

**THE CONSTITUTIONAL CASE OF THE MISSING
CATTLE: CURBING CROSS-BORDER
SMUGGLING AND THE PREVENTION OF
CRUELTY**

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Abstract

On March 5, 2015, the State of Maharashtra imposed a ban on the slaughter of all cattle, and prohibited the transport of cattle out of the state, leading to devastating effects. It began with an immediate loss of livelihood for persons crucially dependent on this trade, such as butchers, slaughter-house owners, and leather-workers. This was followed by the destruction of the production cycle of cattle, which led to a loss of livelihood for farmers, who often depend on this trade to sustain them. In the present day, the ban has resulted in the distress sale of cattle, for prices far lower than that required by farmers to replace old, unusable cattle with new animals, thereby resulting in farmers and cattle owners finding themselves in a desperate situation - incurring

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losses they cannot bear, for animals which provide little to no economic value. Despite the entry of markets and fairs in the state list, the Central Government recently attempted to regulate the trade of cattle under the garb of prevention of cruelty to animals. The Ministry of Environment notified the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017 with twin objectives of preventing cruelty and curbing illicit cattle trading at the the country's border. Owing to the widespread criticism due to the indirect ban on cattle slaughter, the government replaced these rules with a draft regulation titled 'Prevention of Cruelty to Animals in Animal Markets Rules 2018'. This draft regulation specifically aims at tackling the issues of cruel practices in animal markets and also addresses the problem of cattle smuggling. The paper aims to analyze the constitutional issues plaguing the 2017 Rules and whether these issues have been addressed in the draft Rules and their effectiveness. Part I examines the competence of the Central Government to enact the Rules. Part II analyzes whether the Rules fall foul of the Right to Equality contained in Article 14 of the Constitution, while Part III examines them from the perspective of violation under Article 19(1)(g). Part IV considers whether the Rules violate Article 21 of the Constitution by breaching the rights to privacy, personal autonomy, and livelihood. Part V analyses the

Rules in light of Right to Property specified in Article 300A. Part VI addresses these issues vis-à-vis the draft Rules. Finally, Part VII concludes the paper and attempts to provide solutions to the problem of cross-border smuggling of cattle.

I. INTRODUCTION

Beginning with a polarized Constituent Assembly at the time of independence, the legality of trade in cattle has had a long and tumultuous history in India. At that time, there had been a push to enact a law on prohibition on cow slaughter as a fundamental right. A compromise allowed it to be retained as a Directive Principle of State Policy, with the caveat that it would not be enforced by coercion. The inclusion of cattle slaughter as a state subject in Entry 15 of List II of the Seventh Schedule to the Constitution allowed this issue to be legislated upon exclusively by the states each of which have their own policies to regulate the slaughter of cattle; some permit slaughter upon the receipt of a 'fit-for-slaughter' certificate, while there are others that completely prohibit the slaughter of cattle. A few, including Kerala, West Bengal, Sikkim, and Meghalaya, among others, impose no restrictions on slaughter.¹ This exclusive power given to the state governments to frame appropriate legislation on subject-matters contained in List II has widely been recognized as the touchstone of the federal nature of the Indian polity.

¹*The States Where Cow Slaughter is Legal in India*, THE INDIAN EXPRESS (Oct. 8, 2015, 9:00 AM), <http://indianexpress.com/article/explained/explained-no-beef-nation/>.

An attempt to circumvent this was made by the Central Government in 2017 with the enactment of the Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules 2017, under the umbrella of the Prevention of Cruelty to Animals Act, 1960. Ostensibly, the aim of these Rules is to prevent the cruelty caused to cattle during transport and slaughter, to regulate animal markets in order to ensure that only healthy cattle are traded, and to curb trans-border cattle smuggling as per the directions of the Supreme Court in the case of *Gauri Maulekhi v. Union of India*.² The underlying issue in the case rested on the ineffective nature of the mechanisms used against the proliferation of cattle smuggling at the border. On an overview of the provisions, it is correct that the Rules do not impose a ban on cattle slaughter in the country. However, by prohibiting the sale of cattle for slaughter from animal markets, the indirect effect of these Rules has been a ban on the slaughter of all types of cattle.

By framing laws on cattle slaughter, these Rules go beyond the scope of their parent legislation, which carves out an exception for slaughter of animals for the purpose of providing food, thereby damaging the federal nature of the Indian Constitution. Apart from this, however, it is imperative that we draw conclusions on the catastrophic effects that will result from such a ban from the effects that have been observed in the aftermath of the ban on cattle slaughter in the State of Maharashtra, as noted above.³ The Rules will lead to massive losses to a booming livestock industry. Farmers, already in the grips of an agrarian crisis and their increasing dependence upon their cattle to sustain their livelihoods, would be forced to shoulder the cost of unproductive cattle and be deprived of a traditional source of

²Manuraj Shunmugasundaram, *Banning Cow Slaughter by Stealth*, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY (June 29, 2017, 6:58 PM), <http://www.thehinducentre.com/the-arena/current-issues/article9739770.ece>.

³Sagari R. Ramdas, *The Beef Ban Effect: Stray Cattle, Broken Markets and Boom Time for Buffaloes*, THE WIRE (Apr. 6, 2017, 6:00 PM), <https://thewire.in/121728/beef-ban-cattle-market/>.

income.⁴ The leather industry, providing employment to nearly 2.5 million people, most belonging to Scheduled Castes or minority communities, will be brought to a halt due to a shortfall in raw material.⁵ The negative consequences of such a move will also be felt in allied industries like meat, pharmaceuticals and transport, which provide employment to millions and entail revenue of millions of rupees.⁶

It is on the basis of several such considerations that the Supreme Court, supporting the order of the Madras High Court, stayed these Rules, halting the Government's attempt to ban the slaughter of cattle.⁷ Consequently, the Central Government withdrew the rules and notified a draft set of rules titled 'Prevention of Cruelty to Animals in Animal Markets Rules 2018'.

II. OVERREACH BY THE CENTRAL GOVERNMENT

The first criticism of the 2017 Rules arises from the lack of the Central Government's competence to enact such legislation. This argument has two prongs. First, the Rules are within the exclusive

⁴ TV Jayan, *Cow Slaughter Ban can Cost India Dearly*, THE HINDU BUSINESS LINE (Jan. 11, 2018), <https://www.thehindubusinessline.com/economy/agri-business/cow-slaughter-ban-can-cost-india-dearly/article9756523.ece>.

⁵ Brinda Karat, *The Economics of Cow Slaughter*, THE HINDU (Sept. 6, 2016, 1:22 PM), <http://www.thehindu.com/opinion/op-ed/the-economics-of-cow-slaughter/article7880807.ece>.

⁶ Rahul Wadke, *New Cattle Trade Rules May Slaughter a Rs. 2000-cr Industry*, THE HINDU BUSINESS LINE (June 1, 2017), <http://www.thehindubusinessline.com/economy/policy/new-cattle-trade-rules-may-slaughter-a-2000cr-industry/article9717921.ece>; Aesha Datta, *Trade in Cattle for Slaughter Axed*, THE HINDU BUSINESS LINE (May 26, 2017), <http://www.thehindubusinessline.com/economy/agri-business/sale-purchase-of-cattle-from-animal-markets-for-slaughter-banned/article9713472.ece>.

⁷ All India Jamiatul Quresh Action Committee v. Union of India, W.P. (Civil) No. 422 of 2017 (July 11, 2017).

legislative competence of the State Governments, rather than that of the Union Government. Second, the Rules amount to a transgression of the Central Government's jurisdiction, and are in the nature of colourable legislation.⁸

Article 246 of the Constitution states that Parliament has exclusive legislative competence with regard to subject matters contained in the Union List of the Seventh Schedule. Further, it also has the power to enact legislation on matters contained in the Concurrent List. However, the competence to make laws on matters contained in the State List is within the exclusive jurisdiction of the individual State Governments.⁹ The 2017 Rules, like its parent Act - the Prevention of Cruelty to Animals Act, 1860 - have purportedly been made in pursuance of the Central Government's power to legislate on the prevention of cruelty to animals, contained in the Concurrent List.¹⁰ Entries 15 and 28 of the State List, however, give State Governments exclusive jurisdiction to legislate on the subject matters of 'protection and preservation of livestock' and 'markets and fairs'.¹¹

The doctrine of pith and substance is one among many maxims applied by the judiciary in order to ensure that the elements of a federal system between the Union and states, enshrined in the Constitution, are preserved. The doctrine is applied to settle conflicts between the legislative competence of the Central and state Governments.¹² The doctrine calls for a determination of the validity of a legislation on the basis of legislative competence through an ascertainment, on the whole, of its true character. This, in turn, is accomplished by examining the object, scope, and effect of the

⁸ Suhrith Parthasarathy, *Modi Government's Cattle Slaughter Ban is Brazenly Unconstitutional*, THE WIRE (June 5, 2011), <https://thewire.in/politics/modi-cattle-slaughter-ban-unconstitutional>.

⁹INDIA CONST. art. 246.

¹⁰INDIA CONST. Sch VII, List III, Entry 17.

¹¹INDIA CONST. Sch VII, List II, Entry 15, 28.

¹²Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228.

legislation.¹³ In case of the 2017 Rules, although their outward objective is to prevent cruelty to cattle, their effect has been to regulate animal markets and legislate on cattle slaughter, both of which are subjects which falls squarely within the state governments' exclusive competence. For instance, Rule 22(e) imposes a positive obligation on animal markets to ensure that cattle brought to the market are not sold for the purposes of slaughter.¹⁴ Such a law, by transgressing on the competence of the states, clearly violates the separation of powers between Centre and states, espoused in the Seventh Schedule.

Here, an argument may be made that the Central Government has not actually transgressed its powers; rather, the encroachment into the state legislatures' allotted field is only incidental in nature. Such the doctrine of incidental and ancillary encroachment cannot be resorted to in order to extend the competence of a legislature to a subject-matter already provided for in an entry relating to that specific subject.¹⁵ As noted above, the subject-matters which this piece of legislation deals with have already been provided for in Entries 15 and 28 of List II. Hence, the doctrine of incidental and ancillary encroachment has no application in the present case. On an examination of the 2017 Rules on the touchstone of the doctrines of pith and substance and incidental and ancillary encroachment, it is clear that the Union Government has transgressed its legislative competence by legislating on matters within the exclusive jurisdiction of the State Governments.

¹³*Id.*; See also Durga Das Basu, *Commentary on the Constitution of India* 8698 (8th ed. 2011).

¹⁴Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(e) (May 26, 2017) [hereinafter *Regulation of Livestock Markets*].

¹⁵*State of Uttar Pradesh v. Bar Council of Uttar Pradesh*, AIR 1971 All. 187, ¶11. See also 8 DURGA DAS BASU, *COMMENTARY ON THE CONSTITUTION OF INDIA* 8659 (8th ed. 2011).

The second prong of argument is based on the doctrine of colourable legislation. This doctrine applies when one legislature, under the pretence of exercising its own powers, has transgressed, in substance, upon the exclusive powers of another legislature, attempting to do indirectly what it cannot do directly.¹⁶ The 2017 Rules have been framed under the guise of preventing cruelty to animals, which is a subject over which the Central Government has legislative competence. In doing so, however, the government has clearly transgressed into the states' exclusive jurisdiction. It is important to note that the motive of the legislature is irrelevant in determining whether a particular legislation is colourable in nature.¹⁷ Therefore, any contentions that the Central Government's motives in enacting such legislation were bona fide are entirely irrelevant. The 2017 Rules, being colourable legislation, are invalid, and as such, should not be allowed to stand.

III. A QUESTION OF EQUALITY: REASONABLE CLASSIFICATION AND ARBITRARINESS

Right to Equality is one of the notable cornerstones of the Constitution of India. The right does not function on the concept of absolute equality but in fact, allows for differentiation when founded upon reasonable grounds for classification.¹⁸ The reasonability is assessed based on a two pronged test—intelligible differentia and reasonable nexus with the object to be achieved.¹⁹

The 2017 Rules are in compliance with the first prong of the test of reasonable classification—intelligible differentia, differentiation

¹⁶K.C. Gajapati Narayan Deo v. State of Orissa, AIR 1953 SC 375, ¶9.

¹⁷Dharam Dutt v. Union of India, (2004) 1 SCC 712, ¶16.

¹⁸National Council for Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan, (2011) 3 SCC 238, ¶22.

¹⁹In Re: The Special Courts Bill, 1978, (1979) 1 SCC 380, ¶72.

which is capable of being understood.²⁰ It has been recognized by the Apex Court that cattle and other animals such as sheep or goats are capable of being differentiated into separate groups based on their usefulness to society.²¹ Therefore, notifying rules especially for cattle creates an intelligible differentiation between them and other animals, satisfying the first part of the test. However, the reasonable classification test requires a cumulative satisfaction of both prongs.²²

The second prong requires an assessment of the objective of the Rules. The source of these Rules is § 38(1) of the 1960 Act.²³ The section delegates the power of making rules to the Central Government only to “carry out the purposes of the Act”.²⁴ The purposes of the Act has been expressed in the Preamble as prevention of unnecessary pain or suffering to animals from cruel practices.²⁵ Section 11 of the Act lists activities which are covered under the ambit of cruel practices. It specifically excludes the “destruction of any animal as food for mankind” from the definition of cruelty.²⁶ Thus, the object of the Rules, which is founded in the Act, does not extend to prevention of slaughter for food. The provisions of the rules traverse the objective by disallowing sale of cattle for slaughter. Furthermore, the Act contains a specific restriction on interference for killing of an animal for religious purposes.²⁷ This restriction is also flouted by the Rules when it prohibits sacrificing of an animal for any

²⁰DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 1427 (8th ed. 2011). *See also* State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, ¶55.

²¹Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731, ¶72.

²²In Re: The Special Courts Bill, 1978, (1979) 1 SCC 380, ¶72.

²³Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Preamble.

²⁴Prevention of Cruelty to Animals Act, 1960, § 38(1), No. 59 of 1960.

²⁵Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Preamble.

²⁶Prevention of Cruelty to Animals Act, 1960, § 11(3)(e), No. 59 of 1960.

²⁷Prevention of Cruelty to Animals Act, 1960, § 28, No. 59 of 1960.

religious purpose.²⁸ The 2017 Rules fail the second prong as differentiation of cattle from other animals does not have a rational nexus with the object of prevention of cruelty to animals. Therefore, the 2017 Rules violate Article 14 of the Constitution as per the test of reasonable classification.

Further, in 1974, the Supreme Court of India evolved a new test for equality on the grounds of non-arbitrariness.²⁹ The Court took a positivist view to hold that “equality is antithetic to arbitrariness”, which was subsequently rejected in the *McDowell*³⁰ case. However, Nariman J., in the recent *Triple Talaq*³¹ judgment, re-examined the tests for Article 14. He, with the support of Lalit J. and Joseph J.—qualifying for a 3:2 majority, outlined how arbitrariness is a valid ground and is hence, relevant in an Article 14 analysis. Thus, as the law stands today, a law will be held to be in violation of Article 14 if it fails to satisfy either of the two tests of reasonable classification and non-arbitrariness.

The newer doctrine does not require any form of classification. A state action will be held as non-arbitrary when applicable alike to those who are similarly situated.³² In the context of delegated legislation, it has been held that an action will be arbitrary when done in an “unreasonable manner”, “capriciously without any adequate determining principles”.³³ The Ministry of Environment and Forest released a notification stating the intent and purpose of the Rules. It was specified that the Rules were made in light of the order of the Supreme Court pursuant to the case of *Gauri Maulekhi*.³⁴ The case and the subsequent order dealt with necessity of action by the

²⁸Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d).

²⁹E.Y. Royappa v. State of Tamil Nadu, (1994) 4 SCC 3, ¶ 85.

³⁰Mc Dowell & Company Limited v. The Commercial Tax Officer, 1986 AIR 649.

³¹Shayara Bano v. Union of India, AIR 2017 SC 4609.

³²Smt. Maneka Gandhi v. Union of India, (1978) 1 SCC 248, ¶16.

³³Sharma Transport v. Government of Andhra Pradesh, (2002) 2 SCC 188.

³⁴Gauri Maulkehi v. Union of India, W.P. (Civil) No. 881 of 2014.

government to prevent illegal smuggling of the cattle at the border. The 2017 Rules are notified for the entire geographical stretch of India, including states which are neither border states nor adjoining them. This state action of preventing slaughter in all areas is resulting in alike treatment of states that are not similarly situated as border states. Illegal sale of cattle at the border is not an adequate determining principle to ban such sale across states which are not even remotely connected to the border states. Furthermore, the Rules permit purchase only by ‘agriculturists’ who show relevant revenue documents.³⁵ Prohibiting landless farmers from purchasing cattle is neither founded on reason nor on any adequate determining principle. Therefore, these Rules are *prima facie* arbitrary against the residents of non-border areas and landless farmers who are unreasonably prevented from purchasing cattle under the Rules.

Overstepping of the Rules beyond the set objectives of the Act, in addition to an Article 14 violation, also leads to illegality under the administrative law. It is a well recognised principle of delegated legislation that rules made under a statute must be in consonance with the object of the Act.³⁶ An ultra-vires rule will be declared as void. The validity in these scenarios is based on whether the delegated legislation tends towards the objectives of the Act. The present rules go beyond the scope of the Act first, by prohibiting sale for cattle for the purposes of slaughter³⁷ and second, by disallowing killing of cattle for religious purposes,³⁸ both of which are excluded from the

³⁵Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d)(iv).

³⁶N.K. Bajpai v. Union of India, (2012) 4 SCC 653, ¶16.

³⁷Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22(d).

³⁸Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22.

ambit of ‘cruelty’ under the parent Act.³⁹ Therefore, the 2017 Rules are ultra-vires the Act of 1960 and void in law.

IV. THE ILLUSORY RIGHT TO TRADE

Another addition to the Pandora’s box of violations that stem from the 2017 Rules hinges on Article 19. The freedom of trade, occupation and profession which is subject to certain restrictions.⁴⁰ However, such restrictions need to be made in interest of general public and should be reasonable in nature.⁴¹ A restriction is not reasonable when it is arbitrary and beyond what is required.⁴² The judicial test to determine an excess nature of restriction is whether there exists a less drastic measure to achieve the same objective.⁴³

The Rules place a complete ban on purchase of cattle for slaughter in the ‘animal market’.⁴⁴ Now even though, in theory, the Rules appear to be merely regulating the sale of cattle in the ‘animal market’, however. The practical application of the Rules leads to prohibition of slaughter owing to the expansive definition of ‘animal markets’. The Central Government, in effect, has imposed a nation-wide ban on the slaughter of cattle and hence, their consumption by terming ‘slaughter’ as cruelty and making it a criminal offence. As per the definitions clause of the Rules,⁴⁵

³⁹Prevention of Cruelty to Animals Act, 1960, § 11(3)(e), No. 59 of 1960.

⁴⁰INDIA CONST. art. 19(6).

⁴¹Modern Dental College and Research Centre v. State of Madhya Pradesh, AIR 2016 SC 26.

⁴²Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118, ¶6.

⁴³Mohammed Faruk v. State of Madhya Pradesh, (1969) 1 SCC 853, ¶10.

⁴⁴Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 22.

⁴⁵Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 2(b).

“animal market means a market place or sale-yard or any other premises or place to which animals are brought from other places and exposed for sale or auction and includes any lairage adjoining a market or a slaughter house and used in connection with it and any place adjoining a market used as a parking area by visitors to the market for parking vehicles and includes animal fair and cattle pound where animals are offered or displayed for sale or auction.”⁴⁶

The definition turns any place where animals are brought for the purpose of sale under the radar of Animal Market Committee, exposing the place to the prohibition on sale for slaughter. Now, if the sale for slaughter cannot take place from an area wherein the buyers and sellers assemble, the only option left is sale from individual farms. While sale from these farms might seem a safe and balanced solution, it is highly impractical. An individual owner of the cattle or a prospective buyer of the same cannot be expected to go from place to place in search of a cattle. Without a market to sell at or buy from, the demand and supply of the cattle will never intersect, leaving the price and sale indeterminate. A case in point is *Shreya Singhal v. Union of India*,⁴⁷ which tested the constitutional validity of §66A of the Information Technology Act, criminalizing the act of sending any information which may cause “annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.” It was contended by the Government that the freedom of speech is not completely curtailed because an individual is allowed to send information which does not fall into the categories listed in the §66A. The court highlighted the overly broad nature of the offence, holding that any form of act is capable of attracting the punishment in §66A.

⁴⁶Prevention of Cruelty to Animals (Regulation of Livestock Markets) Rules, 2017, Rule 2(b).

⁴⁷*Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

Hence, the section was declared to be unconstitutional on the grounds of vagueness and overbreadth.

Similarly, the Environment Ministry has effectively enforced a nationwide ban on the sale of beef by first, bringing 'slaughter' within the ambit of cruelty and second, making the trade of animals for slaughter in the extended area of animal markets - a criminal offence. Owing to the overly broad nature of the definition of 'cruelty' and 'animal market', farmers would only be able to sell cattle for slaughter from individual farms. As noted above, it is not practical because demand and supply of the cattle will never intersect, leaving the price and sale indeterminate.

Having established that, in effect, the Rules lead to a complete prohibition on sale of cattle for slaughter, there is minimum consensus on such prohibition being unconstitutional. The constitutional bench in *Hanif Qureshi* held that a complete ban on slaughter of buffaloes, bulls and bullocks without giving regard to their age and usefulness is not a reasonable restriction in the interest of general public.⁴⁸ The underlying reason behind the decision was that after a certain age, the cattle cease to be useful for the purposes of yielding milk or breeding. A restriction on right to trade is not reasonable when it is not made in interest of general public but "merely to respect susceptibilities and sentiments of a section of the people whose way of life, belief, or thought."⁴⁹ The Rules presuppose that the farmers require cattle for procuring milk, manure and for tilling the land. Thus, as per the Rules, the selling and reselling of cattle will only take place for rearing of cattle. However, there exists an alternate scenario where the cattle become unproductive and the only possible way of disposing it off is through sale for slaughter. Creating a complete ban on sale for slaughter forces the farmer to

⁴⁸Mohd. Hanif Qureshi v. State of Bihar, AIR 1958 SC 731, ¶46.

⁴⁹Mohammed Faruk v. State of Madhya Pradesh, (1969) 1 SCC 853, ¶10.

bear the economic burden of an unproductive cattle.⁵⁰ Furthermore, even for productive cattle, there are times during the agriculture season wherein the supply for cattle is extremely high as opposed to the demand. In the early months of 2017, Anantapur, a small district in Andhra Pradesh was facing famine conditions. In such a dire situation, the only manner in which the farmers could feed their family members was through selling cattle to slaughterhouses.⁵¹ Further, it is not just farmers engaged in cattle rearing who suffer from the ban, it also dries up chains for supply through dairy farms. Presently, about 40 % of the income of the dairy farms in the country is earned through the sale of unproductive cows.⁵² If they are not allowed to sell the unproductive cows, they will not be able to invest in new young ones without the 40 % income to be used as capital. Now in a situation where the dairy co-operatives are already burdened by the increasing dumping of milk powder from EU, Australia and New Zealand, the entire industry will be wiped out leading to a complete restriction on their right to trade.⁵³ Similar effects will also be caused in the leather industry which presently accounts for 12.93% of the world production of leather because of its dependence on stock from slaughterhouses.⁵⁴

Thus, these Rules completely choke the freedom of movement of cattle in a market, not just going against the general interest of trade

⁵⁰Alan Hetson, *An Approach to the Sacred Cow of India*, 12(2) CURRENT ANTHROPOLOGY, 191-209 (1971).

⁵¹Hoskote Nagabhushanam, *Anantapur: Drought Forces Farmers to Sell Cattle*, DECCAN CHRONICLE (March 16, 2017, 07:54 PM), <http://www.deccanchronicle.com/nation/current-affairs/160317/anantapur-drought-forces-farmers-to-sell-cattle.htm>.

⁵²Seshadri Kumar, *Milking the Holy Cow*, FRONTLINE (Sep. 2, 2016), <https://frontline.thehindu.com/cover-story/milking-the-holy-cow/article8994390.ece>.

⁵³*Id.*

⁵⁴*Id.*

of farmers but even other traders whose right is so intrinsically linked with cattle slaughter.

V. EVERY MAN'S HOUSE IS HIS CASTLE: PRIVACY AND PERSONAL AUTONOMY

Article 21 of the Constitution, which contains the fundamental rights to life and personal liberty, has, through judicial consideration, been held to comprise a large number of other rights as well. Essential to the debate on the 2017 Rules are the right to privacy and personal autonomy, and the right to livelihood. The 2017 Rules are a gross violation of such rights, and as such, should be struck down.

The existence of a right to privacy was a contentious issue in Indian jurisprudence for several years. In 2017, however, the landmark judgment of the Supreme Court in the case of Justice K.S. Puttaswamy v. Union of India went a great way in clarifying the position of law in this respect. The Court, confirming a catena of previous decisions, held the right to privacy to be a fundamental right under the umbrella of Article 21 and a host of other freedoms under Part III of the Constitution.⁵⁵ Citing the interpretation of Warren and Brandeis in their seminal article on the right to privacy, the Court interpreted this right as a 'right to be left alone'.⁵⁶ More specifically, it was held that an individual's choice of food is his personal affair, and is part of the right to privacy.⁵⁷ If such food is not injurious to health, intrusions therein are violative of the right to privacy.⁵⁸ Limitations

⁵⁵Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 [hereinafter *Puttaswamy*].

⁵⁶*Id.* See also Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4(5) HARV. L.R. 193 (1890).

⁵⁷See Puttaswamy, *supra* note 55, at 91; Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat, AIR 2008 SC 1892, ¶27.

⁵⁸Shaikh Zahid Mukhtar v. State of Maharashtra, (2017) 2 ABR 140, ¶192.

on this right require the existence of compelling state interest, which must be proved by the State.⁵⁹

Intricately connected with the right to privacy is the right to personal autonomy. This consists of a positive right to an individual to make decisions for himself and choose which activities to partake in, and a negative right to not be subject to interference by others.⁶⁰ This allows individuals to make free choices that "*affect the course of life*".⁶¹ As contained in the right to privacy, the consumption of any food not injurious to health is also a part of the right to personal autonomy.⁶² Further, it is vital to note that food habits have been adjudged to be an essential part of a secular culture, and therefore, before any restrictions are placed on such habits, the State must consider factors such as health, choice of food, the socio-economic status of society, and the availability of food at inexpensive prices.⁶³

The 2017 Rules impose an indirect ban on the availability and consumption of beef by prohibiting the sale of cattle for slaughter in animal markets. As per most estimates, animal markets are the places from where most cattle are sourced for slaughter. Imposing such a restriction leads to the drying up of the chain of supply of cattle for slaughter. The overall effect is the scarce availability of beef in the market. Therefore, the Rules, by imposing a prohibition, albeit indirect, on choice of food, and causing an inability to exercise the right to choice of food in an effective manner, are violations of the right to privacy and personal autonomy. The State has no compelling interest to justify such a restriction. Although the purported aim of these Rules is to prevent the cruelty experienced by cattle during

⁵⁹*Id.*, ¶202. See also *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*, AIR 2008 SC 1892, ¶4; *Deena Dayal v. Union of India*, 1983 AIR 1155.

⁶⁰*Anuj Garg v. Hotels Association of India*, (2008) 3 SCC 1.

⁶¹See *Puttaswamy*, *supra* note 55, at 109.

⁶²*Shaikh Zahid Mukhtar v. State of Maharashtra*, (2017) 2 ABR 140, ¶185.

⁶³*Saeed Ahmad v. State of Uttar Pradesh*, Misc. Bench No. 6871 of 2017, at 17.

slaughter, this has already been dealt with by the Prevention of Cruelty to Animals (Slaughter House) Rules.⁶⁴ Further, the parent Act makes an exception in this respect with regard to animals being slaughtered for the purpose of providing food.⁶⁵

Beef is an important source of food for minorities and weaker economic sections of Indian society, due in part to its affordability and availability. A large part of this stems from part that animal markets play in providing cattle for slaughter. Therefore, it must also be noted that the Rules do not, while imposing restrictions on sale for the purposes of slaughter, take into account factors such as the availability of food and price. This, too, hampers the effective exercise of personal autonomy.

A different challenge to the 2017 Rules can also be derived from the right to livelihood, under the umbrella of Article 21. Every individual has the right to live a life comprised of all those aspects which make it "*meaningful, complete and worth living*".⁶⁶ One of these aspects is the right of every person to have a livelihood.⁶⁷ Consequently, as the Supreme Court held in the case of *Olga Tellis v. Bombay Municipal Corporation*, the prohibition of any activity essential for an individual to earn his livelihood would lead to an abrogation of his right to life.⁶⁸

As noted above, animal markets have a tremendous impact on the availability of cattle for slaughter for the purpose of acquiring food. They have been regarded as the "*crucial nuclei in the production cycle of animals*", such as cattle.⁶⁹ Estimates show that nearly 90% of

⁶⁴Prevention of Cruelty to Animals (Slaughter House) Rules, 2001.

⁶⁵Prevention of Cruelty to Animals Act, 1960, §11(3)(e), No. 59 of 1960.

⁶⁶*Dr. Ashok v. Union of India*, (1997) 5 SCC 10, ¶4.

⁶⁷*Board of Trustees of the Port of Bombay v. Dilip Raghavendranath Nadkarni*, (1983) 1 SCC 124, ¶13.

⁶⁸*Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180, ¶148.

⁶⁹*Sagari R. Ramdas, Modi Government's New Restrictions on 'Cattle' Slaughter Will Hurt Indian Farmers the Most*, THE WIRE (May 27, 2017), <https://thewire.in/agriculture/cattle-slaughter-restrictions-farmers>.

the cattle sourced for slaughter are purchased at such markets.⁷⁰ Prohibiting the sale of cattle for slaughter from such markets would have a devastating impact on the livelihoods of all persons dependent on this trade, such as slaughter-house owners, butchers, and food processors, among others.⁷¹ As noted in the introduction to this article, one need only consider the situation created in the State of Maharashtra, where the production cycle of cattle was destroyed and thousands of farmers lost their livelihoods after the state government enacted its ban on cattle slaughter in order to understand the ruinous effects of allowing such a law to subsist.⁷²

VI. INDIRECT EXPROPRIATION OF THE FOREIGN EXPORTER'S INVESTMENT

Article 300A of the Constitution of India provides that a person cannot be deprived of his property other than by the authority of

⁷⁰Sanjeeb Mukherjee, *Cleaver Falls on Sale, Purchase of Cattle for Slaughter*, BUSINESS STANDARD (May 27, 2017: 1:07 AM), http://www.business-standard.com/article/economy-policy/cleaver-falls-on-sale-purchase-of-cattle-for-slaughter-117052601549_1.html; *New Cattle Trade Rules: All Animals are Equal*, THE HINDU (May 28, 2017: 11: 21 PM), <http://www.thehindu.com/opinion/editorial/on-cattleslaughter-ban-all-animals-are-equal/article18595323.ece>.

⁷¹Prabhash K. Dutta, *Cattle Slaughter Economy: How Ban on Sale of Cattle for Killing May Affect Industry, Employment*, INDIA TODAY (May 29, 2017), <http://indiatoday.intoday.in/story/cattle-slaughtereconomy-kerala-calf-beef-festival/1/965765.html>.

⁷²Sagari R. Ramdas, *The Beef Ban Effect: Stray Cattle, Broken Markets and Boom Time for Buffaloes*, THE WIRE (April 6, 2017), <https://thewire.in/121728/beef-ban-cattle-market/> (Last visited on September 4, 2017); Sharad Vyas, *Maharashtra Farmers Resort to Distress Sale of Cattle*, THE HINDU (April 12, 2016), <http://www.thehindu.com/news/national/other-states/maharashtra-farmers-resort-to-distress-sale-ofcattle/article8462993.ece>.

law.⁷³ The 2017 Rules violate this Right to Property because first, it lacks authority of law and second, it is not made for public purpose and does not provide for compensation.

‘Property’ under Article 300A includes corporeal, incorporeal, tangible, intangible, visible, invisible, real or personal property.⁷⁴ It consists of right of free use, enjoyment and disposition without any control or diminution unless provided by the laws of the land.⁷⁵ It also includes an interest existing in a “*commercial or industrial undertaking*”⁷⁶, “*business*”⁷⁷ and “*assets, rights and obligations of a going concern*”.⁷⁸ Deprivation occurs when the owner of the ‘property’ is dispossessed of the rights arising out of such ‘property’.⁷⁹ Interference with investment to the extent that investor is unable to enjoy rights arising out of such investment is recognised as a form of deprivation of property.⁸⁰

The investment of persons in commercial undertakings borne out of the slaughter of cattle, such as the beef exporters, amounts to an “*interest existing in a commercial undertaking*”⁸¹ and is hence, ‘property’ within the meaning of Article 300A. The Rules, which place a ban on the sale of cattle for slaughter dispossess the investors of the right to enjoy the benefits arising out of such investment. Therefore, the Rules meaningfully interfere with the investment leading to deprivation of the property of the investor.

⁷³INDIA CONST. art. 300A.

⁷⁴Durga Das Basu, Commentary on the Constitution of India 9681 (8th ed. 2011).

⁷⁵Jilubhai Nanbhai Khachar v. State of Gujarat, (1995) Supp. (1) SCC 596, ¶42.

⁷⁶Chiranjit Lal Chowdhuri v. Union of India, 1950 SCR 869, ¶49.

⁷⁷Saghir Ahmad v. State of Uttar Pradesh, (1955) 1 SCR 707, ¶25.

⁷⁸Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, ¶39.

⁷⁹State of Bombay v. Bhanji Munji, (1955) 1 SCR 777, ¶7. *See also* Dwarkadas Shrinivas of Bombay v. Sholapur Spinning & Weaving Co. Ltd., 1954 SCR 674, ¶56.

⁸⁰K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1.

⁸¹Chiranjit Lal Chowdhuri v. Union of India, (1950) SCR 869, ¶49.

Now, such deprivation of property can only be undertaken through the exercise of ‘authority of law’.⁸² As already shown above, the Rules are ultra vires the parent Act and hence, do not satisfy the requirement of ‘authority of law’ under Article 300A.

Right to compensation and the objective of public purpose in cases of deprivation of property is not specifically mentioned as a requirement in the text of Article 300A. This implies that in situations of deprivation of property, compensation may not necessarily be awarded to Indian citizens and corporations. However, it is recognized as an implied right arising out of Article 300A for foreign investors.⁸³ Although there is no substantial jurisprudence on investments of foreign citizens with regard to compensation, it has been held that the same is subject to India's laws, as well as the international agreements signed between it and other foreign countries.⁸⁴ The applicable law, thus, for the determination of compensation will be the Bilateral Investment Treaties of India with other countries. ‘Expropriation’ in the Model BIT includes a permanent or near complete deprivation of the value of investment and the investor’s right of management and control over these investments. Article 5.1 of the Model BIT of India states that adequate compensation is to be provided to foreign investors when the State takes measures that have an effect equivalent to expropriation.⁸⁵ Furthermore, the compensation must be “*adequate and reflect the fair market of the expropriated investment*”.⁸⁶

Foreign investors dealing with dairy products, cattle slaughter or any industry impacted by the sale or purchase of cattle, have been

⁸²INDIA CONST. art. 300A.

⁸³K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1, ¶189.

⁸⁴*Id.*, ¶220.

⁸⁵Model Text for Indian Bilateral Investment Treaty, 2015, art. 5.1.

⁸⁶*Id.*, art. 5.6.

deprived of their right to property. However, no compensation, fair or unfair, has been paid in lieu of such deprivation. Additionally, the concerned Article of the Model BIT mandates an objective of public purpose for a legal expropriation. The Rules, by violating various provisions of the Constitution and being against the general interest of cattle-rearers, dairy farmers, cattle traders and those involved in leather industry, clearly fail to satisfy the said objective.

Thus, the Rules do not adhere the condition under Article 300A leading to a constitutional violation.

VII. THE NEW REGIME: CONSTITUTIONALITY OF THE DRAFT RULES

The Rules were rolled back in December 2017 due to the backlash received by the Government from various stakeholders. In suppression of these old rules, the Ministry of Environment released a draft regulation titled ‘Prevention of Cruelty to Animals in Animal Markets Rules 2018’ (‘draft Rules’). These draft Rules are aimed at addressing the challenges to the constitutionality of the 2017 Rules.

The draft Rules do not contain any restrictions on the sale of cattle at animal markets, other than those cattle which may be categorized as unfit animals. Primarily, these Rules cover issues pertaining to the facilities at animal markets, prohibited practices, and necessary compliances. Thus, even though these draft Rules still legislate on the subject of ‘markets and fairs’, they, in substance, regulate only the conditions and practices that an animal is subjected to in these markets. This falls squarely within the ambit of ‘prevention of cruelty to animals’, specified in Entry 17 of the Concurrent List.⁸⁷ Any encroachment upon the subject-matter of ‘markets and fairs’, as

⁸⁷INDIA CONST. Sch. VII, List III, Entry 17.

specified in the State List, is merely incidental and the main objective remains to ensure the prevention of cruel practices in these markets. Furthermore, by virtue of removing the provisions of restrictions of sale of cattle, these Rules do not prohibit the sale of cattle for the purpose of slaughter. The significance of this is two-fold. First, the draft Rules are consistent with Article 14, 19, 21 and 300 of the Indian Constitution. Second, they are also within the ambit objective the Prevention of Cruelty to Animals Act and hence, not ultra-vires the Act.

Unlike the 2017 Rules, the draft Rules do not distinguish between cattle and other animals. This places both cattle and non-cattle owners on an equal footing for the purposes of the Rules. Consequently, the draft Rules do not envisage any differentiation which would call for a 'reasonable classification' examination under Article 14. The draft Rules will also be upheld on the touchstone of arbitrariness inasmuch as there is no ban on trading across state lines. This is in line with the rationale of the Rules, which is to prevent illegal smuggling of cattle through international borders. As explained above, an Article 19 violation in the previous Rules was based on the prohibition of trade of cattle in the 'animal markets'. The draft Rules have removed the prohibition on sale of cattle for slaughter, allow farmers and other traders to trade in cattle. As mentioned earlier, animal markets are responsible for a large percentage of cattle trade in the country. The removal of the prohibition therefore, protects the freedom of trade envisaged in Article 19. Likewise, the Rules do not hinder the right to privacy and personal autonomy under the umbrella of Article 21. This stems from the elimination on the prohibition on cattle slaughter, allowing individuals to exercise their right to choice of food, as part of the right to privacy and personal autonomy. Since there does not exist a ban on the sale of cattle for slaughter under the draft Rules, the beef exporters' right to enjoy the benefits arising out of the

investment in the cattle trade remains unobstructed. Ergo, there is no violation of Article 300.

The draft Rules, in addition to excluding the provision on prohibition of sale of cattle for the purposes of slaughter, have also excluded the provision disallowing killing of cattle for religious purposes.⁸⁸ For this reason, the draft Rules do not address any ‘cruel’ practice beyond those contemplated in the parent Act. As a result, these Rules are intra-vires the Act and hence, valid in law.

Therefore, it may be inferred that the Central Government reversed a constitutional disaster to turn it into a potentially viable solution.

VIII. CONCLUSION

Once enforced, the draft Rules will successfully address the issue of cruel practices in animal markets. However, their effectiveness in preventing the illicit smuggling of cattle at international borders still remains disputed. The Central Government has the authority to formulate the export policy of India.⁸⁹ In furtherance of this power, the Government has *restricted* export of live cattle.⁹⁰ At present, it is difficult for the Border Security Force to keep an absolute check on the cattle smuggled illegally into Bangladesh. This is due to the highly porous border that India shares with Bangladesh, a large portion of which is riverine in nature and not fenced.⁹¹ There is an “*inability to substantiate the criminal intent as the alleged accused*

⁸⁸Prevention of Cruelty to Animals in Animal Markets Rules, 2018.

⁸⁹Foreign Trade (Development and Regulation) Act, 1992, § 5, No. 22 of 1992.

⁹⁰Foreign Trade (Development and Regulation) Act, 1992, Schedule II, Table-B, No. 22 of 1992.

⁹¹Rahul Karmakar, *Chilli in Genitals, Pierced with Nails: How Cattle is Smuggled into Bangladesh*, HINDUSTAN TIMES (July 14, 2017, 8:31 PM), <https://www.hindustantimes.com/india-news/tricks-of-the-trade-smugglers-torture-cattle-to-push-them-across-to-bangladesh/storyMprydcZSNzACfBTUbj3GQN.html> [hereinafter Karmakar].

*persons always took the plea that the cattle was meant to be consumed locally. This is because of the fact that the transporters do not carry any transit pass.*⁹²

This problem can be effectively solved if a formal cross-border cattle based supply chain of live cattle is permitted. In pursuance of this, legalization of over-age and non-milch cattle has received strong support from the Border Security Force.⁹³ In the present situation, when mere policing is not sufficient to control the crisis, the Central Government should rethink its national policy in favour of cattle export. The benefits of legalization are multifold. First, it would create a monitored flow of cattle from India, leading to a reduction of illegal trade across the border, which would allow the Border Security Force to clearly identify those traders who might not have the requisite permissions to carry on trade in cattle. Second, it would greatly reduce the instances of cross-border firing across the India-Bangladesh border. Currently, cattle smuggling is a primary reason for firing on this border.⁹⁴ Finally, it also addresses a grave problem related to using of gruesome or cruel practices to make the cattle forcefully storm through the fencing at the border, in order to avoid any checks by border patrols. It has been reported that a strategy adopted by these illicit traders includes inserting chili or petrol into

⁹²Rining Lyngdoh, *Plea to Legalise Cattle Trade*, THE TELEGRAPH (March 12, 2016), <https://www.telegraphindia.com/north-east/plea-to-legalise-cattle-trade/cid/1407264>.

⁹³Deeptiman Tiwary, *BSF Wants Legalization of Cattle Trade to Stop Border Smuggling*, THE TIMES OF INDIA (June 4, 2015, 07:54 PM), <https://timesofindia.indiatimes.com/india/BSF-wants-legalization-of-cattle-trade-to-stop-border-smuggling/articleshow/47534228.cms>.

⁹⁴*Bangladesh's Border Guard says Cattle Smuggling across India Border has Come Down*, THE INDIAN EXPRESS (September 20, 2016, 3:53 PM), <https://indianexpress.com/article/india/india-news-india/bangladesh-border-guard-cattle-cow-smuggling-3040688/>.

the genitals of the cattle, which makes them lash out in pain and storm through the fencing.⁹⁵

Therefore, a push towards legalization of cattle export along with the effective implementation of the draft Rules would result in a marked reduction of the illegal smuggling of cattle as well as the instances of cruelty inflicted on these animals.

⁹⁵Karmakar, *supra* note 91.