

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.34660 of 2020

Kashif Law Book House

Versus

Federation of Pakistan & others

J U D G M E N T

Date of Hearing.	05-12-2023
PETITIONERS BY:	M/s Asfandyar Khan Tareen, Arslan Saleem Chaudhry, Arslan Akram, Rana Muhammad Afzal Razzaq Khan, Ghulam Abbas Haral, Muhammad Umer Rafiq, Abdul Latif and Muhammad Adeel Chaudhry, Advocates.
RESPONDENTS BY:	Sh. Izhar ul Haq and Ch. Imtiaz Elahi, Advocates for FBR. Mr. Asad Ali Bajwa, D.A.G.

Shahid Karim, J:-. This constitutional petition seeks the following relief:

“In the view of foregoing, it is respectfully prayed that this Hon’ble Court may be graciously pleased to allow this petition in the following terms:

- i. *Declare that:*
 - a. *To the extent of books and journals, the Impugned S.R.O. No.927(I)/2019, dated 09.08.2019 is unconstitutional, void ab initio and ultra vires the Arts. 9, 18, 19 and 175(3) of the Constitution.*
 - b. *The right to life includes the right to research, knowledge, access to books and journals (for learning comparative views and receiving ideas).*
 - c. *The outright ban on import of books and journals is not a reasonable restriction on the freedom of trade and press.*
 - d. *The Federal Government has infringed the independence of the judiciary, access to justice and obstructed the administration of justice by prohibiting the import of law books and journals, which are frequently cited and relied upon by the learned members of the Bar and Bench in the ordinary course of their professional duties.*
- ii. *Alternatively, reading down the Impugned S.R.O. for being ambiguous, thus, not applicable to books and journals;*
- iii. *Grants costs of case; and*
- iv. *Grant such other relief as this Hon’ble Court may deem just and appropriate in all the facts and circumstances of the case.”*

The Challenge:

2. This judgment will also decide the connected petition W.P No.35962 of 2021 which too seeks similar relief and challenges paragraph 5 (2)(a) of the Import Policy Order, 2020 dated 25.09.2020. The only difference between the two petitions is that in W.P No.34660 of 2020, SRO 927(I)/2019 (**impugned SRO**) was issued on 09.08.2019 and which was to the following effect:

“S.R.O. 927 (I)/2019.- In exercise of the powers conferred by sub-section (1) of section 3 of the Imports and Exports (Control) Act, 1950 (XXXIX of 1950), the Federal Government is pleased to direct that following further amendments shall be made in the Import Policy Order, 2016, namely:-

In the said Order, in paragraph 5, --

a) in sub-paragraph (A), in clause (ii), the following shall be substituted, namely:--

“(ii) goods of Indian or Israeli origin or imported from India or Israel;”;

b) in sub-paragraph (B), clause (iii) shall be omitted.”

3. The notification amended paragraph 5, sub-paragraph (A) clause (ii) and placed in the prohibition list the import of goods of Indian origin apart from goods of Israeli origin. This was done by amending SRO 345(I)/2016. The second amendment was deletion of para 5(B)(iii) and thereby removed goods of Indian origin or imported from India from the restriction list. In W.P No.35962 of 2021, the challenge is to the Import Policy Order, 2020 (**2020 Order**) which contained paragraph 5(2)(a) and imposed a ban on the import of goods of Indian origin. The 2020 Order repealed the 2016 Order and re-imposed the ban similar to the impugned SRO. Para 5(2)(a) (**the Impugned Para**) is sought to be declared ultra vires and unconstitutional. Thus, the issue in both the petitions converge on the same

challenges regarding import of goods of Indian origin or imported from India.

Background and arguments:

4. The learned counsel for the petitioners stated on the threshold that the petitioners are suppliers of law books and journals (foreign, local and self-published) to members of general public, Bar Associations and Superior and Inferior courts. The challenge is restricted to the extent of books and journals and prohibition of import of these books and journals of Indian origin. The Import Policy Order, 2016 added goods of Indian origin or imported from India in the prohibition list and removed goods of Indian origin from the restriction list. Priorly, in view of the restriction, the goods of Indian origin could be imported subject to certain restrictions. The Import Policy Order is issued under the Imports & Exports (Control) Act, 1950 (“**the 1950 Act**”) which has been enacted by the Parliament to regulate imports and exports from Pakistan. The Federal Government is empowered under Section 3(1) of the 1950 Act to issue Orders to be published in the official gazette and the impugned Orders have been issued under these powers. To reiterate, initially only the goods of Israeli origin or imported from Israel formed part of paragraph 5(A)(ii) of the Import Policy Order, 2016 but later on through the impugned SRO and Para the goods from Indian origin were also included regarding which a complete prohibition was placed on their importation. The petitioners contend that due to imposition of ban on books and journals through the impugned notifications, the market is facing a

severe shortage of law books and no importer or publisher is allowed to import research materials from India. It is submitted that the impugned ban has imposed a prohibition on the import of books and journals which is unreasonable restriction on a legitimate and lawful business. In a nub, the petitioners contend that the ban in question has caused severe shortage of foreign books and journals in the market. These books and law journals are heavily relied upon by Members of the Bar and the Bench in the ordinary course of their professional duties. The impugned action adversely affects the development of legal jurisprudence, quality of research, provision of legal education and is tantamount to obstructing the administration of justice. Relevant data has been produced by the learned counsel for the petitioners to bring home the fact that Indian reprints of foreign books imported from India are considerably cheaper to be imported as compared to their import from other countries like United States of America and United Kingdom. As an illustration, for the established treaties of constitutional law by Rotunda and Novak, the original price is US Dollars 989 whereas the Indian reprint can be obtained on considerably lesser price. The same is the case with *All England Law Reports* where a set has an original price of 1260 GBP whereas the Indian reprint has a price tag of 50,000/- INR. (These prices should vary currently and the difference may be considerably more at the present time).

Legal framework:

5. Section 3 of the 1950 Act provides that:

“3. POWERS TO PROHIBIT OR RESTRICT IMPORTS AND EXPORTS:

*(1) The Federal Govt. may, by an order published in the Official Gazette and subject to such conditions and exceptions as may be made by or under the order, prohibit, restrict or otherwise control the import and export **of goods of any specified description**, or regulate generally all practices (including trade practices) and procedure connected to the import or export of such goods and such order may provide for applications for licenses under this Act, the evidence to be attached with such applications, the grant, use, transfer, sale or cancellation of such licenses, and the term and manner in which and the periods within which appeals and applications for review or revision may be preferred and disposed of, and the charging of fees in respect of any such matter as may be provided in such order.*

(2) No goods of the specified description shall be imported or exported except in accordance with the conditions of a license to be issued by the Chief Controller or any other officer authorized in this behalf by the Federal Government.

(3) All goods to which any order under subsection (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 16 of the Customs Act, 1969(IV of 1969), and all the provisions of that Act shall have effect accordingly.

(4) Notwithstanding anything contained in the aforesaid Act the Federal Government may, by an Order published in the official Gazette, prohibit, restrict or impose conditions on the clearance whether for home consumption or warehousing or shipment abroad of any imported goods or class of goods.”

6. The provision set out above empowers the Federal Government by an order published in the official gazette and subject to such conditions and exceptions as may be made to prohibit, restrict or otherwise control the import and export of goods of any specified description or regulate generally all practices and procedure connected to the import or export of such goods. Further, such an order may provide for applications for licenses under this Act and the terms and manner in which and the periods within which appeals and applications for review or revision may be preferred and disposed of. It is conceded that the matter relating to power to prohibit or restrict imports and exports is a policy matter within the domain of the executive branch of the government and it is a rarity indeed for the Courts to interfere in such matters. It is this rule of deference on the

basis of which this Court will proceed to determine the issues engaged in these petitions. Another guiding pollstar for this Court is the scope of judicial review as expressed by Lord Brightman (UK Supreme Court) in *Chief Constable v Evans* (1982) All ER 141, 154 in the following terms:

“Judicial Review is concerned not with the decision, but the decision-making process. Unless that restriction of the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

7. It is also a rule established by respectable authority that the discretion vesting in the Federal Government is to be exercised reasonably and rationally. The decision-maker cannot be left adrift on a sea of factors without guidance. It is undisputed that the first prohibition was placed by SRO 927 and since then there is no revision in the policy of the Federal Government to allow the goods of Indian origin to be imported from India. In fact, the prohibition has continued during the Import Policy Order, 2020. As explicated, any discretion vesting in the Federal Government cannot be exercised so as to impinge upon the rights guaranteed by the Constitution as also can be judged on other principles of public law such as rationality and reasonableness.

8. Indubitably, greater significance must attach to the words ‘**of goods of any specified description**’ as used in section 3 of 1950 Act. The true construction must be that this does not confer a sweeping power on the Federal Government to prohibit import or export of all goods from any country and the power lies merely to prohibit or restrict ‘goods of any specified description’. As a matter of policy

of the law, the Federal Government should only prohibit specified goods and simultaneously retain power to review the prohibition on a case to case basis. Both these connotations can be culled out from a reading of section 3 of the 1950 Act and the Impugned Para which provides in full, that:

*“(2) Import of the followings are banned, namely:-
(a) goods of Indian or Israeli origin or imported from India or Israel:
Provided that the provisions of this clause to the extent of India shall not apply to therapeutic products regulated by the Drug Regulatory Authority of Pakistan.”*

9. It can be seen that an exception was carved out and the provisions of the clause, to the extent of India, were not made applicable to therapeutic products regulated by the Drug Regulatory Authority of Pakistan. Thus it was felt by policy-makers that a complete ban was not conducive and obviously unhelpful. The prohibition could not be a regulatory straightjacket. The case of therapeutic products must have been presented to the Federal Government upon which an exception was created in their favour. This could be the case with law books and journals as well. The Federal Government cannot shut its doors to requests for waiver of prohibition in favour of certain other products. Yet no procedure has been prescribed to consider such requests. If the matter of prohibition and restriction is a policy decision, then the related matter of revision of such decision is a policy matter too. This is a requirement of fair and equal process. Both the prohibition and the manner to reconsider that prohibition must form part of the same regime. This brings us to section 3 of the 1959 Act that alludes to ‘the

term and manner in which and the periods within which appeals and applications for review or revision may be preferred'. Doubtless, the reference is to the procedure for seeking review of a decision to prohibit import of specific goods and appellate forums to be setup. Such a course has not been supplied although the mandate of law compels that persons affected by an Import Policy Order may have the opportunity to put forth their cases for review of the condition of prohibition or restriction. For, there may be a host of conditions to require a change of policy. The petitioners at least have a right to request that a change be brought about in respect of the goods that they intend to import. It is acknowledged that a wide margin of judgment must be afforded to the government, but it is equally true that that judgment may be remarkably cramped and could be overturned upon cogent grounds.

Seen against Constitutional Rights:

10. There is no doubt that the import of books and journals of Indian origin and in particular the Indian reprints of foreign books imported from India would be considerably cheaper and in respect of the data placed on record by the petitioner, there is no rebuttal on the part of the respondents. In reply to the contents of these petitions, the respondent No.3 which is the Ministry of Commerce, Government of Pakistan has proffered the following reasons for imposing ban on the import of goods from India:

“Admitted to the extent that the Ministry of Commerce, in compliance with decision of the Federal Cabinet, issued the SROs 927(I)/2019 and 928(I)/2019 dated 09-08-2019 (Annex-X), whereby imports from and exports to India were banned for all kinds of goods, including books and journals. However, petitioners’ contention that the said SROs (to the

extent of import of book from India) is ultra vires of the constitution is vehemently denied. The Federal Government is competent to ban one or all goods or class of goods from any one or from world-wide sources. The Federal Government draws its powers from Article 99 of the Constitution and with the Rules of Business 1973, and section 3(1) of the Imports and Exports (Control) Act, 1950. Moreover, India is neither an authority on any field of knowledge nor enjoys monopoly over wisdom. As such banning imports from India including those of books/ journal does not infringe any of the Fundamental rights of the Petitioners, enshrined in the Constitution of Pakistan. Further, the Honourable Court would appreciate that the enjoyment of fundamental rights by citizen of Pakistan is subject to reasonable restrictions imposed in the national of public interest. This particular executive action, i.e. suspension of trade with India, has been taken in the context of Pakistan's national interest and long standing stance on Kashmir. In view of the above, Government's decision to ban all kinds of imports/exports including books/journals from India has been taken in accordance with the Constitution, law (Imports and Exports (Control) Act and Policy of the State of Pakistan on the Kashmir dispute."

11. It is stated in the extract reproduced above that the decision to ban imports from India was taken by the Federal Government and it includes books and journals. It is further stated that the Federal Government is competent to ban one or all goods or class of goods from any source world-wide. There is no denial to this fact. However, the issue relates to the exercise of discretion which has to be based on intelligible criteria and reasonableness.

12. Learned counsel for the petitioners relied upon Article 18 of the Constitution which provides that:

*"18. **Freedom of trade, business or profession:** Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:*

Provided that nothing in this Article shall prevent—

- (a) the regulation of any trade or profession by a licensing system; or*
- (b) (b) the regulation of trade, commerce or industry in the interest of free competition therein; or*
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.*

13. The fundamental right enshrined in Article 18 grants to citizens the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business but this has been made subject to such qualifications as may be prescribed by law.

14. Article 18 fell for determination before a Full Bench of this Court and in a judgment reported as City School Private Limited v. Govt. of the Punjab etc. (2018 PLD 509) the sweep of Article 18 was elaborated as follows:-

“2. In the beginning, some general observations regarding the fundamental right enshrined in Article 18 of the Constitution may be made. This fundamental right is at the forefront of the arguments addressed by the learned counsel for the petitioners and the precise scope of this right was at the heart of the arguments addressed by counsels of both the sides of the aisle.

3. Let us begin by some observations by Lord Parker in Adelaide Steamship Co. (1913) AC 718 (PC), as regards the right to carry on trade or business which is inherent in every member of the community at common law:

“At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interest and inasmuch as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his trade or business, unless there exists some just cause or excuse for such interference...Speaking generally, it is in the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner and in the interest of the community that every individual should have this freedom.”

4. The above observations were quoted by Cornelius J. in East and West Steamship Co. v. Pakistan (PLD 1958 SC (Pak) 41, 68). While dilating upon the reasons underlying the grant of fundamental right by Article 18, Cornelius J. went on to say that:

“We may, therefore, safely conclude that among the considerations which guided the Constitution makers in the drafting of Article 12 (the present Article 18), so as to secure freedom to the citizens of Pakistan to conduct any lawful trade, the place of greatest importance must be given, firstly, to the necessity of ensuring to every individual member of the community, a right to engage in lawful trade according to his choice and to exercise that trade in a mode settled - by him at his own discretion and choice, within the legal requirements, and secondly that the interests of the community should be advanced, by the grant of such liberty to individual citizens, and that every action which tends to interfere

with that liberty should be repressed, since it would be injurious to the interests of the State.”

5. There is no doubt that the right concerns and protects an economic life of a citizen and the right to engage in any profession or occupation or trade or business. These are different forms and sources of livelihood and thus this right is inextricably linked with the right of life and liberty guaranteed by Article 9 of the Constitution. This right will also have to be read with Article 38 of the Constitution (one of the principles of policy) which enjoins on the State amongst others to provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure”. It is in this sense that the reasonable restrictions imposed by the State may also be construed by the courts so that a regulation which is confiscatory in nature may not impinge upon the positive obligation cast under Article 38 on the State. It was reiterated in Muhammad Yasin v. Federation of Pakistan through Secretary, Establish Division, Islamabad and others (PLD 2012 SC 132) that:

“Article 18 and the rights guaranteed by it are concerned with the economic life of the nation and its citizens.”

6. To quote Cornelius J., once again in East and West Steamship Co. case:

“in unequivocal terms that every citizen shall have the right to conduct any lawful trade or business. In so doing, the Article merely furnishes a fresh and authoritative declaration of a pre-existing right under the common law.”

7. In granting the right, Article 18 uses different expressions such as profession, occupation, trade or business but does not define them. However, these are all general terms and as will be seen they run into each other. It will not be required in this case to engage in the nuanced debate as whether the petitioners conduct trade or business or carry on an occupation. For, the petitioners do not quarrel that they run the schools as an occupation and while doing so conduct a business too.”

15. The 1950 Act would suffice as one of the qualifications prescribed by law which empowers the Federal Government to prescribe qualifications in respect of lawful trade regarding import of books and journals from India. The reply which has been set out above on behalf of respondent No.3 alludes to the spirit of national interest which was invoked to ban import of goods from India. It has been misconstrued in the reply that the issue relates to the import of books and journals from India which are exclusively of Indian origin and which will impinge upon the national

policy or impact the national interest. The primary question raised by the learned counsel for the petitioner is that there are Indian reprints and foreign books being printed in India (by foreign publishers) which are considerably cheaper to import as compared to the countries of their origin which would entail higher prices given the exchange rate prevalent at current times. There is no doubt, therefore, that in certain cases the Federal Government may refuse the import of books from India which contain contents which are injurious to the national interest and regarding which the Courts will be loathe to interfere as such matters will be outside the domain of the Courts to judge whether the action is legitimate or not. With regard to certain other books and journals which carry no such connotation and do not have an adverse impact on the national interest, the decision may be made by the Federal Government in a given case to allow the import of such books. For instance, books which are purely research material or precedents of courts having legal and academic value to lawyers and judges as well as academic bodies in Pakistan may be allowed to be imported. These will have no consequent ramifications regarding national interest and will not jeopardise the interest of the country in any manner. In short, this is a matter which ought to be decided on a case to case basis and cannot be determined generally by use of the powers to impose a complete ban without regard to individual cases. For instance, the petitioners in these cases may, if the circumstances were right, apply to the Federal Government for import of specific books regarding which an analysis

may be carried out by the Federal Government and upon such analysis may conclude that such books have no adverse bearing on the national security or interest of the country and may be allowed to be imported. Such discretion should continue to be retained by the Federal Government.

16. A reading of section 3 of the 1950 Act holistically and in the entire context of the law would also lead to the inference that it is intended that the Federal Government retain its power to decide upon the prohibitions and restrictions or otherwise to control the import and export of goods in individual cases coming up before it and for which a procedure may be prescribed by rules. Sub-section (1) of section 3 also prescribes that further appeals may be provided and applications for review or revision should also be prescribed through the rules. Surely, sub-section (2) prohibits the import of goods except in accordance with the conditions of a license to be issued by the Chief Controller. The intention to be gathered from a reading of section 3 leads to the ineluctable conclusion that a complete prohibition of import of goods would be an infringement of rights guaranteed by Article 18 of the Constitution. The Federal Government is merely empowered to regulate the trade or profession by a specific system which is envisaged under sub-section (2) of section 3 of the 1950 Act. It could be a condition of the license that certain goods will not be imported or the license may provide for import of certain other goods which are not injurious to the national interest such as books and journals relating to legal profession and which are not even of the Indian origin but are merely Indian

reprints of foreign books and published by publishing houses based in India.

17. Learned counsel for the petitioners also relied upon Article 19 of the Constitution which provides that:

“19. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, 1 [commission of] or incitement to an offence.”

18. The right guaranteed by Article 19 is inextricably linked to and dependent upon the right to read and receive information. Only then is it possible for the right to freedom of speech to be exercised in a wholesome manner. Thus there must be sovereignty of choice to vest in a reader to sift through different sources of material of literary value which will, in turn, equip him or her with knowledge so that the cherished right to freedom of speech and expression can be enjoyed. It will be noted that the right is subject to reasonable restrictions imposed by law, amongst others, in the **interest of friendly relations with foreign states**. This will include restrictions to be imposed if the relations with a foreign state do not remain so friendly.

19. In a recent judgment by this Court the right guaranteed by Article 19 has been elaborated in the following terms:

“...This is distinct from Article 19 where the legislature cannot make just any law to restrict and constrain that right but can only do so “in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, commission of or incitement to an offence”. Thus the power to restrict free speech and freedom of press is circumscribed and hedged in by the fields of legislation specifically mentioned in Article 19 itself. Any law which seeks to suppress freedom of speech and press and does not

falls strictly within one of the exceptions in Article 19, falls afoul of it and is ultra vires to that extent.

56. *The first part of article 19 confers rights to freedom of speech and expression on every citizen. It further goes on to say that “there shall be freedom of the press”. This is a call by the Constitution on Federal and Provincial Governments to ensure the freedom of the press. The obligation thus placed is merely an extension of the original and primary right to free speech which has come to inhere in a citizen. The whole purpose of providing for freedom of press is to enable democracy to flourish by keeping the citizenry informed and which will, in turn, feed into the entire democratic process through the right to vote. Thus both, right to freedom of speech and freedom of press are inextricably linked to each to form a whole and constitute the main planks on which the edifice of democracy rests. To what purpose is the freedom of speech if the press is not free. Conversely, to what purpose is the freedom of press if the citizens are not free to speak. An abridgment of any of these rights is abridgment of liberty and constitutional values. It is the curtailment of natural rights. For, without a free press, citizens will not be able to gather information to make informed decisions and to raise their voices against tyranny, nepotism, corruption etc. and other vices of like nature which the Governments are engaged in. Although freedom of press has been secured by the Constitution, it has been done for the benefit of citizens and to bolster their ability to participate fully and effectively in democratic process. It is not a right conferred independently on the press and media but is a necessary concomitant of the right to freedom of speech. The Constitution makers did not merely provide a right to freedom of speech and expression but added a further condition that the press shall be free so that the flow and transmission of information to the citizens may not be censored. Thomas Carlyle in ‘On Heroes and Hero-Worship (1841) quoted Edmund Burke, who said that “there were Three Estates in Parliament; but in the Reporters Gallery yonder there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these lines.” Without it the right cannot be enjoyed to its fullest extent and would remain truncated. Information and ideas feed into the decision making process while enriching the mental faculties. This, in turn strengthens the democratic polity and nurtures good governance.*

57. *As if the enumeration in Article 19 was not enough, the right has been reinforced by the introduction of Article 19A through Constitution (Eighteenth Amendment) Act, 2010 and provides that:*

“19A. Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.”

58. *Article 19 and 19A have to be read together to form a seamless web. Right to freedom of speech is incomplete without freedom of press and which in turn, secures the right to have access to information in all matters of public importance. The Constitution guaranteed freedom of speech by Article 19 and lest its significance be lost, enacted*

Article 19A to confer a right to have access to information in all matters of public importance. It is incredulous to conceive that the constitutional mandate of free speech and freedom of press would still remain subservient to a colonial law enacted for a specific purpose to stifle speech. The law was meant to place limits so that the primary purposes of servility and subjugation were achieved. The purpose of law then, is an affront to constitutional rights now conferred. Freedom from colonial rule was meant to usher in freedom of thought and it is impermissible for the citizens of Pakistan to be vilified and persecuted by allowing Section 124-A to remain part of our legal system. These provisions in the Constitution are woven into a unified fabric and make a code unto itself. S.124-A seriously dents the right to publish freely by the press and to impart information through different platforms used by media. Any writings on political issues or discourse on matters of public importance may be caught by the mischief of S.124-A and would have the unpalatable effect of inhibiting free press.”

20. However, in my opinion, the right enshrined in Article 19 and in particular the contention regarding free trade in ideas is too wide a proposition to be considered in the peculiar circumstances of the present cases where the stance of the Federal Government is that a general ban on import of goods from India has been imposed and this is a policy decision taken by the Federal Government based on the circumstances which existed between the two countries and with regard to which this Court is not qualified to render an opinion. It is quintessentially a foreign policy issue and therefore this Court will not substitute its own opinion for that of the Federal Cabinet which reflects the decision of the Federal Government. There is, however, no cavil that the right regarding promotion of free trade in ideas and the right to hold opinions and receive ideas is of international recognition. Particularly, this is contained in Article 19 of the Universal Declaration of Human Rights which states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions

without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

21. It is also undisputed that in the current scheme of things, social media is a cross-border phenomenon and cannot be controlled or regulated by the governments. This has enabled peoples of different countries to have access to free speech and press which include freedom of circulation. They also have access to ideas on the internet and are able to read materials on these platforms which may not be available in printed form. Books and other material and law journals are available online which can be accessed by persons sitting in their homes. Libraries can also be accessed for purposes of research and comparative analysis on different views of legal jurisprudence and interpretation. Superior courts routinely cite not only Pakistani precedents but also Indian cases reported in Indian journals and renowned Indian treaties are frequently relied upon and discussed apart from foreign precedents from the U.S Supreme Court as well UK Supreme Court. If the courts rely upon such precedents without any regard for prohibition on the import of books and journals from India, it is a contradiction in terms that the Federal Government has imposed a prohibition on said material which in actuality does not amount to prohibition at all while all of these books and journals are available online and can be accessed from multitude of sources. Yet that does not imply that the prohibition has placed a restriction on free trade in ideas and has left a gaping void which cannot be filled from other sources. A prohibition on import of law books and journals

from India will have negligible effect on free trade in ideas. But the right to read and acquire knowledge will be seriously dented by the prohibition in that sources of knowledge will either be unavailable or atrociously expensive to acquire.

Right to Read:

22. In the Islamic tradition Iqra, the first revelation was an exhortation to read. In our constitution, this can be culled out of the right to life, Article 9, and 25-A which enjoins the state to provide free and compulsory education to all children of the age of five to sixteen years. More importantly it is an essential and concomitant attribute of the dignity of a man which is inviolable in terms of Article 14 of the Constitution. Dignity of a man can attain its full potential by acquiring education and knowledge and which, in turn, entirely depends upon the freedom to read books and journals as part of basic facilities that a person born in a free country is entitled to enjoy. Power to control the import or export of books can be a potent and powerful weapon in the hands of the executive for indoctrinating the highly receptive and sensitive minds of young people and to stifle the growth and development of free thought so essential for maintenance of democratic way of life and to enjoy constitutional rights. Great writer and thinker *Voltaire* said:

“I may disapprove of what you say, but I will defend to the death your right to say it.”

23. Socrates said that *‘the unexamined life is not worth living’*. Life can only be examined and taken to its full bloom by reading, for *‘a little learning is a dangerous thing’*. Reading prepares the mind to engage in animated discussions

and to trade opinions with disparate and wide range of sources. Right to read is also included in the right to freedom of speech. Justice Douglas (U.S Supreme Court) speaking for the majority in *Griswold v Connecticut*, 381 U.S 479 (1965) at 482, stated that:

*“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, **the right to read.**”*

Eleanor Roosevelt once said:

“it is not only important but mentally invigorating to discuss political matters with people whose opinions differ radically from one’s own This is an invaluable check on one’s own ideas If we are to cope intelligently with a changing world, we must be flexible and willing to relinquish opinions that no longer have any bearing on existing conditions.”

24. Reply of the Federal Government is premised on patriotism and national security. But ‘*patriotism is the virtue of the vicious*’ (Oscar Wilde). Lord Walker in *A V. Secretary of State* (2004) UKHL 56, put it somewhat differently, ‘*patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant*’. And in the context of books and journals used to seek truth, ‘*allowing the government to supervise the search for truth is like appointing the fox to guard the chicken coop*’. (Yuval Noah Harari).

25. To allow books and journals to be imported will not endanger national security nor will it imperil the political system. Both are common law countries having similarities in the system of administration of justice. They have constitutions with the same template and architecture based on parliamentary form of government. Indubitably, the law books and journals will enrich and widen the horizon of the intellectual pursuits of lawyers, judges and academics alike. The prohibition has not deterred courts in Pakistan from using

and relying upon case law from India nor has their value been diminished thereby. To what avail is the prohibition placed by the impugned notification if the import of books and law journals as well as other literary material takes place unimpeded and with impunity. This is being done from other sources and through different routes and so the prohibition is ineffective for all intents which makes it a mockery of the whole exercise of issuing a notification which has no effective applicability. The alternate sources consist of social media platforms and websites which contain such material which can easily be downloaded free of cost or upon payment online. Thus there is no intelligible basis for prohibiting the import of law books and journal if that prohibition can be easily evaded. It simply puts a premium on the original cost. We must bear in mind that the current phenomenon of social media is the new melting pot of ideas and the flow of information through that medium cannot be prohibited.

26. Reading makes a man perfect. It opens new vistas and liberates the mind. Any prohibition on the pursuit of intellectual liberty and on the concept of objective truth threatens in the long run every department of thought. Reading not only enables free thought but, in turn empowers free speech which is the cornerstone of liberty as enshrined in the Constitution. That is how a connection is established between reading and life and liberty (Article 9) so that right to read must be deemed comprised in the right to life and liberty as a penumbra of that right. Porter Stewart, a US Supreme Court justice once observed:

“I should suppose that the hallmark of a truly effective security state would be the maximum public disclosure,

recognizing that secrecy can best be preserved only when credibility is truly maintained.”

27. Reading is essential for education and according to Will Durant, Philosopher and Historian, ‘*education is the transmission of the knowledge and knowledge is power.*’

28. The virtues of reading have been brought forth in the final essay ‘How one should read a book’ of V. Woolf’s book ‘The Second Common Reader’ in these words:

‘I have sometimes dreamt, at least, that when the day of judgment dawns and the great conquerors or lawyers or statesmen come to receive their rewards— their crowns, their laurels, their names carved indelibly upon imperishable marble—the Almighty will turn to Pater and will say, not without a certain envy when he sees us coming with our books under our arms “look, these need no rewards. We have nothing to give them here. They have loved reading”. Since right of reading has been held to be a fundamental right, it cannot be taken away completely by enactment of a law. It can only be regulated and the discretion vesting in the Federal Government must be structured to obviate any irrationality to creep into the whole process.

Political Question and Foreign Affairs:

“I hope that an understanding of the nature of our current engagement with foreign matters will persuade the reader that the best way to preserve American constitutional values is to meet the challenges that the world, as reflected in concrete cases on our docket, actually presents. Doing so necessarily requires greater, not less, awareness of what is happening around us.”

(Justice Stephen Breyer in his book ‘*The Court and the World*’)

29. The Constitution vests the war power and the foreign affairs power in the executive branch. In a word, it delegates to the elected branches responsibility for our security and not to the judiciary. So what happens when security and civil liberties collide? Can the Courts rebalance the imperatives of

security and decide on what the right balance is? The Courts have generally tended in the direction of deference.

30. Two thousand years ago, Cicero (a Roman Senator) wrote, *“when the cannons roar, the laws fall silent.”* This would eventually become one of the best-known legal principles concerning the role of Courts during wartime. Cicero set forth the doctrine of political question. It provides a technical basis for courts to refuse to consider the lawfulness of executive action taken pursuant to either its wartime or foreign affairs powers. *“The doctrine says that in certain instances, the Constitution gives not to the courts but to other branches of government the power to decide whether an action violates the Constitution. In this way, the laws, including the Constitution, do not necessarily fall silent. They still apply to the government action in question. But it is for the Congress or the President, not the Courts, to determine what the law requires gives the national security threat.”*

(Justice Stephen Breyer in *‘The Court and the World’*).

31. In my opinion, the question involved in these petitions is a political question and touches upon national security and foreign affairs matters. The political branches of the government should have unfettered power over such matters. This Court cannot sit in judgment over the decision-making of the Executive which is equipped with reports and relevant information to make the final decision. It would not be appropriate to rebalance the imperatives of the decision in order to come to a different conclusion. At best, this Court can ask the Executive to review its decision in respect of law books and journals. A matter which entails foreign policy

implications must reside with the political branches including the power to review.

32. Justice Robert H. Jackson (U.S Supreme Court) wrote in *Chicago & Southern Airlines, Inc. v Waterman S.S. Corp.*, 333 U.S 103 (1948) that:

“...But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.”

33. Though it would be a far-fetched idea to permit courts to assert their policy preferences in matters of foreign affairs and national security, the courts nevertheless owe a duty to preserve individual liberties. This owes much to the changing nature of the world. In an intensely interdependent world facing global threats that are likely to last a generation or more, special security needs are no longer as intermittent or short-lived as they once were. In such circumstances, for the courts to avoid constitutional questions for security reasons is to concede to the Executive as a matter of course the extraordinary powers it was intended to wield only under extreme conditions.

34. In this case, matters of commerce and trade between two countries are engaged. This is, essentially and properly, a decision in the realm of diplomacy and foreign affairs. The decision has its source in the ebbing of relations between the two countries. There cannot be export of goods if India does

not permit that to happen, which is presumably the case. Conversely, whether to allow import of goods would be a delicate question and one in the expertise of different departments of the Federal Government who can assess the damage to domestic traders and business if unilateral imports were allowed. The right to free trade in ideas needs to be balanced against right of trade, business and profession locally. Yet, a case can clearly be made out for import of Indian reprints of foreign books for which no parallel market exists in Pakistan. Hence the need for establishing forums to review and decide upon individual cases seeking variation in the Import Policy.

35. It has long been settled that a question relating to foreign affairs and national security is par excellence a non-justiciable question. *“Issues of national security do not fall beyond the competence of the courts...It is, however, self-evidently right that national courts must give great weight to the views of the executive on matters of national security”*. (*SSHD v Rehman* [2001] UKHL 47) (held by the UK Supreme Court). Courts have accorded a substantial degree of deference to the expertise of agencies in assessing the risk to national security and in weighing it against countervailing interests. This is being done for two reasons; The first is, institutional competence and the second is, democratic legitimacy of the executive (See e.g *R (National Council for Civil Liberties) v SSHD* [2019] EWHC 2057 (Admin); *R (Miranda) v SSHD* [2016] EWCA Civ 6)

Discretion:

36. It is true that power to issue orders under Section 3(1) of the 1950 Act is not absolute and it has to be exercised in a structured manner according to the rules of reason and justice, not according to private opinion. It cannot be arbitrary, vague and fanciful. But the right question to ask is whether the discretion was exercised on purely trading and commercial considerations or had a predominantly national security and foreign affairs / diplomatic relations feature to it. The reply makes it evident that the decision-making was largely influenced by the latter and so the discretion so exercised cannot be reviewed in the narrow prism of rationality and impropriety. In the assessment of proportionality in this case, conventional rules will not apply and appropriate weight is due to the experience and opinion of agencies, based on sensitive intelligence information.

Conclusion:

37. In conclusion, it is held that:

- a) *The impugned SRO and Para are not per se, unconstitutional and have been issued validly;*
- b) *Right to read is a fundamental right and is enshrined in the Constitution;*
- c) *Federal Government is directed to appoint an officer to hear review / revision of the impugned Para generally and of the petitioners particularly in respect of law books and journals. The recommendations of the Officer so appointed shall then be considered and decided upon by the Federal Government.*
- d) *The Officer shall be appointed within the next two months by the Commerce Division of Ministry of Commerce and Textile, Government of Pakistan and posted on its website. The petitioners may, if so advised, file a review thereafter.*

- e) *The Federal Government shall also issue instructions regarding the filing of review petitions by private persons.*

These petitions are *disposed of* in the above terms.

(SHAHID KARIM)
JUDGE

Announced in open Court on 26-01-2024

Approved for reporting.

JUDGE

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Rafaqat Ali