SECTION: PIL

IN THE HON'BLE SUPREME COURT OF INDIA
(CIVIL ORGINAL WRIT JURISDICTION)

WRIT PETITION (CIVIL) NO. 607 OF 2021

IN THE MATTER OF

DR. JACOB PULIYEL .....PETITIONER

VERSUS

THE UNION OF INDIA & ORS. .....RESPONDENTS

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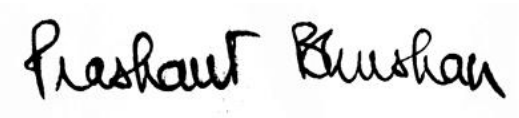

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NEW DELHI
DATED: 19.03.2022

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PAPER BOOK

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International Judgments

United States

1. National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration reportable in 595 U. S. ____ (2022). The US Supreme Court struck down the Occupational Safety and Health Administration's (OSHA) COVID-19 vaccine-or-test Emergency Temporary Standard (ETS) for large private employers. It held that the Occupational Safety and Health Administration overstepped its authority by seeking to impose the vaccine-or-test rule. In India's context the Union of India has submitted that no vaccine mandates have been issued by the Centre thus far. As observed by the Supreme Court of the United States, a doctrine backing a limitation is a necessity especially for orders that are as pervasive as vaccine mandates. In striking down the mandates the court held,

> *"In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would*

> *never end and the liberties our Constitution's separation of powers seeks to preservewould amount to little.*

2. Joseph R. Biden, Jr., President of the United States v. Missouri 595 U. S. ____ (2022). The Court dealt with the question of whether the Department of Health and Human Services has the authority to enforce a rule requiring health care workers at facilities that participate in the Medicare and Medicaid programs to be fully vaccinated against COVID-19 unless they qualify for a medical or religious exemption. The Court has stayed the injunction on the mandate for health workers with an exemption for medical or religious reasons.The judgment states that it is based on the assumption by the Secretary that vaccinations deter transmission of COVID-19:

   > *"In many facilities, 35% or more of staff remain unvaccinated, id., at 61559, and those staff, the Secretary explained, pose a serious threat to the health and safety of patients. That determination was based on data showing that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated.."*

   The court in this case went into the issue of proportionality (because of health workers) given the evidence presented by the Secretary Health and no counter evidence was presented or argued in this short interim hearing.

   The Petitioner has submitted many scientific studies and data to show that COVID-19 vaccinations do not deter transmission of the disease, that vaccinated persons also transmit the disease as has also been evident in the Omicron wave and detailed through various scientific studies in the petitioners submissions. Jurisdictions globally have accepted research studies that indicate that the virus is transmissible despite vaccinations including a High Court of New Zealand judgement on a petition by a group of police and defence force workers' that COVID-19 vaccine mandates unjustifiably infringe on the country's Bill of Rights.

3. **Jacobson v Commonwealth of Massachusetts** 197 U.S. 11 (1905) has been relied on for the proposition that States have plenary power to protect the public against disease by having nearly cart blanche to impose what is necessary to keep others in the community safe. Current covid and the pandemic circumstances are used as justifications to rely on this more than 100 year old judgement, taking the language of Jacobson out of its context to support an extreme interpretation of the violation of rights.

The court in Jacobson upheld a state authorised vaccine requirement imposed on Cambridge residents in response to a small pox outbreak, **unless they fit an exemption, or pay a $5 fine.** Jacobson challenged that the authorizing statute "was in derogation of the rights secured by the 14thAmendment . . . ." The court held, however, that any individual liberty interest involved may be overridden in such circumstances by "laws for the common good."
It is a very nuanced judgment where the court found the $5 fine was a reasonable penalty to pay. It is moot if the person were sentenced to imprisonment for not taking the vaccine, that the court would find it a reasonable penalty. In the same manner if the penalty was to revoke his fundamental rights to life and livelihood, whether the court would uphold the right of the state against Jacobson.

The extreme view of Jacobson led directly to the infamous decision in Buck v. Bell, 274 U.S. 200 (1927), upholding the involuntary sterilization of those with mental retardation. The Buck Court cited Jacobson: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson, 197 U. S. 11. Three generations of imbeciles are enough." 274 U.S.at 207.

However, constitutional jurisprudence has developed since 1905—Jacobson's extreme deference to public health officials does not hold under precedent directly relevant to the issues at stake in the present case, which has also been held by the US Supreme Court in Roman Catholic Church (November 2020) . This extreme deference to decision-makers and no-evidence/"no function" role of the courts in matters of executive policy has far been altered since the decision of Jacobson and even in public health emergencies. While acknowledging that a local community has the power to protect itself against an epidemic, Jacobson recognized that such police powers could be exercised to violate the federal constitutional or statutory law, "in . . . an arbitrary, unreasonable manner," or in a way to go "beyond what [i]s reasonably required for the safety of the public." 197 U.S. at 28. This left judicial review of the exercise of those police powers to subsequent courts. If violations of constitutional rights occur in exercise of those powers, then, under Jacobson, the government needs to show the exercise passes constitutional muster. The present vaccine mandates and orders cannot do so when the proper heightened constitutional scrutiny is applied.

Justice Gorsuch of the US Supreme Court in Roman Catholic Diocese v. Cuomo (November 2020), highlighted this sea-change, noting that Jacobson was a "modest decision" and not "a towering authority that overshadows the Constitution during a pandemic." 141S. Ct. 63, 71 (2020). Regarding Jacobson's modest nature, Justice Gorsuch observed that it was over a century old and involved: (1) an old mode of analysis instead of modern rational-basis review; (2) a "bodily-integrity" right emanating from the Fourteenth Amendment that was asserted to "avoid not only the vaccine but also the $5 fine (about $140 today) and the need to show he qualified for an exemption," id. at 70 (emphasis in original), and (3) "an imposition on [Jacobson's] claimed right to bodily integrity [that] was avoidable and relatively modest." He further remarked that "no Justice now disputes any of these [three] points," none argued that normal constitutional rules should not apply in a pandemic. Chief Justice Roberts agreed, downplaying an earlier comment in concurrence citing Jacobson to the effect that such matters are usually left to the states.

4. In ROMANCATHOLIC DIOCESE OF BROOKLYN, NEW YORK v. ANDREW M. CUOMO, GOVERNOR OF NEW YORK (ON APPLICATION FOR INJUNCTIVE RELIEF [November 25,2020]) held that:

> ***(Pg. 5-6)*** *Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area.* ***But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.***
>
> ***(Pg. 10-12)To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in Jacobson v. Massachusetts, 197 U. S. 11 (1905). But Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.*** *Start with the mode of analysis. Although Jacobson predated the modern tiers of scrutiny, this*

Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5fine, or establish that they qualified for an exemption. Id., at 25 (asking whether the State's scheme was "reasonable"); id., at 27 (same); id., at 28 (same). Rational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. ***Put differently, Jacobson didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, Jacobson applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny:*** *The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. Church of Lukumi, 508 U. S., at 546.*

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but also the $5 fine (about $140 today) and the need to show he qualified for an exemption. 197 U. S., at 13–14. This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In Jacobson, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. Id., at 12, 14. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors. Id., at 36, 38–39. Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses. Nothing in Jacobson purported to address,

> ***let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, Jacobson explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument."*** *Id., at 25.*

Roman Catholic Diocese was preceded by a similar case (church occupancy limits in the pandemic) in Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020)(Mem. Op.), where the Court had denied injunctive relief. There Justice Alito dissented, joined by Justices Thomas and Kavanaugh, noting that "at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules," "[b]ut a public health emergency does not give . . . public officials carte blanche to disregard the Constitution as long as the medical problem exists." Rather, "[a]smore medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."

Justice Alito's dissenting view was essentially adopted by Roman Catholic Diocese, meaning that "blunt rules" may be permitted initially, but fine-tuning to actual scientific evidence is then required—requiring an evidence-focused inquiry in judicial review. Applying the normally-required, current jurisprudence in that case required the government to justify itself under strict scrutiny, which eschews blunt rules and requires narrow tailoring to the least restrictive means to further a compelling interest. Despite the government's interest in public health during a pandemic, Roman Catholic Diocese required normal scrutiny levels instead of defaulting to Jacobsons analysis. Thus, the courts are bound to analyze the contexts in which heightened scrutiny applies to cases involving bodily integrity, autonomy, and of medical treatment choice.

5. Phillips v. City of New York (United States Court of Appeals, Second Circuit.) No. 14-2156 (2d Cir. 2015). In this case the plaintiff argued that the state regulation permitting school officials to temporarily exclude school students who are exempted from the vaccination requirement during an outbreak of a **vaccine-preventable disease** is unconstitutional. The disease for which the plaintiff refused to vaccinate his children was chicken pox and he challenged their exemption from attending school when another student was diagnosed with chicken pox. Chicken pox is a vaccine preventable disease and the case on facts cannot be compared to the present challenge to mandates

for COVID vaccines. Chicken pox being a DNA virus as opposed to an RNA virus like COVID, the virus mutates frequently and the vaccinated continue to be infection in the future. The vaccination for chicken pox involved in the aforementioned case was scientifically proven through years of published clinical research to prevent transmission and therefore to contain a vaccine preventable disease. Therefore the court held that the right of a child to practice religion cannot include the liberty to expose the community or other children to a communicable disease. A mandate that applies for COVID-19 vaccinations would not have any rational nexus since the COVID vaccines do not prevent transmission.

EUROPEAN CASES

6. VAVŘIČKA AND OTHERS v. THE CZECH REPUBLIC (Grand Chamber) Applications no. 47621/13 76 - 174 - The Grand Chamber of the European Court of Human Rights dealt with the Czech Republic's regime for the mandatory vaccination of children and upheld it. The case was filed by a Czech citizen Pavel Vavřička, **who was ordered to pay a fine for refusing to vaccinate his children for tetanus, hepatitis B, and polio.** Importantly the Act authorizing the vaccine mandate for preschool children provided that the preschool facilities **"may only accept children who have received the required vaccinations, or who have been certified as having acquired immunity by other means or as being unable to undergo vaccination on health grounds."** The statute therefore recognized prior infection as a valid exemption from vaccination. It is again to be noted that these are diseases caused by DNA viruses that do not mutate after the initial infection and therefore are vaccine preventable diseases. It is to be noted that these vaccines have had decades of research involved and have demonstratively been found to prevent the disease as well as the transmission, which is not the case with the vaccines for COVID-19. The court found that the public health interest in achieving herd immunity from contagious diseases outweighed the individual right to privacy, and that the Czech law contained sufficient provisions for the exemption of those with medical or religious reasons for not receiving vaccination. The Court held that compulsory vaccination, as an involuntary medical intervention, represents an "interference" with the right to respect for private life within the meaning of Article 8 of the Convention. The relevant question before the Court was therefore whether there was any

justification for the interference. Thus, while upholding these vaccine mandates,the Court assessed whether the interference was "in accordance with the law", pursued one or more legitimate aims specified therein; and was "necessary in a democratic society".The Court also noted herein that "necessary precautions taken, including the monitoring of the safety of the vaccines in use and the checking for possible contraindications in each individual case". It is the case of the petitioner that, in India, the AEFI system to record adverse events is woefully inadequate. Additionally, any pervasive mandate which allows for compulsory vaccination needs to have rational nexus and statutory backing, which is not present in impugned orders — to reiterate, the COVID-19 vaccinations do not prevent transmissions. In VAVŘIČKA, the dissenting judgement notes that:

> *"9. In the Czech Republic, the list of compulsory vaccinations encompasses nine diseases. These diseases are very different to each other. A rational assessment of whether the obligation to vaccinate complies with the Convention requires that the case be examined separately for each disease, proceeding on a disease-by-disease basis. For each and every disease, it is necessary to establish:*
>
> ***- the manner and speed of its transmission;***
>
> *- the risks for infected persons;*
>
> *- the average cost of individual treatment for the disease in the case of non-vaccinated patients, and the prospects of success of such treatment;*
>
> *- the precise effectiveness of the available vaccines;*
>
> *- the average cost of a vaccination;*
>
> ***- the risk of side effects of vaccination;***
>
> *- the average costs of treating the undesirable effects of the vaccination; - the minimum percentage of vaccinated persons which would prevent the disease from spreading (if applicable) and the prospects of achieving such an objective*"

All these factors are to be considered in conjunction with each other.

The COVID vaccine mandate has to be distinguished from the mandate in the present case which was for nursery admission seeking children against diseases like small pox, polio and tetanus the transmission of which could be stopped by the vaccination. Therefore there was a public health rationale underlying the compulsory vaccination. These vaccines were mandated under law and the parent was to pay a fine and the child denied admission if the vaccination duty was not fulfilled.

However, the deprivation of the very right to life and liberty by loss of means of livelihood by the sweeping covid vaccine mandates imposed by various states in India granting no exemptions and without recognition of the fact that the COVID vaccines do not prevent infection or transmission, is clearly distinguishable from the present case.

7. SOLOMAKHIN v. UKRAINE (Fifth Section) Application no. 24429/03 (Page 175- 190 of compilation) held that mandatory vaccination interferes with a person's right to physical integrity protected under Article 8 of the European Convention on Human Rights (ECHR)but also held that such an interference was justifiable in a democratic society in view of public health concerns.

The applicant in the case sought compensation for damages to his health from the local department of public health and the Hospital. He alleged that the vaccination had been administered to him against his will while he was ill and caused him to suffer from several chronic diseases. On the issue of whether the vaccination infringed on the applicant's right to respect his private life, the Court stated that the physical integrity of a person falls under "private life" as guaranteed by Article 8 of the Convention, emphasizing that a person's bodily integrity is one of the most intimate aspects of their private life, and as such compulsory medical intervention constitutes an infringement of this right. Compulsory vaccination falls under this category and thus is an interference with the right to respect for one's private life as protected by Article 8.

> "28. Under Article 8 of the Convention, which is the relevant provision and which provides insofar as relevant as follows:
>
> > 1. Everyone has the right to respect for his private ... life ...
> >
> > 2. **There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law** and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others..."

> "..33. The Court reiterates that according to its case-law, **the physical integrity of a person is covered by the concept of "private life" protected by Article 8 of the Convention** (see X and Y v. the Netherlands, 26 March 1985, § 22, Series A no. 91). **The Court has emphasised that a person's bodily integrity concerns the most intimate aspects of one's private life, and that compulsory medical intervention, even if it is of a minor importance, constitutes an interference with this right** (see Y.F. v. Turkey, no. 24209/94, § 33, ECHR 2003-IX, with further references). Compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by Article 8 § 1 (see Salvetti v. Italy (dec.), no. 42197/98, 9 July 2002, and Matter v. Slovakia, no. 31534/96, § 64, 5 July 1999)."

The judgement notes in para 36:

"36. In the Court's opinion the interference with the applicant's physical integrity could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region…"

To reiterate, it is the case of the petitioner that COVID-19 vaccines do not prevent transmissions and thus, an abstention from the same would not be a danger to any public health considerations. Moreover, those who have had COVID and thus natural antibodies (the majority) are better protected that the vaccinated.

Additionally, the concurring opinion of JUDGE BOŠTJAN M. ZUPANČIČ notes that that informed consent is a necessity:

> *"1. I hesitated to go along with this judgment because of the question of causal link which allegedly had not been established between the procedure of administering the vaccination on the one hand and the death of the applicant on the other hand. The applicant claimed that the vaccination had been done against his will, which implies that there was no prior and informed consent.* ***The "informed" consent implies that the patient in such circumstances must be instructed as to all the potential risks of administering any kind of medical treatment, which he must thereafter consent to in a genuinely informed way. Failing that, we cannot speak***

> ***of a full consent, whereas here – in contrast to the usual medical situation – we seem to speak of a forceful administration of diphtheria vaccine without any consent on the part of the applicant and, indeed, against his so expressed will***. *As per his submissions, these failings had resulted in serious health problems (§ 30 of the judgment).”*

8. Carlo BOFFA and others v. SAN MARINO Applications no. 26536/95 191-200. In Boffa and others v. San Marino, the Court upheld a San Marino's statute enforcing childhood compulsory vaccination because of "the need to protect the health of the public and of the persons concerned." It is submitted that the COVID-19 vaccines may prevent serious illness but they do not prevent transmission of the disease and therefore there is no public health rationale mandating these vaccines. Besides COVID vaccines are unlicensed products. Experimental products for which there is no adequate follow up and for which adverse events (short and long term) are unknown cannot be mandated. Fundamental rights of citizens cannot be sacrificed at the altar of experimental vaccinations in the name of a pandemic.

9. This is especially relevant when the WHO and CDC etc have made categorical statements that the vaccines do not prevent transmission. https://edition.cnn.com/2021/08/05/health/us-coronavirus-thursday/index.html05 Aug 2021 "Fully vaccinated people who get a Covid-19 breakthrough infection can transmit the virus, CDC chief says"

10. In May 2021, CDC was saying vaccinated cannot get infected or transmit: https://www.nytimes.com/live/2021/05/13/world/covid-vaccine-coronavirus-cases#cdc-masks-guidance

As in above link in Aug 2021, the same CDC changed the story saying vaccinated can get infected and transmit.

By Dec 2021, Fauci was saying that even protection against hospitalization and death is waning, hence requiring boosters: https://www.nytimes.com/2021/11/12/podcasts/the-daily/anthony-fauci-vaccine-mandates-booster-shots.html

Fauci: "They are seeing a waning of immunity not only against infection but against hospitalization and to some extent death, which is starting to now involve all age groups. It isn't just the elderly," Fauci said. "It's waning to the point that you're seeing more and more people getting breakthrough infections, and more and more of those people who are getting breakthrough infections are winding up in the hospital."

In late Oct 2021, Pfizer claimed 90% efficacy for its vaccine for 5-11y: https://www.fda.gov/media/153409/download

But data from New York (paper cited by GoI: page 745) has shown that efficacy has waned to negative values after just 7 weeks.

Australia

11. Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural (Federal Court of Australia) Affairs [2022] FCAFC 3 201-231 Para 78-90. In this case, the petitioner's visa was cancelled by a delegate of the Minister for Home Affairs, under section 116(1)(e)(i) of the Migration Act 1958 (Cth)(the Act) on the basis that 'his presence is, or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community'. The petitioner was denied entry into Australian territory due to his stance on against COVID vaccination and that being a celebrity player he would promote vaccine hesitancy in Australia. It is pertinent to note that Djokovic submitted proof of having been infected with COVID-19 quite prior to the tournament, and thus would be unlikely to be re-infected. His previous infection he claimed is a medical contraindication against vaccination.

    Significantly in denying the visa to Djokovic, the court relied on the Minister's recommendation. The Minister consulted the Common Wealth Department of Health for their health advice regarding Djokovic's presence in Australia. The Minister in complete disregard to the scientific and medical advise of the department, that Djokovic would be a low risk to the community, arrived at his own subjective conclusion that he considers his

presence may still be a risk to the health of the Australian community. The Health department concluded as follows:

> **"Mr. Djokovis is unlikely to be infectious with SARS-COV-2 and as such is likely to constitute a LOW risk of transmitting SARS_CoV2 to others. This assessment applies to all other demographic groups.**
>
> **Having regard to specific additional control measures applicable to the Australian Open, 'it is assessed that the risk of a transmission event related to the Australian Open is VERY LOW'"**

The Ministers despite the advice of the health department stated: "I nonetheless consider that his presence may be a risk to the health of the Australian community"

In the light of this, the Court accepted the Ministers advice that Djokovic's well known stance against vaccination would influence the Australian public against vaccines and may foster "anti vaccination sentiment" and encourage anti vaccination groups, him being an iconic tennis player.

12. The judgment of the Supreme Court of New South Wales upholding vaccine mandates for some categories of service providers is based on the following:
    - That the power to issue such a mandate is given to the Minister under the Public Health Act and
    - That in Australia there is no Bill of Rights (equivalent to fundamental rights in our Constitution) and
    - That since the government experts opine that vaccines could reduce the risk of infection and transmission (though no definitive study was quoted), the court should defer to the Ministers view.

    This judgement is not applicable to our country for the reason that Indian constitution guarantees fundamental rights to citizens and any law or government order in violation of those rights are unconstitutional and void. Our Supreme Court has held that every individual has a fundamental right to refuse any medical treatment (including vaccines). A vaccine mandate which deprives a citizen of rations, free movement, going to schools etc, can only be considered to be a reasonable restriction on those rights if there is clear and definite evidence that a person seeking to exercise his right not to take the vaccine would

pose a serious public health hazard to others. The mere fact that the minister or even some government experts are of the view that an unvaccinated person would pose a serious health hazard to others cannot override a citizens fundamental right, unless the government produces definite and compelling evidence to show that a) even people previously infected with covid (which account for more than 80% of the population) would pose a substantially higher risk of infecting others than the vaccinated and b) that there is definite and compelling evidence that the vaccine does significantly reduce infection and transmission (as opposed to serious illness). Not one of the scientific papers presented by the government even makes a claim that the vaccine protection is superior to the protection given by natural infection or that the vaccine prevents or even significantly reduces infection and transmission of the virus. In fact the governments paper largely support the large number of scientific papers and data cited by the petitioners that natural immunity from infection is superior to vaccine immunity and that the vaccine does not prevent infection or transmission (though it might reduce severity of disease in the individual).

FRANCE

13. Decision no. 2021-824 DC of 5 August 2021- Law on managing public health (Conseil constitutionnel) Decision no. 2021-824 DC on 5 August 2021 366-390 Para 35-48. The judgment of the court upholding the provision in the Bill as not imposing unreasonable restrictions on peoples rights is significant due to the fact that the disputed provision provided that the duty imposed on a citizen can be fulfilled by providing either of the following documents:

    - proof of vaccination status
    - the results of viral screening test that do not show infection
    - certificate of recovery from infection

    Therefore the court concluded these provisions do not provide an obligation to get vaccinated. This case is therefore starkly different to the vaccine mandates that have been issued in India by the various states where there is no recognition of immunity from prior infection or proof of RTPCR tests. The mandates require complete compliance with the vaccination requirement or result in loss of jobs, access to rations or educational institutions.

CANADA

14. Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System. The Ontario Superior Court dismissed union applications asking it to grant injunctions restraining the Toronto Transit Commission (TTC) and Sinai Health System (Sinai) from suspending or terminating unvaccinated employees before their mandatory vaccination policies could be challenged in the grievance process. The court observed that it was not going into the question of the legality of the vaccine mandate policy but was only examining whether it should grant an injunction pending the adjudication before the labour arbitrator. The Court again relied on a misplaced apprehension that the unvaccinated employees would pose a greater risk to the community and to those who it served.

    Significantly, because of widespread protests in Canada on the same issue, Ontario's premier announced that Canada's most populous province will lift its COVID-19 proof-of-vaccination requirements in two weeks.

    https://www.aljazeera.com/news/2022/2/14/ontario-drops-vaccine-proof-canada-trucker-protests-persist

Judgments and propositions supporting the petitioner's prayers against vaccine mandates

15. **Judgment of the High Court of New Zealand striking down vaccine mandates**–On 25th February 2022, the High Court of New Zealand held on a petition by a group of police and defence force workers' that COVID-19 vaccine mandates unjustifiably infringe on the country's Bill of Rights. The judgment concerned a mandate introduced by the Minister for Workplace Relations and Safety, which requires all defence force personnel, police constables, recruits and authorised officers to receive two doses of the COVID-19 vaccine by 1 March 2022. The Court held that the concerned Order limits the right to be free to refuse medical treatment recognised by s 11 of the New Zealand Bill of Rights Act (including because of its limitation on people's right to remain employed), and it limits the right to manifest religious beliefs. After carefully examining It also noted that the Omicron

strain in particular affected both the vaccinated and the unvaccinated. The relevant paragraphs from the aforementioned judgement has been reproduced below:

> "Right to refuse medical treatment
> [43] The Crown accepts that the Order limits the right in s 11 of the New Zealand Bill of Rights Act to refuse to undergo medical treatment. The parties' written submissions, and indeed their evidence, then devoted significant attention to the extent of the other rights in the Bill of Rights which were limited by the Order. Given that the Crown accepts, as it has in the previous challenges to vaccine mandates, that the right in s 11 is limited by the Order, I doubt whether the potential applicability of other fundamental rights will likely make much difference to the ultimate outcome of this challenge. I accept, however, that there may be some more subtle implications arising if the other rights are found to be limited. But there is no dispute that the Order limits the right of affected workers to refuse to undergo a medical treatment."

> "Right to work
> [46] I accept that such principles may have indirect relevance. Whilst the right to refuse medical treatment is substantively limited by the Order because of the coercion involved in affected workers being faced with the decision to either get vaccinated or have their employment terminated, it does not literally compel the medical treatment.17 But the associated pressure to surrender employment involves a limit on the right to retain that employment, which the above principles suggest can be thought of as an important right or interest recognised not only in domestic law, but in the international instruments. So in that sense the right to refuse to undergo medical treatment is not the only right (or significant interest) that is being limited."

> "Conclusion on affected rights
> [57] I do not need to address the other arguments advanced by the applicants which I do not accept. The Order limits the right to be free to refuse medical treatment

recognised by s 11 of the New Zealand Bill of Rights Act (including because of its limitation on people's right to remain employed), and it limits the right to manifest religious beliefs under s 15 for those who decline to be vaccinated because the vaccine has been tested on cells derived from a human foetus which is contrary to their religious beliefs. I do not see any other rights as being relevant."

[97] I am not satisfied that the Crown has put forward sufficient evidence to justify the measures that have been imposed, even giving it some benefit of the doubt. The apparently low numbers of personnel the Order actually addresses, the lack of any evidence that they are materially lower than would have been the case had the internal policies been allowed to operate, and the evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the Order materially addresses. If there is a threat to these services it will arise precisely because vaccination and other measures are not able to prevent the risk that Omicron will sweep through workforces.

[98] It is apparent from the evidence that Omicron is highly transmissible, and that it could affect a significant number of New Zealanders, and accordingly a significant number of Police and NZDF personnel. But it is apparent from such waves of infection in other countries that ultimately the levels of infection drop. In other words it has a relatively temporary but very significant impact. That is of importance in my view. The major impact for a period of three to six months may need to be addressed. But the terminations arising from the Order are permanent. It may be that the suspension of the unvaccinated address any potential problems arising from the Omicron wave that are identified. That would suggest that the Order is not proportionate as other means (suspension) could have been employed to achieve the same end in accordance with steps (b)(ii) and (iii) of Tipping J's approach in *Hansen*.

[99] It is important to also bear in mind that there is plainly a risk of other COVID-19 variants emerging in the future.

"[106] COVID-19 clearly involves a threat to the continuity of Police and NZDF services. That is because the Omicron variant in particular is so transmissible. But that threat exists for both vaccinated and unvaccinated staff. I am not satisfied that the Order makes a material difference, including because of the expert evidence before the Court on the effects of vaccination on COVID-19 including the Delta and Omicron variants."

Vaccine mandates are an infringement of Article 21 rights

16. It is clear as a matter of legal principle that coercion to get vaccinated on pain of any penalty like withdrawal of salary, attendance at schools and recreational facilities, opening shops, and access to the means of one's life and livelihood is an infringement of Article 21 rights. Infringements of Article 21 must satisfy the procedural and substantive due process test of being 'fair, just and reasonable.' Coercion for vaccination does not; it is arbitrary, discriminatory, and in violation of constitutional principles of bodily integrity and right to self determination. It is arbitrary and discriminatory because the policy has been decided capriciously and without proper application of mind; despite emerging scientific evidence that natural immunity of those who are Covid recovered is more robust than vaccine immunity and that vaccines do not prevent the infection from Covid (especially from the variants) nor do they prevent transmission of the disease. Mandating vaccines and imposing restrictions on unvaccinated people cannot be said to be reasonable restrictions which are imposed in larger public interest. It is in violation of constitutional principles which include the right to an individual to free and complete informed consent, right to self determination and bodily integrity. As a result the policy is unfair, unjust and unreasonable.

17. Another way of assessing Article 21 infringements post the ***Puttaswamy***judgment is that they must satisfy proportionality test as set out in that case. It requires that a rights-limiting measure should be pursuing a proper purpose, through means that are suitable and necessary for achieving that purpose and there is a proper balance between the importance of achieving that purpose and the harm cause by limiting the right.

18. In Puttaswamy, a majority of the Constitution Bench of this Hon'ble Court found that infringements of Article 21 must satisfy the proportionality standard. In Puttaswamy,Chandrachud J held that any restraints on privacy by the state must fulfil a three-fold requirement. These requirements have been reproduced below:

> 180. "While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement ofArticle 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms."

19. Justice Kaul also elaborated on the proportionality standard, though in slightly different words:

> 71. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:
> "(i) The action must be sanctioned by law;
> (ii) The proposed action must be necessary in a democratic society for a legitimate aim;
> (iii) The extent of such interference must be proportionate to the need for such interference;
> (iv) There must be procedural guarantees against abuse of such interference."

20. Mandatory vaccination for Covid and discrimination against unvaccinated persons, is disproportionate and does not satisfy the test. This especially where the majority already have had COVID and thus are better protected than the vaccinated and where the vaccine does not prevent transmission and especially for experimental vaccines which have not gone through full trials.

a) First, the orders are not validly based on law, because the law cited to justify it i.e. The Disaster Management Act does not give the State power to issue executive instructions discriminating against persons with regard to their right to liberty, livelihood and life, thereby violating fundamental rights of citizens.
As held by the Gauhati High Court in WP (C) 37/2020 by order dated 2.07.2021 held,

> "17. With regard to the contention of the learned Additional Advocate General that the State Government can make restrictions curtailing the Fundamental Rights of the citizens under the Disaster Management Act, 2005 (hereinafter referred to as the "Act"), by way of the SOP, the same in our considered view is clearly not sustainable, as the said clauses in the SOP which are in issue in the present case cannot be said to be reasonable

restrictions made in terms of Article 19(6). A restriction cannot be arbitrary or of a nature that goes beyond the requirement of the interest of the general public. Though no general pattern or a fixed principle can be laid down so as to be universal in application, as conditions may vary from case to case, keeping in view theprevailing conditions and surroundings circumstances, the requirement of Article 19(6) of the Constitution is that the restriction has to be made in the form of a law and not by way of an executive instruction. The preamble of the Act clearly states that it is an Act to provide an effective management of the disasters and for matters connected therewith or incidental thereto. There is nothing discernible in the Act, to show that the said Act has been made for imposing any restriction on the exercise of the rights conferred by Article 19 of the Constitution. Further, the SOP dated 29.06.2021 is only an executive instruction allegedly made under Section 22(2)(h) & Section 24(1) of the Act and not a law. The provisions of Sections 22 & 24 only provide for the functions and powers of the State Executive Committee in the event of threatening disaster situation or disaster. It does not give any power to the State Executive Committee to issue executive instructions discriminating persons with regard to their right to liberty, livelihood and life and violating the fundamental rights of the citizens, which is protected by the Constitution.

b) Second, there is no legitimate state aim: the stated aim of order coercing people to get vaccinated against a penalty of loss of right to life and livelihood, is public health, but this does not stand up to scrutiny given that vaccination is not preventing infection or transmission and therefore no public interest purpose is served by mandating the vaccine. The State in mandating such vaccines has clearly exceeded the wide margin of appreciation to be granted by the court since relevant medical literature and studies do not signify either efficacy of the vaccines in preventing or transmitting the disease. Therefore, the content of the order mandating vaccination does not fall within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. There is little rational nexus between the

stated aim (protection of public health) and what is being done, which is mandatory vaccination through coercion. In any case, there is irrefutable evidence that the Covid recovered (which constitute over 2/3rd of India's population) are better protected against Covid than any protection that the vaccine offers. Also, the young and healthy have virtually no risk from Covid and therefore such vaccine mandates for vaccines which have not been tested for medium or long term adverse effects and are known to have reasonably serious short term adverse effects, cannot satisfy the test of proportionality.

c) Third, the means that are adopted by the state are not proportional to the object and needs sought to be fulfilled by the order and there is less intrusive way to achieve the aim. Vaccines which have not completed full testing and phase three trials for safety and efficacy, cannot be mandated on pain of loss of means of earning their livelihood, access to schools and educations institutions, thereby putting people through undue hardships by the infringement of their very right to life. No medication including vaccination (which does not even prevent transmission) can be mandated unless there is full and complete informed consent.

Power of Judicial Review in matters of policy decisions taken by the Executive

21. In a catena of judgments, the Hon'ble Apex Court has time and again held that the Supreme Court under Article 32 has the power of judicial review in matters of policy decisions taken by the executive. This power, however limited, extends to examining a policy to check whether it violates the fundamental rights enshrined under Part III of the Constitution, to see if it is reasonable, non-arbitrary, fair, is based on an informed decision and does not violate the mandate of the constitution or any statutory provision. Few of these judgments are as follows:

22. In **DDA v. Joint Action Committee, Allottee of SFS Flats, (2008) 2 SCC 672** : (2008) 1 SCC (Civ) 684 : 2007 SCC OnLine SC 1537 at page 697 noted that executive decisions are not beyond the scope of judicial review:

"Policy decision

64. An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review."

23. In **Essar Steels Ltd. v. Union of India** [*Essar Steels Ltd.* v. *Union of India*, (2016) 11 SCC 1 : (2016) 4 Scale 267] this Court summed up the position in law as follows: SCC para 44) categorised the grounds on which a policy decision can be challenged:

"44. ... '65. Broadly, a policy decision is subject to judicial review on the following grounds:

(a) if it is unconstitutional;

(b) if it is dehors the provisions of the Act and the Regulations;

(c) if the delegatee has acted beyond its power of delegation;

(d) if the executive policy is contrary to the statutory or a larger policy. [Ed.: As observed in DDA v. Allottee of SFS Flats, (2008) 2 SCC 672, p. 698, para 65 : (2008) 1 SCC (Civ) 684.] "

"49. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or mala fide manner, or that it offends the provisions of the Constitution of India."

24. In **Peerless General Finance and Investment Co. Ltd. v. RBI,** (1992) 2 SCC 343 at page 387, the Court held that once it is established that a statute is unconstitutional, the burden to prove that the restrictions imposed are reasonable rests on the state:

"48. However, there is presumption of constitutionality of every statute and its validity is not to be determined by artificial standards. The Court has to examine with some strictness the substance of the legislation to find what actually and really the legislature has done. The Court would not be over persuaded by the mere presence of the legislation. In adjudging the reasonableness of the law, the Court will necessarily ask the question whether the measure or scheme is just, fair, reasonable and appropriate or is it unreasonable, unnecessary and arbitrarily interferes with the exercise of the right guaranteed in Part III of the Constitution.

49. Once it is established that the statute is prima facie unconstitutional, the State has to establish that the restrictions imposed are reasonable and the objective test which the Court is to employ is whether the restriction bears reasonable relation to the authorised purpose or is an arbitrary encroachment under the garb of any of the exceptions envisaged in Part III. The reasonableness is to the necessity to impose restriction; the means adopted to secure that end as well as the procedure to be adopted to that end."

25. **Directorate of Film Festivals v. Gaurav Ashwin Jain** [(2007) 4 SCC 737] this Court held: (SCC p. 746, para 16)

16…The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary.

26. Kanhaiya Lal Sethia v. Union of India, (1997) 6 SCC 573 at page 574

2…Generally speaking, the courts do not, in exercise of their power of judicial review, interfere in policy matters of the State, unless the policy so formulated either violates the mandate of the Constitution or any statutory provision or is otherwise actuated by mala fides.

24. **Ugar Sugar Works Ltd. v. Delhi Admn., (2001) 3 SCC 635 : 2001 SCC OnLine SC 572 at page 643**

18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional.

27. When there are two competing views/reports/expert opinion/evidence/policies - the court cannot refrain from interfering on the pretext that "primacy will be given to the state". The court can very well analyze/weigh both the sides and then decide. This power of the court is inherent in the power of Judicial Review. This view, that the court has the power to exercise judicial review in matters of policies especially when it relates to public health has been upheld by this Hon'ble Court in its recent judgment in **Re: Distribution of essential supplies and services during pandemic, 2921 (7) SCC 772** where this court, while taking cognisance of the management of the COVID-19 pandemic, held as follows:

15…However, this separation of powers does not result in courts lacking jurisdiction in conducting a judicial review of these policies. Our Constitution does not envisage courts to be silent spectators when constitutional rights of citizens are infringed by executive policies. Judicial review and soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.

Infact, this court, in the same judgment, has gone further to state that expert opinions based on which the executive takes a decision is not immune from judicial review in matters relating to public health. It has reiterated that the court exercises complete power to go into the vires of the expert opinion and see if it confirms to the standards of reasonableness and protects the right to life of citizens. It stated as follows:

17. The Supreme Court of United States, speaking in the wake of the present Covid-19 Pandemic in various instances, has overruled policies by observing, inter alia, that "Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten" [Roman Catholic Diocese of Brooklyn v. Cuomo, 2020 SCC OnLine US SC 9 : 141 S Ct 63 : 592 US ....(2020)] and "a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights" [Calvary Chapel Dayton Valley v. Sisolak, 2020 SCC OnLine US SC 10 : 140 S Ct 2603 (2020) (Mem) (Justice Alito Dissenting Opinion)] .

18. Similarly, the courts across the globe have responded to constitutional challenges to executive policies that have directly or indirectly violated rights and liberties of citizens. ***Courts have often reiterated the expertise of the executive in managing a public health crisis, but have also warned against arbitrary and irrational policies being excused in the garb of the "wide latitude" to the executive that is necessitated to battle a pandemic.*** *This Court in Gujarat Mazdoor Sabha v. State of Gujarat [Gujarat Mazdoor Sabha v. State of Gujarat, (2020) 10 SCC 459, para 11 : (2021) 1 SCC (L&S) 38] , albeit while speaking in the context of labour rights, had noted that policies to counteract a pandemic must continue to be evaluated from a threshold of proportionality to determine if they, inter alia, have a rational connection with the object that is sought to be achieved and are necessary to achieve them.*

19. ***In grappling with the second wave of the Pandemic, this Court does not intend to second-guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons.This Court is presently assuming a dialogic jurisdiction where various stakeholders are provided a***

forum to raise constitutional grievances with respect to the management of the Pandemic. Hence, this Court would, under the auspices of an open court judicial process, conduct deliberations with the executive where justifications for existing policies would be elicited and evaluated to assess whether they survive constitutional scrutiny.

28. It is clear from the judgment of this Hon'ble Court in **Re: Distribution of essential supplies and services during pandemic, 2921 (7) SCC 772,** that the limitations that usually apply on the power of judicial review in general policy matters is not going to apply in the same way in a case where public health is involved. In matters of public health where Right to life of millions of citizens are at stake, it is clear that the court will go deep into the policy and test the executive decision to see if it fulfills the constitutional mandates or not.

29. This court has time and again held that its power of judicial review in matters of policy extends to scrutinizing all relevant facts and materials on record. In **Union of India versus Dinesh engineering Corporation (2001) 8 SCC 491** this court delineated the aforesaid principle of judicial review in the following manner

> *12. There is no doubt that this court has held in more than one case that where the decision of the authority is in regard to the policy matter this court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision.* ***But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record…Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary***

decision. If it is so then be it a policy decision or otherwise it will be violative of the mandate of article 14 of the Constitution.

Response to Govt cases on interference with Executive Policy

30. Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223

In this case the court was tasked with testing the vires of a policy under the Essential Commodities Act, 1955 wherein the government had rolled out a zone-wise fixation of price of levy sugar for sugar industries by grouping them on the basis of their geographical location. This policy was up for challenge before the court.

While elaborating on the power of the court to exercise its function of Judicial Review in matters of policy, the court held as follows:

52. *The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it.*

Further, on the question of policy decisions taken after expert conclusions, the court held as follows:

53. *The impugned orders are undoubtedly based on an exhaustive study by experts. They are fully supported by the recommendations of the Tariff Commission in 1969 and 1973. It is true that these recommendations in some respects were the subject matter of criticism by a subsequently appointed expert body, viz., the BICP. Apart from the fact that the BICP's criticism has not been accepted by the government, that criticism is not relevant insofar as the impugned orders are concerned because the latter are in regard to an earlier period. These orders are fully supported by the relevant material on record.* ***The conclusions reached by the Central Government in exercise of its statutory power are expert conclusions which are not shown to be either***

discriminatory or unreasonable or arbitrary or ultra vires. *The material brought to our notice by the petitioners does not support the arguments at the bar that the Central Government has not applied its mind to the relevant questions to which they are expected to have regard in terms of the statute. That the sugar factories for the purpose of determining the price of sugar in terms of sub-section (3-C) should be grouped on the basis of their geographical location is a policy decision based on exhaustive expert conclusions.*

It follows therefore, that policy decisions taken on the basis of expert conclusions can be struck down if they are shown to be either discriminatory or unreasonable or ultra vires or if they have been taken without application of mind.

The judgment also held as follows:

49…*Where it is a finding of fact, the court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the court would have come to as a trier of fact.*

It is therefore clear that reliance on the above judgment by the Respondents is erroneous and irrelevant for the purposes of the present case.

31. Fertilizer Corpn. Kamgar Union v. Union of India, (1981) 1 SCC 568

In this case the legality of sale of certain plants and equipment of the Sindri Fertilizer Factory was challenged. The court while discussing the power of Judicial Review held as follows:

35. *A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangements — a problem with which*

Parliament has been wrestling for too long — emerges. I have dwelt at a little length on this policy aspect and the court process because the learned Attorney-General challenged the petitioner's locus standi either qua worker or qua citizen to question in court the wrongdoings of the public sector although he maintained that what had been done by the Corporation was both bona fide and correct. We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. ***This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration.***

The Respondent's reliance on the above judgment is therefore erroneous because the court has upheld the power to test the vires of an executive policy on the anvil of fairness, unreasonableness, etc.

32. **R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30**

In this case the constitutional validity of the Special Bearer Bonds (Immunities and Exceptions) Ordinance, 1981 and Special Bearer Bonds (Immunities and Exceptions) Act, 1981 was challenged on the ground that the Ordinance and the Act are violative of the equality clause contained in Article 14 of the Constitution.

The court in this judgment, while discussing its power to exercise Judicial Review, stated as follows:

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. *It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of*

legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. ***The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.*** *Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style:*

> *"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."*

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". ***Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.*** *The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Company [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such*

legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. ***That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.***

Apart from the fact that the judgment clearly distinguishes between laws/policies relating to economic issues and those pertaining to civil rights and individual freedoms, it also specifically asks for giving a 'wider latitude' to the executive in economic matters because policies relating to economic matters are essentially empiric, based on experimentation and 'trial and error method'.

Reliance on this judgment for the petitions is therefore erroneous for two reasons. Firstly, the present case is specifically in the context of individual freedoms and civil rights and not in the context of an economic issue. Secondly, policies relating to matters of public health where Right to life and freedom of millions of citizens are involved cannot be based on a trial and error method.

33. **Vasavi Engineering College Parents Association vs. State of Telangana and Others (2019) 7 SCC 172**

This was a case where the Telangana Admission and Fee Regulatory Committee (TAFRC) was to regulate the fee structure. The fee structure as notified for the BE and BTech courses was challenged. The below mentioned paragraph sums up the court's analysis of its power of judicial review in a policy matter.

16. *Judicial review, as is well known, lies against the decision-making process and not the merits of the decision itself. If the decision-making process is flawed inter alia by violation of the basic principles of natural justice, is ultra vires the powers of the decision maker, takes into consideration irrelevant materials or excludes relevant materials, admits materials behind the back of the person to be affected or is such that no reasonable person would have taken such a decision in the circumstances, the court may step in to correct the error by setting aside such decision and requiring the decision maker to take a fresh decision in accordance with the law. The*

Court, in the garb of judicial review, cannot usurp the jurisdiction of the decision-maker and make the decision itself. Neither can it act as an appellate authority of Tafrc.

Apart from this analysis on judicial review, the court then went into an analysis of its powers of judicial review in economic matters where it states as follows:

19. *It needs no emphasis that complex executive decisions in economic matters are necessarily empiric and based on experimentation. Its validity cannot be tested on any rigid principles or the application of any straitjacket formula. The Court while adjudging the validity of an executive decision in economic matters must grant a certain measure of freedom or play in the joints to the executive. Not mere errors, but only palpably arbitrary decisions alone can be interfered with in judicial review. The recommendation made by a statutory body consisting of domain experts not being to the satisfaction of the State Government is an entirely different matter with which we were not concerned in the present discussion. The Court should therefore be loath to interfere with such recommendation of an expert body, and accepted by the Government, unless it suffers from the vice of arbitrariness, irrationality, perversity or violates any provisions of the law under which it is constituted. The Court cannot sit as an appellate authority, entering the arena of disputed facts and figures to opine with regard to manner in which Tafrc ought to have proceeded without any finding of any violation of rules or procedure. If a statutory body has not exercised jurisdiction properly the only option is to remand the matter for fresh consideration and not to usurp the powers of the authority.*

It is clear therefore that the respondents reliance on the above judgment is erroneous for two reasons. Firstly, the judgment reiterates the power of the court to exercise judicial review when relevant materials/evidence have not been taken into consideration or on the ground of unreasonableness. Secondly, it talks of giving wider latitude to the executive specifically in matters of economic policy.

34. Parisons Agrotech Private Ltd. and Anr. vs. Union of India & Ors. (2015) 9 SCC 657

Government notifications prohibiting the import of palm oil through the ports of Kerala were challenged. These notifications were issued by the Central Government by virtue of Section 5 r/w Section 3.

14. *No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives.* ***Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the executive*** *as the policy making is the domain of the executive and the decision in question has passed the test of the judicial review.*

15. *In Union of India v. Dinesh Engg. Corpn. [(2001) 8 SCC 491] , this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp. 498-99, para 12)*

> *"12. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision.* ***But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. … Any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."***

From the judgment of the court in this case it is yet again clear that the court while exercising its power of judicial review will see if there was due application of mind in arriving at the decision

and if such a decision is backed by cogent material. It also has powers to test the executive action on the anvil of arbitrariness and irrationality. The judgment also reiterates the power of the court to scrutinise all relevant facts and materials on record while exercising its power of judicial review.

35. Government of Andhra Pradesh & Ors vs. Smt. P. Laxmi Devi 2008 (4) SCC 720

Constitutional validity of Section 47 A and proviso thereto of the Stamp Act, 1899 was challenged. Section 47A provided for reference to the Collector for determination of market value of property in case of undervaluation suspected by the registering officer. However, Section 47A proviso required a deposit of 50% of the deficit duty arrived at by the registering officer as a pre-condition for making of the reference. While analysing its power of Judicial Review, the court held as follows:

80. *However, we find no paradox at all.* ***As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts.*** *It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legislative (sic legislature) and try to enforce its own views and perceptions.*

81. *In this connection we may refer to the famous dissenting judgment of Holmes, J. in Lochner v. New York [49 L Ed 937 : 198 US 45 (1905)]. In that case, the validity of a law made by the New York Legislature providing for a maximum of 10 hours a day and 60 hours a week work in the bakery industry was challenged. While the majority, who believed in the laissez faire theory of economics, held that the law violated the liberty of contract, which they perceived as part of the Bill of Rights to the US Constitution, Holmes, J. pointed out that the Constitution was not intended to embody any particular economic theory, whether of paternalism or of laissez faire. He further observed that reasonable men might think the impugned statute is a proper measure to ensure the health of the workers, and hence it was well within the power of the legislature to enact it. To use*

his own words in the judgment, "The Fourteenth Amendment (to the US Constitution) does not enact Mr Herbert Spencer's social statics".

82. However, when it came to civil liberties, Mr Justice Holmes was an activist Judge. Thus, in Schenck v. United States [63 L Ed 470 : 249 US 47 (1919)] he laid down his famous "clear and present danger" test *for deciding whether restriction on free speech was constitutionally valid. As Holmes, J. observed, the question in every case is*

> *"whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent". (L Ed pp. 473-74)*

It therefore follows that more judicial restraint needs to be exercised specifically in economic matters. However, when it comes to matters regarding civil liberties, the courts will be less inclined to exercise the same level of restraint. The reliance on this judgment by the respondents, is again erroneous for the same reason that they have failed to distinguish between a case which concerns an economic policy vis-a-vis a case where civil liberties of citizens are directly at stake.

36. Federation of Railway Officers Association vs. Union of India (2003) 4 SCC 289

In this case, the formation of new railway zones was challenged and it was contended that the notification issued for formation of new zones is violative of Section 3 of the Railways Act, 1989. Reiterating its power of judicial review, the court outlined the cou=ntours of such a power as follows:

12. *In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited.* ***When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion.*** *On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or* ***arbitrary or irrational or abuse of power****, the court will not interfere with such matters.*

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