes a special provision for encroachment for the purpose of exposing articles for sale, opening temporary booths for vending, or other "trivial purpose". It allows the Highway authority to have the encroachment removed with the time limit and no valid cause is shown for this, prosecution may result.

However, the Section makes a special provision for encroachment for the purpose of exposing articles for sale, opening temporary booths for vending, or other “trivial purpose”. It allows the Highway authority to have the encroachment removed with the help of the police without issuing a notice or give the person responsible for the encroachment the option of executing a lease in favour of the Highway Authority.

Sec.25 provides that the expenditure involved in the removal of such encroachments is recovered from the person responsible for the encroachments, according to the procedure required therein.

THE KARNATAK HIGHWAYS RULES, 1965.

The rules prescribe the rent to be charged for the encroachment of highways. These have been attached as annexures to the present document.

THE KARNATAK TRAFFIC CONTROL RULES 1979.

This Act, in section 3 provides that

No driver shall cause any vehicle to stand on any highway longer than is necessary for the purpose of loading, unloading, or taking up or setting down passengers or in such condition or circumstances as to cause or be likely to cause danger, obstruction or undue inconvenience to the users of such highway.

For the violation of this rule, a police officer may cause the vehicle to move away to the nearest place where it does not or is not likely to cause, danger, obstruction or undue inconvenience to the users of such highway, and,

Where the vehicle has been stationary for a continuous period of 24 hours and adequate steps have not been taken by the owner or his representatives to remove it and its contents to the nearest place of safe custody.

THE KARNATAKA REGULARISATION OF UNAUTHORISED CONSTRUCTIONS IN URBAN AREAS ACT, 1991

This Act deals with permanent constructions. For details of this Act, refer to annexure.

THE KARNATAK MUNICIPALITIES (REGULATION AND INSPECTION OF PRIVATE MARKETS, SLAUGHTERHOUSES AND OTHER PLACES OF SALE OF ARTICLES INTENDED FOR HUMAN FOOD) (MODEL) BYLAWS, 1966.

These bye laws in Section 3 prohibit the use of any place, not belonging to the municipal council as a market or shop for the sale of food without obtaining a license which is to be affixed in a conspicuous place at or near the entrance.

Every such market shall without notice be open to inspection by the municipal commissioner, Chief officer, or any officer authorized by him at any time whenever such market is being used.

A license for such a market will only be granted if the constructions are permanent and no inflammable materials used in construction and other safety measures specified in Section 6 are complied with.

A sanitary certificate is a necessity for the carrying on of such a market. In the case of a hawker, it shall be supplemented by a badge, which shall be worn conspicuously. The standards of safety and health are specified in the Act itself.

THE KARNATAK MUNICIPALITIES ACT 1964.

The Municipal Council is obligated to make adequate provision for constructing, altering and maintaining public streets and markets including separate and suitable place for vending vegetables.

Under section 216 of the said Act, whoever sets up any encroachment or obstruction in a public street shall be punished with fine, which may extend to Rs. 25. The Municipal Council has the power to remove any such obstruction or encroachment as also encroachments in any open space belonging to the government .

The Act also provides in Section 242 that a person who without proper authority, in a public place:

At a time or place that has been prohibited by the municipal council by public or special notice, beats any drums or tom-tom, or blows as horn or trumpet, or beats any utensil, or sounds any brass or other instrument, or plays any music,

Disturbs the public peace or order by singing, screaming or shouting, or by using any apparatus for amplifying or reproducing the human voice, such as a megaphone or a loud-speaker,

Shall be punished with fine, which may extend to one hundred rupees.

THE B.D.A. ZONAL REGULATIONS,

They do not provide for any specific zone for vendors and hawkers. The zoning is done only with permanent structures in mind and people who cannot afford these are left out of the protection of the law. For details, kindly refer to the annexure.

THE KARNATAK MUNICIPALITIES (REGULATING THE CONDITIONS ON WHICH PERMISSION MAY BE GIVEN FOR THE TEMPORARY OCCUPATION OF OR THE ERECTION OF TEMPORARY STRUCTURES ON PUBLIC STREETS OR FOR PROJECTIONS OVER PUBLIC STREETS (MODEL) BYLAWS), 1966.

These byelaws provide that “objectionable encroachments” shall be removed by the municipal commissioner after due notice. The bye laws make a special provision that in certain streets or public roads as may be specified by the municipal council a monthly or daily fee shall be levied, for temporary occupation of the street for the sale of articles like vegetables, fruits, silk, cotton goods or ware, betel leaf or headlands of firewood. This appears to be the only such empowering provisions.

THE KARNATAK PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1974.

The Act defines unauthorized occupation as “the occupation of any person of the public premises, without authority for such occupation and includes the continuance in occupation by any person of the public premises after the authority under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever”.

If the competent officer regards any person as an unauthorized occupant, he is required to issue a show cause notice in writing and give him a reasonable opportunity of being heard before he issues an order of eviction.

Supreme Court Cases on Street hawkers

OLGA TELLIS V. BOMBAY MUNICIPAL CORPORATION (1985) 3 SCC 545

In this case slum dwellers residing in footpaths and pavements were forcibly evicted without prior notice.

The Supreme Court has addressed the issue of forcible evictions besides addressing the main issue of whether the right to livelihood could be considered a part of the right to life under Article 21. The court held that the discretion conferred on the Commissioner to serve or not to serve notice to encroachers should be exercised reasonably so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. The court has added that while vesting in the Commissioner the power to act without notice, the Legislature intended that the power is used sparingly and in cases of urgency, which brook no delay.

M.A. PAL MOHAMMAD V.R.K. SDARANAGAM AIR 985 Mad 23.

The Supreme Court has held that the hawker trade, so long as it is regulated in a proper manner could never be a public nuisance. In fact it has gone on to enumerate the advantages of having street hawkers within cities. These include the reasonable prices, the fact that traders and manufacturers look to hawkers to dispose off their accumulated stocks which they cannot sell, the reasonable prices the fruits and vegetables are sold at. The court has noted that in many cities around the world, on certain days in the week, the vehicular traffic in the earmarked street is prohibited, and the hawkers congregate and the public in large numbers gathers to buy their requirements. The court has observed that if regulatory measures were introduced, bearing in mind the requirements of the public of free access, hygiene, safety etc., it would benefit both the hawkers and the public at large. If specific plots are allotted and they are confined to those portions, there could be no conceivable objection for such a trade to be carried out, especially when it would provide an honest livelihood for those who have meager capital but desire to carry on trade.

BOMBAY HAWKERS UNION V. BOMBAY MUNICIPAL CORPORATION (1985)3 SCC 528.

The main issue in most of these cases was whether restrictions on hawking was violative of Article 19(1) g of the Constitution which gives the right to carry on any trade or business. This is however subject to subclause b) which to impose reasonable restrictions in interests of

the general public. The Court has referred to a list of recommendations relating to restrictions on hawkers. These include identifying Hawking zones: prohibiting handcarts, any form of permanent structure including tarpaulins, cloth or plastic sheets; restrictions on timings, noise, prohibiting sale of cooked food articles and cut fruits and a precondition that the hawkers should extend full cooperation to Municipal workers as far as cleaning the streets and managing public agencies are concerned.

ROMESH CHANDER V. IMTIAZ KHAN (1998) 4 SCC 760.

This was a public interest petition on behalf of pavement hawkers and squatters. It concerns the allotment of sites to eligible squatters as per the Thareja Committee Report.

PYARELAL v. N.D.M.C. A.I.R. 1968 SC133.

In this case the petitioner was carrying on street trading in some food items. N.D.M.C. decided to remove these. The petitioner said N.D.M.C. could not take away his fundamental right to engage in a trade. This was a very wrong argument put forward and the court took strong objections to it. It said no person has fundamental right to carry on street trading on a public street. The court went so far as to say that no exception could be taken to N.D.M.C. exercise of power to “eradicate the evil”

Thus this case shows that claiming a fundamental right to carry on street trading is wrong path to tread on and this argument is torn apart easily. The strong words used by the courts (“eradicate the evil”) are basically a rebound to that argument.

OLGA TELLIS v. BOMBAY MUNICIPAL CORPORATION (1985) SCC 545.

Though this judgement is not directly relevant as in it actually deals with the slum dwellers, the observations made by the court regarding the forcible eviction, right to livelihood, etc. would have definite impact on the hawkers and vendors as well. The court held that eviction would lead to deprivation of livelihood and thus deprivation of life. It went on to say further that no person has the right to encroach on footpaths, pavements or any other place earmarked for a public purpose. Thus it says that forcible eviction is not unreasonable, but that it must be according to procedure established by the law. It says, “procedure prescribed by the law for depriving a person of his right to life must conform to the norms of justice and fair play”. Thus the importance of this judgement lies in the fact that it recognizes that

eviction affects the right of life and livelihood of poor people and thus the procedure followed such as a notice has to be necessarily served unless there are extreme circumstances.

Despite this the court still failed to the needful. As it failed to curb the discretionary powers of the Commissioner to serve notice.

SODAN SINGH v. NDMC (1989) 4 SCC 155

Right to carry on trade not part of Article 21 but Article 19 (1) (g) and can be reasonably restricted under Article 19(6). Hawking on roadsides falls within the “occupation, trade or business” in Article 19(1) (g). All streets and roads are vested in the state but it holds it as a trustee and the members of the public are beneficiaries entitled to use it as a right. Therefore the municipality has full authority to permit hawkers and squatters on the sidewalk wherever at the municipality considers it convenient under the municipalities Act. But there cannot be a fundamental right vested in a citizen to occupy any place on the pavement where he can engage in trading business. Nor can the hawkers assert a fundamental right to occupy a particular place permanently on the pavement. If the circumstances are appropriate and a small trader can do some business for the personal gain on the pavement to the advantage of the general public and without any discomfort or annoyance to others, there can be no objection. Hawkers cannot be permitted to squat on every road. Factors like the width of the road, security etc. has to considered. Licenses must be granted periodically but not daily.

SODAN SINGH v. NDMC (1988) 2 SCC 727.

The judgement basically looked into the recommendations made by the Thareja committee. The court accepted its allotment of sites to hawkers based on number of years. The court accepted its allotment of sites to hawkers based on number of years. This seems to be a good verdict as the committee conducted detailed, free and fair examination of the claims received. It also ordered immediate eviction of unauthorized squatters, which have been alleged to be in collusion with NDMC but at the same time unreasonable conditions regarding change of trade was prohibited as it was violative of Art. 19(1) (g).

Another notable aspect was that the court laid limitations on the arbitrary power abuse of NDMC through its discretionary functions.

GAINDA RAM v. MCD (1993)3 SCC 179

In this case the main dispute was relating to the allotment of stalls by MCD. Was arbitrary due to the sub classification made among the hawkers who possessed survey reports and those who did not. The Supreme Court affirmed this as the criteria applied to shops could not be applied to those did not have such facilities. It also directed the MCD to prevent future encroachments so that the rights of existing hawkers would not be infringed.

GAINDA RAM v. MCD (1994) 5 SCC 52.

This case looked into some of the recommendations of the Thareja committee regarding allotment of sites.

The main grievance of the hawkers is that MCD committee is allocating space on the proximity from the residence basis which rendered their right redundant.

The court held that the committee should obtain the preference of the zones from the hawkers where they would like to be accommodated and then suit their purpose as far as possible without increasing the number of slots in one zone.

GAINDA RAM v. M.C.D. (1998) 1 SCC188.

This case involved the allotment of sites to hawkers and squatters as per the scheme evolved by the MCD. In this case the court held that the status quo order granted earlier by the court itself in 1993 and which operated qua the squatters was to be continued with certain modifications in connection with those cases which would be reconsidered by the committee preferably to remove the encroachments.

MUNICIPAL CORP. OF DELHI v. GURNAM KUAR (1989) 1 SCC 101.

In this the municipal corporation said that it could evict the hawkers if the due procedure of the law is followed and that there was no binding obligation on their part to provide alternate arrangement. The court affirmed this and held that the principle of *Jamaica Das* could not be applied even if the argument *hie. NT* of the art. 141 is used for *obiter dicta* is not binding and moreover in that case the judgement was passed by the consent of the parties.

High Court judgements.**J.JAICHAND v. TOWN MUNICIPALITY**

The President of the municipal council had followed ad hoc procedure in giving lease rights to two shops under a private treaty. The court held that matters of public convenience and revenue should be done in accordance with the law and ad hoc procedure cannot be followed.

CITY MUNICIPALITIES, BIJAPUR v. STATE OF KARNATAKA, AIR 1976 KAR. 788

It was held that the government couldn't direct the council to lease property in favor of anyone of government's choice.

RAHLAD VENKANNA MUDARGI v. THE BETAGARI CITY MUNICIPAL COUNCIL, AIR 1987 K

Kar. 786. The City Corporation had leased land to petty shopkeepers. They were evicted on the termination of the lease. The court held that the action did not violate promissory estoppel or the right to livelihood. It was not a case of contractual obligation.

VIDYARANGANAGAR PETTY SHOPKEEPERS ASSO. V. THE CORRP. OF THE CITY OF BANGALORE, AIR 1987 Kar. 726

It was held that the demolition or alternation of buildings did not confer unguided powers on the commissioner.

As illustrated in the above high court cases, the judiciary has generally been interpreting law in such a manner so as to limit the arbitrary use of authority by the state. This is relevant to the hawkers and street vendors who are the subject of much harassment in the hands of state authorities because of their uncertain status and the huge power conferred on the municipal commissioners. Thus they can go to courts to demand fair play and non-arbitrariness on the state authorities.

Conclusion

That the legal status of hawkers and vendors needs to be changed is evident. However, what needs to be done to achieve this change is a moot point. There seems to be no well defined legal strategy to achieve this. It has been our effort to highlight the existing law so as to

facilitate the formation of this strategy. Here we make an attempt to outline this proposed strategy.

This strategy needs to work at two levels. Firstly, the existing laws need to be used to facilitate their trade. Laws that provide for licences should be urged to implementation. For this, any law or judicial pronouncements that provides this kind of facility must be followed up and voluntary organisations that work on this issue need to follow up on them with the concerned authorities. For example, the recent high Court direction to the municipal corporation to issue licenses within eleven months, if not implemented in time, can amount to contempt of Court. This might serve as a powerful inducement to the authorities to implement it.