

“The expert in anything was once a beginner.”

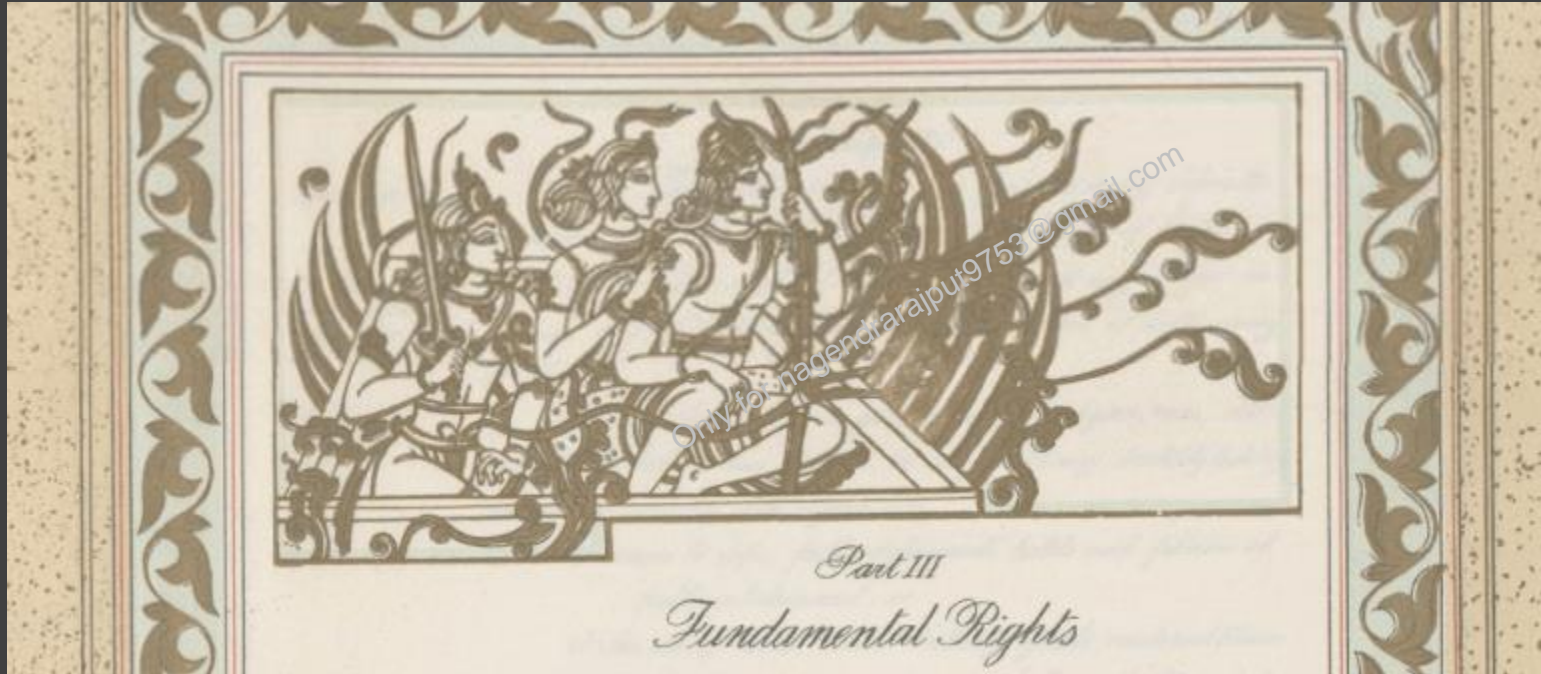


3.

Part III

Fundamental Rights

Constitutional Imagery



ARTICLE 19

The French Declaration of the Rights of Man and Citizen, 1789, stated in its Article 11 that, “The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”

Article 19 of the United Nations’ Universal Declaration of Human Rights, 1948, 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.”

ARTICLE 19

Right to Freedom

19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions ¹[or co-operative societies];
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; and

1. Ins. by the Constitution (Ninety-seventh Amendment) Act, 2011, s. 2 (w.e.f. 15-2-2012).

(g) to practise any profession, or to carry on any occupation, trade or business.

ARTICLE 19

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

ARTICLE 19

Article 19(2) of the Constitution, as first drafted, originally stated that

“Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.”

ARTICLE 19

Supreme Court, in the case of **Romesh Thappar v. State of Madras (AIR 1950 SC 124)**, held that public order considerations cannot be justified under the ground of 'security of the state' under Article 19(2).

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ARTICLE 19

Further, in *Brij Bhushan & Anr. v. State of Delhi* (AIR 1950 SC 129), an English weekly, *Organizer*, was said to be publishing communal writings, and, thus, the Chief Commissioner of Delhi directed the publisher to submit all materials for prior censorship. In its judgment, the Supreme Court propounded that prior permission constrains the constitutional ideal of free speech, as pre-censorship of a journal would be a restriction on liberty.

ARTICLE 19

As the Supreme Court decided both these cases against the State, the Parliament brought in the First Constitutional (Amendment) Act, 1951, that gave us the current version of Article 19(2), with 'public order,' 'friendly relations with foreign states' and 'incitement to an offence' added as grounds.

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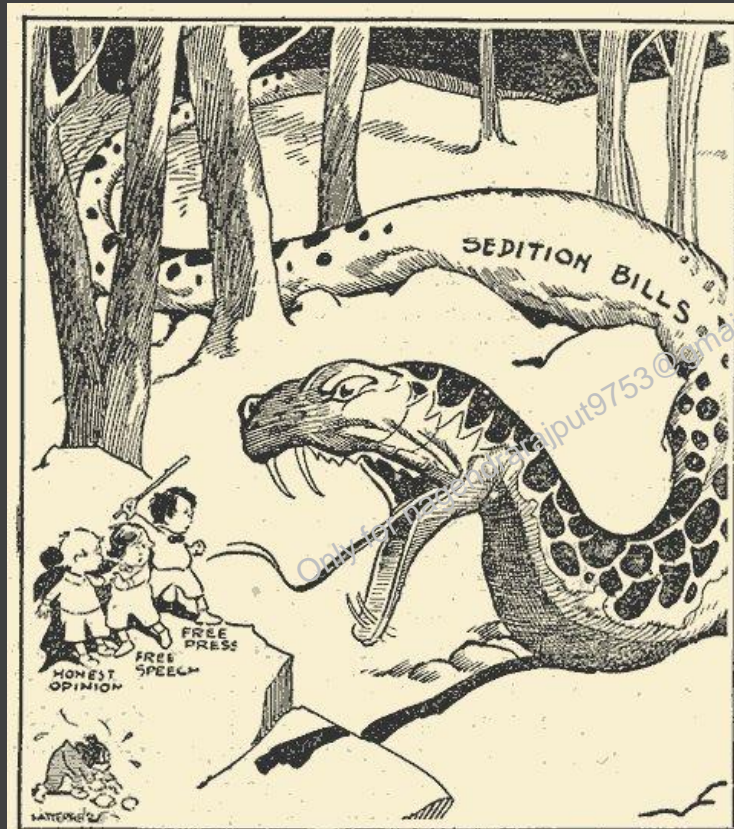
ARTICLE 19

Post amendment the State's power broadened in scope, due to which the Supreme Court, in its landmark judgment in the case of Kedar Nath v. State of Bihar (AIR 1962 SC 955), overruled a challenge to the criminal offence of sedition for allegedly being violative of the right free speech. The court upheld sedition as an offence on the ground that 'public order' and 'national security' were reasonable restrictions under Article 19(2).

ARTICLE 19

The Supreme Court's landmark judgment in the case of *Shreya Singhal v. Union of India*, 2013, commendably expanded the scope of the freedom of expression by narrowly interpreting the grounds of reasonable restrictions attributable to the right while noting that "mere discussion or even advocacy of a particular cause, howsoever unpopular, is at the heart" of the right to free speech and expression.

Sedition



AS GAG-RULERS WOULD HAVE IT.

—Satterfield in the Jersey City Journal.

Sedition



Sedition



Contempt of court



Contempt of court



"Hah! — I've been found in contempt
by better judges than you!"

Contempt of court

Why should Indian judges be so touchy? When the House of Lords delivered the judgment in the 1987 Spycatcher case, a prominent newspaper published as its headline "You Fools".

Fali Nariman, the eminent Indian lawyer, was in London at that time and he asked Lord Templeman who had delivered the majority judgment why the judges did not take action for contempt of court. Lord Templeman smiled, and said that judges in England do not take notice of such comments. In Balogh vs Crown Court, a case contested in England in 1975, the defendant told the judge "You are a humourless automaton. Why don't you self destruct?" The judge smiled, but took no action.

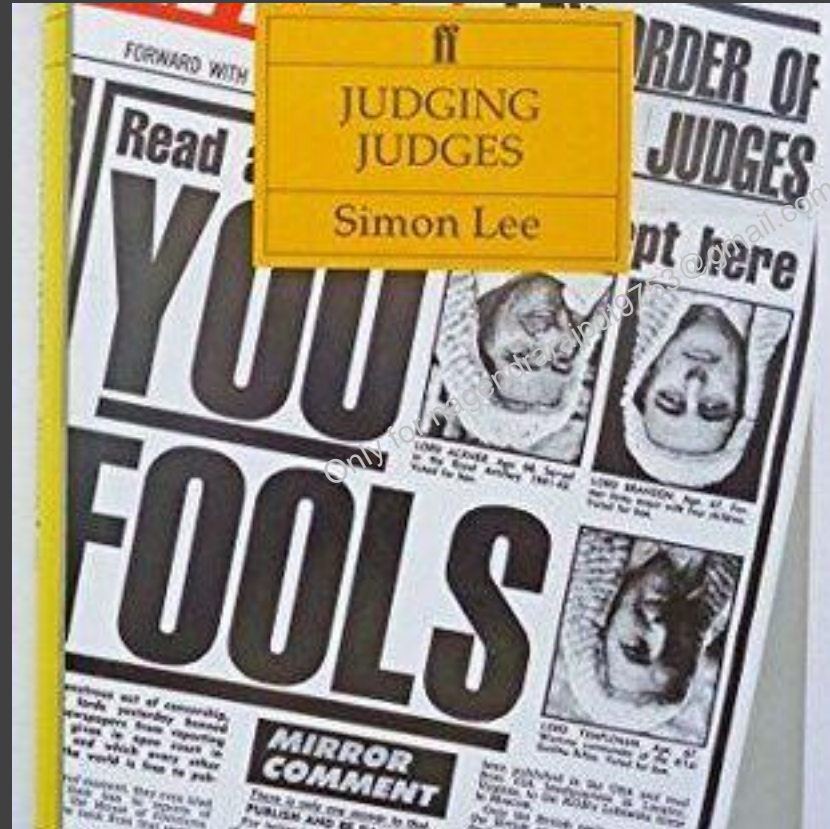
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Contempt of court



Defamation

“Any type of deliberate false communication, either written or spoken, that can harm a person’s reputation or decreases the respect, regard or confidence of a person; or induces disparaging, or a hostile or disagreeable opinion or feeling against a person is known as defamation.”

What is not Defamation

Mere insult or statements that hurt the feelings of the person to whom they are addressed would not constitute defamation. Thus, if a teacher calls a student lazy or an employer admonishes an employee for coming late, the same would not fall under the offence as envisaged under Section 499.

Defamation

Why Supreme Court upheld criminal defamation

- Reputation of an individual, constituent in Article 21 is an equally important right as free speech.
- Criminalization of defamation to protect individual dignity and reputation is a “reasonable restriction”
- It has been part of statutory law for over 70 years. It has neither diluted our vibrant democracy nor abridged free speech
- Mere misuse or abuse of law can never be a reason to render a provision unconstitutional rather lower judiciary must be sensitized to prevent misuse
- Monetary compensation in civil defamation is not proportional to the excessive harm done to the reputation

Defamation

Reasons in support of decriminalization of defamation

- FOSE is important for a vibrant democracy and the threat of prosecution alone is enough to suppress the truth.
- Every dissent may be taken as unpalatable criticism
- The process itself becomes a punishment for the
- Civil remedy is already available
- It goes against the global trend of decriminalizing defamation e.g Sri Lanka
- In 2011, the Human Rights Committee of ICCP called upon states to abolish criminal defamation, noting that it intimidates citizens and makes them shy away from exposing wrongdoing

Decency or Morality

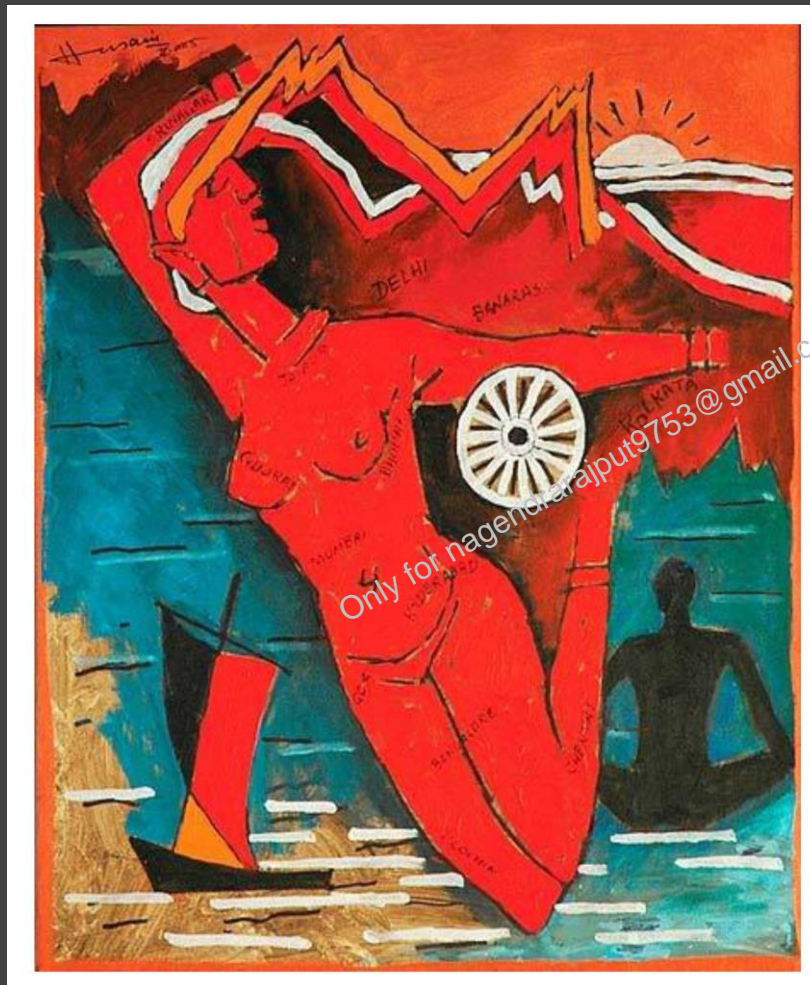
The ideas about decency or morality vary from society and time to time depending on the standards of morals in the contemporary society. Selling of obscene books, obscene things to young persons, committing an obscene act or singing an obscene song in the public place were the listed obscene acts under S 292 of IPC. To test the reasonability what we have to see is that whether a class, not an isolated case, into whose hands the book, article, or story falls suffer in their moral outlook or become depraved by reading it might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must therefore be judged from this aspect. "Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting....".

Obscenity

The United States in *Roth v. United States* observed that sex and obscenity are not to be seen as synonyms. It was held that only those sex-related materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

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Obscenity



Obscenity

The Supreme Court ruled in the Bobby International Case that the scenes depicting nudity must not be seen in isolation. They must be seen in the context or the background in which they (film, portrait, writing, and photograph) are made. The message being conveyed through the portrayal is of utmost importance when deciding the obscenity of an act. The movie Phoolan Devi depicts the social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The object of the scenes was not to titillate the cinemagoer's lust but to arouse in him the sympathy for the victim and disgust for the perpetrators. 'Nakedness does not always arouse baser instinct.'

Obscenity



Obscenity

The Court had observed in *Aveek Sarkar* that the decisions in such cases must be taken keeping in mind the contemporary national standards and not that of a group of sensitive persons.

In a continuously evolving society, which changes with every passing day, having a fixed standard for determining a crime which is based on the perspective and acceptance of the society is wrong. The society will never accept murder, or rape. But if a filmmaker attempts to portray the sufferings of a Phoolan Devi, the society may not have accepted it then but criticizes the decision today. If a photographer wishes to send a message against domestic violence through the bruised bare back of a woman, the picture must be seen in the context of the message and not in isolation.

Incitement to an offence.

Freedom of speech does not confer a license to incite people to commit offence. Incitement to serious and aggravated offences, like murder may be punishable as involving the security of the state. Incitement to many other offences is also punishable as affecting public order. But there may be still other offences like bribery, forgery, cheating, etc., having no public order aspect. So the words 'incitement to offence'.

The Court held in *State of Bihar V. Shailabal Devi*, that incitement to murder or other violent crimes would generally endanger the security of the state; hence a restriction against such incitement would be a valid law under Art. 19(2).

Friendly Relations with foreign states.

The idea or the object behind imposing restrictions on the freedom of speech in the interests of friendly relations with a foreign country is that persistent and malicious propaganda against a foreign power having friendly relations with India may cause considerable embarrassment to India and, accordingly, indulging in such propaganda may be prohibited. This restriction clearly strikes a balance between the purpose of the restriction and social order.

Security of State and Public order.

Art. 19(2) uses two concepts; 'public order' and 'security of state'. The term 'public order' covers a small riot, an affray, breaches of peace, or acts disturbing public tranquility. But 'public order' and 'public tranquility' may not be synonymous. A man playing loud music in his home at night may disturb public tranquility, but not public order. Therefore such acts only the serenity of others may not fall within the term 'public order'. There should be some element of disturbance of peace to bring a matter under 'public order'. An aggravated form of peace which threatens the foundations of, or threatens to overthrow, the state will fall within the scope of the phrase 'security of state'. The expression 'overthrowing the state' is covered by the term 'security of the state'. Therefore making a speech tending to overthrow the state can be made punishable and such a form of restriction is reasonable as it is for preserving social order.

Is right to strike a Fundamental Right?

- The constitution provides the right to demonstrate/protest as a part of one's freedom of speech and expression. SC has held that Right to strike is not an FR but a statutory right.
- As far as the government servants right to strike is concerned the judiciary held that they have an FR to demonstration like any other citizen but they do not have a right to strike as an FR
- Essential Services Maintenance Act authorizes the central government to prohibit any strike in any essential service in the public interest. This law was upheld by SC as constitutionally valid

What about Bandhs?

Bharat Kumar Vs Ubl case

- SC declared Bandhs unconstitutional
- Court declared bandhs organized by Political parties from time to time as unconstitutional for being violative of FRs of the citizens
- The courts refused to accept it as an exercise of freedom of speech and expression. When a bandh is called people are expected not to travel, not to carry on their trade and work and also may lead to the destruction of public property. The court, therefore, held bandh to be illegal and unconstitutional.

Freedom of Movement

This right guarantees to every citizen the right to move 'freely' throughout the territory of India. The adverb 'freely' connotes that the freedom to move is without a restriction and is absolute, i.e., to move wherever one likes, whenever one likes, and however one likes, subject to valid law enacted under clause (5). Laws such as wearing of helmet while riding a two-wheeler motor vehicle, which facilitate movement rather than restrict it, do not violate Art. 19(1)(d).

Freedom of Movement

Grounds for restrictions

The expression 'in the interests of general public', the Court has held, "is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution.

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Freedom of Movement

Grounds for restrictions

The second ground of restriction is to protect “the interests of scheduled tribes”. It was considered necessary to empower the State to impose restrictions upon the entry of outsiders to the areas inhabited by these tribes. An uncontrolled mixing of the tribes with the people of other sections is likely to produce undesirable effects upon the unsophisticated tribal people.

Freedom of Residence

The purpose of this clause is also to remove internal barriers within the territory of India so as to enable every citizen to travel freely and settle down in any part of a State or Union Territory. This freedom is too, subject to restrictions in the interests of public or for the protection of the interests of Scheduled Tribes. Therefore the test for this freedom is if a restriction is in securing the above interests, it is reasonable.

Test of reasonableness

The phrase 'reasonable restriction' connotes that the limitation imposed upon a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interest of the public. T

he word reasonable implies intelligent care and deliberation, that is the choice of a course which reason dictates.

Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the freedom guaranteed in Art.19 (1) and the social control permitted by cl. (2) to (6) of Art. 19, it must be held to be wanting in that quality

Test of reasonableness

For adjudging reasonableness of a restriction, the courts consider such factors as:

- The nature of right alleged to have been infringed
- The underlying purpose of the restrictions imposed
- The extent and urgency of the evil sought to be remedied thereby
- The disproportion of the imposition,
- The prevailing conditions at the time

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Test of reasonableness

Some principles to be taken into consideration

- The reasonability of a restriction has to be determined in an objective manner. It should be from the standpoint of the general public and not from the view of the persons upon whom the restrictions are imposed or upon abstract considerations.
- The phrase reasonable restrictions connotes that the limitation imposed upon a person in the enjoyment of a right should not be arbitrary or of an excessive nature. A legislation arbitrarily invading the right of a person cannot be regarded as reasonable. A restriction to be valid must have a direct and proximate nexus with the object which the legislation seeks to achieve and the restriction must not be in excess of that object
- The Directive Principles of State Policy are also relevant in considering whether a restriction on a Fundamental Right is reasonable or not. A restriction which generally promotes a Directive Principle is regarded as reasonable.

Doctrine of proportionality

SC in KS Puttaswamy Case (2019)

- A Legislation excessively invading a right can't be characterized as reasonable. A restriction should strike a proper balance between the freedom guaranteed by any of the clauses. So that freedom is limited only to the extent necessary to protect the society of which a citizen is a part. It means that the court would consider whether a restriction imposed on a FR is disproportionate.
- The DPSPs are also relevant in considering whether a restriction on an FR is reasonable or not. A restriction which promotes a Directive Principle is generally regarded as reasonable.
- Examples of reasonable restrictions: Prohibition of advertisement claiming to treat disease through magic; pre-censorship of films

Pre-censorship of films

Is pre-censorship of films a violation of article 19(1)(a)?

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Pre-censorship of films

KA Abbas Vs Ubl Case

- SC held that pre-censorship of films is not a violation of Article 19(1)(a) of the constitution. It is very much part of reasonable restrictions.
- A film can, therefore, be censored on the ground mentioned in article 19(2). The court has justified pre-censor of a film because it caters for a mass audience and it has a unique capacity to disturb and arouse feelings and has as much potential for evil as it has for good.
- A film can't, therefore, be allowed to function in a free market place just as newspapers or magazine do.

Right to internet

→ Article 19 and Right to Internet ←

The right to access and distribution of information is protected under Article 19(1)(a). Article 19(1)(a) also protects rights which form an integral part of an exercise of freedom of speech and expression. In the landmark case of *Shreya Singhal v. Union of India* SC recognized the internet as an essential medium to further the constitutional right to freedom of speech

Right to internet

and expression. The Kerala High Court in Faheema Shirin RK v. State of Kerala held that right to access the internet is a part of our fundamental right which cannot be taken away arbitrarily.

Before moving to the case of Anuradha Bhasin, it would be relevant to note the legality of internet shutdowns.

⇒ INTERNET SHUTDOWNS ←

Restrictions to the internet in India take place under three distinct laws :-

- ① Sec 174 of CrPC (1973)
- ② Sec 5 of Indian Telegraph Act (1885) +
[Temporary suspension of Telecom Services
(Public Emergency and Public Safety) Rules,
2017]
- ③ Sec 69A of Information Technology Act, 2000

Right to internet

Sec 144 of CrPc must conform to the Proportionality test. However, in Gravtam Suresh Kumar Vyas case (2015, Gujarat High Court) it has been held that Sec 144 cannot be used to impose internet shutdowns and to suppress legitimate expression.

Right to internet

⇒ Anuradha Bhasin v. Union of India ⇐

This case dealt with the internet shutdowns imposed in Jammu and Kashmir. The Supreme Court declared in this case that right to exercise freedom of speech and expression over the medium of internet enjoys constitutional protection under

Article 19(1)(a) and restrictions on it should be in consonance with Article 19(2), inclusive of the test of PROPORTIONALITY.

Right to internet

- On proportionality, the court noted,

"The degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what's actually necessary to combat an emergent situation."

The court elucidated that the term emergency has different connotations.

In the light of the judgement in Puttaswamy (II) the proportionality test stands on four legs —

- (1) Restriction should serve a legitimate goal
- (2) Must be a suitable way of furthering this goal
- (3) There must not be any less restrictive but equally effective alternate
- (4) Measure must not have a disproportionate impact on the right-holder.

Defamation

Daily Mail

WEDNESDAY, MARCH 13, 2019

www.dailymail.co.uk

70p



Dejected: Theresa May after her deal was rejected by MPs last night

They vowed to deliver the Brexit Britain voted for – and had it in their grasp. But last night contemptuous MPs chose instead to plunge our despairing nation into chaos

THE HOUSE OF FOOLS

MPs plunged Britain into chaos by rejecting Theresa May's Brexit plan for a second time last night.

With just 17 days until the UK is scheduled to leave the EU, headline

By Jason Groves Political Editor

they want to block a No Deal Brexit, but her massive defeat also opens the door to drastic options such as a general election or second referendum.

Amid speculation about how long she can survive in Downing Street, the Prime Minister's aides insisted she had not considered resigning. Boris

Johnson is among leadership candidates sizing up their chances.

Mrs May is giving her MPs a free vote on No Deal – allowing members of the Cabinet to take different sides on what until now has been a matter of Government policy. She admitted

Turn to Page 2

Defamation

Privilege motions initiated against Puri and Bedi in both Houses

Actor Om Puri expresses contrition but ex-police officer justifies speech

Published: August 30, 2011 00:00

By Ajay Jha, Chief Correspondent and S. Narendra, Correspondent



PYQs

What do you understand by the concept “freedom of speech and expression”? Does it cover hate speech also? Why do the films in India stand on a slightly different plane from other forms of expression? Discuss.

Discuss Section 66A of IT Act, with reference to its alleged violation of Article 19 of the Constitution.

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ARTICLE 20

Protection in
respect of
conviction for
offences.

20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

ARTICLE 22

22. Protection against arrest and detention in certain cases.—(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

*(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

ARTICLE 22

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

* [(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4)];

** (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

*** (c) the procedure to be followed by an Advisory Board in an inquiry under **** [sub-clause (a) of clause (4)].



THANKS!

Any questions?

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