

Res Extra Commercium in Online Gaming

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Abstract

This paper critically examines the application of the doctrine of res extra commercium in the context of online gaming regulation in India. Tracing its origins to Roman law and subsequent misinterpretation in Indian jurisprudence, the paper argues against classifying online gaming under this doctrine due to its economic and social implications. Instead, it advocates for regulation under Article 19(6) of the Constitution of India, emphasizing the principle of proportionality. The paper explores the state's powers and obligations to regulate, drawing lessons from global practices in the European Union and China, and stresses the need for a balanced approach that considers public health without stifling economic growth. Finally, it outlines recommendations for creating a robust regulatory framework, ensuring both constitutional principles and public welfare.

Keywords

Res Extra Commercium, Online Gaming Regulation, Article 19(6), Doctrine of Proportionality.

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1. Introduction

Res extra commercium has its origins in Roman law which means *things incapable of private ownership*. Certain categories of things were excluded from the ownership for the use and public welfare such as air, water, trees, etc. This expression has been used in the past to declare that there exists no fundamental right to trade in liquor or any other harmful substance.²² This doctrine was first used “correctly” in the Indian courts in the case of *Angurbala Mullick v. Debabrata Mullick*²³ by N. Chandrasekhara Aiyar, J. where he held that shebaitship of an idol was res extra commercium as it was inalienable.²⁴ The entire problem arises from *R.M.D. Chamarbaugwalla v. Union of India*²⁵, where Venkatarama Ayyar, J. had interpreted gambling to be as “res extra commercium” when Das, C.J. in *State of Bombay v. R.M.D. Chamarbaugwalla*²⁶ held gambling to be as “extra commercium”. The flawed concept of res extra commercium was thus brought into Indian jurisprudence and since then it has been used wrongly. The res extra commercium principle excludes any noxious substance, as so understood by the Court, from the ambit of trade and the rights conferred by Article 19(1)(g) and Article 304.²⁷ The only correct usage of res extra commercium in today’s context would be in space law and the law related to antiques. The entire concept of res extra commercium was nothing but the doctrine of police powers as used in the United States.²⁸ The power is possessed by a Government to protect its citizens from danger.²⁹

The debate surrounding the prohibition of online gaming has been very common in recent years. Various perspectives have been given as to whether this poses harm. The main

²² Datar (2009).

²³ *Angurbala Mullick v. Debabrata Mullick*, AIR 1951 SC 293.

²⁴ Datar and Unnikrishnan (2017).

²⁵ *R.M.D. Chamarbaugwalla v. Union of India*, 1957 AIR 628.

²⁶ *State of Bombay v. R.M.D. Chamarbaugwalla*, 1957 AIR 699.

²⁷ Datar (n 1).

²⁸ The power possessed by a Government to protect its citizens from danger, disease and vice is known as “police power”. In the USA, this power is not dedicated to the Congress but is reserved to the States exclusively. Legislation designed to regulate and prohibit the sale of intoxicating liquor has frequently been upheld by the United States Supreme Court as a valid exercise of police power.

²⁹ Unnikrishnan (n 3).

question of this discourse is whether it should be prohibited or permissible? The primary argument put forward is that online gaming should not be categorised as *res extra commercium*, as the historical intent behind including activities similar to it, such as gambling, in the State list was to empower States to either permit it or prohibit it according to their own policies and social contexts. The power of the State governments to make laws on gambling can be traced to Entry 34 List II of the Seventh Schedule of the Constitution. Thus, the States have exclusive power to make laws on this subject including power to prohibit or regulate gambling etc. in their respective territorial jurisdiction.³⁰

This paper will delve into this argument while discussing the state's obligations or power to regulate these activities, difference in invoking *res extra commercium* or Article 19(6)³¹ and the argument that the State should put forward to justify the banning of the activity, whether the harm is certain or probable.

2. Power or Obligation of State to Regulate Online Gaming

The argument lies in the question as to what is the role of the State in regulating online gaming. There are two sides to this: on one hand, the people who assert that there is no inherent obligation to ban it but have the power under the Constitution to ban it under specific circumstances. This view is supported by the argument that there are principles of federalism present in the Constitution and hence allow States to make policies according to their needs and social conditions. Dr. Ambedkar, in the Constitution Assembly debate, while discussing Entry 45 under List II, explained that if that entry did not exist, the Provincial Governments would be absolutely helpless and if there was strong opposition to this, there must be an article prohibiting it in the Constitution.³² The entry would act as a preventive measure and States would have full power to prohibit gambling.³³ The entire logic was to give power to States to either permit it or prohibit it.

³⁰ 276th Law Commission of India Report, Legal Framework: Gambling and Sports Betting Including in Cricket in India, 29 (2018).

³¹ Constitution of India 1950, art 19(6).

³² Constitutional Assembly Debates, Volume IX, (September 2, 1949).

³³ Indulia (2023).

This power to ban is given to States under Entry 34 List II of the Seventh Schedule³⁴ of the Constitution.

States with a more conservative outlook, concerned about the potential negative effects on public health may choose to ban those activities. For instance, Telangana and Andhra Pradesh banned online gaming activities under the authority of Public Gaming Act 1857.³⁵ They argued that these games involved gambling, an element of cheating, and even led to suicides.³⁶

On the other hand, people who support the blanket ban on online gaming would argue that there exists an ethical and moral obligation of the state to ban activities that are against the public health and morality. The Directive Principles of State Policy lays down the duty of State under Article 39(f)³⁷ and Article 47 of the Constitution of India³⁸ to work towards protecting the children from harmful activities, give them the conditions of freedom and dignity and improve public health.

To further strengthen the argument that State has an obligation to regulate online gaming, we can look to HLA Hart's concept of primary and secondary rules as discussed by him in his book "The Concept of Law".³⁹ He distinguishes between primary rules, which the human beings are required to do or abstain from certain actions, whether they wish to or not, and secondary rules, which provide that human beings may by doing or saying certain things introduce new rules of the primary type. Primary rules impose duties while secondary rules confer powers.⁴⁰

The Directive Principles of State Policy and State's responsibility to protect the people can be seen as primary rules, establishing obligation and duty of the State. The grounds on which the State can regulate can be seen as secondary rules. The State needs to look for grounds other than morality to regulate or ban online gaming as Justice K. Subba Rao,

³⁴ Constitution of India 1950, sch 7 ent 34 list 2.

³⁵ Public Gaming Act 1857, s 3.

³⁶ Raja Simhan (2022).

³⁷ Constitution of India 1950, art 39(f).

³⁸ Constitution of India 1950, art 47.

³⁹ Hart (1994).

⁴⁰ Ibid p 81.

in *Krishna Kumar Narula Etc v. The State of Jammu and Kashmir & Ors*⁴¹ held that, “Standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right”.⁴²

Ultimately, the ‘power’ to ban or regulate online gaming lies with the State, granted by the Constitution. But this power should be used carefully, taking into consideration the empirical data, regulations in other countries. The State has the power to restrict certain activities, impose “reasonable restrictions” under Article 19(6)⁴³ of the Constitution.

3. Res Extra Commmercium v. Article 19(6)

The next question that would come to mind is which path should the State follow – to ban or regulate online gaming, through res extra commercium, or directly under Article 19(6)? The categorization under res extra commercium can be severe and violative of individual freedom and dignity whereas limitations under Article 19(6) necessarily would have to be proportionate and reasonable.

As pointed out earlier, the entire concept of res extra commercium was misinterpreted from the beginning. It was originally intended to refer to things that are outside the realm of private ownership. Activities that are actually under res extra commercium are things for public welfare and use such as air, water, etc.⁴⁴ But by treating online gaming as res extra commercium, the courts would deny them the identity of commercial nature. This would deter/discourage companies from investing further in this industry because of the uncertainty that the State can impose any unjust or unreasonable restrictions on the industry.

Foreign companies would not want to invest in the country because of the high regulations that might be imposed, they would not be benefitted under this. The government has imposed 30% tax on the earnings of online gaming under S. 115BB of the Income Tax

⁴¹ *Krishna Kumar Narula Etc v. The State of Jammu and Kashmir & Ors*, 1967 AIR 1368.

⁴² Ibid para 11.

⁴³ Constitution of India 1950, art 19(6).

⁴⁴ Unnikrishnan (n 3).

Act, 1961.⁴⁵ The investors in the country even wrote an open letter to the Prime Minister to levy taxes on platform fees and not on bet amount. They claimed that the said tax would, “adversely impact prospective investments to the tune of at least \$4 billion in the next 3-4 years...and substantially and meaningfully erode investor confidence”.⁴⁶

After the coming up of these taxes, Mobile Premier League (MPL) laid off its 350 employees.⁴⁷ A case has also been filed by the companies against the said taxation brought in by the government - *M/S E-Gaming Federation and Anr. v. Union of India and Ors*⁴⁸. These all are the side-effects of the regulations brought in by the government. The companies are not able to pay their employees their salary, maintain their business which would ultimately make their business unfeasible. This is a clear violation of Article 19(1)(g).⁴⁹

And if the state goes further and bans it under the pretext of *res extra commercium*, what would happen to the employees in the industry? What would happen to their right of trade and business? The bigger industries would not be affected much because they have the resources to establish off-shore companies and continue their business but this move would adversely affect the new start-ups in the country. The majority companies of the country are new start-ups and this would affect the economy of the country as well.

Furthermore, classifying the activities as *res extra commercium* could even lead to illegal and unregulated online gaming as any legitimate business would not want to operate in such a restricted environment. This could lead to fraud, exploitation and other activities which would be detrimental to the State’s efforts to protect public interests. This would be against the intention of Constitution framers and would lead towards disproportionate limitations and restrictions.

The State, using the path of Article 19(6) can impose “reasonable restrictions” on the activities while respecting the commercial nature of online gaming. The State would be

⁴⁵Income Tax Act 1961, s 115BB.

⁴⁶ Shouvik Das (2023).

⁴⁷ J Jagannath (2023).

⁴⁸ *M/S E-Gaming Federation and Anr. v. Union of India and Ors*, W.P.(C) No. 001374-/2023.

⁴⁹ Constitution of India 1950, art 19(1)(g).

conscious to balance the rights and interests of the people. For instance, the State can set out guidelines and regulations to prevent such advertisements that may induce vulnerable groups to take up online gaming.

For the State to ban or regulate these activities, they could even look up to guidelines set forth by the European Union that seeks to regulate online gambling. The European Commission had many options to go forward with: firstly, they can pass legislation to cover all types of gambling. Secondly, they may decide to deal with some issues while leaving others to national law and third, they may not act at all. If they go ahead with regulating, they can do that by mutual recognition or harmonization. By mutual recognition, the provider can provide the services at a pan-Euro level by complying with the licensing requirements. By harmonization, all the different rules will be replaced by one single set of rules to regulate online gaming.⁵⁰

Even China has set out certain guidelines regarding the same. They have imposed legal obligations on gaming providers to ensure that they protect juveniles from “online gaming addiction”. The legal burdens are as follows:

- (i) Obligation to verify identity of all users.
- (ii) Shutdown law to stop providing juveniles gaming service between 22:00 and 8:00 next morning.
- (iii) Maximum gameplay time.
- (iv) Maximum in-game spending limits.⁵¹

All these regulations are imposed on the service providers and not the users as they understand the unequal bargaining between the service providers and the users.

The State can take up some of these ideas and try to import it in the Indian context. Again, it should be noted that the countries have not resorted to a blanket ban on online gaming, instead tried to regulate it using guidelines and certain reasonable restrictions. Recently,

⁵⁰ Vlaemminck and De Wael (2003).

⁵¹ Xiao (2021).

the Government passed a draft notification for the amendments to the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021⁵² in relation to online gaming. It was stated that these guidelines have been brought in to safeguard the users against potential harm.

The State has “power” to regulate online gaming, it is more reasonable to do so under the limitations provided under Article 19(6) of the Constitution of India, rather than categorising it as “res extra commercium”. This way, the commercial identity of the activity is also safeguarded and reasonable and proportionate restrictions/regulations can be imposed.

4. State’s Justification to Regulate: Certainty or Probability of Harmful Effects

The most important aspect of banning any activity is to identify as to what are the harmful effects of the activity and the State needs to prove that the effects are certain to justify the restriction under Article 19(6). Over the years, across several judgements, the courts have devised a method to determine as to whether a certain prohibition or restriction is well within the contours of the Constitution or not? “When a law limits a constitutional right, such limitation is constitutional if it is proportional”.⁵³

“When we examine the provisions of the statute and some reasonable restrictions are brought in the interest of the general public, the exercise of balancing fundamental rights to carry on occupation on the one hand and restrictions imposed on the other has to be carried out”. This is known as the ‘Doctrine of Proportionality’.⁵⁴ This doctrine is enshrined in Article 19 itself when we read clause (1) along with clause (6). This doctrine was first laid down in the case of *Modern Dental College & Research Centre v. State of Madhya Pradesh*.⁵⁵

⁵² IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

⁵³ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353 para 56.

⁵⁴ *Ibid*, para 53.

⁵⁵ *Modern Dental College & Research Centre v. State of Madhya Pradesh*, (2016) 7 SCC 353.

“There are four components of the test that needs to be satisfied:

1. The action must be sanctioned by law
2. The proposed action must be necessary in a democratic society for a legitimate aim
3. The extent of such interference must be proportionate to the need for such interference
4. There must be procedural guarantees against abuse of such interference”.⁵⁶

Similarly, the court in the cases of *Justice K.S. Puttaswamy v. Union of India* (2017),⁵⁷ while deciding the matter of privacy and in *Justice K.S. Puttaswamy v. Union of India* (2018),⁵⁸ while deciding the case of Aadhar, used the doctrine of proportionality for the judgement.

In India, democracy is treated as the basic feature of the Constitution and is based on a balance between constitutional rights and the public interests.⁵⁹ The limitations would be justified if they are meant to protect public interest or impose reasonable restrictions. The term “reasonable restrictions” strikes a balance between freedoms guaranteed and the limitations permitted under clause (2) to (6). The expression ‘reasonable’ that the limitation imposed should not be arbitrary or of an excessive nature beyond what is required in the interests of the public.⁶⁰ The restriction must satisfy the test of judicial review under: 1. One of the eight grounds mentioned under Article 19(2) 2. The restriction should be reasonable.⁶¹

Even under Article 52 of guaranteed rights under the Charter of Fundamental Rights of the European Union⁶² it emphasises on the fact that the restriction should be reasonable. “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and

⁵⁶ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 para 71.

⁵⁷ *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁵⁸ *Justice K.S. Puttaswamy v. Union of India*, 2019 (1) SCC 1.

⁵⁹ *Modern Dental* (n 30) para 55.

⁶⁰ *Modern Dental* (n 30) para 58.

⁶¹ *K.S. Puttaswamy* (n 33) para 87.

⁶² Charter of the Fundamental Rights of the European Union 2009, art 52.

genuinely meet objectives of general interests recognised by the Union of the need to protect the rights and freedoms of others.”⁶³

From the above stated cases and doctrine, it is clear that the State needs to pass the four-pronged test of proportionality to justify the restrictions or regulations.

1. Legality - Article 19(6) itself provides for limitations on the basis of reasonable restrictions on trade/commerce.
2. Legitimate goal - Preventing potential social harms like addiction, crime from online gaming is a legitimate state aim. University of Oxford in 2021 conducted a study in which it concluded that around 1% of the world’s population may be suffering from “gaming disorder” (gaming addiction),⁶⁴ which was acknowledged by WHO⁶⁵ by listing it under ICD-11.⁶⁶ “The pattern of gaming behaviour is of such a nature & intensity that it results in marked distress or significant impairment in personal, family, social, educational or occupational functioning. The health concerns associated with gaming behaviour are not limited to gaming disorder but extend to other aspects of health such as insufficient physical activity, unhealthy diet, problems with eye sight or hearing, musculoskeletal problems, sleep deprivation, aggressive behaviour & depression and psychosocial functioning”.⁶⁷ WHO highlighted the potential negative impacts of gaming disorder characterised by ‘impaired control over gaming’.⁶⁸ “Online gamers typically sacrifice sleep because of long hours in chat rooms and sitting in front of computers causes headaches, backaches, cervical disease, eye strain, seizures and repetitive stress injury.” It also causes mental illness such as

⁶³ *K.S. Puttaswamy* (n 32) para 134.

⁶⁴ Reer and Quandt (2021).

⁶⁵ ICD–11 is the international standard for systematic recording, reporting, analysis, interpretation and comparison of mortality and morbidity data. This 11th revision is the result of an unprecedented collaboration with clinicians, statisticians, classification and IT experts from around the world, making it useable by these groups, as well as by coders. ICD–11 allows countries to count and identify their most pressing health issues by using an up-to-date and clinically relevant classification system. Health conditions and accidents are assigned ICD–11 codes, resulting in data that can be used by governments to design effective public health policies, and measure their impact, or used for clinical recording.

⁶⁶ Anonymous, ‘Inclusion of “Gaming Disorder” in ICD-11’ *World Health Organization (WHO)* (14 September 2018).

⁶⁷ *All India Gaming Federation v. State of Karnataka*, (2022) 1 KCRR 513.

⁶⁸ Anonymous (2020).

depression, nervousness, fear, social anxiety and social phobias. It also exacerbates attention deficit hyperactivity disorder (ADHD).⁶⁹

3. Proportionality - The State will need to prove that the steps that they will undertake to restrict or ban the activity are proportionate to the harmful effects that are certain to happen. They will need to rely on the empirical data to prove that the harm is certain. A blanket ban is not the only solution to address addiction. Other countries have tried regulating online gaming and have seen positive results.
4. Procedural guarantees - The State needs to rely on research and expert opinion to assess the nature of harm will provide necessary procedural guarantees to the restriction.

The State can pass the proportionality test after justifying their reasonable restrictions on the grounds of health and addiction. 'Public health and sanitation' in Entry 6 of the State List can be broadly interpreted to include online games.⁷⁰ The reasonable restrictions can be applied on any online game that causes health problems and addiction. Historically, courts have restricted games of skill and chance on the grounds of morality but as discussed earlier in this article, morality cannot limit the scope of any right. The Madras High Court in *Junglee Games India Private Limited v. State of Tamil Nadu*⁷¹ had commented that "there appears to be a much greater element of morality involved in what activities would be regarded as *res extra commercium*".⁷² Since the State needs to look for more grounds other than morality, as discussed earlier, in this case health and addiction, the fact that it is a game of skill or chance would not matter. Any game that poses a harm to the health of the public can be restricted or regulated, as necessary, by the State.

5. Conclusion

The regulation of online gaming is a very nuanced issue and it needs to be understood from different perspectives of legal, social and economic lens as well as the efforts to keep up the constitutional principles of freedom and authority. The main argument of this

⁶⁹ Zhan and Chan (2012).

⁷⁰ All India Gaming Federation (n 41).

⁷¹ *Junglee Games India Private Limited v. State of Tamil Nadu*, (2021) SCC OnLine Mad 2762.

⁷² Ibid para 107.

article- that online gaming should be regulated under Article 19(6)⁷³ and not categorised under *res extra commercium* - offers a good approach to solve the problem.

The acknowledgement of the fact that the doctrine was misinterpreted seeks to rectify the wrong jurisprudence that has been followed by the courts from the past sixty years. By recognizing online gaming as *res extra commercium*, the courts have denied the activity its commercial nature.

Furthermore, the state has the power to ban/restrict online gaming under Article 19(6). Constitution framers had the intent of giving powers to ban to the State by mentioning it under State List so that they can ban it according to their own needs and social conditions. Several states have used this power to ban online games as it was affecting the people of their state. The States have the power to either permit it or prohibit it.

State should not use the doctrine of *res extra commercium* to ban online gaming as it would have severe consequences. Companies would refrain from investing in the country as there would be uncertainty regarding the restrictions or regulations that could be brought in by the State as they could be even unreasonable as by declaring the activity *res extra commercium*, they have removed it from the ambit of Article 19(1)(g). The jobs of people would be in danger. The taxation has also been imposed by the government. Hence, the restrictions should be under Article 19(6) which provides for reasonable restrictions. The State could look at other countries who have tried to regulate online gaming and try to bring some reform on the same model.

The State has to justify the ban or restriction under Article 19(6), the regulations have to pass the four-pronged proportionality test given in *KS Puttaswamy*. The limitations need to be reasonable and this strikes a balance between freedoms guaranteed and limitations that can be imposed by the States. Even the Charter of Fundamental Rights of the European Union⁷⁴ guarantees that there should be reasonable restrictions on the rights guaranteed by the Constitution. The States would be successful in passing the

⁷³ Constitution of India 1950, art 19(6).

⁷⁴ Charter of Fundamental Rights of the European Union (2009).

proportionality test if they impose reasonable restrictions on the grounds of health and not morality but would not be successful in imposing a blanket ban as this is not the only option that is available to address the issue of addiction in online gaming.

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