CHAPTER XXIV

FUNDAMENTAL RIGHTS (5)
SIX FREEDOMS OF A CITIZEN

SYNOPSIS

A. RIGHT TO FREEDOM

Clauses (*a*) to (*g*) of Art. 19(1) guarantee to the citizens of India six freedoms, *viz.*, of 'speech and expression', 'peaceable assembly' 'association', 'free movement', 'residence', and 'practising any profession and carrying on any business'.

These various freedoms are necessary not only to promote certain basic rights of the citizens but also certain democratic values in, and the oneness and unity of, the country. Art. 19 guarantees some of the basic, valued and natural rights inherent in a person.

According to the Supreme Court, it is possible that a right does not find express mention in any clause of Art. 19(1) and yet it may be covered by some clause therein.[1] This gives an additional dimension to Art. 19(1) in the sense that even though a right may not be explicit, it may yet be implicit, in the various clauses of Art. 19.[2]

It has been said that these rights are great and basic rights which are recognized and guaranteed as the natural rights, inherent in the status of a citizen of a free country but not absolute in nature and uncontrolled in operation. The scheme of Article 19 shows that a group of rights are listed as clauses (a) to (g) and are recognized as Fundamental Rights conferred on citizens. All the rights do not stand on a common pedestal but have varying dimensions and underlying philosophies. The common thread that runs throughout clauses (2) to (6) is that the operation of any existing law or the enactment by the State of any law which imposes reasonable restrictions to achieve certain objects, is saved; however, the quality and content of such law would be different by reference to each of sub clauses (a) to (g) of clause (1) of Article 19.[3]

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1. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; For conjoint reading see also *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamal*, (2005) 8 SCC 534 : AIR 2006 SC 212.
Also see, *infra*, Sec. F, under Art. 19(1)(d) .

2. See, *supra*, Ch. XX; *infra*, Chs. XXVI, XXXIV and XL.

3. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

Originally, Art. 19 guaranteed seven freedoms. The freedom to hold and acquire property was deleted in 1978.[4]

However, the freedoms guaranteed by Art. 19(1) are not absolute as no right can be. Each of these rights is liable to be controlled, curtailed and regulated to some extent by laws made by Parliament or the State Legislatures. Accordingly, clauses (2) to (6) of Art. 19 lay down the grounds and the purposes for which a legislature can impose 'reasonable restrictions' on the rights guaranteed by Arts. 19(1)(*a*) to (*g*).

Article 19 confers the several freedoms on the citizens. Therefore, a municipal committee,[5] deity,[6] or a foreigner[7] cannot invoke Art. 19. The question of citizenship of a company or a corporation has already been discussed earlier.[8]

Article 19 protects the six freedoms of an Indian citizen from state action, and violation of these freedoms by private conduct of an individual is not within its purview.[9]

Inspite of there being a general presumption in favour of constitutionality of a legislation, in a challenge laid to the validity of any legislation allegedly violating any right or freedom guaranteed by clause (1) of Art. 19, on a *prima facie* case of such violation having been made out, the onus would shift upon the respondent State to show that the legislation comes within the permissible limits of restrictions set out in clauses (2) to (6) of Art. 19, and that the particular restriction is reasonable. The Constitutional Court would expect the State to place before it sufficient material justifying the restriction and its reasonability. Thus the onus of proof in such cases is an ongoing shifting process to be consciously observed by the Court called upon to decide the constitutional validity of a legislation by reference to Article 19 of the Constitution.[10] These rights have been advisedly set out in broad terms leaving scope for their expansion and adaptation, through interpretation, to the changing needs and evolving notions of a free society.[11] Every right is coupled with a duty. Part III of the Constitution of India although confers rights, duties and restrictions are inherent thereunder. Such reasonable restrictions have been found to be contained in the provisions of Part III of the constitution of India, apart from clauses (2) to (4) and (6) of Article 19 of the Constitution of India. Thus, the right to fly the National Flag is subject to certain restrictions which can be read from chapter IV-A.[12]

FOREIGNERS

A foreigner enjoys no rights under Art. 19. Art. 19 confers certain Fundamental Rights on the citizens and not on non-citizens of India.[13]

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4. See, *infra*, Chs. XXXI and XXXII.
5. *Amritsar Municipality v. State of Punjab*, AIR 1969 SC 1100 : (1969) 1 SCC 475.
6. *Deity L.P. v. Chief Commr.*, AIR 1960 Man 20.
7. *British I.S.N. Co. v. Jasjit Singh*, AIR 1964 SC 1451 : 1964 (2) SCJ 543.
8. *Supra*, Ch. XVIII.
9. *Shamdasani v. Central Bank of India*, AIR 1952 SC 59 : 1952 SCR 391; *Supra*, 463.
10. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
11. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
12. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.
13. *State Trading Corp. of India Ltd. v. Commercial Tax Officer*, AIR 1963 SC 1811 : (1964) 4 SCR 99; *Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta*, AIR 1955 SC 367 : (1955) 1 SCR 1284; *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337 : (1971) 3 SCC 104; *Gilles Pfeiffer v. Union of India*, AIR 1996 Mad 322.

A foreigner can thus claim no right "to reside and settle in India", as mentioned in Art. 19(1)(*e*).[14] The Government thus has an unrestricted right to expel a foreigner. As regards the right to be heard, there is no hard and fast rule about the manner in which a person concerned has to be given such an opportunity.

A foreigner who came to India in 1937 on a Belgian passport engaged himself in Christian missionary work. He had been staying continuously in India since 1937. By an order dated 8-7-1987, his request for further stay in India was rejected and he was ordered to leave the country. He challenged the order through a writ petition under Art. 32 which was rejected.

The Court ruled that he had not become a citizen of India under Art. 5 of the Constitution as he had not acquired his domicile in India.[15] For this purpose, "He must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient. "In the instant case, there was nothing to suggest even remotely that the petitioner had formed any intention of permanently residing here."[16]

A foreigner does, however, enjoy the Fundamental Right to life and personal liberty under Art. 21.[17] According to the tenor of the language of Art. 21, it is available not only to every citizen of this country, but also to a person who may not be a citizen of this country. Even those who come to India merely as tourists or in any other capacity are entitled to the protection of their lives under Art. 21.[18]

B. REASONABLE RESTRICTIONS: ARTS. 19(2) TO 19(6)

Limitations imposed by Arts. 19(2) to 19(6) on the freedoms guaranteed by Arts. 19(1)(*a*) to (*g*) serve a twofold purpose, *viz.*, on the one hand, they specify that these freedoms are not absolute but are subject to regulation; on the other hand, they put a limitation on the power of a legislature to restrict these freedoms. A legislature cannot restrict these freedoms beyond the requirements of Arts. 19(2) to 19(6).

Three significant characteristics of clauses 19(2) to 19(6) may be noted:

(1) The restrictions under them can be imposed only by or under the authority of a law; no restriction can be imposed by executive action alone without there being a law to back it up.

(2) Each restriction must be *reasonable*.

(3) A restriction must be related to the purposes mentioned in Clauses 19(2) to 19(6).

There is thus a double test to adjudge the validity of a restriction:

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14. See, *infra*, Sec. F.
15. *Louis De Raedt v. Union of India*, AIR 1991 SC 1886 : (1991) 3 SCC 554; *supra*, Ch. XVIII.
16. *Supra*, Chap. XVIII.
17. *Anwar v. State of Jammu & Kashmir*, AIR 1971 SC 337 : (1971) 3 SCC 104; see, infra, Ch. XXVI.
18. *The Chairman, Railway Board v. Mrs. Chandrima Das*, JT 2000 (1) SC 426 : AIR 2000 SC 988.

(a) whether it is reasonable; and

(b) whether it is for a purpose mentioned in the clause under which the restriction is being imposed?

Both these questions are to be determined finally by the Courts when a law is challenged as unconstitutional. The legislative determination of what restrictions to impose on a freedom is not final and conclusive as it is subject to judicial review.

(a) TEST FOR REASONABLENESS

It is difficult to give an exact definition of the word "reasonable".[19] There is no definite test to adjudge reasonableness of a restriction. Each case is to be judged on its own merits, and no abstract standard, or general pattern of reasonableness is applicable uniformly to all cases. As the Supreme Court has observed in *State of Madras v. V.G. Row*:[20] "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases."

However, the Courts have laid down a few broad propositions in this respect.

When the law contains 'substantive' restrictions with regard to the exercise of the right, as well as 'procedural' provisions, the Courts would consider the reasonableness of both.

For adjudging reasonableness of a restriction, the Courts consider such factors as: the duration and the extent of the restrictions; the circumstances under which, and the manner in which, that imposition has been authorised. The nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and the urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, all these considerations enter into the judicial verdict.[21]

The Court, confronted with a challenge to the constitutional validity of any legislative enactment by reference to Article 19 of the Constitution, shall first ask what is the sweep of the Fundamental Right guaranteed by the relevant sub clause out of sub clauses (a) to (g) of clause (1). If the right canvassed falls within the sweep and expanse of any of the sub-clauses of clause (1), then the next question to be asked would be, whether the impugned law imposes a reasonable restriction falling within the scope of clauses (2) to (6) respectively. However, if the right sought to be canvassed does not fall within the sweep of the Fundamental Rights but is a mere concomitant or adjunct or expansion or incidence of that right, then the validity thereof is not to be tested by reference to clauses (2) to (6). The test which it would be required to satisfy for its constitu-

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19. *Gujarat Water Supply v. Unique Electro* (*Gujarat*) (*P*), AIR 1989 SC 973 : (1989) 1 SCC 532.

20. AIR 1952 SC 196 : 1952 SCR 597.

21. *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759; *State of Madras v. Row*, AIR 1952 SC 195 : 1952 SCR 583; *Maneklal Chhotalal v. M.G. Makwana*, AIR 1967 SC 1373 : (1967) 3 SCR 65; *State of Bihar v. K.K. Misra*, AIR 1971 SC 1667 : (1969) 3 SCR 337; *Laxmi v. State of Uttar Pradesh*, AIR 1968 SC 1323 : (1969) 1 SCR 22; *Harakchand v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166; *Krishnan Kakkanth v. Govt. of Kerala*, AIR 1997 SC 128, 135 : (1997) 9 SCC 495.

tional validity is one of reasonableness, as propounded in the case of V.G. Row[22] or if it comes into conflict with any other provisions of the constitution.

The questions : (i) whether the right claimed is a Fundamental Right, (ii) whether the restriction is one contemplated by any of clauses (2) to (6) of Article 19, and (iii) whether the restriction is reasonable or unreasonable, are all questions which shall have to be decided by keeping in view the substance of the legislation and not beguiled by the mere appearance of the legislation.[23]

Thus, the standard of reasonableness is to be judged with due reference to the subject-matter of the legislation in question, economic and social conditions in India and the surrounding circumstances. The Supreme Court has emphasized in *Pathumma*[24] that in interpreting the constitutional provision, the Court should keep in mind the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the legislature in its wisdom through beneficial legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic, and elastic rather than rigid.

The concept of reasonableness must change with passage of time and absorb the current socio-economic values as exemplified in Telecasting case involving the State owned Doordarshan. The complaint of violation of the Fundamental Right under Art. 19(1)(a) of the Constitution was made against Doordarshan when it decided not to telecast a documentary film titled "Father, Son and Holy War". The film was the third part of a trilogy of documentary film against communal violence. In this film the respondent film maker looked at the question of gender along with the issue of religious violence (prompted by the understanding of Sati in Deorala and thousands of young men celebrating the death of Roop Kanwar). The filmmaker challenged the refusal of Doordarshan to telecast the film which was disposed of by a Division Bench of the Bombay High Court by directing Doordarshan to take a decision on the application of the film maker. A selection committee was constituted by Doordarshan to pre-view the film and according to the Committee the violence depicted in the film would have adverse effect on the minds of the viewers. This decision came up for consideration before the Supreme Court. The Supreme Court came to the conclusion that the film maker had a right to convey his perception on the oppression of women, flawed understanding of manhood and evils of communal violence throughout the film. The film, according to the Court, in its entirety had a serious message to convey which was relevant in the present context and Doordarshan, being a state controlled agency funded by public funds, could not have denied access to screen the documentary. The Court pointed out that the test of fairness has to be looked into from various angles and common sense point of view; the manner in which the film maker has handled the thinking the absence of offensive matters like vulgarity and obscenity etc. The Court considered the implications of the states power to impose reasonable restrictions under Article 19(2). It also took note of the fact that India was a party to the International Covenant on Civil and Political Rights and observed:

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22. AIR 1952 SC 196.
23. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1559.
24. *Pathumma v. State of Kerala*, AIR 1978 SC 771 : (1978) 2 SCC 1.

> "The catchword here is reasonable restriction which corresponds to societal norms of decency. In the present matter, the documentary film Father, Son and Holy War depicts social vices that are eating into the very foundation of our Constitution. Communal riots, caste and class issues and violence against women are issues that require every citizen's attention for a feasible solution. Only the citizens especially the youth of our nation who are correctly informed can arrive at a correct solution. This documentary film in our considered opinion showcases a real picture of crime and violence against women and members of various religious groups perpetrated by politically motivated leaders for political, social and personal gains."[25]

The limitation imposed on a freedom should not be arbitrary or excessive, or beyond what is required in the situation in the interests of the public.[26] A legislation arbitrarily or excessively invading the right cannot be characterised as reasonable. A restriction should strike a proper balance between the freedom guaranteed by any of the clauses and the social control, so that the freedom is limited only to the extent necessary to protect society of which a citizen is only a part.[27] This introduces the principle of proportionality. This means that the Court would consider whether the restriction imposed by legislation on the Fundamental Right are disproportionate to the situation and are "not the least restrictive of the choices".

The burden to show that the restriction is reasonable, lies on the state. The restrictions are imposed by law on the Fundamental Rights contained in Art. 19(1)(a) to (g) and the Courts are entitled to consider the "proportionality" of these restrictions which means that the restrictions should not be "arbitrary or of an excessive" nature, beyond what is required for achieving the objects of the legislation. Legislation which arbitrarily or excessively invades the Fundamental Right, cannot be said to contain the quality of reasonableness unless it strikes a proper balance between the Fundamental Right guaranteed and the restriction imposed thereon.[28]

Further, a restriction to be valid must have a direct and proximate nexus, or a rational relation with the object which the legislature seeks to achieve and must not be in excess of the object.[29] It is the substance of the legislation, and not merely its appearance or form, which is to be taken into consideration while assessing its validity. It is the direct, inevitable and the real, not the remote, effect of the legislation on the Fundamental Right which is to be considered,[30] subject to the rider that the legislature cannot indirectly take away or abridge a Fundamental Right when it cannot do so directly.[31]

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25. *Director General, Directorate General of Doordarshan v. Anand Patwardhan,* (2006) 8 SCC 433 : AIR 2006 SC 3346.
26. *M.R.F. Ltd. v. Inspector Kerala Govt.,* AIR 1999 SC 188, 191 : (1998) 8 SCC 227.
27. *Om Kumar v. Union of India,* AIR 2000 SC 3689. Also see, *infra*.
28. See, *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 188; *State of Madras v. V.S. Rao*, AIR 1952 SC 196 : 1952 SCR 597; *Om Kumar v. Union of India*, JT 2000 (Suppl. 3) SC 92 : AIR 2000 3689.
29. *Arunachala Nadar v. State of Madras*, AIR 1959 SC 300 : 1959 Supp (1) SCR 92; *M.R.F. v. Inspector, Kerala Govt., supra.*
30. *Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12; *Bachan Singh v. State of Punjab*, AIR 1980 SC 898 : (1980) 2 SCC 684.
31. *In re Kerala Education Bill*, AIR 1958 SC 956 : (1959) SCR 995; *Supra*. On this point, see, the *Bennett Coleman* case, *infra*.

The Directive Principles of State Policy are also relevant in considering whether a restriction on a Fundamental Right is reasonable or not.[32] A restriction which promotes a Directive Principle is generally regarded as reasonable.[33] As the Supreme Court has observed in *Kasturi Lal Lakshmi Reddy*,[34] "Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable. So also the concept of public interest must as far as possible receive its orientation from the Directive Principles."[35]

In *Papnasam*,[36] the Supreme Court has stated that the following principles and guidelines should be kept in view while considering the constitutionality of a statutory provision imposing restriction on a Fundamental Right guaranteed by Art. 19(1)(a) to (g) when challenged on the ground of unreasonableness of the restriction imposed by it:

(a) The restriction must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved.

(b) There must be a direct and proximate *nexus* or a reasonable connection between the restriction imposed and the object sought to beachived.

(c) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of qualify of reasonableness, therefore, is expected to vary from case to case.

(d) In interpreting constitutional provisions, the Court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation.

(e) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic.

(f) It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Art. 19 is being effectuated by the restriction imposed on the Fundamental Right.

(g) The Rights guaranteed to a citizen by Art. 19 do not confer any absolute or unconditional right. Each Right is subject to reasonable restriction which the legislature may impose in public interest. It is therefore

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32. On Directive Principles, see, *infra*, Ch. XXXIV.

33. *State of Bombay v. Balsara*, AIR 1951 SC 318 : 1951 SCR 682; *Quraishi v. State of Bihar*, AIR 1958 SC 731 : 1959 SCR 629; *Jalan Trading Co. v. D.M. Aney*, AIR 1979 SC 233 : (1979) 3 SCC 220; *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873 : (1981) 2 SCC 600.
Also see, Ch. XXXIV, *infra.*

34. *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*, AIR 1980 SC 1992 : (1980) 4 SCC 1.

35. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Union of India v. Hindustan Development Corp.*, AIR 1994 SC 988 : (1993) 4 SCC 499.

36. *Papnasam Labour Union v. Madura Coats Ltd.*, AIR 1995 SC 2200 : (1995) 1 SCC 501.

necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.

(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by procedural perniciousness or jurisprudence of remedies.

(i) A restriction imposed on a Fundamental Right guaranteed by Art. 19 must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonably discriminatory. *Ex hypothesi*, therefore, a restriction to be reasonable must also be consistent with Art. 14 of the Constitution.[37]

(j) In judging the reasonableness of the restriction imposed under Art. 19(6), the Court has to bear in mind Directive Principles of State Policy.[38]

(k) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a Directive Principle can be presumed to be reasonable restriction in public interest.

It is clear from the above that a Court evaluating the reasonableness of a restriction imposed on a Fundamental Right guaranteed by Art. 19 enjoys a lot of discretion in the matter.

A statute imposing a restriction with retrospective effect is not *prima facie* unreasonable; but retrospectivity is an element to be taken into consideration in determining whether the restriction is reasonable or not.[39]

A law affecting a Fundamental Right may be held bad for sheer vagueness and uncertainty.[40] The word 'restriction' includes 'prohibition'. Under certain circumstances, therefore, a law depriving a citizen of his Fundamental Right may be regarded as reasonable.[41]

A restriction to be valid must have a rational relation with the grounds for which the legislature is entitled to impose restrictions. These grounds are laid down in Arts. 19(2) to (6). Too remote connection between a restriction and the constitutionally authorized ground for restriction will render the law invalid.[42]

When a law is found to infringe a right guaranteed by Art. 19(1)(a) to (g), the law will be invalid unless it can be brought under the protective provisions of Arts. 19(2) to (6). The burden to show this is on those who seek that protection and not on the citizen to show that the restrictive enactment is invalid.[43] Thus, the onus is on the state to justify that the restriction imposed on any Fundamental Right guaranteed by Arts. 19(1)(*a*) to (*g*) is reasonable under clauses 19(2) to (6).[44]

Where a law purports to authorise the imposition of restrictions on a Fundamental Right in language wide enough to cover restrictions both within and with-

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37. *Supra*, Ch. XXI.
38. *Infra*, Ch. XXXIV.
39. See Sec. G., *infra*.
40. *K.A. Abbas v. Union of India*, AIR 1973 SC 123; see *infra*.
41. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375; see *infra*.
42. *Superintendent, District Jail v. Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
43. *Vrajlal M. & Co. v. State of Madhya Pradesh*, AIR 1970 SC 129 : (1969) 2 SCC 248.
44. *Laxmi Khandsari v. State of Uttar Pradesh*, *infra*.

out the limits of constitutionally permissible legislative actions affecting such right, it is not possible to uphold it even insofar as it may be applied within the constitutional limits as it is not severable.[45] So long as the possibility of such a provision being applied for purposes not sanctioned by the Constitution cannot be ruled out, it may be held to be wholly unconstitutional and void. For example, Art. 19(2) allows imposition of restrictions on the freedom of speech and expression only in cases where danger to the state is involved (Public order/Security of State), an enactment which is capable of being applied to cases where no such danger could arise cannot be held to be constitutional and valid to any extent.[46]

The above are only a few general guiding norms and not absolutes applicable with mathematical precision in judging the reasonableness of a restriction. The Judges enjoy a broad discretion in this respect as the Supreme Court itself has stated: [47]

> "In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

A consequence of such judicial discretion is the creation of uncertainty as to what constitutes a 'reasonable' restriction on a Fundamental Right. It is not always easy to find a common denominator in the various judicial pronouncements in this area as will be evident from the discussion that follows.

It needs to be emphasized that any restriction under Arts. 19(2) to 19(6) on any right guaranteed by Arts. 19(1)(*a*) to (*g*) can be imposed only by a law and not through a mere administrative direction or departmental instructions which have no statutory force.[48]

(b) EFFECT V. SUBJECT-MATTER TEST

A significant point which arises from a study of the above cases deserves to be mentioned here. What is the test to be applied to ascertain whether a law violates Art. 19(1)(*a*), or any other Fundamental Right? Should the Courts look into its subject-matter or the effect of the legislation for this purpose?

In *Bennett Coleman*,[49] the Central Government argued in support of the newsprint policy that its subject-matter was rationing of imported commodity and not freedom of speech, and the test to adjudge the validity of a regulatory provision should be its subject-matter, its pith and substance, and not its effect or result. The Court rejected this approach and enunciated the test: What is the 'direct' or 'inevitable' consequence or effect of the impugned state action on the Funda-

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45. On the doctrine of severability, see, *supra*, Ch. XX, Sec. H.
Also see, Ch. XL, *infra.*

46. *Romesh Thappar v. State of Madras,* AIR 1950 SC 124 : 1950 SCR 594.

47. *State of Madras v. Row,* AIR 1952 SC 196 : 1952 SCR 597.

48. *Kharak Singh v. State of Uttar Pradesh,* AIR 1963 SC 1295 : (1964) 1 SCR 332; *infra; Bijoe Emmanual v. State of Kerala,* AIR 1987 SC 748 : (1986) 3 SCC 615; *infra.*

49. *Bennett Coleman & Co. v. Union of India,* AIR 1973 SC 106 : (1972) 2 SCC 788; see, *infra.*

mental Right of the petitioner? "The true test is whether the effect of the impugned action is to take away or abridge Fundamental Rights."

A legislation or government action may have a direct effect on a Fundamental Right although its subject-matter may be different. The object of the law or executive action is irrelevant when it infringes a Fundamental Right although its subject-matter may be different. Even a law dealing directly with a purpose mentioned in Art. 19(2) would be invalid if it is not reasonable. The Court stated that "no law or action would state in words that rights of freedom of speech and expression are abridged or taken away. That is why Courts have to protect and guard Fundamental Rights by considering the scope and provisions of the Act and its effect upon the Fundamental Rights."

The Court held that, in the instant case, the object of the restrictions imposed on newspapers has nothing to do with the availability of newsprint or foreign exchange because these were post-quota restrictions which fell outside the purview of Art. 19(2). Thus, in the instant case, the Court applied the test of 'direct effect' of law on a Fundamental Right.

The 'effect' test has been applied by the Supreme Court in *Maneka Gandhi*[50] and several other cases.[51] For example, in the *Bank Nationalization* case,[52] the Supreme Court has said that it is the direct operation of the Act upon the rights which form the real test. However, earlier, in the *Gopalan* case,[53] the Supreme Court had applied the test of subject-matter in order to uphold the validity of the Preventive Detention Act against a challenge under Art. 19(1)(*a*).[54]

Logically, the *Bennett Coleman* approach should mean that the validity of the Preventive Detention Act should be adjudged with reference to Art. 19(1)(*a*) as well along with Arts. 21 and 22.[55] In course of time, the *Bennett Coleman* approach has been accepted and the *Gopalan* approach discarded.[56] This approach gives greater protection to Fundamental Rights.

It may, however, be noted that under the *Bennett Coleman* doctrine, it is the 'direct' effect on a Fundamental Right which is determinative. A difference of judicial opinion is possible on the question whether the 'effect' of a provision on a Fundamental Right is 'direct' or 'indirect'.[57]

C. FREEDOM OF SPEECH: ARTICLES 19(1)(*A*) AND 19(2)

(a) IMPORTANCE OF FREEDOM OF SPEECH

Freedom of speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a

50. *Infra*, Ch. XXVI.
51. As for example, see, the *Sakal Papers* case, *infra*.
52. *Infra*, Ch. XXXI.
53. See *infra*, Ch. XXVI, Sec. B.
54. The subject-matter test was also applied in the *Hamdard Dawakhana* case, *infra*. Also, *Ram Singh v. Delhi*, *infra*, Ch. XXVI.
55. See, *infra*, Chs. XXVI and XXVII.
56. *Infra*, Chs. XXVI and XXVII.
57. This test has been applied in the *Express Newspapers* case, *infra*; Also see the judgment of MATHEW, J., in the *Bennett Coleman* case, *supra*.

preferred position in the hierarchy of liberties giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties.[58]

In a democracy, freedom of speech and expression opens up channels of free discussion of issues. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. Freedom of speech and expression, just as equality clause and the guarantee of life and liberty has been very broadly construed by the Supreme Court right from the 1950s. It has been variously described as a "basic human right", "a natural right" and the like. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help formation of one's opinion and view point and debates on matters of public concern. So long as the expression is confined to nationalism, patriotism and love for the motherland, the use of the National Flag by way of expression of those sentiments would be a Fundamental Right. It cannot be used for commercial purpose or otherwise. The law in USA not only recognizes the right to fly National Flag but it has gone to the extent of holding flag burning as an expression of free speech and free expression of its citizens against the establishment but our constitution does not approve the latter part of the right as envisaged in the U.S.[59]

In *Maneka Gandhi v. Union of India*,[60] BHAGWATI, J., has emphasized on the significance of the freedom of speech and expression in these words:

> "Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

In 1927, in *Whitney v. California*,[61] LOUIS BRANDEIS, J., made a classic statement on the freedom of speech in the context of the U.S. Constitution:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties... They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile.... that public discussion is a political duty; and that this should be a fundamental principle of the American government."

Talking about the First Amendment to the U.S. Constitution which guarantees freedom of speech in the U.S.A. The U.S. Supreme Court has observed:[62]

> "It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee".

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58. *Report of the Second Press Comm.*, Vol. I, 34-35.
59. *Union of India v. Naveen Jindal*, (2004) 2 SCC 510 : AIR 2004 SC 1559.
60. AIR 1978 SC 597 : (1978) 1 SCC 248.
61. 247 U.S. 214.
62. *Associated Press v. U.S.*, 326 US 1.

(b) ARTICLE 19(1)(A) OF THE CONSTITUTION

Out of the several rights enumerated in clause (1) of Article 19, the right in sub-clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by reference to freedom.[63]

Article 19(1)(*a*) guarantees to all citizens the right to 'freedom of speech and expression'. Under Art. 19(2), 'reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under Art. 19(1)(*a*) not falling within the four corners of Art. 19(2) cannot be valid.

The freedom of speech under Art. 19(1)(*a*) includes the right to express one's views and opinions at any issue through any medium, *e.g.*, by words of mouth, writing, printing, picture, film, movie, etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under Art. 19(2). Free expression cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary.[64]

Article 19(1)(*a*) corresponds to Amendment I of the U.S. Constitution which says: "Congress shall make no law....abridging the freedom of speech or of the press." Unlike Art. 19(1)(*a*) of the Indian Constitution, the provision in the U.S. Constitution has two notable features, *viz.*,

(1) Freedom of Press is specifically mentioned therein;

(2) No restrictions are mentioned on the freedom of speech unlike Art. 19(2) which spells out the restrictions on Art. 19(1).

The Courts in the U.S.A. have to spell out the restrictions on this right from case to case.[65] This provision protects the right to receive information and ideas. The First Amendment preserves "an uninhibited market place of ideas in which truth will ultimately prevail...It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences".[66]

As stated earlier, in case of a conflict between the freedom of speech under Art. 19(1)(*a*) and the privilege of Parliament or a State Legislature under Art. 105 or 194 respectively, the freedom of speech will give way to accommodate the legislative privilege.[67] It has also been ruled by the Supreme Court that the freedom of speech available to a Member of Parliament under Art. 105(1) (as well as to a Member of a State Legislature under Art. 194(1)] is wider in amplitude than the right to freedom of speech and expression guaranteed under Art. 19(1)(*a*) since the freedom of speech of the members of a Legislature on the floor of the House under Art. 105(1) is not subject to the limitations contained in Art. 19(2).[68]

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63. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
64. *Radha Mohan Lal v. Rajasthan High Court*, (2003) 3 SCC 427 : AIR 2003 SC 1467.
65. For a discussion on the American provision, see, *Secretary, Ministry of Information & Broadcasting v. Cricket Association, Bengal*, AIR 1995 SC 1236 : (1995) 2 SCC 161, *et. seq.*
66. *Kleindiest v. Mandel*, 408 US 753, 763.
67. *Supra*, Chs. II and VI.
68. *P.V. Narasimha Rao v. State*, AIR 1998 SC 2120 : (1958) 4 SCC 626; *supra*, Ch. II.

The Jammu & Kashmir Legislature has passed an anti-defection law requiring a member of the legislature to resign his seat in the legislature if he defects from the party to which he belonged at the time of his election to the legislature. The purpose of the law is to discourage defection which has so much vitiated the country's political atmosphere. The law was challenged under Art. 19(1)(*a*) on the ground that it unreasonably curbs the right of dissent and violates the freedom of speech and expression of a legislator. Rejecting the challenge, the Court has pointed out that the totality of rights enjoyed by a legislator including the freedom to speak on the floor of the House are merely privileges governed by Art. 105 and not Fundamental Rights.[69]

In *Kihota Hollohon v. Zachilhu*,[70] the Supreme Court has refused to test the anti-defection law passed by Parliament to prohibit defection of members of Legislatures and Parliament from one political party to another against the touchstone of Art. 19(1)(*a*). Here arises a clash of two values—(*i*) freedom of speech and expression; (*ii*) to improve and strengthen the democratic fabric of the country. The Court has given preference to promotion of democracy over freedom of speech and expression if there is any inconsistency between the two. "Unprincipled defection is a political and social evil." It subverts democracy.

An exhibitor of video films, it has been held, cannot claim protection of Art. 19(1)(*a*) as he is not propagating or circulating any of his own views. The producer of a film can, but a mere exhibitor of video films cannot, claim protection of Art. 19(1)(*a*).A right of a film maker to make and exhibit his film is a part of his Fundamental Right of freedom of speech and expression under Article 19(1)(a) and the restrictions imposed under Sections 4 and 5A of the Cinematograph Act, 1952 relating to certification by Censor Board by applying the guiding principles set out in Section 5B is a reasonable restrictions contemplated under Article 19(2).[71] The exhibitor shows films merely to earn profit and not to propagate any ideas or arousing any public opinion. An exhibitor of films cannot be equated with circulation or distribution of newspapers. Exhibiting films is a commercial activity. Circulation of newspapers and magazines continues with the publisher but the film after production goes out of the producer's hands for being exhibited by such persons as are totally unconnected with production.[72]

The phrase 'speech and expression' used in Art. 19(1)(*a*) has broad connotation. The right to paint or sing or dance or to write poetry or literature is also covered by Art. 19(1)(*a*) because the common basic characteristic of all these activities is freedom of speech and expression.[73]

THE RIGHT TO FLY NATIONAL FLAG AND SING NATIONAL ANTHEM

The right to fly the national flag however is neither unfettered, unsubscribed, unrestricted nor unchannellised. Right to fly the flag is regulated by the Emblems and Names (Prevention of Improper Use) Act, 1950 and Prevention of Insults to National Honour Act, 1971.

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69. *Mian Bashir v. State of Jammu & Kashmir*, AIR 1982 J & K 26.
70. AIR 1993 SC 412 : 1992 Supp (2) SCC 651; *supra*, Ch. II, Sec. F(a).
71. *Director of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.
72. *Star Video v. State of Uttar Pradesh*, AIR 1994 All 25.
73. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 : (1978) 1 SCC 248; *Usha Uthup v. State of West Bengal*, AIR 1984 Cal. 268.

National Anthem, National Flag and National Song are secular symbols of the nationhood. They represent the supreme collective expression of commitment and loyalty to the nation as well as patriotism for the country. They are necessary adjuncts of sovereignty being symbols and actions associated therewith. If the unity and integrity of India is to be perceived in diverse situations, the feeling of loyalty, commitment and patriotism can be judged not only by giving effect to constitutionalism but also on their secular symbols. Unrestricted use of the National Flag may result in commercial exploitation of the flag. The unrestricted use of the National Flag may result in its indiscriminate use in procession, meetings etc. Instances of insults to the National Flag as a matter of protest may also occur. It must certainly be treated with the utmost respect and dignity. This might not be possible without imposing any restrictions on its use. Flag Code although is not a law within the meaning of Article 13(3) (a) of the Constitution of India, for the purpose of clause (2) of Article 19 it would not restrictively regulate the free exercise of the right of flying the National Flag. But the Flag Code to the extent it provides for preserving respect and dignity of the National Flag, the same deserves to be followed.[74] In other words, our National Flag cannot suffer any indignity.

In *Baragur Ramachandrappa*[75] The Supreme Court rejected the challenge that Section 95 of the Criminal Procedure Code which confers power on the State Government to forfeit certain publications referred to in that section including news papers, was violative of Article 19(1) (a). The issue as to the validity of the section arose in relation to a book which was considered by the petitioner to be objectionable, inflammatory, hurtful and insulting to the sentiments and feelings of a religious sect known as Veerashaivas who were the followers of Basaveshwara, a great saint of the twelfth century. On behalf of the author it was contended that the entire matter should be examined in the backdrop of the philosophy and principles underlying sub clause (h) of the Article 51A of the Constitution which envisaged the development of a scientific temperament, a feeling of humanism and a spirit of inquiry and reform as well as the Fundamental Right to freedom of speech under Article 19(1)(a). The Court after taking into consideration the vast disparities in language, culture and religion in the country, was of the view that unwarranted and malicious criticism or interference in the faith of others could not be accepted, and after referring to certain earlier cases of the Court[76] held that the challenge could not be sustained on the finding that publication of a book which endangers public order and held that the extracts quoted from "The Book" from chapter XII were not in sync with the rest of the novel and had been deliberately designed to be hurtful.

(c) RIGHT TO SILENCE

The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends the freedom to be free

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74. *Union of India v. Naveen Jindal,* (2004) 2 SCC 510 : AIR 2004 SC 1559.
75. *Baragur Ramachandrappa v. State of Karnataka,* (2007) 5 SCC 11 : (2007) 6 JT 411.
76. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India,* (1985) 1 SCC 641; *The State of Uttar Pradesh v. Lalai Singh Yadav,* (1976) 4 SCC 213; *S. Rangarajan v. P. Jagjivan Ram,* (1989) 2 SCC 574.

from what one desires to be free from. A loudspeaker forces a person to hear what he wishes not to hear. The use of a loudspeaker may be incidental to the exercise of the right but, its use is not a matter of right, or part of the rights guaranteed by Article 19(1).[77]

(d) RIGHT TO RECEIVE INFORMATION

The expression "freedom of speech and expression" in Art. 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

In People's Union for Civil Liberties, the Supreme Court dealt with this aspect of the freedom elaborately. The right of the citizens to obtain information on matters relating to public acts flows from the Fundamental Right enshrined in Art. 19(1)(a). Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a).[78]

Freedom of expression, as contemplated by Article 19(1) (a) which in many respects overlaps and coincides with freedom of speech, has manifold meanings. It need not and ought not to be confined to expressing something in words orally or in writing. Even a manifestation of an emotion, feeling etc. without words would amount to expression. Communication of emotion and display of talent through music, painting etc. is also a sort of expression. The Court noted that ballot is the instrument by which the voter expresses his choice between candidates.[79]

While expounding the scope of "expression" in Article 19(1) (a), the Supreme Court has drawn a distinction between the conferment of the right to vote on fulfillment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. The Court pointed out that though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter and that is where Article 19(1) (a) is attracted.[80]

Since right to information is a constituent of the freedom of expression under Art. 19(1)(a), the amended S. 33-B of Representation of People Act, 1951 which provides that notwithstanding anything contained in the judgment of any Court or directions issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information in respect of his election which is not re-

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77. *Noise Pollution (V), In re,* (2005) 5 SCC 733 : AIR 2005 SC 3136.
78. *PUCL v. Union of India,* (2003) 4 SCC 399 : AIR 2003 SC 2363.
79. *Ibid.*
80. *PUCL v. Union of India,* (2003) 4 SCC 399.

quired to be disclosed or furnished under the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as the Supreme Court has held that the voter has a Fundamental Right under Article 19(1)(a) to know the antecedents of a candidate and was therefore *ultra vires* Act. 19(1)(a).[81]

It has been said that although elections are fought by political parties, the same would be a farce if the voters are unaware of the antecedents of candidates contesting elections and it would be a vote without any basis. Such elections cannot be considered as free or fair. The concomitant of the right to vote which is the basic postulate of democracy is two fold:

First, formulation of an opinion about the candidates; and

Secondly the expression of choice by casing a vote in favour of the candidate preferred by the voter.[82] In Peoples Union for Civil Liberties[83] the petitioners sought disclosure of information relating to safety violations and defects in various nuclear power plants, the Court upheld the contention of Union of India that data about fissile materials are matters of sensitive character which may enable the enemies of the nation to monitor strategic activities and therefore any information relating to training features, processes or technology of nuclear plants cannot be disclosed.

Right to information is a facet of the right to freedom of speech and expression as contained in Article 19(1)(a) of the Constitution. Right to information, thus, indisputably is a Fundamental Right.

But the right does not carry with it an unrestricted right to gather information. A reasonable restriction on the exercise of the right to know or right to information is always permissible in the interest of the security of the State. Generally, the exemptions/exceptions under the laws referred to in Article 19(2) entitled the Government to withhold information relating to the following matters :

(i) International relations,

(ii) National security (including defence) and public safety;

(iii) Investigation, detection and prevention of crime;

(iv) Internal deliberations of the Government;

(v) Information received in confidence from a source outside the Government;

(vi) Information, which if disclosed, would violate the privacy of the individual;

(vii) Information of an economic nature, (including trade secrets) which, if disclosed, would confer an unfair advantage on some persons or concern, or, subject some person or Government to an unfair disadvantage;

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81. *People's Union for Civil Liberties (PUCL) v. Union of India,* (2003) 4 SCC 399 : AIR 2003 SC 2363.

82. *People's Union for Civil Liberties (PUCL) v. Union of India,* (2003) 4 SCC 399 : AIR 2003 SC 2363.

83. *Peoples Union for Civil/Liberties v. Union of India,* (2004) 2 SCC 476 : AIR 2004 SC 1442.

(viii) Information which is subject to a claim of legal professional privilege, e.g. communication between a legal adviser and the client; between a physician and the patient;

(ix) Information about scientific discoveries.[84]

(x) Much of this has been covered by the Right to Information Act, 2006

The Supreme Court has given a broad dimension to Art. 19(1)(*a*) by laying down the proposition that freedom of speech involves not only communication, but also receipt, of information. Communication and receipt of information are the two sides of the same coin. Right to know is a basic right of the citizens of a free country and Art. 19(1)(*a*) protects this right. The right to receive information springs from the right to freedom of speech and expression enshrined in Art. 19(1)(*a*). The freedom to receive and to communicate information and ideas without interference is an important aspect of the freedom of speech and expression. Without adequate information, a person cannot form an informed opinion.

When allegations of political patronage are made, the public in general has a right to know the circumstances under which their elected representatives got such allotment.[85]

In case of a matter being part of public records, including Court records cannot be claimed.[86]

In *State of Uttar Pradesh v. Raj Narain*,[87] the Supreme Court has held that Art. 19(1)(a) not only guarantees freedom of speech and expression, it also ensures and comprehends the right of the citizens to know, the right to receive information regarding matters of public concern. The Supreme Court has underlined the significance of the right to know in a democracy in these words:

> "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption".

In *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*,[88] the Supreme Court reiterated the proposition

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84. *People's Union for Civil Liberties v. Union of India*, (2004) 2 SCC 476 : AIR 2004 SC 1442.
85. *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673.
86. *District Registrar and Collector v. Canara Bank* (2005) 1 SCC 496 : AIR 2004 SC 1442.
87. *State of Uttar Pradesh v. Raj Narain*, AIR 1975 SC 865, 884 : (1975) 4 SCC 428.
Also see, *Reliance Petrochemicals Ltd. v. Indian Express*, AIR 1989 SC 190 : (1988) 4 SCC 592; *infra*, footnote 38 on 1430.
88. *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236; *infra*, 1177-78.

that the freedom of speech and expression guaranteed by Art. 19(1)(a) includes the right to acquire information and to disseminate the same.

In *Dinesh Trivedi, M.P. and Others v. Union of India*,[89] the Supreme Court dealt with the right to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court further observed:

> "Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".

The Delhi High Court in *Association for Democratic Reforms v. Union of India*,[90] has emphasized that the right to receive information acquires great significance in the context of elections.[91]

It is now common knowledge that there is criminalisation of politics in India. It is a matter of great concern that anti-social and criminals are seeking to enter the political arena through the mechanism of elections to State Legislatures and even to Parliament. Parliament has not yet been able to enact a law to uproot the evil. In this scenario, the Delhi High Court has sought to cleanse the electoral process through the mechanism of the right to know of the people. The Delhi High Court has ruled that from every candidate for election, the Election Commission shall secure for the voters the following information:

(1) Whether the candidate is accused of any offence punishable with imprisonment.

(2) Assets possessed by the candidate, his or her spouse and dependant children.

(3) Facts denoting the candidate's competence and suitability for being a parliamentarian. This should include the candidate's educational qualification.

(4) Any other relevant information regarding candidates' competence to be a member of Parliament or State Legislature.

It needs to be emphasized that through its pronouncement, the Delhi High Court is not seeking to impose any additional qualification on a candidate over and above what the Constitution and the relevant law prescribe. What the Court is seeking to achieve is that a voter after knowing the background of the candidate will vote properly. As the Court has said, "… since the future of the country depends upon the power of the ballot, the voters must be given an opportunity for making an informed decision." Exercise of the informed option to vote in favour or against a candidate will strengthen democracy in the country and root out the evil of corruption and criminality at present extant in politics.

On appeal, the Supreme Court substantially agreed with The Delhi High Court. The Court has upheld the right of a voter to know about the antecedents of

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89. (1997) 4 SCC 306 : (1997) 1 SCJ 697.

90. *Association for Democratic Reforms v. Union of India*, AIR 2001 Del 126, 137. Also see, *infra*, 1431.

91. *Supra*, Ch. XIX.

his candidate as a part of his Fundamental Right under Art. 19(1)(a). Democracy cannot survive without free and fairly informed voters. The Court has observed:

> "... one-sided information, disinformation, mis-information and non-information will equally create an uniformed citizenary which makes democracy a faree... Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions".[1]

The Court has ruled that candidates for the Lok Sabha or State Legislative Assemblies would have to disclose their antecedents, assets and educational qualifications to help the electorate make the right choice. The Court has said: "Votes cast by uninformed voters in favour of a candidate would be meaningless." The common man may think twice before electing law-breakers as law-makers. Reiterating that law-makers are public servants and, therefore, the people of the country have a right to know about every public act by public functionaries, including MPs and MLAs who are public functionaries.

Rejecting the argument that the voters do not have a right to know about the "private" affairs of public functionaries, the Court has observed:

> "There are widespread allegations of corruption against persons holding post and power. In such a situation, the question is not of knowing personal affairs but to have openness in democracy for attempting to cure the cancerous growth of corruption by a few rays of light".

The Court has said that the Election Commission must make it mandatory for the candidates to give details on the following counts:

- Whether the candidate is convicted or acquitted or discharged of any criminal offence in the past—whether he has been punished with imprisonment or fine?
- Prior to six months of filing of nomination, whether the candidates has been accused in any pending case, of any offence punishable with imprisonment for two years or more. Whether charge is framed or cognisance is taken by the Court of law, if so details thereof;
- The assets (immovable, movable, bank balances etc) of a candidate and of his/her spouse and that of dependants;
- Liabilities, if any, particularly whether there are any overdues of any public financial institution or government dues;
- The educational qualification of the candidate.

It will be appreciated that the judiciary has used its craftsmanship to harness the right to information to achieve an extremely laudable social objective, viz., that of preventing criminalisation of the Indian politics.

Since right to information is not absolute, a report made by Committee of Judges regarding the conduct of High Court Judges to the Chief Justice of India is wholly confidential and is only for the purpose of satisfaction of the Chief Justice of India. It is purely preliminary in nature, *ad hoc* and not final. The authority by which the Chief Justice of India can exercise this power of inquiry is moral or ethical and not in the exercise of powers under any law. Exercise of such

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1. *Union of India v. Association for Democratic Reforms*, JT 2002(4) SC 501.
Also see, Ch. II, Sec. D(e), *supra*; Ch. XIX, Sec. D(b), *supra*.

power of the Chief Justice of India based on moral authority cannot be made the subject matter of a writ petition to disclose a report made to him.[2]

(e) FREEDOM OF THE PRESS

In the U.S.A., the First Amendment, mentioned above, specifically protects a free press. The view developed by the U.S. Supreme Court is that freedom of the press includes more than merely serving as a "neutral conduit of information between the people and their elected leaders or as a neutral form of debate."

The prime purpose of the free press guarantee is regarded as creating a fourth institution outside the government as an additional check on the three official branches—executive, legislative and the judiciary.[3] It is the primary function of the press to provide comprehensive and objective information on all aspects of the country's social, economic and political life. The press serves as a powerful antidote to any abuse of power by government officials and as a means for keeping the elected officials responsible to the people whom they were elected to serve.

The democratic credentials of a state are judged today by the extent of the freedom press enjoys in that state. DOUGLAS, J., of the U.S. Supreme Court has observed that "acceptance by Government of a dissident press is a measure of the maturity of the nation."[4] Suppression of the right of the press to praise or criticise government agents and to clamour and contend for or against change violates the First Amendment by restraining one of the very agencies the framers of the U.S. Constitution selected to improve the American society and to keep it free.[5] The freedom of speech and of the press is protected not only from direct government encroachment but also from more subtle government interference. The U.S. Supreme Court has emphasized that it has power to nullify "action which encroaches on freedom of utterance under the guise of punishing libel."[6]

In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Art. 19(1)(*a*). There is no specific provision ensuring freedom of the press as such. The freedom of the press is regarded as a "species of which freedom of expression is a genus."[7] Thus, being only a right flowing from the freedom of speech, the freedom of the press in India stands on no higher footing than the freedom of speech of a citizen, and the press enjoys no privilege as such distinct from the freedom of the citizen.

The Supreme Court has laid emphasis in several cases on the importance of maintaining freedom of press in a democratic society. The press seeks to advance public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Articles and news are published in the press from time to time to expose the weaknesses of the government. This leads at times to the suppression of the freedom of the press by the government.

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2. *Indira Jaising v. Registrar General, Supreme Court of India*, (2003) 5 SCC 494.
3. *New York Times v. Sullivan*, 376 U.S. 254; *New York Times Company v. United States*, 403 U.S. 713 (1971) (known as the Pentagon Papers case).
4. *Terminiello v. Chicago*, 337 U.S. 1.
5. *Mills v. Alabama*, 384 U.S. 214.
6. *Beauharnais v. Illinois*, 72 S. Ct. 1070.
7. *Sakal Papers v. Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842.

It is, therefore, the primary duty of the Courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with the freedom of the press contrary to the constitutional mandate.[8]

In *Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer*,[9] the Supreme Court has reiterated that though freedom of the press is not expressly guaranteed as a Fundamental Right, it is implicit in the freedom of speech and expression. Freedom of the press has always been a cherished right in all democratic countries and the press has rightly been described as the fourth estate. The democratic credentials of a state are judged by the extent of freedom the press enjoys in that state.

The Supreme Court has emphasized that the freedom of the press is not so much for the benefit of the press as for the benefit of the general community because the community has a right to be supplied with information and the government owes a duty to educate the people within the limits of its resources.

Article 19(1)(*a*) applies to citizens only and so a non-citizen running a newspaper cannot seek the guarantee of this constitutional provision.

Imposition of pre-censorship on a newspaper,[10] or prohibiting it from publishing its own views or those of its correspondents on a burning topic of the day,[11] constitute an encroachment on the freedom of speech and expression. The freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as a publication is of little value without circulation. Therefore, imposition of a ban upon entry and circulation of a journal within a State is restriction of Art. 19(1)(*a*).[12]

Olivier v. Buttigieg,[13] a Privy Council case from Malta, is interesting on the point of circulation. The constitutional provisions in India and Malta regarding freedom of speech are practically synonymous. The church authorities condemned 'Voice of Malta', a paper run by the opposition party. The Health Minister thereupon issued a circular prohibiting the entry of the newspaper in the various hospitals and branches of the Health Department. The entry of any other newspaper was not prohibited. The Privy Council decided that the Minister's order amounted to a hindrance in the way of the editor of the paper in the enjoyment of his freedom to impart ideas and information which is an essential part of the freedom of speech and expression. The Privy Council refused to accept the argument that the hindrance was slight and that it could be ignored as being *de minimis.*

(f) SAKAL PAPERS

An Act[14] and a government order[15] thereunder sought to regulate the number of pages according to the price charged, prescribed the number of supplements to

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8. *Indian Express Newspapers* (*Bombay*) *P. Ltd. v. Union of India,* AIR 1986 SC 515 at 527 : (1985) 1 SCC 641.
9. (1994) 2 SCC 434.
10. *Brij Bhushan v. Delhi*, AIR 1950 SC 129 : 1950 SCR 605.
11. *Virendra v. State of Punjab,* AIR 1957 SC 896 : 1958 SCR 308.
12. *Romesh Thappar v. State of Madras,* AIR 1950 SC 124 : 1950 SCR 594.
13. (1966) 2 All E.R. 459.
14. The Newspaper (Price and Page) Act, 1956.
15. The Daily Newspaper (Price and Page) Order, 1960.

be published, and regulate the size and area of advertisements in relation to other matter contained in a newspaper. Thus, the number of pages published by a newspaper depended upon the price charged to the readers.

The Supreme Court ruled it invalid for its purpose was to reduce circulation of some newspapers by making their price unattractively high for their readers. Reduction in the area for advertisements would reduce revenues forcing the newspapers to raise their prices which was also bound to affect circulation. This directly affected the freedom of speech and expression because inherent in this freedom is the right to publish and circulate the publication.

Art 19(1)(*a*) guarantees not only what a person circulates but also the volume of circulation. "The freedom of a newspaper to publish any number of pages or to circulate it to any number of persons is each an integral part of the freedom of speech and expression. A restraint placed upon either of them would be a direct infringement of the right of freedom of speech and expression" Being a restriction on Art. 19(1)(*a*), it was not related to any of the purposes mentioned in Art. 19(2), and so it was invalid.[16]

In the instant case, the Central Government sought to support the Act and the order by pleading that they regulated the commercial aspects of the newspapers, and not dissemination of news and views by them, and amounted to reasonable restrictions under Art. 19(6).[17] The Court agreed that newspapers have two aspects—dissemination of news and views and commercial. The two aspects are different, the former falls under Art. 19(1)(*a*) read with Art. 19(2), and the latter falls under Art. 19(1)(*g*) and can be regulated under Art. 19(6).[18] However, the state cannot seek to place restrictions on business by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in Art. 19(6). "Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen."

The grounds on which the two freedoms—of speech and of trade and commerce—can be curtailed are different. The freedom of speech cannot be curtailed 'in the interests of the general public', but the freedom to carry on business can be. If a law directly affecting freedom of speech is challenged, "it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6)."

Article 19 enumerates different freedoms separately and then specifies the extent of restrictions to which each of them can be subjected and the objects for securing which this could be done.[19] A citizen is entitled to enjoy each and every one of the freedoms together and Art. 19(1) does not prefer one freedom to another. The state cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. "All the greater reason, therefore, for holding that the state cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom." Therefore, referring the press as a business and justifying the impugned restriction under Art. 19(6) as a proper restriction on the right to carry on the business of publishing a newspaper

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16. For discussion on Art. 19(2), see *below*.
17. *Sakal Papers v. Union of India*, AIR 1962 SC 305, at 314 : (1962) 3 SCR 842.
18. For discussion on Arts. 19(1)(*g*) read with 19(6), see, *infra*, Sec.H.
19. See, *infra*, for discussion on restrictions on the freedoms guaranteed by Arts. 19(1)(*a*) to 19(1)(*g*).

"would be wholly irrelevant for considering whether the impugned Act infringes or does not infringe the freedom guaranteed by Art. 19(1)(*a*)." This means that freedom of speech cannot be restricted for the purpose of regulating the commercial aspect of the activities of the newspapers.

As the purpose of the law in question was to effect directly the right of circulation of newspapers "which would necessarily undermine their power to influence public opinion it cannot but be regarded as a dangerous weapon which is capable of being used against democracy itself." The Court emphasized, "The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and Governments and must be preserved."[20]

(g) *BENNETT COLEMAN*

Bennett Coleman & Co. v. Union of India,[21] is a case of great significance in the area of freedom of speech and expression. India faces a shortage of indigenous newsprint. Therefore, newsprint has to be imported from foreign countries. Because of the shortage of foreign exchange, quantity of newsprint imported was not adequate to meet all requirements. Some restrictions, therefore, became necessary on the consumption of newsprint. Accordingly, a system of newsprint quota for newspapers was evolved. The actual consumption of newsprint by a newspaper during the year 1970-71 or 1971-72, whichever was less, was taken as the base. For dailies with a circulation up to 100,000 copies, 10 per cent increase in the basic entitlement was to be granted, but for newspapers with a larger circulation, the increase was to be only 3 per cent. Newspapers with less than 10 pages daily could raise the number of pages by 20 per cent subject to the ceiling of 10. A few more restrictions were imposed on the user of newsprint.

The dominant direction of the policy was to curtail the growth of big newspapers which could not increase the number of pages, page-area or periodicity by reducing circulation to meet their requirements even within their admissible quota of newsprint. This newsprint policy was challenged in the Supreme Court.

By a majority, the Supreme Court declared the policy unconstitutional. While the Government could evolve a policy of allotting newsprint on a fair and equitable basis, keeping in view the interests of small, medium and big newspapers, the Government could not, in the garb of regulating distribution of newsprint, control the growth and circulation of newspapers. In effect, here the newsprint policy became the newspaper control policy. While newsprint quota could be fixed on a reasonable basis, post-quota restrictions could not be imposed. The newspapers should be left free to determine their pages, circulation and new editions within their fixed quota. The policy of limiting all papers whether small or large, in English or an Indian language, to 10 pages was held to be discriminatory as it treated unequals as equals. The restrictions imposed cut at the very root of the guaranteed freedom. The Court stated:[22]

> "The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect

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20. AIR 1962 SC at 314-15 : 91962) 3 SCR 842.

21. AIR 1973 SC 106 : (1972) 2 SCC 788.
For a comment on the case by the author, see 15 *JILI* 154.

22. *Ibid*, at 120-121.

> is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed."

The Court maintained that the freedom of the press embodies the right of the people to speak and express. The freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views. The press has the right of free publication and their circulation without any obvious restraint on publication. In the words of the Court: "Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content."[23]

(h) INDIAN EXPRESS

Several newspapers filed writ petitions challenging the constitutional validity of the notifications issued by the Centre imposing from March 1, 1981, specified rates of customs duty and auxiliary duty on newsprint imported by different categories of newspapers. The levy was challenged in the Supreme Court. The main plea of the petitioners was that the impugned levy of duty on imported newsprint was excessive and had the direct effect of crippling the freedom of speech and expression and the carrying on of the business of publishing newspapers as it had led to an increase in the price of newspapers resulting in reduction of their circulation.

The Supreme Court accepted the plea of the newspapers with the following observation:[24]

> "What may, however, have to be observed in levying a tax on newspaper industry is that it should not be an overburden on newspapers which constitute the Fourth Estate of the country. Nor should it single out newspaper industry for harsh treatment. A wise administrator should realise that the imposition of a tax like the customs duty on newsprint is an imposition on knowledge and would virtually amount to a burden on a man for being literate."

The fundamental principle involved was the "people's right to know". Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of the people in the administration. The Court noted that with a view to checking malpractices interfering with the free flow of information, democratic constitutions the world over make provisions guaranteeing freedom of speech and expression and laying down the limits of interference therewith. It is, therefore, the primary duty of all national Courts to uphold this freedom and invalidate all laws or administrative actions which interfere with this freedom, contrary to the constitutional mandate.

The Court pointed out that the imposition of customs duty on newsprint amounts to an imposition of tax on knowledge and virtually amounts to a burden imposed on a man for being literate and for being conscious of his duty as a citizen to inform himself of the world around him. It is on account of the special interest which society has in the freedom of speech and expression that the approach of the government must be more cautious while levying taxes on matters concerning newspaper industry than while levying taxes on other matters.

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23. *Ibid*, at 130.

24. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India,* AIR 1986 SC 515 at 539 : (1985) 1 SCC 641.

But instead of quashing the impugned notification itself, the Court directed the Government to consider within six months the entire question of levy of import duty or auxiliary duty on newsprint with effect from March 1, 1981. If on such reconsideration, the government decided to modify the levy of the duty, it should take necessary steps to that end. Quashing the impugned notifications would have led to the petitioners paying much higher duty and the result would have been disastrous to them.

The Court emphasized that it did not wish the Government to be deprived of the legitimate duty which the petitioners would have to pay on the imported newsprint. The Court thus rejected the plea of the petitioners that no duty could be levied on the newspaper industry. Having regard to the facilities like telephones, teleprinters, postal, transport and other communication amenities provided by the state at considerable cost to itself, the newspapers "have to bear the common fiscal burden like the others." However, such a levy was "subject to review by Courts in the light of the provisions of the Constitution."[25] The Court has to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul.

Underlining the importance of the freedom of the press in democratic society, the Court has stated that in to-day's free world, freedom of press is the heart of social and political intercourse. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. With a view to checking malpractices interfering with the free flow of information, democratic constitutions all the world over make provisions guaranteeing the freedom of speech and expression and laying down the limits of interference with it. "It is, therefore, the primary duty of all the national Courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate."[26]

(i) HINDUSTAN TIMES

Executive orders issued by State Government under Art. 162 directing deduction of an amount of 5% from the bills payable to newspapers having circulation of more than 25,000 copies for publication of government advertisements for implementation of its "Pension and Social Security Scheme for Full time Journalists" has been held to be *ultra vires*. The Court observed that advertisements in newspapers play an important role in the matter of revenue of the newspapers and have a direct nexus with its circulation by making the newspapers available to the readers at a price at which they can afford and they have no other option but to collect more funds by publishing commercial and other advertisements and as such the State cannot, in view of the equality doctrine contained in Article 14 of the Constitution, resort to the theory of "take it or leave it". Every executive action which operates to the prejudice of any person must have the sanction of

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25. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India,* AIR 1986 SC 515 at 539 : (1985) 1 SCC 641.
26. *Ibid*, at 527.

law and the executive cannot interfere with the rights and liabilities of any person unless the legality thereof is supportable in any Court of law.[27]

(j) OTHER ASPECTS OF THE FREEDOM OF PRESS

The newspaper reporters can interview the prisoners condemned to death if they are willing to be interviewed. Unless, in a given case, there are weighty reasons for denying the opportunity to interview a condemned prisoner, the right of the press to interview the prisoners should not be denied. The reasons for denying the interview should be recorded in writing.[28] In the instant case, the President had declined to commute the death sentence to life imprisonment; the convicted prisoners were willing to be interviewed. Accordingly, the Court ruled that the denial of right to the petitioner press reporter to interview these condemned prisoners, in the absence of any weighty considerations, was not justified.

Again in *M. Hasan v. State of Andhra Pradesh*,[29] the Andhra Pradesh High Court has held that denial of permission to a press reporter to interview a willing condemned prisoner on a ground not falling within Art. 19(2) is not valid. "Any such denial is deprivation of a citizen's Fundamental Right of freedom of speech and expression". Convicts are not wholly denuded of their Fundamental Rights.

During the course of a trial of a suit for damages, the judge ordered that the evidence of a witness should not be published in the newspapers. The Supreme Court rejected the plea that the order infringed the Fundamental Right of a press reporter under Art. 19(1)(*a*). The Court observed that, as a judicial decision purports to decide the controversy between the parties before the Court and nothing more, a judicial verdict pronounced by a Court in relation to a matter brought before it for its decision would not affect the right of citizens under Art. 19(1).[30]

An Act[31] enacted to regulate conditions of service of employees of newspaper establishments, *e.g.*, gratuity, hours of work, leave, wages, *etc.* does not violate Art. 19(1)(*a*). An argument against its validity was that it would adversely affect the financial position of the marginally situated newspapers which might be forced to close down and thus the tendency of the Act was to curtail circulation, which violated Art. 19(1)(*a*). The Court held, on the other hand, that the press had no immunity from general laws like tax or industrial laws. The purpose of the Act was to ameliorate the conditions of the workmen in the newspaper industry. The burden on marginally viable newspapers was an extraneous consequence or incidental disadvantage and not what the legislature aimed at in enacting the measure. The burden on the industry was remote which might or might not come about, and unless the burden was the direct and inevitable consequence of the Act itself, it could not be held invalid under Art. 19(1)(*a*).[32]

The press is not immune from taxation or general labour laws or civil or criminal laws. The prohibition is upon the imposition of any restriction directly

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27. *Hindustan Times v. State of U.P.*, (2003) 1 SCC 591 : AIR 2003 SC 250.
28. *Smt. Prabha Dutt v. Union of India*, AIR 1982 SC 6 : (1982) 1 SCC 1.
29. AIR 1998 AP 35.
Also see, *State v. Charulata Joshi*, AIR 1999 SC 1379 : (1999) 4 SCC 65, on the question of interviewing an under-trial prisoner.
30. *Naresh Mirajkar v. State of Maharashtra*, AIR 1967 SC 1 : 1966 (3) SCR 744.
31. The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955.
32. *Express Newspapers v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12. Also see, *Indian Express Newspapers (P.) Ltd. v. Union of India*, AIR 1995 SC 965.

relatable to the right to publish, to the right to disseminate information and to the circulation of newspapers.[33]

It is not inconsistent with Art. 19(1)(*a*) for the Central Government to appoint a committee to enquire into the economics of the newspaper industry.[34]

A legal provision requiring printing of the name of the printer, place of printing, name of the publisher and the place of publication on every paper or book does not infringe Art. 19(1)(*a*) for the intention of the provision is to inform the public as to who the printer or publisher is.[35]

Under S. 99A, Cr. P.C., a State Government can forfeit any book or newspaper if it appears it to contain any seditious matter, or matter intended to promote feelings of enmity or hatred between different classes of citizens, or matter intended to outrage the religious feelings of a class of citizens. The aggrieved party can move the High Court against the order of forefeiture. The provision has been held valid under Art. 19(2) as having been made in the interest of public order, decency or morality.[36]

Reliance Petrochemicals undertook a mega issue of debentures worth more than Rs. 500 crores. Suits and writ petitions were filed in various Courts seeking injunction against the said public issue. On an application by Reliance, the Supreme Court transferred all these cases to itself for decision, and also made an *ex parte* direction that the issue of debentures should go on "without let or hindrance". The Indian Express published an article questioning the validity of the consent given by the Controller of Capital Issues to the issue in question. Reliance secured from the Supreme Court an order of injunction prohibiting the newspaper from publishing anything questioning the legality or validity of the issue of debentures—a matter which at the time was *sub judice*.

The debentures were over-subscribed though not allotted yet when the concerned newspaper sought vacation of the Court's order against it. Reliance opposed vacation of the injunction at that stage on the ground that before allotment was made, the subscribers could withdraw their applications which might adversely affect the issue and so they pleaded that "the danger still persists". The newspaper argued that pre-stoppage of newspaper publication on matters of public importance was contrary to the freedom of the press enshrined in the Constitution. The Supreme Court adopted the test laid down in *Anita Whitney v. California*[37] that there must be reasonable ground to believe that the danger apprehended was "real and imminent". BRANDEIS, J., has said in *Whitney* that the fact that speech was likely to result in some violence or in destruction of property was not enough to justify its suppression. There must be probability of serious injury to the state.

In *Reliance Petrochemicals Ltd. v. Indian Express*,[38] the Court has underscored the right of the people to know. The Court has pointed out that in the instant case it had to balance two interests of great public importance-freedom of speech and administration of justice. "A balance, in our opinion, has to be struck

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33. *Printers (Mysore) Ltd. v. Asst. Commercial Tax Officer*, (1994) 2 SCC 434.
34. *The Statesman v. Fact Finding Committee*, AIR 1975 Cal. 14.
35. *In re G. Alavander*, AIR 1957 Mad 427.
36. *Veerabrahman v. State*, AIR 1969 AP 572. For discussion on Art. 19(2), see, *infra*.
37. (1926) 71 Law Ed. 1095.
38. AIR 1989 SC 190 : (1988) 4 SCC 592.

between the requirements of free press and free trial..." The Court has observed in this regard:[39]

> "We must see whether there is a present and imminent danger for the continuance of the injunction ..... It is necessary to reiterate that the continuance of this injunction would amount to interference with the freedom of press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpaired... We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform."[40]

The Court thus ordered that there was no longer any need to continue the injunction. "Preventive remedy in the form of an injunction is no longer necessary." Of course, the Court has pointed out that if any article written in the newspaper comes in the way of administration of justice by the Court in the instant case, there would always be available the concept of contempt of Court to take care of such an eventuality.

In *Dainik Sambad v. Tripura*,[41] Gauhati High Court has considered another matter of significance to the freedom of press. Does discriminatory allotment by Government of its advertisements among the various newspapers in the same category impair the freedom of press and the right to equality? The State had argued in the instant case that it was not bound to give advertisements to the petitioner newspaper equally with other newspapers as it had raised communal frenzy through its editorials, refused to publish Government contradictions and had always been critical of the Government.

Rejecting the argument, the High Court pointed out that the fundamental principle involved here was the people's right to know. The Court laid emphasis upon the importance of freedom of press in strengthening an individual's participation in the decision-making process by the Government as the Supreme Court has emphasized in *Indian Express*.[42] In sum, "the fundamental principle involved here is the people's right to know."[43] Freedom of press should receive a generous support from all those who believe in the participation of the people in the administration. Thus, the society has an interest in the freedom of press. In the instant case, the High Court directed the State to distribute its advertisements equally among all newspapers including the petitioner. The Court said: "Such power should not be used on the newspaper establishment so as to make the establishment subservient to the Government."

To the same effect is *Sushil Choudhury v. Tripura*,[44] where the High Court has stated that discriminatory allocation of government advertisements among the

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39. *Ibid*, at 202-3.
40. For discussion on Art. 21, see, *infra*, Ch. XXVI.
For the right to be informed, see, *supra*, 1155.
41. AIR 1989 Gau 30.
42. *Indian Express v. Union of India*, AIR 1986 SC 515 : (1985) 1 SCC 641; *supra.*
43. On the "right to know" see, *supra*, 1066.
44. AIR 1998 Gau 28.

newspapers adversely affects freedom of speech and expression as it may result in reduction of circulation of these newspapers which get less advertisement. A large number of newspaper readers are interested in government advertisements. Such readers may prefer to subscribe to those newspapers which have government advertisements. If a newspaper gains in circulation, it comes to have a great influence on the public mind, and this strikes at the very foundation of the freedom of speech and expression.

In *Rajgopal*[45], the question was how far the press could criticise and comment on the acts and conduct of public officials. The Supreme Court felt that freedom of the press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events. But, as regards their private life, a proper balancing of freedom of the press as well as the right of privacy and defamation has to be done in terms of the democratic way of life laid down in the Constitution.

The Supreme Court has ruled that neither the State nor its officers have any authority in law to impose any prior restraint on publication of any material in the press on the ground that it is defamatory of the State or its officers. Their remedy arises only after publication by way of suit for damages for defamation.

(k) ADVERTISEMENTS

How far are advertisements protected under Art. 19(1)(*a*)? The Supreme Court has considered this question in *Hamdard Dawakhana v. Union of India*.[46]

Parliament enacted an Act with a view to control advertisements of drugs in certain cases. The Act was challenged on the ground that restriction on advertisements was a direct abridgment of the freedom of expression. The Court ruled that the predominant object of the Act was not merely to curb advertisements offending against decency or morality, but also to prevent self-medication by prohibiting instruments which might be used to advocate or spread the evil. The Court stated that an advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thought and, thus, would fall within the scope of Art. 19(1)(*a*). But a commercial advertisement having an element of trade and commerce and promoting business has an element of trade and commerce, and it no longer falls within the concept of freedom of speech for its object is not to propagate any ideas—social, political or economic or to further literature or human thought.

An advertisement promoting drugs and commodities, the sale of which is not in public interest, could not be regarded as propagating any idea and, as such, could not claim the protection of Art. 19(1)(*a*).

An advertisement meant to further business falls within the concept of trade or commerce. A commercial advertisement advertising an individual's business cannot be regarded as a part of freedom of speech.

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45. *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 : (1994) 6 SCC 632.
Also see, *infra*, Ch. XXVI, Sec. J(i), under 'Right to Privacy', for further discussion on this case.

46. AIR 1960 SC 554 : (1960) 2 SCR 671.

But the Supreme Court has modified its view expressed in *Hamdard Dawakhana* somewhat in later cases. In *Sakal*[47] and *Bennett Coleman*,[48] the Supreme Court has dilated upon the great significance of advertisement revenue for the economy of newspapers. In *Indian Express Newspapers*,[49] differing from *Hamdard Dawakhana* ruling, the Court has observed: "We are of the view that all commercial advertisements cannot be denied the protection of Art. 19(1)(*a*) of the Constitution merely because they are issued by business men". Advertising pays large portion of the costs of supplying the public with newspapers. "For a democratic press the advertising "subsidy" is crucial". With the curtailment in advertisements, the price of newspaper will be forced up and this will adversely affect its circulation and this will be a direct interference with the right of freedom of speech and expression guaranteed under Art. 19(1)(*a*).

Reading *Hamdard Dawakhana* and *Indian Express* together, the Supreme Court has concluded in *Tata Press*[50] that "commercial speech" cannot be denied the protection of Art. 19(1)(*a*) merely because the same is issued by businessmen. "Commercial speech" is a part of freedom of speech guaranteed under Art. 19(1)(*a*). The public at large has a right to receive the "commercial speech". Art 19(1)(*a*) protects the rights of an individual "to listen, read and receive" the "commercial speech". The protection of Art 19(1)(*a*) is available both to the speaker as well as the recipient of the speech.

Advertising is a 'commercial speech' which has two facets:

(1) Advertising which is no more than a commercial transaction, nonetheless, disseminates information regarding the product advertised. Public at large stands benefited by the information made available through advertisement. In a democratic economy, free flow of commercial information is indispensable. Therefore, any curtailment of advertisement would affect the Fundamental Right under Art 19(1)(*a*) on the aspects of propagation, publication and circulation.

(2) The public at large has a right to receive commercial information. Art 19(1)(*a*) protects the right of an individual to listen, read and receive the said speech. The protection of Art. 19(1)(*a*) is available to the speaker as well as the recipient of the speech.

In *Tata*, the Supreme Court accepted as valid the printing of yellow pages by the Tata Press. Printing of a directory of telephone subscribers is to be done exclusively by the Telephone Department as a part of its service to the telephone subscribers. But yellow pages only contain commercial advertisements and Art. 19(1)(*a*) guarantee freedom to publish the same.

Reference may be made here to a few foreign cases having a bearing on the freedom of the press.

In *New York Times v. Sullivan*,[51] the facts were as follows: In 1960, the New York times carried a full page paid advertisement sponsored by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South', which

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47. *Sakal Papers, supra*.
48. *Bennett Coleman, supra*.
49. AIR 1986 SC 515 : (1985) 1 SCC 641.
50. *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.,* AIR 1995 SC 2438, 2446 : (1995) 5 SCC 139.
51. (1964) 376 US 254.

asserted or implied that law enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. The respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate.

The State Court awarded damages against the newspaper, but the U.S. Supreme Court reversed. BRENNAN, J., stated:

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving the truth on the speaker…… *A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to….. "self-censorship".* Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred…. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in Court or fear of the expenses of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."…. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard to whether it was false or not…"

In *Derbyshire County Council v. Times Newspapers Ltd.*,[52] the House of Lords ruled that a local authority could not sue the press for libel. The Lords held that there is no public interest in allowing government institutions to sue for liable; it is "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech".

In *Leonard Hector v. Att. Gen. of Antiqua and Berbuda*,[53] the Privy Council has observed:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

The question is how far the principles stated in the above cases are applicable in India. The Supreme Court has answered this question as follows:[54]

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52. (1993) 2 WLR 449.
53. (1990) 2 AC 312.

> "So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of Torts providing for damages for invasion of the right to privacy and defamation and sections 499/500, I.P.C. are the existing laws saved under clause (2). But what is called for today—in the present times—is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding—and in the process becoming more inquisitive. Our system of government demands—as do the systems of Government of the United States of America and United Kingdom—constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system."

One principle which the Court did lay down is that the State or its officers cannot impose any prior restraint or prohibition on any publication because they apprehend that they may be defamed. Their remedy, if any, would arise only after the publication.[55]

(l) PICKETING, DEMONSTRATION AND STRIKE

Within certain limits, picketing or demonstration may be regarded as the manifestation of one's freedom of speech and expression. "Peaceful picketing is free speech. Non violent acts are like words." Picketing or demonstration is a non-violent act of persuasion.[56]

In *V. Vengan*,[57] picketing a North-Indian shop and dissuading intending customers from purchasing in that shop was held to be not warranted by Art. 19(1)(*a*). Art. 15(1) prohibits discrimination on the ground of place of birth,[58] and if the State Legislature were to pass an Act forbidding South Indians to purchase from North Indian shops, such an Act would be unconstitutional. Therefore, the picketing and the propaganda in question contained an unconstitutional germ in support of which the Constitution could not be invoked. The conduct of the petitioner, if carried to its extreme conclusion, would undermine the security of the State by creating disaffection and ultimately strife and hatred between South Indians and North Indians residing and doing business in the South.

As regards government servants, the judicial view appears to be that while banning demonstrations by them is not valid, a strike by them can be validly pro-

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54. *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264 : (1994) 6 SCC 632.
55. Also see, *infra*, Ch. XXVI, Sec. J(i) under 'Right to Privacy'.
56. *Thornhill v. Alabama*, 310 US 88 (1940).
Also, HARROP A FREEMAN, Needed a Jurisprudential Theory for Liberal Democracy, 2 *JILI*, 49.
57. (1951) 2 M.L.J. 241.
Also, *Damodar v. State of Bombay*, AIR 1951 Bom. 459.
58. *Supra*, Ch. XXII.

hibited. A rule made by the Bihar Government prohibited government servants from participating in any demonstration or strike in connection with any matter pertaining to their conditions of service. The rule was challenged. The Supreme Court said that a government servant does not, by accepting government service, lose his Fundamental Rights under Art. 19. A demonstration, held the Court, is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others and is in effect a form of speech or expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech and expression. Accordingly, certain forms of demonstration would fall under Art. 19(1)(*a*).

In the instant case, the government justified the rule as being in the interests of 'public order'. Nevertheless, the Court declared the rule bad as it banned every type of demonstration howsoever innocent, and did not confine itself to those forms of demonstrations only which might lead to a breach of public tranquillity, or would fall under the other limiting criteria specified in Art. 19(2). However, the rule was not held bad in so far as it prohibited a strike, for there was no Fundamental Right to resort to strike.[59]

Again, in *O.K. Ghosh v. E.X. Joseph*,[60] a disciplinary rule prohibited government servants from participating in any demonstration. The Court held the rule to be invalid. The Court emphasized that the rule could be valid if it imposed a reasonable restriction in the interests of public order. The Court did however emphasize that government servants are subject to the rules of discipline which are intended to maintain discipline among them and to lead to an efficient discharge of their duties.

The above-stated principle has been reiterated by the Court in other cases as well. S. 3 of the Essential Services Maintenance Ordinance, 1960, authorised the Central Government to prohibit any strike in any essential service in the public interest. Going on a prohibited strike became illegal and punishable with imprisonment. The provision was declared valid as it did not curtail freedom of speech and there was no Fundamental Right to go on a strike.[61]

(m) BANDH

In a landmark decision in *Bharat Kumar*,[62] a full Bench of the Kerala High Court has declared "Bandhs" organised by political parties from time to time as unconstitutional being violative of the Fundamental Rights of the people. The Court refused to accept it as an exercise of the freedom of speech and expression by the concerned party calling for the *bandh*. When a *bandh* is called, people are expected not to travel, not to carry on their trade, not to attend to their work. A threat is held out either expressly or impliedly that any attempt to go against the call for bandh may result in physical injury.

A call for *bandh* is clearly different from a call for general strike or *hartal.* There is destruction of public property during a *bandh*. Accordingly, the High Court has directed that a call for a *bandh* by any association, organisation or political party and enforcing of that call by it, is illegal and unconstitutional. The

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59. *Kameshwar Pd. v. State of Bihar*, AIR 1962 SC 1166 : 1962 Supp (3) SCR 369.
60. AIR 1963 SC 812 : 1963 Supp (1) SCR 789; also see, *infra.*
61. *Radhey Shyam v. P.M.G., Nagpur*, AIR 1965 SC 311 : (1964) 7 SCR 403.
62. *Bharat Kumar K. Palicha v. State of Kerala*, AIR 1997 Ker 291.

High Court has also directed the State and all its law enforcement agencies to do all that may be necessary to give effect to the Court order.

The Supreme Court has dismissed an appeal against the above-mentioned High Court decision. The Supreme Court refused to interfere with the High Court decision. The Court has accepted the distinction drawn by the High Court between a 'bandh' and a strike. A *bandh* interferes with the exercise of the Fundamental Freedoms of other citizens, in addition to causing national loss in many ways. The Fundamental Rights of the people as a whole cannot be regarded as subservient to a claim of Fundamental Right of an individual, or of a section of the people.[63]

The Supreme Court has now declared the reason why bandh should be banned. In the name of hartal or bandh or strike no person has any right to cause inconvenience to any other person or to cause in any manner a threat or apprehension of risk to life, liberty and property of any citizen or destruction of life and property, and the least to any government or public property. The Supreme Court pointed out that it was high time that the authorities concerned took serious note of this requirement while dealing with those who destroy public property in the name of strike, hartal or bandh. Any soft or lenient approach for such offenders would be an affront to the rule of law and challenge to public order and peace.[64]

In *Ranchi Bar Association v. State of Bihar*,[65] following the Apex Court decision, mentioned above, the Patna High Court has ruled that no party has a right to organise a *bandh* causing/compelling the people by force to stop them from exercising their lawful activities. The government is duty bound to prevent unlawful activities like *bandh* which invades people's life, liberty and property. The government is bound to pay compensation to those who suffer loss of life, liberty or property as a result of a *bandh* because of the failure of the government to discharge its public duty to protect them.

In appropriate cases, even the organisers of the *bandh* may be directed to pay compensation. Any organization interfering with the functioning of the Courts commits contempt of Court and can be punished accordingly. A peaceful strike which does not interfere with the rights and properties of the people is however not illegal. In the instant case, the High Court did award compensation against the State Government for loss of property and death of a person during the *bandh* for failure of the authorities to take appropriate action and provide adequate protection to the people's life, liberty and property. The Government failed to discharge its public duty to protect the people during the *bandh*.

(n) RIGHT TO TRAVEL ABROAD

An interesting question considered in *Maneka* was whether the right to travel abroad could be regarded as a part of Arts. 19(1)(*a*) and (*g*).[66] The right to freedom of speech and expression guaranteed by Art. 19(1)(*a*) is exerciseable not only in India but outside as well. According to BHAGWATI, J., state action taken in India may impair or restrict the exercise of this right elsewhere. For example, a journalist may be prevented from sending his dispatches abroad. The same applies by parity to Art. 19(1)(*g*). But the Court refused to accept the argument, that the right to travel abroad was an 'essential part' of the freedoms guaranteed by

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63. *Communist Party of India v. Bharat Kumar,* AIR 1998 SC 184 : (1998) 1 SCC 201.
64. *James Martin v. State of Kerala,* (2004) 2 SCC 203 : (2003) 10 JT 371.
65. AIR 1999 Pat 169.
66. *Maneka Gandhi v. Union of India, supra.*

Arts. 19(1)(*a*) and (*g*) so that whenever the former was violated, the latter would also be impaired.

The right to travel abroad is not specifically named as a Fundamental Right in Art. 19(1). But a right not named expressly may still be covered by some clause in Art. 19, if it "is an integral part of a named Fundamental Right or partakes of the same basic nature and character as the named Fundamental Right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named Fundamental Right".[67] Judged by this test, the right to travel abroad is not an integral part of the rights under Art. 19(1)(*a*) or (*g*), but only a concomitant or peripheral right to these rights. S. 10(3)(*c*) of the Passport Act which authorises imposition of restrictions on the right to go abroad by impounding of passport, could not, therefore, be held void under Art. 19(1)(*a*) or (g).

But this does not mean that an order made under S. 10(3)(*c*), Passport Act, may not violate Art. 19(1)(*a*) or (*g*) under any circumstances. There may be situations when denial of the right to travel abroad may have a direct and inevitable effect to abridge or take away the freedom of speech and expression, or the right to carry on a profession or business. In the words of BHAGWATI, J.:[68]

> "...There may be many such cases where the restriction imposed is apparently only on the right to go abroad but the direct and inevitable consequence is to interfere with the freedom of speech and expression or the right to carry on a profession. A musician may want to go abroad to sing, a dancer to dance, a visiting professor to teach and a scholar to participate in a conference or seminar. If in such a case his passport is denied or impounded, it would directly interfere with his freedom of speech and expression... Examples can be multiplied, but the point of the matter is that though the right to go abroad is not a Fundamental Right, the denial of the right to go abroad may, in truth and in effect, restrict freedom of speech and expression or freedom to carry on a profession..."

When a right under Art. 19(1)(*a*) or (*g*) is infringed, impounding of the passport would have to be justified under Art. 19(2) or (6). In that case, the expression 'in the interests of the general public' in S. 10(3)(*c*) will have to be read down to mean 'public order, decency or morality' [words used in Art. 19(2)],[69] if there is a violation of the right under Art. 19(1)(*a*). Then impounding of a passport for an indefinite length of time would amount to an unreasonable restriction under Arts. 19(2) and (6). BHAGWATI, J., however, cautioned the Passport Authority that the power to refuse or impound a passport should not be exercised lightly as it is a basic human right recognised in Art. 13 of the Universal Declaration of Human Rights; it is a valuable right, a part of personal liberty with which the authority seeks to interfere.

(o) TELEPHONE TAPPING

The freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner.

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67. For discussion on the doctrine of Implied Fundamental Rights, see, *supra*, Sec. A. Also see, *infra*, Ch. XXVI, Sec. J.

68. AIR 1978 SC at 644-5.

69. See, *infra*, Sec. D.

When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone tapping, accordingly, infracts Art. 19(1)(*a*) unless it falls within the grounds of restrictions falling under Art. 19(2).[70]

The Court also treated it as an aspect of privacy and invoked Art. 21 against telephone tapping.[71]

(p) SOME MISCELLANEOUS SITUATIONS

When a professor was suspended by the university concerned, and later on an enquiry was set up against him on the allegation that he had made derogatory remarks against the Prime Minister, it was held that Art. 19(1)(*a*) could not protect him against such an inquiry.[72]

Carrying of letters written by others against payment does not fall within Art. 19(1)(*a*).[73]

A condition imposed on cinema exhibitors to show about 2000 ft. of educational films, or films dealing with news and current affairs, or documentary films, has been held to be not inconsistent with Art. 19(1)(*a*) . This is a means of communication and propagation of scientific ideas and the like.[74]

An argument raised against the impugned provision was that just as a restraint on free speech is a violation of Art. 19(1)(*a*) [except as permitted under Art. 19(2)] compelled speech, often known as a "must carry" provision in a statute, is equally an infringement of the right to free speech, except to the extent permitted under Art. 19(2).

The Court countered this argument by stating that whether compelled speech will or will not amount to a violation of the freedom of speech and expression, "will depend on the nature of a 'must carry' provision." If it furthers informed decision-making which is the essence of the right to free speech and expression, it will not amount to any violation of the Fundamental Freedom of speech and expression. If, however, such a provision compels a person to carry out propaganda, or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression. Justifying the provision in question, the Court has observed:

> "The social context of any such legislation cannot be ignored. When a substantially significant population body is illiterate or does not have easy access to ideas or information, it is important that all available means of communication, particularly audio visual communication, are utilised not just for entertainment but also for education, information, propagation of scientific ideas and the like".

The provision in question does not require the cinema exhibitor to show a propaganda film, or a film conveying the views which he objects to.

Levy of an entertainment tax on cable operators has been held to be valid. Their activities have two aspects—business and speech. There is no reason why

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70. *People's Union for Civil Liberties v. Union of India,* AIR 1997 SC 568 at 574-575 : (1997) 1 SCC 301; for discussion on Art. 19(2), see, *infra,* Sec. D.
71. See, *infra*, under Art. 21, Ch. XXVI, Sec. J(i).
72. *A.N. Nigam v. University of Jodhpur,* AIR 1982 Raj 248.
73. *Inland Commercial (TPT) Service v. Union of India,* AIR 1982 Del 393.
74. *Union of India v. The Motion Picture Association,* AIR 1999 SC 2334 : (1999) 6 SCC 150.

the business part cannot be taxed when a similar tax is levied on cinema shows. "Where the freedom of speech gets intertwined with business, it undergoes a fundamental change and its exercise has to be balanced against social interests….while there can be no tax on the right to exercise freedom of expression, tax is leviable on profession, occupation, trade, business and industry".[75]

(q) LIFE INSURANCE CORPORATION

The Consumer Education and Research Centre published a study entitled "A Fraud On Policyholders". It was a scientific research made into the working of the Life Insurance Corporation. This study tried to portray and establish the discriminatory practices which the Corporation was alleged to have adopted and which adversely affected a large number of policy holders, their investment policies, their expense ratio, availability of term insurance and other cognate matters.

The Director of the Corporation wrote a reply to it. His reply was published in The Hindu. In that reply, he tried to challenge the conclusions recorded in the study prepared by the Centre. The Director's reply was also published by the Corporation in '*Yogakshema*', a journal run by the Corporation. On a scientific and studied basis, the Executive Trustee of the Centre (petitioner) rejoined the Director and replied to his reply. Since *Yogakshema* had published the Director's reply, the petitioner requested the Corporation to publish his reply also in *Yogakshema*. The Corporation refused to do so.

In these circumstances, the Gujarat High Court ruled in the case noted below[76] that the action of the Corporation was violative of the petitioner's Fundamental Rights under Art. 19(1)(*a*) and Art. 14. The Corporation is a public body and belongs to no individual. Therefore, the considerations which govern the case of an individual do not apply to a statutory public body. Every citizen has a right to demand of the State to make available to him a particular channel or channels for publishing his studied criticism of the concerned branch of public administration. To make such an opportunity available to an admirer and to deny it to a critic is to deny to him his freedom of speech and expression and to throttle democracy. In a democratic polity, though people may not directly participate in governmental working or public administration, they have a right to demand of those who are in charge of their destiny for the time being how they deal with the problems which they are facing. A Corporation which carries on the business of life insurance in the shape of a statutory monopoly is answerable to the people of India with whose funds it deals and to whose welfare it claims to cater. "The Corporation is a public body and belongs to no individual."

Article 19(1)(*a*) embraces within its sweep both acts of omission and commission which curtail or abridge the freedom of speech and expression, subject to the reasonable restrictions contemplated by Art. 19(2). The Corporation is obligated to publish a studied criticism of its activities and a citizen has a right to express through the medium of such Corporation his studied criticisms of its activities. By spending public funds on publishing only what is appreciative of its activities and by refusing to publish a critical study of its activities, the Corporation will only assume the guardianship of public mind. This cannot be allowed because of

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75. *A. Suresh v. State of Tamil Nadu*, AIR 1997 SC 1889 : (1997) 1 SCC 319.
Also, *Hukum Singh v. State of Uttar Pradesh*, AIR 1998 All 120.

76. *Prof. Manubhai D. Shah v. Life Insurance Coprn.*, AIR 1981 Guj 15.

Art. 19(1)(*a*). If the official Gazette publishes a studied criticism of someone's study without publishing the original article or study, it is under an obligation to publish a studied reply to such a criticism which is the study of a problem. Assuming that All India Radio or Doordarshan publishes something which is a reply to someone's study or is a criticism of someone's studied article by naming that person, it is under an obligation to publish a studied reply to it.

The Court rejected the claim made by the Corporation to the editorial privilege and absolute discretion to publish or not to publish an article as being inconsistent with the Fundamental Rights guaranteed by the Constitution. The Court also rejected as untenable the contention that '*Yogakshema*' was a house magazine and not a mass media. Merely because it is interested in a particular subject-matter and happens to find its circulation amongst officers, employees and agents of the Corporation, it does not attain the character of a house magazine. Under the pretext and guise of publishing a house magazine, the Corporation cannot violate the Fundamental Rights of the petitioner. A house magazine cannot claim any privilege against the Fundamental Rights of a citizen.

The Court also held it against Art. 14 to make available public funds to an admirer and not to a sober critic. Both have an equal place in the social order and both must be treated equally and alike. Thus, refusal to the petitioner to make '*Yogakshema*' available for voicing his studied criticism violated Art. 14.

The matter then came before Supreme Court in *Life Insurance Corporation of India v. Manubhai D. Shah*.[77] The Supreme Court has stated in this case that a liberal interpretation should be given to the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*). The Court has characterised this right as a "basic human right". This right includes "the right to propagate one's views through the print media or through any other communication channel, *e.g.* the radio and television". Thus, every citizen "has the right to air his or her views through the print and/or the electronic media subject, of course, to permissible restrictions imposed under Art. 19(2) of the Constitution".[78]

In the instant case, the Supreme Court has taken cognisance of two situations. One, the respondent circulated a research article suggesting that the LIC was charging unduly high premiums from those who took out life insurance policies. The LIC published a counter reply to this paper in a daily newspaper and also in its own in-house magazine *Yogakshema*. The respondent then prepared a rejoinder and got it printed in the same daily newspaper. He also wanted the LIC to print his rejoinder in *Yogakshema*, but the LIC refused to do so. The Supreme Court was called upon to decide the question whether the LIC was right in refusing to publish the rejoinder by the respondent in *Yogakshema*. Answering in the negative, the Court pointed out that the attitude of the LIC was both "unfair and unreasonable"—unfair because fairness demanded that both view points were placed before the readers and unreasonable because there was no justification for refusing publication. By refusing to print and publish the rejoinder the LIC had violated the respondent's Fundamental Right.

Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom of speech and expression is subject only to the restric-

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77. AIR 1993 SC 171 : (1992) 3 SCC 637.
78. On Art. 19(2), see, *infra.*

tions imposable under Art. 19(2). Efforts by intolerant authorities to curb or suffocate this freedom must be firmly repelled, more so when public authorities betray autocratic, tendencies.

LIC is a 'state' within the meaning of Art. 12.[79] The LIC Act enacted by Parliament requires LIC to function in the best interest of the community. The community is, therefore, entitled to know whether or not, this requirement of the statute is being satisfied in the functioning of the LIC.

(r) TELEVISION

The other situation dealt with by the Supreme Court in the instant case arose out of the *Doordarshan's* refusal to telecast a documentary film on Bhopal gas tragedy prepared by the petitioner. The film in question had won the golden lotus award as the best non-feature film in 1987 and yet the Doordarshan refused to telecast the film on the ground that "the contents being outdated do not have relevance now for the telecast." The Supreme Court has ruled that a film maker has a Fundamental Right under Art. 19(1)(*a*) to exhibit his film and, therefore, the party which claims that it is entitled to refuse enforcement of this right by virtue of law made under Art. 19(2), is under an onus to show that the film does not conform to the requirements of the law.

The Court has emphasized that the words "freedom of speech and expression in Art. 19(1)(*a*) must be broadly interpreted so as to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities, like radio and television, subject, of course, to permissible restrictions imposed under Art. 19(2). "The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy". Subject to reasonable restrictions placed under Art. 19(2), a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Art. 19(1)(*a*).

Ultimately, the Court has rejected *Doordarshan's* reasons for not showing the film on the Television. The Court has stated concerning the film: "To bring out the inadequacy of the State effort or the indifference of the officers, etc., cannot amount to an attack on any political party if the criticism is genuine and objective and made in good faith." Doordarshan being a state-controlled agency funded by public funds could not have denied access to screen except on valid grounds.

In *Ramesh*,[80] a writ petition was filed to restrain the screening of serial *Tamas* on the television on the ground that it violated Arts. 21 and 25 of the Constitution as well as s. 58 of the Cinematograph Act, 1952. The Court rejected the petition saying that the serial viewed in its entirety "is capable of creating a lasting impression of the message of peace and co-existence..." The Court quoted copiously from its earlier decision in *Abbas*.[81]

Odyssey,[82] another case involving the *Doordarshan*, arose on appeal against a stay order issued by the Bombay High Court restraining telecasting of certain episodes of the serial *Honi Anhonee*. The question before the Supreme Court was

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79. See, *supra*, Ch. XX, Sec. D.
80. *Ramesh v. Union of India,* AIR 1988 SC 775 : (1988) 1 SCC 668.
81. *Khwaja Ahmad Abbas v. Union of India, supra; infra.*
82. *Odyssey Communications Pvt. Ltd. v. Lok Vidyayan Sanghatana,* AIR 1988 SC 1642 : (1988) 3 SCC 410.

whether these episodes should be prohibited from being telecast. Refusing to do so, the Court has pointed out that the right of a citizen to exhibit films on the *Doordarshan,* subject to the terms and conditions imposed by *Doordarshan,* is a part of the Fundamental Right of freedom of expression guaranteed under Art. 19(1)(*a*) which can be curtailed only under circumstances set out in Art. 19(2). A citizen's right to exhibit films on television "is similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisements, hoardings etc., subject to the terms and conditions of the owners of the media." The episodes in question did not violate any law or any right of the petitioners nor was the serial likely to affect prejudicially the well being of the people. The showing of these episodes was not likely to endanger public morality. The Court thus allowed the appeal.

Commenting upon the issue of an interim injunction by the High Court, the Supreme Court stated that "the High Court overlooked that the issue of an order of interim injunction in this case would infringe a Fundamental Right of the producer of the serial." Also, the Court has reserved its opinion on the question whether a citizen has a Fundamental Right to establish a private broadcasting station, or television centre. Underlining the great value which the Court attaches to the of speech and expression, the Court has emphasized:

> "Freedom of expression is a preferred right which is always very zealously guarded by this Court."

The petitioner produced a documentary on violence and terrorism in Punjab. The film received a "U" certificate from the Board of Film Censors. Besides, it also received several international awards. Nevertheless, the *Doordarshan* refused to telecast the film. The Bombay High Court ruled that the refusal of *Doordarshan* to telecast the film was unjustified and amounted to violation of the petitioner's right under Art. 19(1)(*a*). It also amounted to violation of the right of the people under Art. 19(1)(*a*) to be informed and enlightened about the situation in Punjab. The Court emphasized that every person has a Fundamental Right to form his own opinion on any issue of general concern. The State cannot prevent open discussion and open expression of views however hateful to its policies. Restrictions on freedom of speech and expression can be imposed only under Art. 19(2) and not outside that provision. Accordingly, the Court directed the *Doordarshan* to exhibit the film on Channel I or II at a proper time.[83]

As the Supreme Court has emphasized, television plays a very important and significant role in modern life. Many people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It exercises tremendous influence over millions of people. Freedom of speech and expression includes the right to receive information and ideas as well as freedom to impart them.[84]

During the course of recording of the interview of the petitioner for a T.V. programme pertaining to "Laws relating to Women" on the invitation of *Doordarshan* itself, she made critical remarks about a Bill which was then

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83. *Anand Patwardhan v. Union of India,* AIR 1997 Bom 25.
Also see, *C. Gopal Krishnan v. Union of India,* AIR 1996 Ker 333.

84. *Secretary, Ministry of Information and Broadcasting v. Cricket Assn. of Bengal,* AIR 1995 SC 1236 : (1995) 2 SCC 161; see, *infra*.

pending before Parliament as being violative of women's right to equality. When the programme was telecast, her views on the Bill were deleted. The petitioner in a writ petition asserted that this amounted to censorship of her views by the television authorities as her views were against the views of the ruling party. The *Doordarshan* authorities justified deletion on the basis that it only amounted to editing and not censorship. The High Court ruled in *Indira Jai Singh v. Union of India*[85] that the deletion of her views was not by way of editing but by way of censorship.

The interesting aspect of the High Court's decision is the ruling that the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*), protects this freedom on the television as much as it does anywhere else. The Court has observed:

> "A citizen who is interviewed over television by invitation of the television authorities is entitled to express his or her views freely. Censorship or deliberate distortion of these views would violate Art. 19. Any restriction of this right must be within the ambit of Art. 19(2) and by law."

The Court held that the respondents restricted the petitioner's right under Art. 19(1)(*a*) arbitrarily and by an executive fiat. The Court has emphasized that the executive action restraining exercising of a right under Art. 19(1)(*a*) cannot be taken without any legislative authority.

(s) CENSORSHIP OF FILMS

In *K.A. Abbas v. Union of India*,[86] the Supreme Court has upheld censorship of films under Art. 19(1)(*a*) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product of art. A film can therefore be censored on the grounds mentioned in Art. 19(2).

Another case on film censorship is *Rangarajan*[87] which came before the Supreme Court by way of appeal from the Madras High Court. In this case, the Supreme Court has considered the question of censorship of films *vis-a-vis* Art. 19(1)(*a*).

The Court has justified pre-censorship of a film because it caters for mass audience, it has unique capacity to disturb and arouse feelings and has as much potential for evil as it has for good. A film cannot therefore be allowed to function in a free market place just as the newspapers or magazines do.

Here was a film which criticised the reservation policy of the Tamil Nadu Government. While the Board of Film Censors certified the film as fit for showing, and granted it U certificate, the Madras High Court banned the film from being exhibited and cancelled the certificate as there was some public protest against the film. So, the matter came before the Supreme Court in appeal and the Court reversed the High Court and accepted the appeal. Emphasizing upon the concept of freedom of speech and expression, the Court has stated:

> "Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be

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85. AIR 1989 Bom 25.
86. AIR 1971 SC 481 : (1970) 2 SCC 780.
87. *Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 : (1989) 2 SCR 204.

> remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

A film producer is entitled to project his own message which others may not approve of. Everyone has a Fundamental Right to form his own opinion on any issue of general concern. The State cannot prevent open discussion and open expression of views, however critical of its own views.

At another place in the judgment, the Court has observed:

> "In democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Every one has a Fundamental Right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means. The democracy is a Government by the people via open discussion."

The Court has accepted that movies doubtless enjoy the guarantee under Art. 19(1)(*a*).

The State Government had pleaded for banning the exhibition of the film on the ground that otherwise there might arise a serious law and order situation in the State. To this plea, the Court has given a caustic reply as follows:

> "What good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Art. 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence .... It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State...."

The Court has emphasized that if the film is unobjectionable and cannot constitutionally be restricted under Art. 19(2), freedom of expression cannot be suppressed on account of threat of demonstration or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. The State cannot plead its inability to handle the hostile audience problem. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people.

In the end, the Court has observed:

> "The fundamental freedom under Art. 19(1)(*a*) can be reasonably restricted only for the purposes mentioned in Art. 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself."

The Delhi High Court directed certain excisions to be made from the film "Bandit queen". On appeal, the Supreme Court set aside the High Court's decision.[88]

(t) TELECASTING

In *Cricket Association*,[89] the Supreme Court has considered the significant question of freedom of telecasting *vis-a-vis* Art. 19(1)(*a*).

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88. *Bobby Art International v. Om Pal Singh Hoon*, JT 1996 (4) SC 533 : AIR 1996 SC 1846.

89. *Secretary, Ministry of Information and Broadcasting v. Cricket Association, Bengal,* AIR 1995 SC 1236 : (1995) 2 SCC 161.

In this case, the right of the Cricket Association to telecast the cricket match came up for consideration before the Supreme Court.

Telecasting is a system of communication either audio or visual or both. Organisation of an event in India is an aspect of the freedom of speech and expression protected by Art. 19(1)(*a*) and reasonable restrictions can be imposed thereon under Art. 19(2). It therefore follows that organisation, production and recording of an event cannot be prevented except by a law permitted by Art. 19(2). Similarly, the publication or communication of the recorded event through the cassettes cannot be restricted or prevented except under a law made under Art. 19(2).

The freedom to receive and communicate information and ideas without interference is an important aspect of the freedom of speech and expression under Art. 19(1)(*a*). Freedom of speech includes the right to propagate one's views through print media or through any other communication channel, *e.g.*, radio and television. The right to impart and receive information is a species of freedom of speech. No monopoly of electronic media is permissible as Art. 19(2) does not permit state monopoly.

Unlike the print media, there are certain built-in limitations on the use of electronic media, *viz.*: (*i*) the airwaves or frequencies are a public property and they have to be used for the benefit of the society at large; (*ii*) the frequencies are limited; (*iii*) the airwaves are owned or controlled by the Government or a central national authority; (*iv*) they are not available on account of the scarcity, costs and competition.

Broadcasting is a means of communication, and, therefore, a medium of speech and expression. Hence, in a democratic society, neither any private body nor any governmental organisation can claim any monopoly over it. The Indian Constitution also forbids monopoly either in the print or electronic media. The Constitution only permits state monopoly in respect of a trade or business.[90] The Government can however claim regulatory powers over broadcasting so as to utilize the public resources in the form of the limited frequencies available for the benefit of the society at large and to prevent concentration of the frequencies in the hands of the rich few who can then monopolise the dissemination of views and information to suit their interests. In democratic countries, this regulatory function is discharged by an independent autonomous broadcasting authority which is representative of all sections of the society and is free from state control. In this case, the Court has laid down the following three propositions:

(1) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property.

(2) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Art. 19(1)(*a*). A citizen has a Fundamental Right to use the best means of imparting and receiving information and as such to have an access to telecasting for

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90. Art. 19(6).
For discussion on Art. 19(6), see, *infra*, under Sec. I.

the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, *viz.*, the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Art. 19(2) of the Constitution.[91]

(3) The broadcasting media should be under the control of the public as distinct from the Government. The Central Government shall, therefore, take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

The Supreme Court has also emphasized in the instant case that freedom of speech and expression involves not merely freedom to communicate information and ideas without interference but also the freedom to receive the same.

The right to freedom of speech and expression includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The right to telecast a sporting event therefore includes the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. The right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed under Art. 19(1)(*a*).

The Board of Cricket Control or the Cricket Association function on the basis of "no profit no loss". Their main aim is to promote the game of cricket. Therefore, telecast by such a body of a cricket match can hardly be regarded as a commercial activity. Because of its educational and entertainment values, this activity falls more appropriately under Art. 19(1)(*a*).

It can thus be seen that the Supreme Court has interpreted Art. 19(1)(*a*) broadly so as to bring broadcasting and telecasting within its coverage. Also, the Court has taken a very significant step by way of freeing these activities from governmental monopolistic control. Also, the function of regulating airwaves will henceforth be performed by an autonomous body rather than the Government itself.

(u) VOTING

Voting at an election is a form of expression.[92] A citizen as a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA.

D. RESTRICTIONS UNDER ART. 19(2)

(a) GROUNDS OF RESTRICTIONS

While it is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some curbs on this freedom

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91. On the right to receive information, see, *supra*, Sec. C(d), this Chapter.

92. *People's Union for Civil Liberties (PUCL) v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

for the maintenance of social order. No freedom can be absolute or completely unrestricted. Accordingly, under Art. 19(2), the state may make a law imposing 'reasonable restrictions' on the exercise of the right to freedom of speech and expression 'in the interests of' the security of the State, friendly relations with foreign States, public order, decency, morality, sovereignty and integrity of India, or 'in relation to contempt of Court, defamation or incitement to an offence'.

The expression used in Art. 19(2) "*in the interests of*" give a wide amplitude to the permissible law which can be enacted to impose *reasonable* restrictions on the right guaranteed by Art. 19(1)(*a*) under one of the heads mentioned in Art. 19(2). No restriction can be placed on the right to freedom of speech and expression on any ground other than those specified in Art. 19(2).

The burden is on the authority to justify the restrictions imposed.

A look at the grounds contained in Art. 19(2) goes to show that they are all conceived in the national interest or in the interest of the society. The first set of grounds, *viz.*, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order—are all grounds referable to national interest; whereas, the second set of grounds, *viz.*, decency, morality, contempt of Court, defamation and incitement to offence are all conceived in the interest of the society. Some of the grounds for which restrictions can be imposed are explained below.

(b) SECURITY OF STATE AND PUBLIC ORDER

Article 19(2) uses two concepts: 'public order' and 'security of state'. The concept of 'public order' is wider than 'security of state'.[93] As the Supreme Court points out, in Art. 19(2), there exist two expressions 'public order' and 'security of state'. Thus, 'security of state' having been specifically and expressly provided for, "public order cannot include the security of state, though in its widest sense it may be capable of including the said concept. Therefore, in cl. (2), public order is virtually synonymous with public peace, safety and tranquillity."[94]

The term 'public order' covers a small riot, an affray, breaches of peace, or acts disturbing public tranquillity. But 'public order' and 'public tranquillity' may not always be synonymous. For example, a man playing loud music in his home at night may disturb public tranquillity, but not public order. Therefore, such acts as disturb only the serenity of others may not fall within the term 'public order'.[95]

In a foreign case, the Privy Council justified restrictions on the use of loudspeakers at public meetings under 'public order' giving the phrase a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of the people.[96] It will be difficult to give such an extended meaning to 'public order' in India. There should be some

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93. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Supdt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821; *R.M. Lohia v. State of Bihar*, AIR 1966 SC 740 : (1966) 1 SCR 709.
Also see, *infra*, Ch. XXVII, under Preventive Detention.

94. *O.K. Ghosh v. E.X. Joseph*, AIR 1962 SC 812, at 814.

95. *Madhu Limaye v. S.D.M., Monghyr*, AIR 1971 SC 2486 : (1970) 3 SCC 746.

96. *Francis v. Chief of Police*, (1973) 2 All ER 251.

element of disturbance of peace to bring a matter under 'public order'.[1] But the Indian Courts have been able to place some curb on noise pollution.[2]All grounds on which action can be taken under S. 144, Cr. P.C., fall within the term 'public order' with this rider that 'annoyance' should be of grave proportions.[3]

An aggravated form of disturbance 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 state'. Therefore, making a speech tending to overthrow the state can be made punishable.[4]

Under Art. 19(2), a restriction can be imposed 'in the interests of' public order, etc. The expression 'in the interests of' gives a greater leeway to the legislature to curtail freedom of speech and expression, for a law penalising activities having a *tendency* to cause, and not *actually* causing public disorder, may be valid as being 'in the interests of' public order. However, the restriction imposed must have a reasonable and rational relation with the public order, security of state, etc. If the nexus between the restriction and public order, etc., is farfetched, then the restriction cannot be sustained as being in the 'interests' of public order, etc.[5] As has been stated earlier, this introduces the concept of proportionality in the area of Fundamental Rights.[6]

The Supreme Court has lucidly explained the effect of the clause "in the interests of" in *O.K. Ghosh v. E.X. Joseph* as follows:[7]

> "This clause again cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect, the restriction can be said to be in the interests of public order. A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order.' "

In *Ram Manohar Lohia*,[8] SUBBA RAO, J., speaking for the Court, pointed out that the expression "in the interests of public order" though wider than the phrase "for the maintenance of public order" still could not mean that the existence of any remote or fanciful connection between the impugned act and public order would be sufficient to sustain the validity of the law. The connection between the act prohibited or penalised and public order should be intimate. In other words, there should be a reasonable and rational relation between it and the object sought to be achieved, *viz.*, public order. The nexus should thus be proximate—not far-fetched, problematical or too remote in the chain of its relation with public order.

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1. *D. Anantha Prabhu v. Distt. Collector, Ernakulam,* AIR 1975 Ker 117.
2. *Infra,* (j).
Also see, *Infra,* Ch. XXVI, Sec. J(p), under Art. 21.
3. The *Madhu Limaye* case, *supra* footnote 95.
Also, see, *infra*.
4. *Santokh Singh v. Delhi Administration,* AIR 1973 SC 1091 : (1973) 1 SCC 659.
5. *V.K. Javali v. State of Mysore,* AIR 1966 SC 1387 : (1962) 1 LLJ 134.
6. *Supra,* Sec. B.
7. AIR 1962 SC 814 : 1962 Supp (2) SCR 571.
8. *Supdt. Central Prison v. Ram Manohar Lohia, supra.*

A legal provision making penal speeches or expressions on the part of an individual 'which incite or encourage the commission of violent crimes such as murder' would be valid as these speeches or expressions cannot but undermine the security of the State.[9] Sec. 295A, I.P.C., penalizes a person who 'with deliberate and malicious intention', by words either spoken or written, or by visible representations, insults or attempts to insult the religious beliefs of any class. The constitutional validity of the provision was challenged on the ground that the section was wide enough to cover even trifling forms of religious insults which may not involve any question of public order. It was thus argued that S. 295A, IPC, be declared void.

But the Supreme Court did not do so. The Court ruled that S. 295A makes criminal only graver types of conduct involving insults to religion or religious beliefs. The provision penalizes not every act of, or attempt to, insult the religious beliefs of a class of citizens, but only those aggravated forms of insult to religion which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class of citizens. The calculated tendency of such an aggravated form of insult is clearly to disrupt public order and hence the provision is valid.[10]

A provision made penal any instigation not to pay any exaction to government. The Supreme Court ruled that the prohibition imposed was too wide, as it "takes in the innocent and the guilty persons, *bona fide* and *mala fide* advice, individuals and class, abstention from payment and deferment of payment, express or implied instigation, indirect or direct instigation... In short, no person, whether legal adviser or a friend or a well-wisher of a person instigated can escape the tentacles of this section, though in fact the rent due has been collected through coercive process or otherwise".

The section was declared invalid as there was no proximate or even foreseeable connection between such instigation and public order. The Court emphasised that the Fundamental Rights could not be controlled on "hypothetical and imaginary considerations". The Court rejected the argument that any instigation to break the law would in itself be a disturbance of the public order with the remark that "if this argument without obvious limitation be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life".[11]

Section 124A, I.P.C., punishes any person who by words, spoken or written, attempts to bring into hatred or contempt, or excites disaffection towards the government established by law. In the pre-Independence era, this section had been interpreted very broadly, and exciting or attempting to incite bad feelings towards the government was held punishable whether or not it resulted in public disorder.[12] Obviously, the section in such a broad form could not be sustained under Art. 19(2). In *Kedar Nath v. State of Bihar*,[13] the Supreme Court upheld S. 124A by interpreting it restrictively—as rendering penal only such activities as would be intended, or have a tendency, to create disorder.

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9. *State of Bihar v. Shailabala*, AIR 1952 SC 329 : 1952 SCR 654.
10. *Ramji Lal Modi v. State of Uttar Pradesh*, AIR 1957 SC 650.
11. *Superintendent, Central Prison v. Lohia*, AIR 1960 SC 633 : (1960) 2 SCR 821.
12. *Emperor v. Sadashiv Narayan*, AIR 1947 SC 82.
13. AIR 1962 SC 955 : 1962 Supp (2) SCR 769.

In *Kedar Nath*, the Court took the position that when a provision of law is capable of two interpretations, one of which makes it constitutional and the other unconstitutional, the interpretation which makes it constitutional should be preferred. Accordingly, the Court ruled that a mere criticism of government action, however strongly worded, would be consistent with the Fundamental Right of freedom of speech and expression. Only the words having the pernicious tendency, or intended to create disturbance of law and order would be penal in the interests of public order. The gist of the offence, the Supreme Court said, "is incitement to disorder or tendency or likelihood of public disorder or the reasonable apprehension thereof." For determination of criminality, the Court in each case has to determine whether the words in question have "the pernicious tendency" and the uttered has the "intention of creating public disorder or disturbance of law and order." Then only the penal law would take note of the utterance.[14]

On the other hand, considering the constitutional validity of S. 3 of the Pepsu Police (Incitement to Disaffection) Act, the Court has ruled that attempting to cause disaffection amongst the members of a police force towards government established by law, or inducing any member of a police force to commit a breach of discipline may be made penal. Any breach of discipline by members of police force must reasonably be reflected in a threat to public order, for an indisciplined police force could hardly serve as an instrument for maintenance of public order.[15] The Court observed: "Any breach in the discipline by its members must necessarily be reflected in a threat to public order and tranquillity. If the police force itself were indisciplined they could hardly serve as instruments for the maintenance of public order or function properly as the machinery through which order could be maintained among the general public."

Public order is not the same thing as public safety. Hence no restrictions can be imposed on the right to freedom of speech and expression on the ground that public safety is endangered.

(c) SOVEREIGNTY AND INTEGRITY OF INDIA

Section 2 of the Criminal Law Amendment Act, 1961, makes penal the questioning of the "territorial integrity or frontiers of India" in a manner which is, or is likely to be, prejudicial to the interests of the safety or security of India.

(d) FRIENDLY RELATIONS WITH FOREIGN STATES

The idea 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 a propaganda may be prohibited. The ground, however, is of broad import and is susceptible of supporting legislation which may even restrict legitimate criticism of the foreign policy of the Government of India.

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14. For a comment on this case see, R.K. MISRA, Freedom of Speech and the Law of Sedition, 8 *JILI*, 117 (1966).
Also see, *I.L.I., THE LAW OF SEDITION IN INDIA*, (1964).

15. *Dalbir Singh v. State of Punjab*, AIR 1962 SC 1106 : 1962 Supp (3) SCR 25.

Under Art. 367(3), a foreign State means any State other than India. The President, however, may, subject to any law made by Parliament, by order declare any State not to be a foreign State for such purposes as may be specified in the order. The Constitution (Declaration as to Foreign State) Order, 1950, directs that a Commonwealth country is not to be a foreign State for the purposes of the Constitution.

The question, therefore, arises whether a restriction can be imposed on the freedom of speech on the ground of its being prejudicial to a Commonwealth country. The Supreme Court has stated in *Jagan Nath v. Union of India*[16] that a country may not be regarded as a foreign State for the purposes of the Constitution, but may be regarded as a foreign power for other purposes. The affairs amongst the Commonwealth countries are foreign affairs and they are foreign powers in relation to each other. Therefore, a Commonwealth country is a foreign country for purposes of Art. 19(2).

(e) INCITEMENT TO AN OFFENCE

According to the general theories of criminal law, incitement and abutment of a crime is punishable. Incitement to serious and aggravated offences, like murder, may be punished as involving the security of the State.[17] Incitement to many other offences may be made punishable as affecting the public order. But there may still be some offences like bribery, forgery, cheating, etc., having no public order aspect, and incitement to which could not be made punishable as an aspect of public order. So. Art. 19(2) has the words 'incitement to an offence'.

The word 'offence' has not been defined in the Constitution but according to the General Clauses Act it means any act or omission made punishable by law. This is a broad concept and so it is possible for the Legislature to create an offence and make incitement thereto punishable. In this way, the freedom of speech can be effectively circumscribed as any subject can be precluded from public discussion by making it an offence.

(f) CONTEMPT OF COURT

In a democratic society, freedom of speech and expression is a prized privilege and a salutary right of the people. But, at the same time, no less important is the maintenance of independence and integrity of the judiciary and public confidence in the administration of justice. It thus becomes necessary to draw a balance between the two values.

Power has been specifically conferred on the Supreme Court [Art. 129] as well as each High Court [Art. 215] to punish its contempt. The freedom of speech and expression guaranteed by Art. 19(1)(*a*) is thus subject to Arts. 19(2), 129 and 215.

The question of contempt of the Supreme Court and of the High Courts has already been discussed earlier.[18] Contempt of other Courts can be punished by the High Courts under the Contempt of Courts Act, 1952. A challenge to the Act as imposing an unreasonable restriction on the right under Art. 19(1)(*a*), because it

16. AIR 1960 SC 675 : (1960) 2 SCR 942.
17. *Shailabala's* case, *supra*.
18. *Supra*, Chs. IV, Sec. C(i) and VIII, Sec. C(i).

provides no definition of the expression 'contempt of Court', has been rejected on the ground that the expression has a well-recognised judicial interpretation.[19]

The law of contempt of Court as administered by the Supreme Court under Art. 129 has been held to be reasonable under Art. 19(2).[20] S. 228, I.P.C., also makes some cases of contempt of Court punishable.

While the Constitution guarantees freedom of speech and expression, it also lays down that in exercising that right, contempt of Court may not be committed. The underlying idea is that authority of Courts be preserved and obstructions to the due administration of justice removed.

Charging the judiciary as "an instrument of oppression", and the judges as "guided and dominated by class hatred" "instinctively favouring the rich against the poor" has been held to constitute contempt of Court as these words weaken the authority of law and law Courts, and have the effect of lowering the prestige of judges and Courts in the eyes of the people.[21] The Supreme Court has observed recently on the question of contempt of Court:

> "We wish to emphasize that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into dispute or ridicule….Indeed, freedom of speech and expression is "life blood of democracy" but this freedom is subject to certain qualifications. An offence of scandalising the Court *per se* is one such qualification."[22]

(g) TRIAL BY MEDIA

Interference with administration of justice is not a permissible freedom nor an unreasonable restriction. In a case relating to suicide by wife due to her harassment for dowry, an application for grant of anticipatory bail was rejected by Courts below. When special leave petition from such rejection was pending before Supreme Court, an article appeared in a magazine based on an interview of the family of the deceased, giving their version of the tragedy and extensively quoting the father of the deceased as to his version of the case which could all be materials that may be used in the forthcoming trial. The Supreme Court took the view that such articles appearing in the media would certainly interfere with the administration of justice and deprecated such practice and cautioned the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue was sub judice.[23]

Again the Supreme Court has said that before placing criticism of a judgment in public, all concerned in its publication have to see whether any such criticism has crossed limits of fair criticism. Right to freedom of media has to be exercised responsibly and internal mechanism should be devised to prevent publications that would bring judiciary into disrepute and interfere with administration of jus-

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19. *E.T. Sen v. E. Narayanan,* AIR 1969 Del. 201.
20. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132 : (1971) 1 SCC 626.
21. *E.M.S. Namboodiripad v. T.N. Nambiar,* AIR 1970 SC 2015 : (1970) 2 SCC 325; In re: *D.C. Saxena,* AIR 1996 SC 2481.
Also see, *supra,* Ch. IV, Sec. C(i).
22. *Narmada Bachao Andolan v. Union of India,* AIR 1999 SC 3345, 3347 : (1999) 8 SCC 308.
Also see, In re: *D.C. Sazena,* AIR 1996 SC 2481 : (1996) 5 SCC 216.
23. *M.P. Lohia v. State of West Bengal,* (2005) 2 SCC 686 : AIR 2005 SC 790.

tice, especially since judiciary has no way of replying thereto by the very nature of its office. Proclivity to sensationalism is to be curbed in every case and it would be no answer to plead that publisher, editor or others concerned did not know of the contemptuous nature of publication or that it was done in haste. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected. While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a Court for public good or report any such statements, it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the Court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. The judgments of Courts are public documents and can be commented upon, analysed and criticized, but it has to be in a dignified manner without attributing motives.[24]

(h) DEFAMATION

Defamation is both a crime as well as a tort. According to Winfield: "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."[25] As a crime, Defamation is defined in S. 49, I.P.C. The law seeks to protect a person in his reputation as in his person or property.

(i) DECENCY OR MORALITY

These are terms of variable content having no fixed meaning for ideas about decency or morality vary from society to society and time to time depending on the standards of morals prevailing in the contemporary society.

The Indian Penal Code in Ss. 292 to 294 lists some of the offences like selling obscene books, selling obscene things to young persons, committing an obscene act, or singing an obscene song in a public place. S. 292, I.P.C., has been held valid because the law against obscenity seeks no more than to promote public decency and morality.[26]

The test of obscenity is whether the tendency of the matter charged as obscene is to deprive and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort is likely to fall.[27]

Again, the Court has observed in *Chandrakant*:[28] "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 or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect". On the question of obscenity, the Court has laid emphasis on "the importance of art to a value judgment" by the censors. Art should be preserved and promoted in any scheme of censorship for, as the Court observed, "The artistic appeal or presentation of an episode

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24. *Rajendra Sail v. M. P. High Court Bar Assn.*, (2005) 6 SCC 109 : AIR 2005 SC 2473.
25. WINFIELD and JOLOWICZ on *Tort*, 274 (1979).
26. *Ranjit Udeshi v. State of Maharashtra*, AIR 1965 SC 881 : 1965 (1) SCR 65.
27. *R. v. Hicklin*, L.R. 3 Q.B. 360; *Ranjit D. Udeshi v. State of Maharashtra, ibid*.
28. *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, AIR 1970 SC 1390 : (1969) 2 SCC 687. Also see, *Chandra Rajkumari v. Police Commissioner*, AIR 1998 AP 302.

robs it of its vulgarity and harm..." In short what the Court means is that there is a distinction between artistry and pornography.

In *Ramesh Prabhoo*,[29] the Supreme Court has given somewhat wider meaning to the term 'decency' and 'morality'. The Court has maintained that 'decency' or 'morality' is not confined to sexual morality alone. The ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety. The Court has cited with approval the following observation from an English case:[30]

> "…… 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…."

Accordingly, the Court has ruled that in a secular society, the requirement of correct behaviour or propriety is that a candidate at an election should not make an appeal for votes in the name of his religion. Seeking of votes at an election on the ground of the candidate's religion in a secular state is against the norms of decency and propriety of the society and a statutory provision declaring this as a corrupt practice is constitutionally valid.

(j) FREEDOM OF SPEECH AND DISCIPLINE IN CIVIL SERVICE

The Supreme Court has ruled in *Devendrappa* that reasonable restrictions may have to be imposed on the freedom of speech and expression in the interest of maintaining discipline in public services, even though it may not have been mentioned as a ground in Art. 19(2).[31]

The appellant, in the instant case, was the general manager of the Karnataka Small Industries Development Corporation. In a statement made to the press he made a direct attack on the head of his organisation. In a letter to the Governor, he made attacks on several officials of the corporation. He was dismissed from service on the ground that his conduct was clearly detrimental to the proper functioning of the organization, or its internal discipline. He challenged the service rules as well as his dismissal, but the Supreme Court upheld both. He challenged his dismissal on the ground of breach of his freedom of speech and expression, but the Court rejected his plea.

The Court expressed the view that a service rule is made to maintain discipline within the service and not to curtail the freedom of speech. Rules of government service designed for proper discharge of duties and obligations by government servants are not invalidated under Art. 19(1)(*a*) although such rules may, to some extent, curtail or impose limitations on the Fundamental Rights of these persons. Although freedom under Art. 19(1)(a) applies to government servants, it does not mean that the responsibility arising from official position of government servants could not impose some limitations on the exercise of their rights as citizens.

The Court justified the service rules under Art. 19(2). These rules cannot be invalidated even if not justified under Art. 19(2). On the question of interrelation

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29. *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte,* AIR 1996 SC 1113 : (1996) 1 SCC 130.

30. *Knuller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions,* (1972) 2 All ER 898.

31. *M.H. Devendrappa v. Karnataka State Small Industries Development Corpn.,* AIR 1998 SC 1064 : (1998) 3 SCC 732.

of several freedoms guaranteed by Art. 19, the Court has observed that they "are not necessarily and in all circumstances mutually supportive, although taken together they weave a fabric of a free and equal democratic society". Proper exercise of rights may have, implicit in them, certain restrictions. The rights must be harmoniously construed so that they are properly promoted with the minimum of such implied and necessary restrictions. Joining government service has, implicit in it, if not explicitly so laid down, the observance of a certain code of conduct necessary for the proper discharge of functions as a government servant. This code cannot be flouted in the name of other freedoms. Of course, the Courts have to be vigilant to ensure that the code is not so widely framed as to unreasonably restrict fundamental freedoms. "But a reasonable code designed to promote discipline and efficiency can be enforced by the Government organisation in the sense that those who flout it can be subjected to disciplinary action".[32]

In the instant case, the conduct of the petitioner was clearly detrimental to the proper functioning of the organisation, or its internal discipline. "On a proper balancing, therefore, of individual freedom of the appellant and the proper functioning of the government organisation which had employed him, this was a fit case where the employer was entitled to take disciplinary action against him under the service Rules."

But the Supreme Court has refused to apply the *Devendrappa* ruling to an elected member of the corporation who criticised the house tax assessment by the council and asked the tax payers to approach him for sorting out their grievances. He was exercising his democratic right of fair criticism, and it could not be regarded as misconduct on his part, and he could not be removed from the municipal council on that ground.[33] He was an elected member of the municipal council and not its employee. As a representative of the people he owed a duty not merely to the municipal council, but also to the public in his constituency. He held the office in trust for them. As an elected representative of the people, he was expected to safeguard their interest. As such, he would enjoy freedom of speech under Art. 19(1)(a), which includes fair criticism of the law or any executive action. The Supreme Court has observed in this connection:[34]

> "Freedom of speech and expression is guaranteed in our democratic republic both in legislature as well as in local bodies and, therefore, a legislator or a municipal councillor legitimately can express his views in regard to what he thinks to be in public interest. A legitimate exercise of right of speech and expression including a fair criticism is not to be throttled."

(k) NOISE POLLUTION

Lately the Courts have been very conscious of the fact of environmental pollution in India. Accordingly, the Courts have started playing an activist role in the matter of protecting environment.

For this purpose, the Courts have invoked Art. 21 and in a number of cases thereunder, the Courts have tackled a number of problems relating to pollution.[35] The Courts have also interpreted Art. 19 so as to ensure that anti-environmental activities are not protected thereby. On perusal of the relevant case-law, one may

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32. Also see, under *Balakothaiah* case, *infra.*
33. *Baldev Singh Gandhi v. State of Rajasthan,* AIR 2002 SC 1124.
34. *Ibid,* at 1127.
35. See, *Infra,* Ch. XXVI, Sec. J(p).

conclude that the Courts have refused to protect polluting activities under Art. 19. On the other hand, it seems that the various clauses in Art. 19 have been so interpreted as to exclude such activities from their protection.

Coming to Art. 19(1)(*a*), the emerging judicial view is that the freedom of speech can be exercised by a person subject to keeping the level of noise pollution within bearable limits. Although noise pollution has not been mentioned in Art. 19(2) as a ground for which reasonable restrictions can be imposed on the freedom of speech, the Courts have implied this limitation from Art. 19(1)(*a*) itself.

The Courts have argued that freedom of speech includes the freedom to remain silent. The Courts have raised the question: can a person exercise his right under Art. 19(1)(*a*) so as to interfere with the freedom of others? To put it differently, can a citizen say that notwithstanding that he is causing public nuisance and interfering with the right of others, he would be entitled to enjoy his freedom under Art. 19(1)(*a*) in any way he likes, or absolutely without any restriction?

The Courts have answered this question as follows: when a person enjoys his right under Art. 19(1)(*a*), he must do so causing very minimum inconvenience to others. A person cannot claim his freedom of speech so as to interfere with the human rights and Fundamental Rights of others.[36]

The question of noise pollution has arisen in connection with the use of loud speakers. Loud speakers amplify sound manifold and thus create noise pollution. The question has arisen: how far can the use of loud speakers be regulated under Art. 19(1)(*a*)?

In the U.S.A., an uncontrolled discretion vested in the Chief of Police to permit or not to permit the use of loudspeakers at public meetings has been held to be bad for "loudspeakers are today indispensable instruments of effective public speech".[37]

To begin with, the Courts in India also took the same position. It was ruled that the right to use loudspeakers can be regarded as a Fundamental Right in itself being a part of the right of the freedom of speech and expression and, so, a blanket ban on the use of loudspeakers cannot be imposed. A person has a right to propagate, communicate and circulate his views through all means of communication and through all forms of media for reaching a wider audience. Reasonable restriction can, however, be imposed on this right under Art. 19(2).

An uncontrolled discretion cannot be given to executive officers to control the use of loudspeakers, etc. The discretion will have to be controlled as exercisable only when there is an apprehension of a breach of peace. A condition that at a public meeting, loudspeakers should not be used at any time infringes Art. 19(1)(*a*).[38] For example, in an early case, *Indulal v. State of Gujarat*,[39] the Gujarat High Court held that freedom of speech includes freedom to circulate one's views in any manner. The Court drew support for this view from the Privy Council's decision in *Francis v. Chief of Police.*[40]

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36. *New Road Brothers v. Commissioner of Police, Ernakulam*, AIR 1999 Ker 262.
37. *Saia v. New York*, 334 US 558 (1948).
38. *D. Anantha Prabhu v. Dist. Collector*, AIR 1975 Ker 117; *Satya Yug Party v. State of Andhra Pradesh*, AIR 1996 AP 218.
39. AIR 1963 Guj 259.
40. *Supra*.

On the other hand, lately the Courts have started adopting a different stance. For example, in *K. Venu v. Director General of Police*,[41] a single Judge of the Kerala High Court expressed the view that he was not inclined to hold that the right to use loudspeakers was a Fundamental Right in itself on the ground that sound pollution was an accepted danger and indiscriminate use of loudspeakers could not be permitted. In a given situation, it was for the authority concerned to satisfy itself whether a loudspeaker could be used or not.

In *P.A. Jacob v. Supdt. of Police, Kottayam*,[42] the Kerala High Court has taken noise pollution into account saying, "exposure to high noise is a known risk". The Court has observed: "If an absolute right is conceded in this behalf, it will be an unlimited charter for aural aggression." "However wide a right is, it cannot be as wide as to destroy similar or other rights in others". And, further the High Court has said:

> "The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen".

But the Court has maintained that even though use of loudspeakers does not constitute a Fundamental Right, denial of the use of loudspeakers could validly take place only within the confines of the relevant law. In the instant case, denial of permission by the police authorities was held to be wrongful and arbitrary and for no reason.

The Calcutta High Court has imposed restrictions on the use of loudspeakers at the time of *azan* on the ground of noise pollution. The Court has stated that excessive noise certainly causes pollution in society. In India, there is no effective law made to control the noise creator. But, under Art. 19(1)(*a*), read with Art. 21, the citizens have a right of a decent environment and have a right to live peacefully, right to sleep at night and a right to leisure which are all necessary ingredients of the right to life guaranteed under Art. 21.[43]

In another case,[44] the Calcutta High Court has stated that unfortunately, in India, no restriction has been placed on the user of microphones or loudspeakers. Therefore, it is the duty of the Court to show judicial creativity in the matter. The Court has stated, "….where a law of the past does not fit in the present context, the Court should evolve a new law…"[45]

The Court has emphasized that the citizens are entitled to live in society peacefully, free from mechanical and artificial sounds which create a tremendous health hazards and adverse effect on the citizen. Citizens have a right to live in a society which is free from pollution. If the legislature fails to make an appropriate law for the purpose of controlling noise pollution, the Courts have to fill the gap. In the words of the Court:[46]

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41. AIR 1990 Ker 344.
42. AIR 1993 Ker 1.
43. *Maulana Mufti Syed Md. Noorur Rehman Barkati v. State of West Bengal*, AIR 1999 Cal 15. Also see, *Om Biranjana Religious Society v. State of West Bengal*, (1996) 100 Cal WN 617; *Free Legal Aid Cell v. Delhi*, AIR 2001 Del 455.
44. *Burrabazar Fire Works Dealers Assn. v. Commissioner of Police, Calcutta*, AIR 1998 Cal 121.
45. *Ibid*, at 129.
46. *Ibid*, at 134.

> "If a citizen has a right it is also equally a duty on the part of this Court to see that such rights are preserved and not allowed to be destroyed. Legislature may not rise to the occasion but that does not mean that Court will keep its hand folded in the absence of any legislative mandate. The Courts are the custodian of the rights of the citizens and if the Court is of the view that citizens rights guaranteed under the Constitution of India are violated, the Court is not powerless to end the wrong."

The question of controlling noise pollution has also become embroiled with the question of religious freedom guaranteed by Arts. 25 and 26.[47] Can a church claim the freedom to relay prayers on the loud speakers causing noise pollution and nuisance to the residents?. The Supreme Court has ruled in *Church of God v. K.K.R.M.C.Welfare Ass.*[48] that the question of religious freedom does not arise as no religion requires that prayers be performed through voice amplifiers. The Court directed that the guidelines framed by the Government under the relevant rules framed under the Environment Protection Act, 1986, must be followed by the concerned authorities.[49]

(l) ADMINISTRATIVE DISCRETION

The general principle is that it is unreasonable to leave absolute and arbitrary discretion to an administrative officer to regulate the freedom of speech and expression. The discretion to be valid must be exercisable for purposes specified in Art. 19(2), and subject to legislative policy and procedural safeguards. This judicial approach is illustrated by the following cases.

A provision authorising the district magistrate to prohibit dramatic performances of a scandalous or defamatory nature, corrupting persons or arousing or likely to excite feelings of disaffection to the government has been held to be unconstitutional for it makes a district magistrate the final authority to determine the question whether or not a particular play is offensive under the Act. Further, the district magistrate is not obligated to give reasons for his decision and there is no high authority (judicial or otherwise) to review his decision.[50]

A significant judicial pronouncement in the area is *Virendra v. State of Punjab*.[51] Sec. 2 of a Punjab Act empowered the State Government to prohibit the printing of any matter relating to a particular subject for a maximum period of two months in any issue of a newspaper if the government was satisfied that such action was necessary to prevent any activity prejudicial to the maintenance of communal harmony likely to affect public order. The aggrieved party could make a representation to the government against the order, which, after consideration of the same, could modify, confirm or rescind the order. Sec. 3 authorised the State Government to prohibit the bringing into Punjab of any newspaper if it was satisfied that such action was necessary to prevent any activity prejudicial to the maintenance of communal harmony affecting public order.

These provisions were challenged on the ground of giving arbitrary and uncontrolled discretion to the government to curtail freedom of speech 'on its sub-

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47. *Infra*, Ch. XXIX, Secs. B and C.
48. AIR 2000 SC 2773 : (2000) 7 SCC 282.
49. Also see, *Om Biranguna Religious Society v. State of West Bengal*, (1996) 100 Cal WN 617.
50. *State of U.P. v. Baboolal*, AIR 1956 All. 571; *Harnam v. State of Punjab*, AIR 1958 Punj. 243.
51. AIR 1957 SC 896 : 1958 SCR 409.

jective satisfaction'. The Supreme Court pointed out that there existed in Punjab serious tension amongst the various communities and in such a situation, conferment of wide powers to be exercised in the subjective satisfaction of the government could not be regarded as an unreasonable restriction. The State Government being in possession of all material facts, was the best authority to take anticipatory action for prevention of threatened breach of peace. Therefore, determination of the time when, and the extent to which, restriction should be imposed on the Press must of necessity be left to the judgment and discretion of the government. To make the exercise of those powers justiciable would defeat the very purpose of the Act.

Further, the Court held that a law conferring discretion on the executive could not be invalid if it laid down the policy so that discretion was exercised to effectuate the policy. The law in question satisfied this test for it laid down the purposes for which the power could be exercised. Further, in S. 2, there were two safeguards subject to which the government was to exercise its power, *viz.*, an order could remain in force only for two months, and the aggrieved person could make a representation to the government against the order, and so S. 2, as a whole, was valid. S. 3 was held invalid for it neither laid down any time-limit for the operation of the order, nor did it provide for any representation to the government against the order.[52]

Under S. 144, Cr.P.C., where in the opinion of a district magistrate there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, he may, by a written order stating the material facts of the case, direct any person to abstain from a certain act if the district magistrate considers that such direction is likely to prevent danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. The magistrate could, either on his own motion or on the application of any aggrieved person, rescind or alter any order made by him. When an aggrieved person applies, the magistrate is to give him an opportunity of showing cause against the order. If the application is rejected, the magistrate will record his reasons in writing for doing so. No order under S. 144 is to remain in force for longer than two months, but the State Government could direct otherwise in cases of danger to human life, health or safety, or a likelihood of a riot or an affray.

The provision was challenged on the ground that it confers too wide powers on the district magistrate to put restrictions on the freedom of speech and assembly. Rejecting the argument, the Supreme Court has ruled in *Babulal Parate,*[93] that S. 144 is intended to be availed of for preventing disorders, obstructions and annoyances. The magistrate has to act judicially; restraints permissible under S. 144 are of a temporary nature and can only be imposed in an emergency. An opportunity is to be given to the aggrieved person to show cause against the order and the magistrate has to record reasons if he rejects the application of the aggrieved person. The duty to maintain law and order rests on the district magistrate and, therefore, there is nothing unreasonable in making him the initial judge of the emergency.[53]

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52. For further discussion on this topic, see, JAIN, A TREATISE ON ADMN. LAW, 792-794 (1996).

53. *Babulal Parate v. State of Maharashtra,* AIR 1961 SC 884 : (1961) 3 SCR 423; JAIN, CASES AND MATERIALS ON INDIAN ADM. LAW, III, 1809-1813.

But that part of the section [S. 144(6)] which authorises the State Government to extend the life of the order beyond two months has been found to be invalid in *Misra,*[54] because no safeguards were provided in that case. The government exercises its powers in an executive manner; an order passed by it need not be of a temporary duration, and the aggrieved party has been given no opportunity to make representation against government's order.

Under S. 99-A, Cr.P.C., 1898 [presently S. 95, Cr.P.C., 1974) the State Government may, by notification in the Gazette stating the grounds of its opinion, forfeit any book, newspaper or any document containing seditious matter, etc. In *Harnam Das v. State of Uttar Pradesh,*[55] the Court quashed the notification forfeiting certain books because the Government failed to state the grounds for forming its opinion. The ambit of government's power is too large and uncontrolled.

A notable example of administrative regulation of freedom of speech and expression is to be found in the system of film censorship. In *K.A. Abbas v. Union of India,*[56] the Supreme Court has upheld censorship of films under 19(1)(*a*) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product of art. Films can therefore be censored on the grounds mentioned in Art. 19(2). There exists the Board of Film Censors for the purpose.[57]

Prior to the *Abbas* case, the final appellate powers from the decision of the film censors lay in the Central Government. This was challenged on the ground of its inconsistency with Art. 19(1)(*a*). The Central Government agreed to change this and vest the appellate powers in an independent tribunal. The Court expressed satisfaction that the Central Government would cease to perform curial functions through one of its Secretaries in the sensitive field of freedom of speech and expression. "Experts sitting as a Tribunal and deciding matters *quasi*-judicially inspire more confidence than a Secretary..." The Government also agreed to prescribe reasonable time-limits for the decision of the authorities censoring the film.[58]

A tribunal has now been established to replace the Central Government as the appellate tribunal from the decision of the Board of Film Censors. But a provision was put in the Cinematography Act through which the Central Government could review the decision of the Appellate Tribunal. The Supreme Court held this provision to be unconstitutional being "a travesty of the Rule of law which is one of the basic structure of the Constitution."

The Court disliked the idea of the executive sitting in appeal over the decision of a quasi-judicial body. The Court insisted that the executive must obey judicial orders rather than *vice versa.* The government claimed that the power was necessary because on certain occasions there was public resentment to a film, and this created law and order problem even though the film had been cleared by the Board or the Tribunal. Rejecting the argument, the Court insisted that in such a

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54. *State of Bihar v. K.K. Misra,* AIR 1971 SC 1667; JAIN, CASES, III, 1813-1816.
55. AIR 1961 SC 1662 : (1962) 2 SCR 371.
56. AIR 1971 SC 481 : (1970) 2 SCC 780.
57. See, *supra,* Sec. C(s), under "Censorship of Films".
58. For a description of the working of the film censors see, LEVIN, Hearing Procedures of Three Administrative Agencies, 4 *JILI,* 205 (1962).

situation, "the clear duty of the government is to ensure that law and order is maintained by taking appropriate action against the persons who break the law.[59]

According to a G.O. issued by the Andhra Government, all government advertisements were to be released to the newspapers only by the Director of Information subject to the following guidelines: advertisements were not to be issued to a newspaper or a periodical adopting any of the following tones: (*i*) anti-national; (*ii*) communal; (*iii*) rabid, abusive; (*iv*) provoking tensions between different sections of society; (*v*) distorting news for mischievous purposes; (*vi*) character assassination; black-marketing, mudslinging, etc.; (*vii*) fomenting group rivalries; (*viii*) abusive and slanderous attacks on government and its functionaries.

In *Ushodaya Publications (P) Ltd. v. State of Andhra Pradesh*,[60] the Andhra Pradesh High Court said that the newspapers had no right to demand advertisements from the government. On the other hand, the government did have a right to choose the newspapers in which it would advertise. While the government could give its advertisements to such papers as it pleased, it could not discriminate between one newspaper and another.[61] Government's discretion to grant largess must be structured by rational, relevant and non-discriminatory standards or norms.[62] The government must not use its power to give advertisements to muzzle the press which criticises its policies and actions. The Court held conditions (*i*), (*ii*), (*iv*), (*vi*) and (*viii*) valid but not conditions (*iii*), (*v*) and (*vii*) as it was very difficult to decide the matters mentioned therein.[63]

A notice served on the Indian Express for cancellation of the lease and demolition of its building was quashed by the Supreme Court in *Express Newspapers Pvt. Ltd. v. Union of India*.[64] The company publishing the paper took on perpetual lease a piece of land from the Central Government for construction of its building. On the allegation that the building did not conform with the sanctioned plan, a notice to cancel the lease and for re-entry and demolition of the building was served on the company. The company challenged the same as being violative of the freedom of the press. The allegation was that the Indian Express was a trenchant critic of the Prime Minister Indira Gandhi and as a vindictive measure the notice in question had been given to it. It was also stated that whatever the deviations, they had all been sanctioned by the concerned Central Minister.

The Supreme Court quashed the notice holding it to be *mala fide.* The Court came to the conclusion that the notice of the re-entry and the threatened demolition of the Express buildings were intended and meant to silence the voice of the Indian Express. The impugned notice was held to constitute a direct and immediate threat to the freedom of the press and, thus, violative of Art. 19(1)(*a*) read with Art. 14.

(m) PRESS COUNCIL

The Press Council was first established in 1965 but was abolished in 1976 during the internal emergency declared on June 25, 1975.[65] The Council was re-

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59. *Union of India v. K.M. Shankarappa*, AIR 2000 SC 3678 : (2001) 1 SCC 582.
60. AIR 1981 AP 109.
61. See, *supra*, under Art. 14, Ch. XXI.
62. *Ramana, Supra*, 496; *E.E.C. Ltd. v. State of West Bengal*, AIR 1975 SC 266 : (1975) 1 SCC 70.
63. Also see, *supra*, Sec. C(e), on this point.
64. AIR 1986 SC 872 : (1986) 1 SCC 133.
65. *Supra*, Ch. XIII, Sec. B.
Also see, Ch. XXXIII, Sec. F, *infra.*

established in 1978 by the Press Council Act, 1978. The Council is conceived as an agency of self-regulation, and the preservation of the freedom, of the press. It consists primarily of working journalists, managers and owners of newspapers. Its avowed objects are preservation of the freedom of the press and maintenance and improvement of the standards of newspapers in India. If a newspaper offends against standards of journalistic ethics or public taste, or if an editor or working journalist commits professional misconduct, the council may, after giving a hearing and recording the reasons, censure newspaper, editor or the journalist concerned.[66]

The jurisdiction of the council to protect the freedom of the press is every broad. The council can take note of violation of the right to liberty of the press from any agency—be that the State, State functionary, public authority, companies, individual or any person, real or fictional.[67]

E. FREEDOM TO ASSEMBLE: ARTS. 19(1)(*b*) AND 19(3)

ARTICLE 19(1)(*B*)

Article 19(1)(*b*) guarantees to the citizens of India the right to assemble peaceably and without arms. Under Art. 19(3), however, the state can make any law imposing reasonable restrictions on the exercise of this right in the interests of public order, and sovereignty and integrity of India.

To some extent, there is common ground between Arts. 19(1)(*a*) and 19(1)(*b*). For example, demonstrations, processions and meetings considered under Art. 19(1)(*a*) also fall under Art. 19(1)(*b*) for a demonstration also amounts to an assembly and, therefore, the same principles apply under both Articles.[68] The right to strike is not available under either of these Articles.[69]

Article 19(1)(*b*) does not confer on any one a right to hold meetings in government premises. Therefore, Railways can validly prohibit holding of meetings in their premises either within or outside office hours. The right of assembly cannot be exercised on the property of somebody. Railways are entitled to enjoy their properties in the same manner as any private individual subject to such restrictions as may be placed on them by law or usage.[70] But a right to hold public meetings on government property (like a maidan) can be created by usage.[71]

It is not valid to confer uncontrolled discretion on administrative officers to regulate the freedom of assembly. A rule banning holding of public meetings on public streets without police permission has been held bad in *Himmat Lal v. Police Commissioner*.[72] In India, citizens had a right to hold meetings on public streets before the Constitution, subject to the control of appropriate authority regarding the time and place of the meeting and considerations of public order. The rule in question gave no guidance as to the circumstances in which permission to hold a meeting could be refused and, therefore, gave arbitrary powers.[73]

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66. For comments on the Press Council Bill, 1965, see 7 *JILI*, 112 (1965).
67. See, *State of Bihar v. Press Council*, AIR 1975 Del 79.
68. *Supra*, Sec. C(l).
69. *Ibid;* see also *T. K. Rangarajan v. Govt. of T. N.*, (2003) 6 SCC 581 : AIR 2003 SC 3032.
70. *Railway Board v. Niranjan Singh*, AIR 1969 SC 966 : (1969) 1 SCC 502.
71. *D. Anantha Prabhu v. District Collector*, AIR 1975 Ker 117.
72. AIR 1973 SC 87 : (1973) 1 SCC 227.
73. Also see, *Mathai v. State*, AIR 1954 TC 47; *Brahmanand v. State of Bihar*, AIR 1959 Pat. 425; *In re Annadurai*, AIR 1959 Mad 63; *Dasappa v. Dy. Addl. Commr*., AIR 1960 Mys 57.

F. FREEDOM TO FORM ASSOCIATION : ARTS. (19)(1)(*c*) AND 19(4)

(a) ARTICLE 19(1)(*C*)

Article 19(1)(*c*) guarantees to the citizens of India the right to form associations or unions. Under Art. 19(4), reasonable restrictions in the interests of public order or morality or sovereignty and integrity of India may be imposed on this right by law.

The right to form associations is the very lifeblood of democracy. Without such a right, political parties cannot be formed, and without such parties a democratic form of government, especially that of the parliamentary type, cannot be run properly. Hence the Constitution guarantees the right to form associations subject to such restrictions as can be imposed under Art. 19(4).

Recognising the importance of the right of forming associations in a democratic society, the Courts have not favoured the vesting of absolute discretion in the executive to interfere with this Fundamental Right. A discretion vested in a government official to prohibit formation of an association, without proper safeguards, has been held to be unconstitutional.

A law empowered the State Government to declare an association unlawful on the ground that such association constituted a danger to the public peace, or interfered with the maintenance of public order, or the administration of the law. The government notification had to specify the grounds for making the order and fix a reasonable period to make a representation against the order. The State Government was, however, authorised not to disclose any facts which it regarded as being against public interest. The government had to place the notification and the representation against it before an advisory board. If the board, after considering the material, found that there was no sufficient cause for declaring the association unlawful, the government was bound to cancel the order.

In *State of Madras v. V.G. Row*,[74] the Supreme Court declared the provision to be unconstitutional, for the test to declare an association unlawful was 'subjective' and the factual existence of the grounds was not justiciable. The Court emphasized that curtailing the right to form associations was fraught with serious potential reactions in religious, political and economic fields. Therefore, the vesting of power in the government to impose restrictions on this right without having the grounds therefor tested in a judicial inquiry was a strong element to be taken into consideration in judging the reasonableness of the restrictions. The existence of a summary and largely one-sided review by an advisory board was no substitute for a judicial inquiry.

A requirement that teachers of schools should seek the Board's permission to engage in political activities has been held to be wholesome, for a teacher has got to be under certain terms and discipline of employment and it is detrimental to his calling to get mixed up into rivalries in respect of the union, panchayat or the district board.[75]

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74. AIR 1952 SC 196 : 1952 SCR 597.
Also see, JAIN, *Cases, III,* 1817-1822.

75. *Hazi Mohd. v. District Board, Malda,* AIR 1958 Cal. 401.

At times, recognition of an association by the government may affect the right to form an association, *e.g.*, if the government were to prohibit its servants from becoming members of an unrecognised association, then formation of an association becomes vitally linked up with government recognition, for without recognition, the right to form association becomes illusory. In such a situation, Art. 19(1)(*c*) would control the power of the government to recognise associations. A rule provided that a union could not represent the parties in an industrial dispute unless it had been approved by the Labour Commissioner for this purpose. The application for approval could be made only two years after its formation and the Labour Commissioner had absolute discretion to accept or reject the application. These conditions for recognition were held to contravene Art. 19(1)(*c*).[76]

Similarly, the Supreme Court invalidated a rule which provided that no government servant could join or continue to be a member of any services association which the government did not recognise or in respect of which recognition has been refused or withdrawn by it. The Court held that the rule imposed a restriction on the undoubted right of a government servant under Art. 19(1)(*c*). The rule in question was neither reasonable nor in the interest of "public order" under Art. 19(4). The restriction was such as to make the right guaranteed under Art. 19(1)(*c*) illusory since the government could refuse or withdraw recognition of an association on considerations which might not have any direct or reasonable connection with discipline or efficiency of government servants or public order.[77]

Does the right to form associations also involve a guarantee that an association shall have the concomitant right to achieve its objectives for which it has been formed? Can the law place some restrictions on trade unions in the way of their acting as instruments of agitating and collective bargain to improve the wages of the workmen? Can it be argued that if the concomitant right of an association to achieve its purposes is not guaranteed, then the right to form association becomes an idle right? The right to form associations or unions does not include within its ken as a Fundamental Right a right to form association or unions for achieving a particular object or running a particular institution, the same being a concomitant or concomitant to a concomitant of a Fundamental Right, but not the Fundamental Right itself. A right to form association guaranteed under Article 19(1) (c) does not imply the fulfillment of every object of an association as it would be contradictory to the scheme underlying the text and the frame of the several Fundamental Rights guaranteed by Part III and particularly by the scheme of the guarantees conferred by sub-clauses (a) to (g) of clause (1) of Article 19.[78]

The Supreme Court has, however, not countenanced this extended dimension sought to be given to Art. 19(1)(*c*). The Court has ruled that the right guaranteed by Art. 19(1)(*c*) does not carry with it a concomitant right that unions formed for protecting the interests of labour shall achieve their object such that any interference to such achievement by any law would be unconstitutional unless it could be justified under Art. 19(4) as being in the interests of public order or morality. The right under Art. 19(1)(*c*) extends only to the formation of an association or union and insofar as the activities of the association or union are concerned, or as regards the steps which the union might take to achieve its object, they are sub-

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76. *U.P. Shramik Maha Sangh v. State of Uttar Pradesh*, AIR 1960 All. 45.
Also, *E.R.E. Congress v. General Manager, E. Rly*., AIR 1965 Cal. 389.
77. *O.K. Ghosh v. E.X. Joseph*, AIR 1963 SC 812 : 1963 Supp (1) SCR 789; *supra*.
78. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

ject to such laws as may be framed and such laws cannot be tested under Art. 19(4). The Court has held that even a very liberal interpretation of Art. 19(1)(*c*) cannot mean that the trade unions have a guaranteed right to strike. The right to strike may be controlled by appropriate industrial legislation.[79]

The above-mentioned proposition has been reiterated by the Court in the case noted below.[80] Art. 19(1)(*c*) does not extend to, or embrace within it, the objects or purposes or the activities of an association. In other words, Art. 19(1)(*c*) does not carry with it a further guarantee that the objects or purposes or activities of an association so formed shall not be interfered with by law except on grounds as mentioned in Art. 19(4). In the instant case, the State Government took over an educational institution run by a society. The Court ruled that Art. 19(1)(*c*) had not been violated since the institute was taken over and the rights of the society remained unimpaired and uninterfered. It may be that the Institute was the only activity of the society but the Court is concerned with the right of the society to form association. So long as there is no interference with the society, its constitution or composition, merely because of the taking over or acquisition of the Institute, which was the only property or activity of the society, the Fundamental Right of the society to form association is not infringed.

The Court adopted a similar approach in *Raghubar Dayal v. Union of India*.[81] The Forward Contracts (Regulation) Act, 1952, authorises the Central Government to ban forward trading in any commodity by any one except by a recognised association. A recognised association could not amend its rules except with the previous approval of the Central Government. The government could also direct the association to make certain rules. These provisions were challenged as infringing Art. 19(1)(*c*) and not being germane to public order or morality were not warranted by Art. 19(4). It was argued that the freedom to form an association should also include ensuring effective functioning of an association so as to enable it to achieve its lawful objects. The argument in a nutshell was that if a law regulates the recognition of an association under certain conditions subject to which alone recognition could be accorded or continued such conditions would be invalid. Thus, the Court was called upon to consider the question whether the freedom of association implies or involves a guaranteed right of recognition. The contention in the instant case was that if the object of an association was lawful, no restriction could be placed upon it except in the interest of public order and that freedom to form an association carried with it the right to determine its internal arrangements also.

The Court rejected the argument. It ruled that Parliament has power to legislate for regulation of forward trading. It is voluntary, and not compulsory, for an association to seek recognition, and, therefore, conditions of recognition would not affect freedom to form associations. The Supreme Court thus refused to accept the theory that Art. 19(1)(*c*) also confers a Fundamental Right on an association to achieve each of its objectives for which it has been formed and that a law hampering the fulfilment of any of its objects, but not falling under Art.

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79. *All India Bank Employees' Ass. v. The National Industrial Tribunal*, AIR 1962 SC 171 : (1962) 3 SCR 269.
Also, *Radhey Shyam v. P.M.G., Nagpur, supra.*

80. *L.N. Mishra Institute of E.D. & Social Change v. State of Bihar*, AIR 1988 SC 1136 : (1988) 2 SCC 433.

81. AIR 1962 SC 263 : (1962) 3 SCR 547.

19(4), would be unconstitutional. The freedom to associate does not involve freedom to pursue without restriction the objects of the association.[82] Thus, while the right to form association is fundamental, recognition of such an association is not a Fundamental Right and, thus, Parliament can by law regulate the working of such associations by imposing conditions and restrictions on such functions. There can be no objection to statutory interference with the composition or functioning of associations which are created, controlled and governed by statute. Legislative provisions can be validly made for eliminating qualifications for membership based on sex, religion, persuasion or mode of life. However, so long as there is no legislative intervention, it is not open to the Court or authorities purportedly acting under a statute to coin a theory that a particular approved bye-law of a registered cooperative society is not desirable and would be opposed to public policy as indicted by the Constitution. Hence a challenge to the Constitutional validity of a bye law of Zoroastrian Cooperative Society restricting its membership to Parsi community has been repelled.[83]

A Bombay Act provided that only a 'representative union', *i.e.* a union having at least 15 per cent of the total employees in an industry in a local area, could represent the entire body of workers in their relations with the employees. The Court held that the Act imposed no restriction on the right to form unions of textile workers; there was nothing to prevent other unions of other workers from forming a fresh union and enrolling a higher percentage so as to acquire the right of representation.[84]

In *P. Balakotaiah v. Union of India*,[85] certain railway employees who belonged to a Worker's Union sponsored by the Communists carried on agitation for a general strike in order to paralyse communications and movement of essential supplies. They were chargesheeted and their services were terminated. The action was taken against the employees not because they were Communists but because they were engaging themselves in subversive activities. The appellants, however, submitted that their dismissal from service for being communists and trade unionists amounted in substance to a denial to them of the freedom to form association. The Supreme Court rejected the plea saying that the impugned order did not prevent them from continuing to be communists or trade unionists. Their right in that regard remained as before. The appellants, no doubt, enjoyed a Fundamental Right to form associations under Art. 19(1)(*c*), but they had no Fundamental Right to remain in government service, and so when their services were terminated they could not complain of violation of any Fundamental Right.

In *Devendrappa*,[86] the Supreme Court has dissented from the *Balakotaiah* ruling entailing freedom *v.* service. The Court has now said that legitimate action discreetly and properly taken by a government servant with a sense of responsibility and at the proper level to remedy any malfunction in the organisation may

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82. Also see, *D.A.V. College v. State of Punjab*, AIR 1971 SC 1737 : (1971) 2 SCC 269; *Manohar v. State of Maharashtra*, AIR 1984 Bom 47, 53.

83. *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Coop. Societies (Urban)*, (2005) 5 SCC 632 : AIR 2005 SC 2306. Exclusionist associations based on sex or religion etc. in secular India, history and objects of cooperative movement, theory of "area of operation" of cooperative societies, discussed.

84. *Raja Kulkarni v. State of Bombay*, AIR 1954 SC 73 : 1954 SCR 384.

85. AIR 1958 SC 242.

86. *M.H. Devendrappa v. Karnataka State Small Industries Development Corpn.*, AIR 1998 SC 1064 : (1998) 3 SCC 732; *supra.*

not be barred. A person who legitimately seeks to exercise his rights under Art. 19 cannot be told that you are free to exercise the rights, but the consequences will be so serious and so damaging, that you will not, in effect, be able to exercise your freedom. This means that the *Balakotaiah* approach saying that a government servant is free to exercise his freedom under Art. 19(1)(*a*) or (*b*), but at the cost of his service, clearly amounts to deprivation of freedom of speech. Therefore, what the Court has to consider is the reasonableness of service rules which curtail certain kinds of activities amongst government servants in the interests of efficiency and discipline in order that they may discharge their public duties as government servants in a proper manner without undermining the prestige or efficiency of the organisation. If the rules are directly and primarily meant for this purpose, "they being in furtherance of Art. 19(1)(*g*)",[87] can be upheld although they may indirectly impinge upon some other limbs of Art. 19 *qua* an individual employee. Courts ensure that such impingement is minimal and rules are made in public interest and for proper discharge of public interest. "A proper balancing of interests of an individual as a citizen and the right of the state to frame a code of conduct for its employees in the interest of proper functioning of the state, is required".

Thus, *Devendrappa* reduces somewhat the harshness of the *Balakotaiah* ruling. *Balakotaiah* seemed to suggest that a government servant cannot exercise any freedom under Art. 19 and he can enjoy his freedom only if he gives up government service. But *Devendrappa* ruling permits some space to a government servant to enjoy his freedoms subject to proper functioning of the state. A balance has to be drawn between the interests of a government servant as a citizen and the interests of the state as an employer in promoting the efficiency of public service.

The Hindi Sahitya Sammelan is a society registered under the Societies Registration Act. Because of differences among its management, some litigation started. Parliament intervened by enacting a law creating a statutory body to take over the assets of the old society. All members of the old society were to be members of the new body with some new members added by law without the volition of the original members. The Supreme Court declared the law bad mainly on the ground that it interfered with the composition of the society itself; it interfered with the right of association of the pre-existing members of the old society insofar as new members were added without their consent, and also enrolment of new members was not at the choice of the original members. Imposing new members on the old members against their wishes clearly interfered with their right to continue to function as members of the society which was voluntarily formed by the original founders. "The right to form an association" "necessarily implies that the persons forming the association, have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association."

Even a very liberal interpretation of Article 19(1) (c) cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective

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87. See, *infra*, Sec. I.

bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to declare a lockout may be controlled or restricted by appropriate industrial legislation.[88]

This means that any law compulsorily altering the composition of the association amounts to a breach of the right to form the association because it violates the composite right of forming an association and the right to continue it as the original members desired it. The right to form association is not restricted only to the initial stage of forming an association. It also protects the right to continue the association with its own composition as voluntarily agreed upon by the persons forming the association. Otherwise, the right under Art. 19(1)(*c*) would be meaningless because, as soon as an association is formed, a law may be passed interfering with its composition, so that the association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association. The law in question did not merely regulate the affairs of the society; it altered its composition. Any law altering the composition of the association compulsorily will be a breach of the right to form the association of the original members guaranteed under Art. 19(1)(c). Such a law is not protected under Art. 19(4).[89]

(b) THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

The Act authorises the Central Government to declare by notification in official gazette an association as unlawful on certain grounds mentioned in S. 2(*f*) of the Act. To keep control over the government power, provision has been made for appointment of a tribunal consisting of a sitting High Court Judge. A notification declaring an association unlawful is not to be effective until it is confirmed by the tribunal. The tribunal is to decide whether or not there is sufficient cause for declaring the association as unlawful. Undoubtedly, the mechanism of a tribunal is incorporated into the law as a consequence of what the Supreme Court had stated earlier in *Row*.[90]

In the wake of demolition of the Babri Mosque at Ayodhya, the Government of India issued notifications under the Act on December 10, 1992, declaring the following bodies as unlawful for two years: Vishwa Hindu Parishad (VHP); Rashtriya Swayam Sevak Sangh (RSS); Bajrang Dal; Islamik Sevak Sangh and Jamaat-e-Islami Hind. The tribunal appointed under the Act upheld the ban against the VHP, but quashed the same against RSS and Bajrang Dal. The ban against the Jammat-e-Islami was upheld by the tribunal, but, on appeal, from the tribunal decision, the Supreme Court quashed the order on the ground that "there was no objective determination of the factual basis for the notification to amount to adjudication by the tribunal, contemplated by the Act.[91]

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88. *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.

89. *Damyanti Naranga v. Union of India*, AIR 1971 SC 966 : (1971) 1 SCC 678.
Also see, *Asom Rastrabhasa Prachar Samiti v. State of Assam*, AIR 1989 SC 2126 : (1989) 4 SCC 496; *Mani Ram v. State of Haryana*, AIR 1996 P&H 92.

90. *State of Madras v. V.G. Row*, *supra*, footnote 74.

91. *Jamaat-e-Islami Hind v. Union of India*, (1995) SCC 428; see also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295; JAIN, *CASES ON INDIAN ADM. LAW.*, Ch. XVI, Sec. D(iii).
Also see, *Rajendra Prasad Agarwal v. Union of India*, AIR 1993 All 258.

The ban against the VHP came to an end on December 9, 1994. Again, on January 14, 1995, the Government of India declared VHP as unlawful. This ban was negatived by the tribunal. It ruled that the notification had been issued on "extraneous considerations" and so it was vitiated. The tribunal ruled that the notification had been for "collateral purposes and not for the purpose of maintaining peace and tranquillity in society", and that the Government had "taken into account matters which it ought not to have taken into consideration".

(c) RIGHT NOT TO FORM ASSOCIATION

A question not yet free from doubt is whether the Fundamental Right to form association also envisages the right to refuse to form an association. In *Tikaramji v. State of Uttar Pradesh*,[1] the Supreme Court observed that assuming that the right to form an association "implies a right not to form an association, it does not follow that the negative right must also be regarded as a Fundamental Right". It has been already seen that while the constitution guarantees a right to form an association or unions the association or union cannot claim as a further Fundamental Right to achieve the particular purpose for which such association has been established and that such a right even if concomitant to the Fundamental Right is not a Fundamental Right in itself unless the same is justified Article 19(4).[2]

A co-operative society of canegrowers was formed to supply sugarcane to the sugar mills. The membership of the co-operative was voluntary. The canegrowers were free to join or not to join the society. The members were free to resign their membership except when indebted to the society. The Court held that the society did not fall foul of Art. 19(1)(*c*).

A High Court has held that the right to form an association necessarily implies that a person is free to refuse to be a member of an association if he so desires, and, therefore, a rule making it compulsory for every teacher to become a member of a government sponsored association at the risk of suffering disciplinary action in case a teacher absents from two consecutive meetings infringes Art. 19(1)(*c*).[3]

(d) GOVERNMENT SERVANTS

The Fundamental Right guaranteed by Art. 19(1)(*c*) can be claimed by government servants as well. A government servant may not lose his right under Art. 19(1)(*c*) by joining government service. But the right guaranteed by Art. 19(1)(*c*) to form association does not involve a guaranteed right to recognition thereof as well.

In *Delhi Police Non-Gazetted Karmchari Sangh v. Union of India*,[4] the Supreme Court has upheld the validity of the Police Forces (Restriction of Rights) Act, 1966, which imposes certain restrictions on the enjoyment of Fundamental Rights on members of the police force. The Act has been enacted under Art. 33 but it is also valid under Art. 19(4).

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1. AIR 1956 SC 676 : 1956 SCR 393.
2. See also *Dharam Dutt v. Union of India*, (2004) 1 SCC 712 : AIR 2004 SC 1295.
3. *Sitharamachary v. Deputy Inspector of Schools*, AIR 1958 AP 78.
Also see on Art. 19(1)(*c*), S.N. DWIVEDI, Right to Group-Life under the Constitution—Its Nature & Scope, 12 *JILI* 237 (1970).
4. AIR 1987 SC 379 : (1987) 1 SCC 115.

A rule compelling a member of the police force to withdraw his membership of an association as soon as recognition accorded to it is withdrawn, or if, no recognition is granted to it, would be protected by Art. 33. [5] It is also protected by Art. 19(4), as it is a reasonable restriction on the right guaranteed by Art. 19(1)(*c*) in the interest of discipline and public order.

(e) MORALITY

The term 'morality' in Art. 19(4) is to be given a broad connotation as meaning not merely 'sexual morality' but 'public morality' as well in the wider sense as understood by the people as a whole.[6]

G. FREEDOM OF MOVEMENT AND RESIDENCE: ARTS. 19(1)(*d*), (19)(1)(*e*) AND 19(5)

(a) ARTICLE 19(1)(*D*)

Article 19(1)(*d*) guarantees to every citizen the right to move freely throughout the territory of India. Art. 19(1)(*e*) guarantees to a citizen the right to reside and settle in any part of India. According to Art. 19(5), however, the State may impose reasonable restrictions on these rights by law in the interests of general public or for the protection of the interests of any Scheduled Tribe.

These constitutional provisions guarantee to the Indian citizens the right to go or to reside wherever they like within the Indian territory. A citizen can move freely from one State to another, or from one place to another within a State. These rights underline the concept that India is one unit so far as the citizens are concerned.

The rights of movement [Art. 19(1)(*d*)] and residence [Art. 19(1)(*e*)] go together in most cases for when a person is asked to quit a particular place, both these rights are simultaneously affected. Therefore, most of the cases fall both under Arts. 19(1)(*d*) and (*e*) simultaneously, and more or less the same principles are followed in the matter of restrictions on any of these two rights, and hence these are being discussed together.

(b) FOREIGNERS

Article 19(1)(*e*) applies only to the citizens and not to foreigners. Accordingly, the Fundamental Right of a foreigner is confined to Art. 21 guaranteeing his life and liberty.[7] He cannot claim the right to reside and settle in the country as guaranteed by Art. 19(1)(*e*). The Government of India thus has power to expel foreigners from India.[8]

(c) RESTRICTING MOVEMENT TO MAINTAIN PUBLIC ORDER

The Punjab Akalis threatened to hold a demonstration in Delhi on the occasion of the inauguration of Asian games. To frustrate such demonstration, the Governments of Haryana and Uttar Pradesh took stringent measures, such as, barri-

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5. For Art. 33, see, *infra*, XXXIII, Sec. E.
6. *Manohar v. State of Maharashtra, supra; Brijgopal Denga v. State of Madhya Pradesh*, AIR 1979 M.P. 173.
7. See, *infra*, Ch. XXVI.
8. *Louis De Raedt*, see, *supra*, Ch. XVIII.

cading highways, resorting to seizure and arrests, intercepting movement of Akalis across the border on to Delhi.

These steps were challenged through a writ petition in the Supreme Court. The Court laid down some general norms as to how the police should behave in such a situation. The police is entitled to impose reasonable restraints on the physical movement of the members of the public in order to protect public property and avoid needless inconvenience to other citizens in their lawful pursuits. But all such restraints on personal liberty have to be commensurate with the object which furnishes their justification. These should be minimal and ought not to exceed the constraints of the particular situation, either in nature or in duration. Above all, these cannot be used as engines of oppression, persecution and harassment. The sanctity of person and privacy has to be maintained at all costs and ought not to be violated in the name of maintenance of law and order. The rule of law requires that no one is to be subjected to harsh, uncivilised or discriminatory treatment even when the objective is the securing of the paramount exigencies of law and order.[9]

(d) WEARING HELMETS

A rule was made under the Motor Vehicles Act requiring compulsory wearing of helmet by a person driving a scooter or a motor cycle. The rule was challenged as infringing the free movement of the driver of a two wheeler guaranteed under Art. 19(1)(*d*), but the Court refused to accept the argument. The Court maintained that the rule has been framed for the benefit and welfare of, and safe journey by, a person driving a two wheeler vehicle. The rule is made to prevent accidents not to curtail freedom of movement. Even if it be assumed that the rule does put some restriction on the freedom of movement, it is justifiable under Art. 19(5) as a reasonable restriction in the interest of the general public.[10]

(e) EXTERNMENT

Articles 19(1)(*d*) and 19(1)(*e*) have been invoked frequently to challenge the validity of an externment order served by the executive on a citizen requiring him to leave a State or a district. Such an order *prima facie* curtails the freedoms guaranteed by these Articles, and, therefore, the Courts are entitled to test whether the order, and the law under which it has been made, are reasonable within Art. 19(5).

An externment order was challenged on the ground that it was not a reasoned order. The Supreme Court rejected the challenge pointing out that there is a certain brand of lawless elements in society whom it is impossible to bring to book by established methods of judicial trial because the legal evidence essential for conviction is impossible to obtain. For fear of reprisals, witnesses are unwilling to depose in public against such characters. So, in the externment order against such a person, and in the disposal of appeal against that order, the concerned authority is not bound to give reasons or to write a reasoned order. The externee is only entitled to be informed of the general nature of the material allegations.[11]

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9. *Rupinder Singh Sodhi v. Union of India,* AIR 1983 SC 65 : (1983) 1 SCC 140.
10. *Ajay Canu v. Union of India,* AIR 1988 SC 2027 : (1988) 4 SCC 156.
11. *State of Maharashtra v. Saleem Hasan Khan,* AIR 1989 SC 1304 : (1989) 2 SCC 316.

The district magistrate of Delhi, empowered by the East Punjab Safety Act, 1949, served an externment order on Khare asking him to immediately remove himself from Delhi and not to return there for three months.

The Act in question empowered the State Government, or the district magistrate, to make an order of externment on being satisfied that such an order was necessary to prevent a person from acting in any manner prejudicial to public safety or maintenance of public order. The satisfaction was 'final' and not open to judicial review. A district magistrate's order could not remain in force for more than three months while that of the government could last for an indefinite period.

In *Khare*,[12] the Supreme Court held the above-mentioned provision valid pointing out the several safeguards subject to which the executive could pass an order of externment, *e.g.*, the district magistrate could not extern a person from his district, and the government could not extern a person from the State and this was a great safeguard; the grounds on which an externment order was made had to be communicated to the externee by the authority making the order, and if the order was to remain in force for more than three months, he had a right to make a representation which was to be referred to an advisory board constituted under the Act. It may be noted however that the opinion of the board was only of a recommendatory nature and not binding on the government.

Under the Bombay Police Act, the Commissioner of Police could direct a person to remove himself from Greater Bombay for a period up to two years if—(*i*) the Commissioner was satisfied that his acts were calculated to cause alarm or danger to person or property, or that he was about to commit an offence involving violence or force; and (*ii*) in his opinion, witnesses were not forthcoming to testify against him in public.

The person concerned had some procedural safeguards: he was to have in writing the main allegations against him: he was to have an opportunity to explain the allegations; he could appear through a lawyer and produce witnesses to clear his character. He could appeal to the State Government against the externment order and could resort to a Court on certain grounds.

The Supreme Court held in *Hari*[13] that the law was valid *vis-à-vis* Art. 19(5) as the restrictions had been imposed to protect the public from dangerous and bad characters; there were many safeguards, and the maximum time-limit for an externment order could only be two years.[5]

An argument was taken against the validity of the law that there was no advisory board to scrutinize the material on which the authority took action against the person concerned. The Supreme Court rejected the argument with the remark that there was no universal rule that the absence of an advisory board would necessarily make such legislation unconstitutional. Another argument advanced against the validity of the law was that the case against the externee was initiated by the police and it was the police itself who was the judge in the case. The Court

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12. *N.B. Khare v. Delhi*, AIR 1950 SC 211 : 1950 SCR 519.

13. *Hari v. Dy. Commr. of Police*, AIR 1959 SC 559 : 1959 Supp (1) SCR 769.
Also, *Bhagubhai v. District Magistrate*, AIR 1956 SC 585 : 1956 SCR 533; *Gurbachan v. State of Bombay*, AIR 1952 SC 221 : 1952 SCR 737; JAIN, *CASES ON ADM. LAW*, Ch. XV, Sec. D(iv); R. DEB, Operation of Special Laws relating to Externment of Bad Characters, 11 *JILI*, 1 (1969).

rejected the contention arguing that whereas the case could be initiated by an inspector of police, the order of externment could be made only by the Commissioner of Police. A safeguard available in the law was that an appeal against the order lay to the State Government and a reference could be made to the Courts on some points.

A State law authorised the district magistrate to require a person to live, or not to live, at a particular place, or to notify his movements, in the interests of security of the State or public order. Although there were adequate procedural safeguards, nevertheless, the Supreme Court declared the law unreasonable mainly on the ground that it required a person to reside at any place, without giving him a hearing before selecting a place for him. A place could be selected for him where he might not have any residential accommodation or means of subsistence. There was no provision for providing him with residence or means of livelihood in the place selected for him for his residence.[14]

Another law authorised the district magistrate, in an area declared by the State Government as disturbed, to direct a 'goonda' not to remain within, or enter into, a specified part of the district, if he was satisfied that his presence was prejudicial to the interests of the general public. Adequate procedural safeguards were provided but the Supreme Court declared the Act invalid on the ground *inter alia* that the definition of a 'goonda' afforded no assistance to deciding who fell in that category. 'Goonda' had been defined as meaning a hooligan, rouge or a vagabond and included a person who was dangerous to public peace or tranquillity. This was an inclusive definition; it did not indicate any tests to be applied to decide whether a person fell in the first part of the definition, and it was left to the unguided discretion of the magistrate to treat any citizen as a goonda which was hardly proper.[15] The Court insisted that the Act must have clearly indicated when and under what circumstances a person could be called a 'goonda'.

In *Prem Chand v. Union of India*,[16] the Court has adopted a very strict approach on the question of externment. The Court has characterised exterment of a person as "economic harakari and psychic distress". The Court has emphasized that externment provisions have to be read strictly and that any "police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon creditable material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence". Natural justice must be fairly complied with.

In the instant case, the Supreme Court quashed the externment proceedings by the police against the petitioner (under the Delhi Police Act, 1978) on the ground of misuse of power and laid down the following guidelines for the use of such a power: [17]

> "There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that

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14. *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 : (1967) 2 SCR 454.
15. *State of Madhya Pradesh v. Baldeo Prasad*, AIR 1961 SC 293 : (1961) 1 SCR 970; JAIN, *CASES III*, 1834-1838.
16. AIR 1981 SC 613 : (1981) 1 SCC 639.
17. *Ibid*., at 616.

> his mere presence in Delhi or any part thereof is hazardous to its community and its safety.... Natural justice must be fairly complied with and vague allegations and secret hearings are gross violations of Articles 14, 19 and 21 of the Constitution..."

It will be appreciated that the Court has shown a tougher attitude in this case than in the Bombay case mentioned above. In the instant case, the restriction could be imposed only in a disturbed area and only on a 'goonda'. There were no such restrictions in the Bombay Act under which any person could be externed and this was much broader than the term 'goonda' howsoever vaguely it might have been defined. The discretion conferred in the Bombay Act was, therefore, much broader than in the instant case but still while the Bombay Act had been held valid, the Act in the instant case was declared invalid.

The above cases appear to establish the proposition that a person can be externed from a local area on the grounds mentioned in Art. 19(5). The power to make such an order may be left to the subjective satisfaction of an administrative officer, subject to some substantive and procedural safeguards. The grounds served on an externee should not be vague, indefinite or incomplete and they should have a direct bearing on the purposes for which an externment order can be made under the relevant law. The externee should be given an opportunity to make a representation or of being heard against the order of externment. This appears to be the minimal procedural safeguard which should be given to the externee.[18]

(f) DEPORTATION

Article 19(1)(*e*) has also been used to challenge deportation of Indian citizens out of the country and, in this area, the Supreme Court has limited the powers of the executive a great deal. This judicial approach is illustrated by the following cases.

When the residence visa permit of a person who entered India on the basis of a valid permit was cancelled, the Supreme Court held that having regard to the fact that he has entered the country legally, the competent authority must inform him of the reasons for his proposed deportation. The reasons must be sufficient to enable the petitioner to make effective representation and only after considering the representation, the competent authority may pass an appropriate order. The Court however observed that the procedure may be departed from for compelling reasons.[19]

A Central law authorised the Central Government to direct the removal from India of any person against whom a reasonable suspicion existed of having entered India without a permit, or on an invalid permit, or committing a breach of a condition of the permit. The Supreme Court held the provision invalid in its relation to the Indian citizens. While an Indian citizen guilty of serious prejudicial acts like espionage or disloyalty to his country, may render himself liable to the gravest penalty, it would be repugnant to all notions of democracy, and inconsistent with his Fundamental Rights, to expel him from the country for any other reason. This amounts to destroying his citizenship which could be done only by taking recourse to Art. 11.[20]

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18. *Raja Sukhnandan v. State of U.P.*, AIR 1972 All. 498.
19. *Hasan Ali Raihani v. Union of India,* (2006) 3 SCC 705 : AIR 2006 SC 1714.
20. *Supra*, Ch. XVIII.

Further, a person could be externed when the government entertained a reasonable suspicion that an offence had been committed under the Act. Thus, the question whether an offence had been committed or not was left entirely to the 'arbitrary and unrestrained discretion' of the government. A person could thus be removed merely on suspicion without giving him a reasonable opportunity to clear his conduct and this was nothing short of a travesty of the right of citizenship. A forfeiture of citizenship on suspicion of committing a breach of permit regulations could hardly be regarded as a reasonable restriction on the Fundamental Right to reside and settle in the country.[21]

According to a Passport rule, no person could enter India without a valid passport. An Indian citizen entered the country without a passport and he was fined for committing the offence. Holding the rule valid, the Supreme Court stated that it is a proper restriction upon entry of an Indian citizen returning from a foreign country to require him to produce a passport.[22] But it will be a different matter to say that if he enters India without a passport he may be deported from India. Such an order will be bad under the *Ebrahim Vazir* ruling.

(g) POLICE SURVEILLANCE

Since the pre-independence days, there have been in operation in some of the States, some police regulations providing for police surveillance of activities of persons suspected of criminal habits or tendencies. This includes secret picketing of the house, domiciliary visits at nights, and shadowing the movements of the suspect. The purpose of police surveillance is prevention of commission of crimes by such persons.

The validity of such regulations with reference to Art. 19(1)(*d*) was first considered by the Supreme Court in *Kharak Singh v. State of Uttar Pradesh*.[23] The Court ruled by a majority that no aspect of police surveillance fell within the scope of Art. 19(1)(*d*). The purpose of secret picketing was only to identify the visitors to the suspect so that police might have some idea of his activities and this did not affect his right of movement in any material form. Against the validity of shadowing of the suspect's movements, it was argued that if a person suspected that his movements were being watched by the police, it would induce in him a psychological inhibition against movement and this would infringe Art. 19(1)(*d*) which should be interpreted as postulating freedom not only from physical, but even psychological, restraints on a person's movement. Rejecting this argument which advocated too broad a view of the scope of the safeguard guaranteed by Art. 19(1)(*d*), the Court ruled that Art. 19(1)(*d*) guarantees freedom from physical, direct and tangible restraints; it has no reference to 'mere personal sensitiveness', or 'the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion'.

On the same view, domiciliary visits were also held to fall outside the scope of Art. 19(1)(*d*) as a knock at the door, or rousing a man from his sleep, does not impede or prejudice his locomotion in any manner.

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21. *Ebrahim Vazir v. State of Bombay*, AIR 1954 SC 229 : 1954 SCR 933. For further discussion on this case see, JAIN, *A TREATISE ON ADM. LAW*, I, 800-801.
22. *Abdul Rahim v. State of Bombay*, AIR 1959 SC 1315 : (1960) 1 SCR 285.
23. AIR 1963 SC 1295 : (1964) 1 SCR 332.

The minority view, on the other hand, was that all acts of surveillance result in a close observation of a suspect's movements which infringes Art. 19(1)(*d*). If a man is shadowed, his movements are constricted. "He can move physically, but it can only be a movement of an automation."

Needless to say, in *Kharak Singh,* the majority took too restrictive a view of Art. 19(1)(*d*) and that the minority view contained a lot of truth. The flaw in the majority view was that if there was no physical restraint on a person's movements, then the reasonableness of police surveillance could not be scrutinised *vis-à-vis* Art. 19(1)(*d*). This flaw has now been removed by the Supreme Court by its pronouncement in *Govind v. State of Madhya Pradesh.*[24] The Court has now held that police surveillance will have to be restricted to such persons only against whom reasonable materials exist to induce the opinion that they show 'a determination to lead a life of crime'—'crime in this context being confined to such as involve public peace or security only and if they are dangerous to security risks.' Similarly domiciliary visits and secret picketing by the police should be restricted to clearest cases of danger to community security and should not be resorted to as routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. The Court administered a warning that these old regulations 'ill-accord with the essence of personal freedom,' verge 'perilously near unconstitutionality' and, therefore, need to be revised.

The Supreme Court has reiterated in *Malak Singh v. State of Punjab*[25] that police can maintain discreet surveillance over reputed bad characters, habitual offenders and other potential offenders in order to maintain public peace and prevent commission of offences. However, intrusive surveillance seriously encroaching on a citizen's privacy is not permissible under Arts. 19(1)(*d*) and 21.

(h) RIGHT TO PRIVACY

An interesting question considered by the Court in these cases is whether there is in India a fundamental Right to privacy.

In the *Kharak Singh* case, [26] the Supreme Court ruled definitively that the 'right to privacy' was not a guaranteed right in India. But in *Govind*,[27] the Court appears to have accepted a limited Fundamental Right to privacy 'as an emanation' from Arts. 19(1)(*a*), (*d*) and 21.

The right to privacy is not, however, absolute, and reasonable restrictions can be placed thereon in public interest under Art. 19(5). The impugned police regulations were characterised as making 'drastic inroads directly into the privacy' and 'indirectly into the Fundamental Rights,' of the suspect and, therefore, they were given a restrictive operation as stated above.

A further discussion is held on the right to privacy later under Art. 21.[28]

(i) ADMINISTRATIVE DISCRETION

A review of the cases concerning Arts. 19(1)(*c*), (*d*) and (*e*) will reveal that there appears to be a difference in judicial attitude towards the permissible limits

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24. AIR 1975 SC 1378 : (1975) 2 SCC 148.
25. AIR 1981 SC 760 : (1981) 1 SCC 420.
26. *Supra*, footnote 23.
27. *Supra*, footnote 24.
28. *Infra*, Ch. XXVI, Sec. J(i) .

of administrative discretion to curtail the Fundamental Rights of 'association', 'movement' or 'residence'. The right of association is better protected for the administrative authority cannot be empowered to restrict the right finally in its discretion; some kind of judicial scrutiny should be provided for.[29] In other cases, judicial review may not be necessary over administrative discretion.

It is also interesting to note the variable judicial attitude to the adequacy of an advisory board (provided for in preventive detention cases),[30] as a control mechanism over administrative discretion. In case of right of association, the Supreme Court has said that since there is an advisory board in preventive detention cases, it does not mean that it will be sufficient in cases of restraint on the right of association as well. On the other hand, in cases of restraint on the right of 'movement or residence', the Court has stated that advisory board is not necessary in such cases just because there is one in preventive detention cases. The dichotomy in judicial attitude may be because of the realisation that in a democracy right of 'association' should be protected effectively as that is the basis of organisation of political parties.

H. RIGHT TO PROPERTY: ARTICLES 19(1)(*F*) AND 19(5)

Article 19(1)(*f*) guaranteed to the Indian citizens a right to acquire, hold and dispose of property. Art. 19(5), however, permitted the state to impose by law reasonable restrictions on this right in the interests of the general public or for the protection of the interests of any Scheduled Tribe. Arts. 19(1)(*f*) and 19(5) have been repealed by the Constitution (Forty-fourth Amendment) Act, 1979.[31]

Some aspects of Art. 19(1)(*f*) have been discussed later under the Right to Property.[32]

I. FREEDOM TO CARRY ON TRADE AND COMMERCE: ARTS. 19(1)(*g*) AND 19(6)

(a) ARTICLE 19(1)(*G*)

Article 19(1)(*g*) guarantees to all citizens the right to practise any profession, or to carry on any occupation, trade or business. Under Art. 19(6), however, the state is not prevented from making a law imposing, in the interests of the general public, reasonable restrictions on the exercise of the above right. Nor is the state prevented from making—

(*i*) a law relating to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business; or

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

For long India has believed in a regulated and planned economy and not in a *laissez faire* economy. A number of constitutional provisions made under the title

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29. *Supra*, Sec. F.
30. *Infra*, Ch. XXVII, Sec. B.
31. See, Chs. XXXI, Sec. B, and XLII, *infra.*
32. *Infra*, Ch. XXXI, Sec. B.

of "Directive Principles of State Policy" bear testimony to this economic philosophy.[33] 'Reasonable restrictions' on trade, commerce or business have to be assessed keeping this factor in mind. Consequently, the right to carry on trade is very much regulated in India and the Courts have upheld, in course of time, a good deal of social control over private enterprise.[34] By and large it is correct to say that despite Art. 19(1)(*g*), the government enjoys power to regulate and order the economy in any way it pleases.

In 1978, by the 44th Amendment of the Constitution, the word 'socialist' has been introduced in the Preamble to the Constitution characterising India as 'sovereign socialist secular democratic Republic'.[35] Does the addition of the word 'socialist' mean that the Courts should sanction a more rigorous social control of trade and commerce? Should the Courts lean more and more in favour of nationalisation and state ownership of industries? Should the concept of socialism and social justice be pushed to such an extreme as to ignore entirely the interests of private enterprise?

The Supreme Court sought to answer these questions in *Excel Wear v. Union of India*.[36] The Court emphasized that while there may be greater emphasis on nationalisation and state ownership of industries, private ownership of industries is recognised; private enterprise forms an overwhelmingly large proportion of India's economic structure. Limited companies having shareholders own a large number of industries. There are creditors and depositors and various other persons having dealings with the undertakings. Socialism cannot go to the extent of ignoring the interests of all such persons. A private sector undertaking differs from a public sector undertaking. When the latter closes down, it can protect the labour even at the cost of the public exchequer. But a private undertaking is run for return to the owner not only to meet his livelihood or expenses but also for the formation of capital for growth of the national economy. The Court has posed the question: Does it stand to reason that by rigorous restrictions all these interests should be completely or substantially ignored? The Court has said: "The questions posed are suggestive of the answers."[37] In the application of the Fundamental Right to carry on business, the Court has permitted the invoking of the principle of "level playing field", subject however, to the doctrine of public interest. The Court has taken note of the fact that "level playing field" is an important factor to be kept in mind and this factor is embodied in Article 19(1)(g) of the Constitution.[38]

For some time now the trend has been undergoing a change. Instead of nationalisation, the trend has shifted to privatisation. Instead of government control over trade and commerce, the emphasis now is to relax government control. The government has come to view its role more as a facilitator, rather than as a controller, of private enterprise. From the case law, one can see that, hitherto, the

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33. See, *infra*, Ch. XXXIV.

34. See, M.P. JAIN, *ADMINISTRATIVE PROCESS UNDER THE ESSENTIAL COMMODITIES ACT, 1955* (ILI, 1964); M.P. JAIN, *COMMODITY CONTROL IN I.L.I., GOVERNMENT REGULATION OF PRIVATE ENTERPRISE* 19-44 (1971); M.P. JAIN, A Survey of Laws Preventing Concentration of Economic Power in I.L.I., *SOME PROBLEMS OF MONOPOLY AND COMPANY LAW*, 43-62 (1972).

35. *Supra*, Ch. I; *infra*, Ch. XXXIV.

36. AIR 1979 SC at 36. Also see, *infra*.

37. For discussion on this aspect, also see, *supra*, Ch. I and, *infra*, Ch. XXXIV.

38. *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1 : (2007) 11 JT 1.

orientation of the Courts has been favourable to state control. One can visualise that the present-day liberal trend will manifest itself in the case-law arising in future.

Article 19(1)(*g*) uses four expressions, *viz.*, profession, occupation, trade and business. Their fields may overlap but each of these expressions has a content of its own distinct from the others.

The Fundamental Right to establish educational institution as contained in Article 19(1) (g) of the Constitution of India would, however, be subject only to the reasonable restrictions which may be imposed by any law in terms of clause (6) thereof.[39]

(b) STATE MONOPOLY

Article 19(6)(*ii*) (see above) enables the state to make laws for creating state monoplies either partially or complete in respect of any trade or business or industry or service. The state may enter into any trade like any other person either for administrative reasons, or with the object of mitigating the evils in the trade, or even for the purpose of making profits in order to enrich the exchequer.

The law relating to such trading activities must be presumed to be reasonable and in the interest of general public. This was the view taken by the Supreme Court in *Akadasi,*[40] where the Court observed that the law relating to such state monopoly should be presumed to be reasonable and in the interest of general public within the scope of Art. 19(6)(*ii*). The state is not required to justify its trade monopoly as a 'reasonable' restriction and as being in the 'interests of the general public'.[41] It is presumed to be so. No objection can be taken under Art. 19(1)(*g*) if the state carries on a business either as a monopoly, complete or partial, to the exclusion of all or some citizens only, or in competition with any citizen.[42] Thus, the right of the citizens to carry on a trade has been subordinated to the right of the state to create a monopoly in its favour.[43]

Article 19(6)(*ii*) is a saving provision; its function is not to create a power, but to immunize the exercise of legislative power falling within its ambit from being attacked under Art. 19(1)(*g*).[44] Art. 19(6)(*ii*) does not envisage that a State can carry on a trade only under its own law and not under a law made by Parliament. Parliament has power to create trading monopolies in the States under entry 21 in the Concurrent List.[45]

Reference may also be made in this connection to Art. 298, according to which the Union and each State has power to carry on any trade or commerce.[46]

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39. *Modern School v. Union of India,* (2004) 5 SCC 583 : AIR 2004 SC 2236.
40. *Akadasi Padhan v. State of Orissa,* AIR 1963 SC 1047 : 1963 Supp (2) SCR 691.
41. *New Bihar Biri Leaves Co. v. State of Bihar,* AIR 1981 SC 679 : (1981) 1 SCC 537; *Utkal Contractors & Joinery (P.) Ltd. v. State of Orissa,* AIR 1987 SC 2310 : 1987 Supp SCC 751.
42. *P.T. Society v. R.T.A.,* AIR 1960 SC 801 : 1960 (3) SCR 177.
43. *Ramchandra v. State of Orissa,* AIR 1956 SC 298 : 1956 SCR 28; *J.Y. Kondala Rao v. Andhra Pradesh Road Transport Corp.,* AIR 1961 SC 82 : (1961) 1 SCR 642.
44. *H.C. Narayanappa v. State of Mysore,* AIR 1960 SC 1073 : (1960) 3 SCR 742.
45. *Supra,* Ch. X, Sec. F.
46. Ch. XII, Sec. C.

In *Akadasi,*[47] the Supreme Court upheld the validity of an Orissa Law conferring monopoly rights on the State in the matter of trade in kendu leaves. Nevertheless, the Court restricted the scope of the protection under Art. 19(6)(*ii*). The Court ruled that Art. 19(6)(*ii*) protects *only* those statutory provisions which are "basically and essentially" necessary for creating the State monopoly and not such provisions as are only 'subsidiary, incidental, or helpful' to the operation of the State monopoly. Such subsidiary provisions are not immunized by Art. 19(6)(*ii*) and they would have to satisfy the twin tests of 'reasonableness' and 'public interest' as laid down in Art. 19(6).

In *Akadasi,* the provisions dealing with the fixation of the price at which the kendu leaves were to be purchased from the growers were treated as incidental and, thus, held to be grossly unfair contravening the rights of the growers under Art. 19(1)(*f*). Thus, before a law can get immunity under Art. 19(6)(*ii*), the Court has to apply a kind of value judgment, separate the 'essential' monopolistic provisions from the 'non-essential', and test the validity of the latter under Art. 19(6) like that of any other ordinary law restricting trade and commerce.[48]

Further, under Art. 19(6)(*ii*), a State may create monopoly in its own favour but not in favour of third persons for their benefit.[49] The latter law has to fulfil the normal requirements of Art. 19(1)(*g*) read with Art. 19(6). When monopoly in *kendu* leaves was given to certain agents appointed by the State, but those persons were free from government control and the profit was theirs and not of the State, the Supreme Court held that those persons were not really agents of the concerned State within Art. 19(6)(*ii*).[50]

Reiterating this principle, the Supreme Court emphasized that the monopoly created by the State in favour of third parties is different from a monopoly created by the State in its own favour. "The profit resulting from the sale must be for public benefit and not for private gain." The test thus is whether the entire benefit arising from the monopoly enures to the State. Monopoly in a commodity may be valid if it is only for the benefit of the State. It should not serve the private interests of any one person or class of persons.[51] State monopoly ought not to be used as a cloak for conferring private benefit upon a limited class of persons.[52]

A government policy to purchase certain medicines for government hospitals from public sector manufacturers only was held not to amount to a monopoly. The policy does not prohibit other manufacturers from manufacturing and selling their products to other consumers. The government's requirement for drugs is very limited. There is a lot of public demand for drugs in the open market from other consumers. The Supreme Court has observed in this regard in the undernoted case:[53]

> "Monopoly as contemplated under Art. 19(6) of the Constitution is something to the total exclusion of others. Creation of a small captive market in fa-

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47. *Akadasi Padhan v. State of Orissa*, AIR 1963 SC 1047 : 1963 Supp (2) SCR 691.
Also, *Rasbihari Panda v. State of Orissa*, AIR 1969 SC 1081 : (1969) 1 SCC 414; *New Bihar Biri Leaves Co. v. State of Bihar*, *supra*, note 5.

48. *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248; *Vrajlal M. & Co. v. State of Madhya Pradesh*, AIR 1970 SC 129 : (1969) 2 SCC 248.

49. *State of Rajasthan v. Mohanlal*, AIR 1971 SC 2068 : (1971) 3 SCC 705.

50. *Akadasi*, *supra*, footnote 47.

51. *New Bihar Biri Leaves*, *supra*, footnote 41.

52. *Rasbihari*, *supra*, footnote 47.

53. *Indian Drugs & Pharm. Ltd. v. Punjab Drugs Manufacturers Assn.*, AIR 1999 SC 1626 : (1999) 6 SCC 247.

> vour of a State-owned undertaking out of a larger market can hardly be treated as creation of monopoly as contemplated under Art. 19(6) of the Constitution, more so because this captive market consists only of State owned hospitals and dispensaries. Thus, on facts… there is no monopoly created by the impugned policy."

When prohibition is only with respect to the exercise of the right referable only in a particular area of activity or relating to particular matters, there is no total prohibition. Hence, when total prohibition is imposed on the slaughter of cow and her progeny the ban is total with regard to slaughter of one particular class of cattle and is not on total activity of butchers as they are left free to slaughter cattle other than those specified in impugned Act.[54]

Again where a municipality by its resolution prohibited the issue of certain receipts and passes to commission agents on behalf of owners of grain, but not restricting their entry into the market on legitimate business, it was held that the resolution merely prohibited employees of the municipality from issuing such receipts and passes but did not prevent them from carrying on business as an Adatya of a seller of grain which could be considered as a restriction but not a total prohibition.[55]

(c) TRADE: MEANING OF

The guarantee in Art. 19(1)(*g*) extends to practice any *profession* or to carry on any *occupation, trade or business.* Art. 19(1)(*g*) uses four different expressions so as to make the guarantee in Art. 19(1)(*g*) as comprehensive as possible and to include all avenues and modes through which a person earns his livelihood. Nevertheless, Art. 19(1)(*g*) protects only such activities which are of a commercial or a trading nature. Any activity not regarded as trade or business falls outside the purview of this protection. This means that the validity of a law regulating any such activity need not be decided upon by the yardstick of reasonableness and public interest as laid down in Art. 19(6). Thus, a judicial technique to promote rigorous government control of some activities is to refuse to characterise them as trading or commercial activities because of considerations of public morality, public interest, or their harmful and dangerous character.

Plying motor vehicles,[56] or rickshaws[57] on public pathways have been held to be trade and commerce.

(d) LIQUOR TRADE

The judicial opinion on the question whether liquor trade is trade or not for the purposes of Art. 19(1)(*g*) has taken time to stabilize.

An early as 1954, in *Cooverji*,[58] the Supreme Court ruled that no one has an inherent right to sell intoxicating liquors in retail sale. A citizen has no such privilege. As it is a business which is dangerous to the community, the State may

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54. *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,* (2005) 8 SCC 534 : AIR 2006 SC 212.
55. *Krishna Kumar v. Municipal Committee,* (2005) 8 SCC 612.
56. *Saghir Ahmad v. State of Uttar Pradesh,* AIR 1954 SC 728 : (1955) SCR 707 ; *Raman & Raman v. State of Madras,* AIR 1959 SC 694 : 1959 Supp (2) SCR 227.
57. *Iqbal v. Municipal Board,* AIR 1959 All. 186.
58. *Cooverjee v. Excise Commissioner, Ajmer,* AIR 1954 SC 220 : 1954 SCR 873.

entirely prohibit it or permit it under conditions. The manner and extent of regulation rest within the discretion of the State.

Again, in *Krishan Kumar v. State of Jammu & Kashmir*,[59] the Supreme Court refused to countenance the argument that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals and, therefore, was not trade. The Court stated that the acceptance of such a broad argument "involves the position that the meaning of the expression 'trade or business' depends upon, and varies with, the general acceptance of the standards of morality obtaining at a particular point of time in our country". The Court was of the view that while standards of morality could afford guidance to impose restrictions, they could not limit the scope of the right. The morality or illegality or otherwise of a deal would not affect the quality or character of the activity though it might be a ground for imposing a restriction on the activity.

However, the judicial view underwent a fundamental change in course of time. In *Nashirwar v. State of Madhya Pradesh*,[60] the Supreme Court held that there was no Fundamental Right to carry on trade in liquor because of the reasons of public morality, public interest and harmful and dangerous character of liquor. The Court ruled that "there is the police power of the state to enforce public morality to prohibit trades in noxious or dangerous goods". Reference was also made to Art. 47 a Directive Principle, in support of this view.[61]

In *Har Shankar*,[62] after reviewing the previous case-law, the Court observed: "There is no Fundamental Right to do trade or business in intoxicants. The state under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession."

Again, in *Khoday Distilleries*,[63] the Court observed that a citizen has no Fundamental Right to trade or business in intoxicating liquors and that trade or business in such liquors can be completely prohibited. Because of its pernicious and vicious nature, dealing in intoxicating liquors is considered to be *res extra commercium*. The state can create a monopoly either in itself or in an agency created by it for manufacture, possession, sale and distribution of liquor as a beverage. The state can impose restrictions, limitations and even prohibition on intoxicating liquors.[64]

Alternatively the Court has argued in *McDowell*,[65] that even if it were to be argued that trade in intoxicating liquors falls within the scope of Art. 19(1)(*g*), the State could still impose severe restrictions, or even prohibition, on the trade in intoxicating liquors. Art. 47 expressly speaks of the obligation of the state to endeavour to bring about prohibition of the consumption of intoxicating liquors. Therefore, imposing prohibition is to achieve the directive principle adumbrated in Art. 47. Such a course merits to be treated as a reasonable restric-

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59. AIR 1967 SC 1368 : (1967) 3 SCR 50.
60. AIR 1975 SC 360 : (1975) 1 SCC 29.
61. *Infra*, Ch. XXXIV.
62. *Har Shankar v. Dy. E.T. Commr.*, AIR 1975 SC 1121 : (1975) 1 SCC 737.
63. *Khoday Distilleries v. State of Karnataka*, (1995) 1 SCC 574 : (1994) 6 JT 588.
64. *Ugar Sugar Works Ltd. v. Delhi Administration*, AIR 2001 SC 1447, 1452 : (2001) 3 SCC 635.
65. *State of Andhra Pradesh v. Mcdowell & Co.*, AIR 1996 SC 1627 : (1996) 3 SCC 709.

tion within the meaning of Art. 19(6). Thus, whichever line of thought one adopts, an Act imposing prohibition on manufacture, production, consumption and sale of intoxicating drinks is valid.

Liquor trade may thus be subjected to rigorous control. Restrictions which may not be lawful in case of other trades may be permissible as regards the liquor trade. Even prohibition of the liquor trade may be regarded permissible and lawful. The state has complete right of controlling any aspect of the liquor trade. The state has exclusive right to manufacture and sell liquor. The state can sell its right to raise revenue, and the consideration charged by the state for this purpose is neither tax not fee but is like rental.[66] The state can sell its right by public auction or private negotiation. Whatever has been said here in relation to liquor trade applies with equal force to trade in all intoxicants and nauseous drinks.[67]

A caveat may, however, be added here. Although, regulation of liquor trade may fall outside Art. 19(1)(g), Art. 14 can still be invoked if a restriction imposed on liquor trade is found to be arbitrary, irrational or unreasonable.[68]

(e) BETTING AND GAMBLING

The Supreme Court has refused to characterise many other activities as trade for purposes of Art. 19(1)(*g*). Prize chits serve no social purpose but are prejudicial to public interests as they exploit the poor people and so these can be totally banned.[69] Betting and gambling have been held to be not trade and so fall outside the purview of Art. 19(1)(*g*), as gambling activities from their very nature and in essence "are extra *commercium* although the external forms, formalities and instruments of trade may be employed".[70] Prize competitions involving substantial skill are regarded as business activities. On the other hand, a prize competition which is of a gambling nature would not fall within the protection of Art. 19(1)(*g*).[71]

(f) OTHER TRADES

In *Krishnachandra v. State of Madhya Pradesh*, the Court considered the reasonableness of the Gambling Act under Art. 19(1)(*g*) as if gambling was trade and the Court did not take the stand, as it had done earlier, that gambling was not protected by Art. 19(1)(*g*).[72]

The Calcutta High Court has ruled that Art. 19(1)(*g*) does not guarantee the Fundamental Right to carry on trade or business which generates pollution. No one has a Fundamental Right to manufacture, sell and deal in fireworks which produce sound beyond permissible limits, or which generates pollution which would endanger health and public order.[73]

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66. *Harshankar v. Dy. E. & T. Commr*., AIR 1975 SC 1121 : (1975) 1 SCC 737; *Sat Pal & Co. v. Lt. Governor of Delhi,* AIR 1979 SC 1550 : (1979) 4 SCC 232.
67. *P.N. Kaushal v. Union of India,* AIR 1978 SC 1457 : (1978) 3 SCC 558; *Southern Pharmaceuticals & Chemicals v. State of Kerala,* AIR 1981 SC 1862 : 1981 LIC 1520.
68. *Ugar Sugar*, *supra*.
69. *Srinivasa Enterprises v. Union of India,* AIR 1981 SC 504 : (1980) 4 SCC 507.
70. *State of Bombay v. R.M.D.Chamarbaugwala*., AIR 1957 SC 699; *R.M.D.C. v. Union of India,* AIR 1957 SC 628 : 1957 SCR 930.
71. *Supra*, footnote 70.
72. AIR 1965 SC 307 : 1964 (1) SCR 765.
73. *Burrabazar Fire Works Dealers Association v. Commissioner of Police, Calcutta,* AIR 1998 Cal 121.

The Supreme Court has declared that no one can claim a Fundamental Right to carry on business in adulterated foodstuffs thus implying that it is not a trade for purposes of Art. 19(1)(*g*).[74] Money-lending to poor villagers has been held to be not trade and commerce as it is exploitative of the village people. Such an activity has been considered as 'anti-social, usurious, unscrupulous'. On the other hand, money-lending amongst the commercial community is trade as it is integral to trade and commerce.[75]

A contract between an individual and a government is not protected by Art. 19(1)(*g*). If the government infringes the contract, the individual may sue for damages or specific performance, but he cannot argue that he has been deprived of his Fundamental Right to carry on trade and commerce guaranteed by Art. 19(1)(*g*).[76]

The Supreme Court has ruled in *Unni Krishnan*,[77] that establishing educational institutions cannot be regarded as trade or commerce falling under Art. 19(1)(*g*). Imparting education cannot be allowed to become commerce. Trade or business normally connotes an activity carried on for a profit motive. Imparting of education has never been regarded as commerce in India.

Private educational institutions are a necessity of the day as the government alone cannot meet the demand for education particularly in the sector of medical and technical education which calls for huge outlays.

In this case, the Court was faced with the question—how to encourage private educational institutions without allowing them to commercialize education.[78] Establishing and administering an educational institution for imparting knowledge to students is an occupation, protected by Article 19(1) (g) and additionally by Article 26(a), if there is no element of profit generation. Although imparting education has also become a means of livelihood for some professionals and a mission in life for some altruists and is characterized as an occupation, yet it does not cease to be a service to the society and cannot be equated to a trade or a business.

Teaching may however be regarded as a profession falling under art. 19(1)(g).

The law regulating to local administration of an urban or rural area affects the social and economic life of the community. The reasonableness of complete restriction imposed on trade of non vegetarian food items has, therefore, to be viewed from the cultural and religious background of the three municipal towns of Haridwar, Rishikesh and Muni ki Reti. Therefore, the impugned bye-law notified by the Municipal Board, Rishikesh which prohibited the sale and consumption of eggs within the limits of the Municipal Board was not violative of Art. 19(1)(g) cannot be held to be violative of Article 19(1) (g).[79]

(g) ARTS. 19(1)(*G*) AND 301

Article 301 also guarantees freedom of trade. The scope of Art. 301 and its relation with Art. 19(1)(*g*) has been discussed earlier.[80] A provision infringing

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74. *State of Uttar Pradesh v. Kartar Singh,* AIR 1964 SC 1135 : 1964 (6) SCR 679.
75. *Fateh Chand v. State of Maharashtra,* AIR 1977 SC 1825 : (1977) 2 SCC 670; *Supra*.
76. *Achutan v. State of Kerala,* AIR 1959 SC 490 : 1959 Supp (1) SCR 787.
Also see, *infra*, Ch. XXXIX.
77. *Unni Krishnan v. State of Andhra Pradesh,* AIR 1993 SC 2178, at 2244 : (1993) 1 SCC 645.
78. Also see, *infra*, Ch. XXVI, Sec. J(i).
79. *Om Prakash v. State of U.P.,* (2004) 3 SCC 402 : AIR 2004 SC 1896.
80. *Supra*, Ch. XV, Sec. C.

Arts. 301 and 304 may, and ordinarily will, infringe Art. 19(1)(*g*) as well and so it can be challenged under Art. 19(1)(*g*).[81]

J. RESTRICTIONS ON TRADE AND COMMERCE

In several cases, the Courts have upheld measures affecting trade and commerce to some extent, on the ground that they do not constitute restrictions on the Fundamental Right concerned.

Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract considerations. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interest of the country are concerned or where the business affects the economy of the country.[82]

In *Ram Jawaya v. State of Punjab*,[83] the government scheme to nationalise school text books was held valid under Art. 19(1)(*g*) because the private publishers' right to print and publish any book they liked and offer the same for sale, was not curtailed. The choice of text books for the recognised schools lay with the government and the publishers had no Fundamental Right to have any of their books prescribed as a text book by the school authorities.

The Government of Kerala directed that the farmers getting assistance from it for purchase of pumpsets had to purchase them from government approved pump dealers. The private dealers challenged the direction as violation of their right under Art. 19(1)(*g*), but the Supreme Court rejected the contention. The Court ruled that no one has the "Fundamental Right to insist upon the government or any other individual for doing business with him." A government or an individual is free to determine with whom it will do business. The government has every right to select dealers of its choice for delivering of pump sets keeping in view the price and after sale service and this cannot be challenged as an unreasonable restriction under Art. 19(1)(*g*) read with Art. 19(6).[84]

A regulation of trade and commerce becomes challengeable under Art. 19(1)(*g*), if it is shown that it directly and proximately interferes in *praesenti* with the exercise of freedom of trade. If the alleged restriction does not directly or proximately interfere with the exercise of freedom of trade, the freedom guaran-

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81. *S. Ahmad v. State of Mysore*, AIR 1975 SC 1443 : (1975) 2 SCC 131.
82. *Bannari Amman Sugars Ltd. v. CTO*, (2005) 1 SCC 625 : (2004) 10 JT 500.
83. AIR 1955 SC 549; *supra*, Ch. III, Sec. D(iii).
Also, *Naraindas v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 4 SCC 788.
84. *Krishnan Kakkanth v. Govt. of Kerala*, AIR 1997 SC 128 : (1997) 9 SCC 495.

teed by Art. 19(1)(*g*) is not violated.[85] Once it is assumed that the impugned legislation imposes a restriction on the freedom of trade, the burden is on those who support it to show that the restriction imposed is reasonable and in the interest of general public. The burden is on those who seek the protection of Art. 19(6) and not on the citizen who challenges the restriction as invalid.[86] The Supreme Court has also emphasized that "the greater the restriction, the more the need for strict scrutiny by the Court".[87]

(a) REASONABLE RESTRICTION : WHAT IS?

What is a 'reasonable restriction' under Art. 19(6)?[88] Reasonableness of a restriction has to be tested both from procedural as well as substantive aspects of the law. In order to determine the reasonableness of the restrictions, regard must be had to the nature of the business and the conditions prevailing in the trade. These factors differ from trade to trade and no hard and fast rules concerning all trades can be laid down.[89] Further, a restriction on a trade or business is unreasonable if it is arbitrary or drastic and has no relation to, or goes much in excess of, the objective of the law which seeks to impose it.

As early as 1951, in *Chintaman Rao,*[90] the Supreme Court laid down the test for a "reasonable restriction" as follows:

> "The phrase reasonable restriction cannotes that the limitation imposed on 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. The 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 and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."[91]

The Court has further explained the concept of "reasonableness" as envisaged in Art. 19(6) in *Krishnan*:[92]

> "The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restrictions are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly…..In determining the infringement of the right guaranteed under Art. 19(1)(*g*), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the

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85. *Sukhnandan Saran Dinesh Kumar v. Union of India,* AIR 1982 SC 902 : (1982) 2 SCC 150.
86. *Laxmi Khandsari v. State of Uttar Pradesh,* AIR 1981 SC 860, 873 : (1981) 2 SCC 600.
87. *Narendra Kumar v. Union of India,* AIR 1960 SC 430, 437 : (1960) 2 SCR 375; *Municipal Corp. v. Jan Mohammad,* AIR 1986 SC 1205 : (1986) 3 SCC 20.
88. See, *supra,* Sec. B.
89. *Sreenivasa General Traders v. State of Andhra Pradesh,* AIR 1983 SC 1246 : (1983) 4 SCC 353.
90. *Chintaman Rao v. State of Madhya Pradesh,* AIR 1951 SC 118 : 1950 SCR 759; see, *infra,* note 62.
91. Also see, *Bishambhar Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33; *P.P. Enterprises v. Union of India,* AIR 1982 SC 1016 : (1982) 2 SCC 33.
92. *Krishnan Kakkanth v. Govt. of Kerala,* AIR 1997 SC 128, at 135 : (1997) 9 SCC 495.

> disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict."

Thus, restrictions to be reasonable must not be arbitrary or excessive in nature so as to go beyond the interest of general public. This formulation involves a balancing of private interest *vis-a-vis* public interest. In this process, the Courts have leaned towards the consumers' interests. Thus, while far-reaching restrictions are imposed on trade and commerce, only rarely will a restriction be held as unreasonable.

It has since been held that in judging the reasonableness of the restrictions imposed by Art. 19(6), the Court has to bear in mind the Directive Principles.[1]

In *Sivani*,[2] the Supreme Court has laid down the criteria to evaluate the reasonableness of a restriction under Art. 19(6). The Court must take into account whether the law has struck a proper balance between social control, on the one hand, and the right of the individual on the other. The Court has to take into account such factors as, nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how far the restriction is or is not proportionate to the evil and the prevailing conditions at the time. The Court cannot proceed on any abstract or general notion of what is reasonable. The Court cannot judge reasonableness of a restriction from the point of view of one person or a class of persons on whom the restriction may be imposed.

In the context of the Lotteries (Regulation) Act 1988 the Supreme Court has held that if by a statutory action the rights of an agent to carry on business is affected, he may in his own right maintain an action. A quia time application is also maintainable if his right in any manner to carry on business is infringed or is a threatened.[3]

To adjudge the reasonableness of the restriction, regard must be had to the nature of the business, and the conditions prevailing therein which would differ from trade to trade. No hard and fast rules covering all trades can be laid down. The nature of the business and its indelible effect on public interest etc. are important elements in deciding reasonableness of therestriction. No one has inherent right to carry on a business which is injurious to public interest. Trade or business attended with danger to the community may be totally prohibited or be permitted subject to such conditions or restrictions as would prevent the evils to the utmost.

(b) CAN RESTRICTION AMOUNT TO A PROHIBITION?

A question has arisen from time to time whether a restriction can amount to a *prohibition*. The position of the Supreme Court on this question has been that restriction may even amount to prohibition in a given case if the mischief to be remedied warrants total prohibition.[4]

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1. See, *infra*, Ch. XXXIV.
Also see, *infra*, footnotes 40-43 on 1494.

2. *Sivani v. State of Maharashtra*, AIR 1995 SC 1770, at 1774 : (1995) 6 SCC 289.

3. *Tashi Delek Gaming Solutions v. State of Karnataka*, (2006) 1 SCC 442 : AIR 2005 SC 4256.

4. *Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033, 1065 : (1992) 2 SCC 343.

In *Narendra Kumar*,[5] the Supreme Court construed the term 'restriction' to include 'prohibition' and ruled that the reasonableness of such a restruction has to be considered "in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public", and "whether the restraint caused by the law was more than what was necessary in the interests of the general public." Even though total prohibition upon carrying on one's profession can be imposed by way of regulatory measure but for doing so such prohibition must pass through a stringent test of public interest.[6]

Rent Act, which imposes a limit on the rent which can be charged, would pass the test of reasonable restriction.[7]

The Court has again explained the position as follows in *Mohd. Faruk*:[8]

> "The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the Fundamental Rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint and in the absence of exceptional situations such as the prevalence of a state of emergency—national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

In *Narendra Kumar*, a total prohibition on copper dealers was held valid.[9] In *Systopic Laboratories*,[10] complete ban on manufacture and sale of certain medical formulations was held to be not an unreasonable restriction on the right to carry on trade under Art. 19(1)(*g*). The Central Government took the said decision on the recommendation of the Drugs Consultative Committee which had thoroughly studied the matter. Implementation of directive principles would be in the interest of the general public and, therefore, trades that are harmful or dangerous to the ecology may be regulated or totally prohibited.[11]

Although regulatory measures for better efficiency, conduct and behaviour in the public interest would be a reasonable restriction, but a total prohibition on a person from carrying on his profession at an age chosen by the Government would not be a reasonable restriction unless special reasons are shown to exist.[12] The Court also expressed the view that the freedom of carrying on a profession should be enjoyed by the citizen to the fullest possible extent without putting "shackles" of avoidable cobweb of rules and regulations putting restrictions in

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5. *Narendra Kumar, supra,* at 436.
6. *B. P. Sharma v. Union of India,* (2003) 7 SCC 309 : AIR 2003 SC 3863.
7. *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.,* (2003) 6 SCC 315.
8. *Md. Faruk v. State of Madhya Pradesh,* AIR 1970 SC 93 : (1969) 1 SCC 853.
9. *Supra,* footnote 5.
10. *Systopic Laboratories (P) Ltd. v. Prem Gupta*, AIR 1994 SC 205 : (1994) Supp (1) SCC 160.
11. *Indian Handicrafts Emporium v. Union of India,* (2003) 7 SCC 589 : AIR 2003 SC 3240.
12. *B. P. Sharma v. Union of India,* (2003) 7 SCC 309 : AIR 2003 SC 3863.

the enjoyment of such freedoms. As such clause 17 of the conditions of licence issued by the Tourism Department of the State restricting the age of tourist guide as 60 years was held to be unconstitutional.

Thus, it is clear from the above discussion that in certain circumstances, a restriction on trade may amount even to prohibition. As stated above, protection of Art. 19(1)(*g*) has already been withdrawn from trade in intoxicants.[13] No person has any Fundamental Right to carry on trade in any noxious or dangerous goods like intoxicating drugs or intoxicating liquors.[14]

(c) MISCELLANEOUS SITUATIONS

A State law prohibited the manufacture of *bidis* in the villages during the agricultural season. No person residing in the villages could employ any other person, nor engage himself, in the manufacture of *bidis* during the agricultural season. The object of the provision was to ensure adequate supply of labour for agricultural purposes. The *bidi* manufacturer could not even import labour from outside, and so had to suspend manufacture of *bidis* during the agricultural season. Even villagers incapable of engaging in agriculture, like old people, women and children, etc., who supplemented their income by making *bidis* in their spare time, were prohibited from engaging themselves in *bidi* manufacture without any reason. The prohibition was held to be unreasonable because it was in excess of the object in view and was drastic in nature.[15]

An order obligating wheat growers to dispose of excess wheat within 15 days was held unreasonable as it did not create any corresponding obligation whatever on any one to purchase wheat at a reasonable price.[16]

In order to curb the increasing menace of vehicle theft the central government devised a system of introducing High Security Registration Plates and accordingly issued the Motor Vehicles (New High Security Registration Plates) Order 2001. The Ministry of Road Transport and Highway left the discretion to the states in the matter of using Notice Inviting Tender (NIT) for supplying such plates. The petitioners challenged the conditions of NIT concerning experience and extent of business of the prospective bidders and the NIT stipulated that the bidders should be operating in at least five countries for licence plates and in atleast three countries having security features worldwide, with minimum annual turnover equivalent to must be from licence place business. The agreement is to subsist for a period of 15 years during which the bidder will be approved except in case of termination of contract. The petitioners challenged these conditions contending that the conditions concerning experience and extent of business are discriminatory and tailor made to suit the interest of a class of manufacturers having foreign collaboration and a cartel of companies. The State was well aware that only one or two companies could satisfy the eligibility conditions in the name of implementing Rule 50 requiring use of such number plates and in the process was taking away the rights of existing manufacturers violating their Fundamental Right under Article 19(1)(g) of the Constitution by eliminating individual manufacturers of plates.

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13. *Supra*, Sec. I(d).
14. *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 SC 1862 : 1981 LIC 1520.
15. *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759.
16. *Partap Singh v. State of Punjab*, AIR 1975 P&H 324.

Rejecting the petitioner's plea, the Court held that the impugned clauses had been incorporated to ensure that the manufacturers are technically and financially competent to fulfill the contractual obligation. The know how was available outside India and the indigenous manufacturers are mostly those who have foreign collaboration. Keeping in mind the nature and magnitude of the job, the huge infrastructure required for nationwide implementation, the state's attempt to select foreign manufacturers having foreign collaboration and experience in foreign countries cannot be held to be discriminatory and even if one manufacturer is selected through open tender the said selection cannot be held to be creating monopoly or violative of Article 19(g) read with Clause 6.[17]

With a view to stop production of *Khandsari*, a restriction was imposed by way of stopping the crushers for two months. The restriction was held valid in *Laxmi Khandsari v. State of Uttar Pradesh*[18] as it was imposed with a view to stop production of *Khandsari* so as to promote production of white sugar and to make it available to the consumers at reasonable rates. The restriction was held to be in public interest and as bearing a reasonable *nexus* to the objects sought to be achieved, *viz.*, to reduce shortage of sugar and ensure its equitable distribution. The restriction was not more excessive than what the situation demanded.

A law prohibiting advertisements relating to magic remedies was held valid because the underlying purpose of the law was to prevent objectionable and unethical advertisements in order to discourage self-medication and self-treatment.[19]

Whether a particular restriction on trade (prohibiting selling of eggs) to the extent of its complete prohibition is to be considered reasonable within the meaning of clause (b) depends on the nature of trade involved and the public interest to be subserved by such total prohibition. In this respect the Supreme Court has held that the term reasonable restriction as appearing in clause (6) is highly flexible and draws colour from its context. In this case the Court come to the reasoning that a large number of residents are strict vegetarians. A major source of employment and revenue in Rishikesh, Haridwar and Muni Ki Reti is derived from tourism and a floating population of pilgrims. On the other hand as the appellant/petitioners who are running hotels and restaurants form a small section of the population who can also trade in adjoining towns and villages no substantial harm is caused to them.[20]

A law setting up markets for commercial crops and prohibiting any trade in such crops within a reasonable radius of a market has been held to be reasonable. The purpose is to reduce scope for exploitation in dealings. Such markets ensure correct weighing and reasonable prices and provide other facilities to the growers of commercial crops.[21]

Qualitative restrictions imposed on fruit products through a legal provision have been held valid as being reasonable and in public interest.[22]

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17. *Association of Registration Plates v. Union of India*, (2004) 5 SCC 364 : AIR 2005 SC 1354.
18. AIR 1981 SC 860, 873.
19. *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 : 1960 (2) SCR 671; *supra.*
20. *Om Prakash v. State of U.P.*, (2004) 3 SCC 402 : AIR 2004 SC 1896.
21. *M.C.V.S. Arunachala Nadar v. State of Madras*, AIR 1959 SC 300 : 1959 Supp (1); *Mohd. Hussain v. State of Bombay*, AIR 1962 SC 97 : 1962 (2) SCR 659; *Jan Mohd. Noor Mohd. v. State of Gujarat*, AIR 1966 SC 385 : 1966 (1) SCR 505.
22. *Hamdard Dawakhana v. Union of India*, AIR 1965 SC 1167 : (1965) 2 SCR 192.

In *Minerva Talkies, Bangalore v. State of Karnataka*,[23] the Supreme Court has upheld a rule made by the State Government to the effect that no licensee shall exhibit more than four cinema shows in a day. The Court has ruled that the rule in question does not impose any unreasonable restriction on the freedom to carry on any occupation, trade or business guaranteed by Art. 19(1)(*g*) in the interest of general public.

The state law prohibited members of the State Medical Education Service from private practice. The Supreme Court held the restriction to be reasonable and hence valid.[24] The Court said that no one compels any one to join the service; one is free to leave it at anytime. The restriction is not on the freedom to practise the medical profession but on such practice while one continues to be a member of the state service. The restriction is in public interest. The state is free to recruit persons to its services on such terms as it thinks desirable to make the services beneficial to the public.

(d) STREET HAWKERS

In *Bombay Hawkers' Union v. Bombay Municipal Corporation*,[25] the Supreme Court ruled, in answer to the claim of the hawkers that under Art. 19(1)(*g*) they have a Fundamental Right to carry on their trade on public streets, that no one has a right to do business so as to cause annoyance or inconvenience to members of the public. Public streets are meant for use by the general public; they are not meant to facilitate the carrying on of private trade or business. But the hawkers ought not to be completely deprived of their right to carry on trade. So, the Court directed that there should be hawking zones in the city where licenses should not be refused to the hawkers except for good reasons.

In *Sodan Singh v. New Delhi Municipality*,[26] (I) the Supreme Court again considered the question: how far the hawkers have a right to ply their trade on pavements meant for pedestrians? In the instant case, the Court has come to the conclusion that the right to carry on trade or business mentioned in Art. 19(1)(*g*) on street pavements, if properly regulated, cannot be denied on the ground that the street pavements are meant exclusively for pedestrians and cannot be put to any other use. Proper regulation is, however, a necessary condition, for otherwise the very object of laying roads would be defeated. The State holds all public roads and streets in the country as a trustee on behalf of the public and the members of the public are entitled as beneficiaries to use them for trading as a matter of right subject to the right of others including pedestrians. The right of hawkers is subject to reasonable restrictions under Art. 19(6). The Court has however negatived the contention of the hawkers that they have a Fundamental Right to occupy a particular place on the pavement where they can squat and do business. "The petitioners do have a Fundamental Right to carry on a trade or business of their choice but not do so at a particular place,[27]" said the Court. The Court has conceded to the hawkers the right to do business while going from place to place subject to proper regulation in the interest of general convenience of the public.

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23. AIR 1988 SC 526 : 1988 Supp SCC 176.
24. *Sukumar Mukherjee v. State of West Bengal*, AIR 1993 SC 2335.
25. AIR 1985 SC 1206 : 1985 (3) SCC 528.
26. AIR 1989 SC 1988 : (1989) 4 SCC 455.
27. *Ibid*, at 1996.

The *Sodan* ruling has been reiterated by the Court in *Sodan Singh v. NDMC (II)*.[28] The Court has said that every citizen has a right to the use of a public street vested in the state as a beneficiary but this right is subject to reasonable restrictions as the state may choose to impose. "Street trading is albeit a Fundamental Right under Art. 19(1)(*g*) of the Constitution but it is subject to reasonable restrictions which the state may choose to impose by virtue of Art. 19(6)." This right includes hawking on the street pavements by moving from one place to another without being stationary on any part of the pavement. This does not include a citizen occupying or squatting on any specific place of his choice on the pavement, regardless of the rights of others, including the pedestrians, to use the pavements. The Court has emphasized in this connection: "Proper regulation is, however a necessary condition, for otherwise the very object of laying roads would be defeated."[29]

The right to hawk cannot be unreasonably restricted The correct approach is to determine where hawking is not to be permitted and thereafter such areas to be non-hawking zones.[30]

In a matter relating to eviction of illegal squatters occupying railway property and also areas around Rabindra Sarobar, the Calcutta High Court directed the railway administration and the State of West Bengal to provide sanitary facilities to the squatters as interim measure. The Union of India went to Supreme Court contending that the High Court ought to have directed police assistance for eviction and rather than providing them with further benefit as such occupation was causing danger to passengers and goods carried by railway and also causing pollution. The Supreme Court directed that the High Court should take necessary steps to give effect to the orders of eviction passed by competent authorities and also the High Court from time to time.[31]

It is clear that in these cases the Supreme Court has sought to reconcile the interests of the pedestrians with those of the hawkers.[32]

(e) WAGES, GRATUITY, LABOUR DISPUTES

There is a close relationship between the right to carry on trade and wages payable to the employees in a trade or industry. Too high wages may affect the economic viability of an industry; but too low wages may amount to exploitation of human labour. A balance has to be drawn between the two conflicting values and the Supreme Court has sought to do so in several cases. The Court has held that the technique of appointing a wage board consisting equally of the representatives of the employers and employees with a few neutral members and a neutral chairman for fixing wages in an industry according to factors laid down and according to natural justice, does not amount to an unreasonable restriction on trade and commerce.[33]

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28. AIR 1992 SC 1153 : (1992) 2 SCC 458. Also see, *Sodan Singh v. NDMC (III),* AIR 1998 SC 1174 : (1998) 2 SCC 727; *Maharashtra Ekta Hawkers Union v. Municipal Corporation Greater Mumbai,* 2004 (1) SCC 625, 640 : AIR 2004 SC 416.

29. *Ibid,* at 1154.

30. *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai,* (2004) 1 SCC 625 : AIR 2004 SC 416.

31. *Union of India v. Howrah Ganatantrik Nagarik Samity,* (2003) 9 SCC 302 : AIR 2003 SC 3990.

32. Also see, *South Calcutta Hawkers Association v. Government of West Bengal,* AIR 1997 Cal 234; *Bapuji Nagar Khudra Byabsai Ass. v. State of Orissa,* AIR 1997 Ori 189.

33. *Express Newspapers v. Union of India,* AIR 1958 SC 578 : 1959 SCR 12.

Wages are usually classified into 'living wage', 'fair wage' and 'minimum wage'. A 'minimum wage' provides for bare sustenance of life just sufficient to cover the bare physical needs of a worker and his family and such a wage must be paid to a worker irrespective of the industry's capacity to pay. 'A living wage' provides a frugal measure of comfort and other amenities, *e.g.*, education and health in addition to what 'minimum wage' provides for. A 'fair wage' is a mean between 'minimum' and 'living' wages. Arts. 19(1)(*g*) and 19(6) demand that in fixing 'living' or 'fair' wages, industry's capacity to pay is an essential ingredient. Fixing 'living' or 'fair' wages without taking into consideration 'capacity to pay' amounts to an unreasonable restraint on the right to carry on trade.[34]

Gratuity, the Supreme Court has held, is a retirement benefit which may be awarded by an employer when an employee retires or resigns from service voluntarily after completion of 15 years' continuous service. Gratuity being a reward for good, efficient and faithful service rendered for a considerable period, there could be no justification for awarding it when an employee resigns only after three years' service except under exceptional circumstances. Accordingly, a provision of law providing for gratuity in such a case amounts to an unreasonable restriction under Art. 19(6) on the employer's right to carry on business and would be liable to be struck down as unconstitutional.[35]

In *British Paints*,[36] the Supreme Court accepted 10 years' minimum period of service for earning gratuity. In *Straw Board*,[37] the Court again changed its position and upheld the 5 years' minimum qualifying period of service for entitlement to gratuity to workmen who voluntarily retire or resign. This shows that the concept of "gratuity" has undergone a metamorphosis over time. The obligation of the employer to pay gratuity to the employee on his resignation or retirement after a continuous service of five years has been held to be a reasonable restriction in public interest on the employer's right to carry on trade. The Court has justified it as a welfare measure in the interest of the general public to secure social and economic justice to workmen to assist them in their old age and to ensure them a decent standard of life on their retirement.[38]

Provisions made for labour-welfare providing for annual paid leave or one month's notice for dismissal have been held to be reasonable.[39]

In *Jalan Trading Co. v. D.M. Aney*,[40] a statutory obligation to pay the statutory minimum bonus by the employers to the employees even when the employer sustained loss has been held to be reasonable and in public interest, as this is in implementation of the Directive Principles in Arts. 39 and 43.[41] What is sanctioned by the Directive Principles cannot be regarded as unreasonable or contrary to public interest in the context of Art. 19.[42] A state law increasing the number of compulsory

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34. *Ibid*.; *The P.T.I. v. Union of India*, AIR 1974 SC 1044 : (1974) 4 SCC 638.
Also, *U. Unichayi v. State of Kerala*, AIR 1962 SC 12 : (1962) 1 SCR 946.
35. *Express Newspapers (Pr.) Ltd. v. Union of India*, AIR 1958 SC 578 : 1959 SCR 12.
36. *British Paints (India) Ltd. v. Its Workmen*, AIR 1966 SC 732 : 1966 (2) SCR 523.
37. *Straw Board Mfg. Co. Ltd. v. Their Workmen*, AIR 1977 SC 941 : (1977) 2 SCC 329.
38. *Bakshish Singh v. Darshan Engg. Works*, AIR 1994 SC 251.
39. *M.G. Beedi Works v. Union of India*, AIR 1974 SC 1832 : (1974) 4 SCC 43.
40. AIR 1979 SC 233 : (1979) 3 SCC 220.
41. For Directive Principles see, *infra*, Ch. XXXIV.
42. See, *supra*, footnote 1 on 1488.

paid national and paid holidays from 9 to 13 during a year has been held to be valid in view of Art. 43.[43]

(f) ESSENTIAL COMMODITIES

Trades in certain commodities (designated as essential commodities) may be more drastically regulated than trade in other commodities. To assess the reasonableness of a restriction, the nature of the business and conditions prevailing therein are important factors to be considered. As these factors differ from trade to trade, no hard and fast rules concerning all trades can be laid down. The result of this approach is that Courts may hold drastic restrictions on certain trades in certain circumstances as reasonable. As for example, fixation of a ceiling of 200 quintals on wheat stocks possessed by a dealer at any time is valid to obviate black-marketing and hoarding in essential commodities.[44] A similar embargo on sugar stocks has been held valid.[45]

A notification under the Essential Commodities Act imposed a levy on sugar manufacturers. They were required to hand over to the government 50 per cent of their production at a fixed price. They could sell the rest in free market. The notification was challenged on the ground that the price of levy sugar was not sufficient to cover their manufacturing cost. The Court rejected the argument on the following grounds: (1) Interest of the consumers must prevail over that of manufacturers. The dominant object of the price control policy was to ensure equitable distribution and make the commodity available at fair price so as to benefit the consumers. Thus, individual interests must yield to the larger interests of the community. (2) Even if the petitioners had to bear some loss, that would not make the restriction unreasonable.[46] The determining factor was the interest of the consumer and not that of the producer. (3) Since the petitioners could sell 50 per cent of their production in the open market, the loss to them, if any, would be minimal.[47]

An order establishing direct relation, in the field of copper trade, between the importer and the consumer of copper, and completely eliminating the middleman—the dealer, was held valid in *Narendra Kumar*.[48] Copper is an essential commodity; its indigenous production is small; consumers depend on imported copper and there is a tendency of its price to go up. The order was promulgated in an honest effort to protect the interests of the general public.

A rule banning all hedging contracts in cotton except those permitted by the Textile Commissioner, and also authorising him to place such restrictions as he thought fit on such contracts, was held valid. Cotton being an essential commodity, restrictions may reasonably amount to prohibition for a time of all normal trading in the commodity.[49]

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43. *M.R.F. Ltd. v. Inspector, Kerala Govt.*, AIR 1999 SC 188. Also see, *infra*, footnotes 54-59, on 1496-1497.
44. *Suraj Mal Kailash Chand v. Union of India*, AIR 1982 SC 130 : (1981) 4 SCC 554.
45. *P.P. Enterprises v. Union of India*, AIR 1982 SC 1016 : (1982) 2 SCC 33.
46. *Ref. Meenakshi & Prag Ice, infra*.
47. *New India Sugar Works v. State of Uttar Pradesh*, AIR 1981 SC 998 : (1981) 2 SCC 293. Also see, *infra*, Sub-sec. (O) on 1507, under Price Fixing.
48. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375.
49. *M.B. Association v. Union of India*, AIR 1954 SC 634.

Drastic restrictions placed on the dealers of gold by the Gold (Control) Act have been upheld.[50]

(g) SLAUGHTER OF ANIMALS

To reconcile the right of butchers to carry on their trade, and restrictions imposed on killing of animals through several State laws, the Supreme Court has adopted an economic approach, *viz.*, killing of useful animals could be prohibited but not of those animals who have become economically useless to the society. The Court has emphasized that a prohibition imposed on the Fundamental Right to carry on trade and commerce cannot be regarded as reasonable if it is imposed not in the interest of general public, but merely to respect the susceptibilities and sentiments of a section of the people. Thus, it is reasonable to prohibit slaughter of cows of all ages and male or female calves of cows or buffaloes; prohibition of slaughter of bulls, bullocks and she-buffaloes below the age of twenty-five years is an unreasonable restriction on the butchers' right to carry on their trade as well as not in public interest as these animals cease to be useful after the age of 15 years.[51] The Court observed in this connection in *Quareshi*: "The maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. To maintain them is to deprive the useful cattle of the much needed nourishment. The presence of so many useless animals tends to deteriorate the breed."

An elaborate procedure for certification of animals for slaughter has also been held unreasonable as imposing disproportionate restriction on the butchers' right to carry on their trade.[52] A municipal corporation issued a standing order under a statute directing closure of slaughter houses for seven holidays in a year. The order was challenged as putting an unreasonable restriction on the trade of the butchers. The question before the Court was whether the restriction was reasonable in the interest of the general public. The question before the Court was whether the restriction was reasonable in the interest of the general public. The Supreme Court took the view that the expression "in the interest of general public" found in Art. 19(6) "is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in the Directive Principles." The Court ruled that the order in question did not put any unreasonable restrictions on the Fundamental Right of the petitioners under Art. 19(1)(*g*).[53]

A ban was put on the slaughter of bulls and bullocks below the age of 16 years. The Supreme Court found that these animals could be used for breeding, draught and agricultural purposes up to the age of 16 years. Accordingly, the Court ruled that the restriction was not unreasonable, looking to the balance which needs to be struck between public interest, which requires preservation of useful animals, and permitting the different traders in beef, etc. to carry on their trade and profession.[54]

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50. *Manick Chand v. Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65.
51. *M.H. Quareshi v. State of Bihar*, AIR 1958 SC 731; *Abdul Hakim v. State of Bihar*, AIR 1961 SC 448 : (1961) 2 SCR 610.
52. *Md. Faruk v. State of Madhya Pradesh*, AIR 1970 SC 93 : (1969) 1 SCC 853.
Also, *supra*, Sec. B and *infra*, Chap. XXXIV, under Directive Principles.
53. *Municipal Corporation, Ahmedabad v. Jan Mohammed*, AIR 1986 SC 1205 : (1986) 3 SCC 20.
54. *Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat*, AIR 1986 SC 1213 : (1986) 3 SCC 12.

Again, the State of Madhya Pradesh imposed a total ban on the slaughter of bulls and, bullocks and again, the Supreme Court quashed the same.[55]

After referring to all the provisions cases on this question, the Court stuck to its view that these animals were useful only up to the age of 16 years and their slaughter thereafter could not be banned. Referring to Art. 48, a Directive Principle,[56] the Court observed that absolute ban on slaughter of bulls and bullocks is not necessary to comply with Art. 48. The Court has thus sought to strike a balance between the right of the butchers to carry on their trade and public interest.

(h) IMPORT AND EXPORT

Drastic restrictions on the right of trade and commerce have been judicially upheld for the purpose of import and export control. The reason is that import and export policy of a country has to be flexible in modern times as it needs constant adjustments keeping in view the needs of the country, international relations, foreign exchange position, need to protect indigenous industries and a number of other relevant factors. No one can claim an unrestricted right to import or export. The import and export policy forms an integral part of the country's economic policy.[57] Thus, the system of licensing of imports and exports has been held to be reasonable. To regulate imports and exports, there is first the Imports and Exports (Control) Act, 1947, which is a short enactment of eight sections. Issued thereunder are the two orders, the Import Control Order and the Export Control Order. Then, at the third stage, there is the import and export policy announced by the Central Government from time to time. The policy statement is not statutory but only administrative.

The Supreme Court has accepted the right of the Central Government to change, rescind or alter the policy from time to time merely by administrative instructions. Courts do not normally go into such policy decisions. It has also been held that no person can claim a right to the grant of an import or export licence, enforceable at law, merely on the basis of a policy statement.[58] Then, with a view to earn foreign exchange, if under the Import or Export Order, the Government decides to canalise import or export of a commodity through a specialised channel, import or export licences in that commodity could be refused to individuals. Such canalisation is not *per se* an unreasonable restriction and it would be presumed to be in public interest unless the contrary is shown clearly.[59] For example, in *Glass Chatons*,[60] the import of glass chatons was

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55. *Hasmattullah v. State of Madhya Pradesh*, AIR 1996 SC 2076 : (1996) 4 SCC 391.
Also see, *Mirzapur Moti Kureshi Kasab Jamat v. State of Gujarat*, AIR 1998 Guj 220. *Abdul Sattar Yusufbhai Qureshi v. State of Gujarat*, AIR 2001 Guj 179.

56. See, Ch. XXXIV, *infra*.

57. *Bhatnagars & Co. v. Union of India*, AIR 1957 SC 478 : 1957 SCR 701; *Supra*.

58. *Andhra Ind. Works v. C.C. of Imports*, AIR 1974 SC 1539 : (1974) 2 SCC 348, *J. Fernandes & Co. v. Dy. Chief Controller or Imports and Exports*, AIR 1975 SC 1208 : (1975) 1 SCC 716.
But see, *Oswal Woollen Mills Ltd. v. Union of India*, AIR 1983 SC 969 : (1983) 4 SCC 345, where certain administrative decisions not in accordance with certain provisions of the Import Policy were quashed.

59. *Daya v. Jt. Chief Controller, I. & E.*, AIR 1962 SC 1796 : (1963) 2 SCR 73; *Glass Chatons Importers and Users Ass. v. Union of India*, AIR 1961 SC 1514 : (1962) 1 SCR 862; *Daruka & Co. v. Union of India*, AIR 1973 SC 2713; *A.M. Ahmad & Co. v. Union of India*, AIR 1982 Mad. 247.

60. *Supra*, footnote 59.

banned, but import licences were issued to the State Trading Corporation under the import order. This is an example where by administrative policy-making, and by using its power to issue import or export licences, the government was able to create a monopoly for import and export of several commodities in favour of its specialized agencies like the State Trading Corporation, the Mineral and Metal Trade Corporation, etc.

To earn foreign exchange, Parliament enacted a law to impose an obligation on sugar mills to hand over a percentage of their production to a government agency for export. The export price realised was less than the government fixed internal price. The scheme was challenged on the ground that the mills were being forced to sell a part of their production at a loss. The government's contention however was that in fixing the internal price, it had added a margin to cover the loss on export. The Supreme Court upheld the scheme as reasonable because the loss, if any, was comparatively less and there was a very real possibility of its being recouped. The Court also ruled that reasonableness of a restriction imposed under one Act could be assessed by taking into account the countervailing advantage conferred under another Act if both the Acts are enacted as part of a single legislative plan.[61]

(i) TAXING LAWS

At times, taxing statutes have been challenged under Art. 19(1)(*g*), but it is rarely that such a challenge succeeds.[62] A taxing statute is not *per se* regarded as a restriction on the freedom under Art. 19(1)(*g*) even if it imposes some hardship in individual cases. "Then again, the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not *per se*, and without more, constitute violation of the rights under Art. 19(1)(*g*)."[63] Accordingly, the Supreme Court upheld a tax on "chargeable expenditure" in a hotel having room rent of Rs. 400 or more per day.[64]

Sales tax is a tax on the sale of goods. Unless confiscatory, such a tax does not impose an unreasonable restriction on the right of a person to carry on trade whether or not law permits or prohibits the dealers from passing on tax to the purchasers.[65]

Imposition of a tax with retrospective effect is not ordinarily regarded as invalid. To test whether a retrospective imposition of a tax operates so harshly as to violate the Fundamental Right under Art. 19(1)(*g*), the Court considers such factors as relevant as the context in which retroactivity was contemplated, such as, whether the law is one of validation of a taxing statute struck down by the Courts for certain defects, the period of such retroactivity, and the degree and extent of

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61. *Lord Krishna Sugar Mills v. Union of India*, AIR 1959 SC 1124 : (1960) 1 SCR 39. For a comment on the case see, 1 *JILI* 572.

62. *Hoechst Pharmaceuticals Ltd. v. State of Bihar*, AIR 1983 SC 1019 : (1983) 4 SCC 45; *Malwa Bus Service v. State of Punjab*, AIR 1983 SC 634 : (1983) 3 SCC 237; *State of Karnataka v. Hansa Corp.*, AIR 1981 SC 463 : (1980) 4 SCC 697.

63. *Federation of Hotel & Restaurant v. Union of India*, AIR 1990 SC 1637 : 1989 Supp (2) SCC 169, at 1655.

Also see, *Express Hotels (P) Ltd. v. State of Gujarat*, AIR 1989 SC 1949 : (1989) 3 SCC 677.

64. *Federation of Hotel, Ibid*.

65. *S. Kodar v. State of Kerala*, AIR 1974 SC 2272 : (1974) 4 SCC 422.

any unforeseen or unforeseeable financial burden for the past period, etc. A sales tax law voided by the High Court was validated by the State Legislature with retrospective effect by passing an Act. This retrospective law was held valid. Had the law not been validated, dealers who had already collected the tax from customers would have had a windfall as they would not have had any such right had the original law been held valid.[66] A competent legislature can always validate a law declared invalid by the Courts provided the infirmities and vitiating factors noticed by the Court are in its judgment, are removed or cured by the legislature. Such a validating law can be made retrospective.[67]

The Courts do not usually interfere with a tax on the ground of its being excessive, or that it imposes a heavy burden on trade and commerce, or that the profits of the business are greatly reduced thereby.[68] Except in the extreme case when the Court regards an impost as confiscatory,[69] or discriminatory.[70]

An impost on trade, whether a licence-fee or a tax, levied through an invalid or unconstitutional law, infringes Art. 19(1)(*g*) for an illegal impost always amounts to an unreasonable restriction on a citizen's right.[71]

A tax which is 'compensatory' in nature can never operate as an unreasonable restriction on the right to carry on trade or business. The very idea underlying such a tax is service more or less commensurate with the tax levied, and no citizen can claim a right to engage in trade without paying for the special services he receives from the state. This is part of the cost of carrying on business.[72]

(j) INDUSTRIAL DISPUTES

The scale of compensation payable to the employees by the employers who close their undertakings, prescribed by the Industrial Disputes Act, has been held to be not unreasonable,[73] because it is based on social justice.[74]

In *Fertilizer Corporation Kamagar Union v. Union of India*,[75] the workers in the Public undertaking challenged the validity of sale of certain plants and equipment claiming that this would result in the retrenchment of many workers and, thus, depriving them of their right under Art. 19(1)(*g*). The Court rejected

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66. *Krishnamurthi & Co. v. State of Madras*, AIR 1972 SC 2455 : (1973) 1 SCC 75.
67. *Ujagar Prints v. Union of India*, AIR 1989 SC 516 : (1989) 3 SCC 488.
68. *Nazeeria Motor Service v. State of Andhra Pradesh*, AIR 1970 SC 1864 : (1969) 2 SCC 576; *Jagan Nath v. Union of India*, AIR 1962 SC 148 : (1962) 2 SCR 118.
69. For an example of such a tax see *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552 : (1961) 3 SCR 77; *supra*.
70. *Supra*, Ch. XXI, under Art. 14.
Also see, *supra*, Ch. XI, Sec. H, under 'fees'.
A fee can be declared as excessive if it has no relation to the service performed. See, *Chandrakant Krishnarao Pradhan v. Collector of Customs*, AIR 1962 SC 204, where a licence renewal fee for customs agents was held unreasonable as there was no service being rendered at that stage and "under the guise of a fee there must not be an attempt to raise revenue for the general funds of the State".
71. *Yasin v. Town Area Committee*, AIR 1952 SC 115 : 1952 SCR 572; *Himmat Lal v. State of Madhya Pradesh*, AIR 1954 SC 403; *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661 : (1955) 2 SCR 603.
72. *G.K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583 : (1975) 1 SCC 375; *Supra*, Ch. XV.
73. *Hathisingh Mfg. Co. Ltd. v. Union of India*, AIR 1960 SC 923.
74. *Infra*, Ch. XXXIV.
75. AIR 1981 SC 344 : (1981) 1 SCC 568.

the challenge saying that Art. 19(1)(*g*) does not protect the right to work in a particular post under a contract of employment. "The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in any particular post under a contract of employment." Art. 19(1)(*g*) cannot be invoked against the loss of a job or retrenchment or removal from service. If workers are retrenched in a factory, they can pursue their rights and remedies under the industrial laws. The closure of an establishment in which a workman is for the time being employed does not by itself infringe his Fundamental Right under Art. 19(1)(*g*). "Art. 19(1)(*g*) confers a broad and general right which is available to all persons to do work of any particular kind and of their choice. It does not confer the right to hold a particular job or to occupy a particular post of one's choice."

(k) ADMINISTRATIVE REGULATION

An administrative order not authorised by law under which it is made, and imposing a restriction on the right to carry on business, is void under Art. 19(1)(*g*).[76] Thus, a condition imposed on the licensee by the licensing authority which is not justified by the Act and the rules under which the licence is issued and which also seriously affects the business of the licensee, would be unreasonable.[77] An order made under a law should impose reasonable restrictions on trade and commerce. Thus, fixing a period of 26 days for disposal of sugar released for free sale in the open market was held unreasonable. Further, refusal by government to extend the period when the petitioners had done every thing they could to remove the sugar from their godowns was also held to be unreasonable as the government acted mechanically in the matter.[78]

The area of trade, commerce and business is progressively coming under rigorous administrative regulation. Licensing, price-fixing, requisitioning of stocks, control on movement of commodities, regulation of industry have been undertaken in the country on a large scale; because of several reasons, *e.g.*, shortage and scarcity of essential commodities, need for economic regeneration of the country under the impact of the five year plans, to discourage some immoral and illegal trades and unfair trade practices, the present day concept of socialist pattern of society, and to reduce concentration of wealth in a few hands.[79] The general principle is that the power conferred on the executive by a law to regulate trade or commerce should not be arbitrary, "unregulated by any rule or principle". A law or order which confers arbitrary power upon the executive in the matter of regulating trade or business is regarded unreasonable.[80]

Generally speaking, administrative discretion is not regarded as arbitrary if the circumstances in, or the grounds on, which it can be exercised are stated, or if the law lays down the policy to achieve which the discretion is to be exercised, or if there are enough procedural safeguards in the law to provide security against

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76. *Tahir Hussain v. District Board,* AIR 1954 SC 630; *Bidi Supply Co. v. Union of India,* AIR 1956 SC 479 : 1956 SCR 267; *Mineral Development Co. v. State of Bihar,* AIR 1960 SC 468; *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33 : (1982) 1 SCC 39.

77. *Hamid Raza v. State of Madhya Pradesh,* AIR 1960 SC 994.

78. *Oudh Sugar Mills v. Union of India,* AIR 1970 SC 1907.
Also, *R.H. Hegde v. Market Commission, Sirsa,* AIR 1971 SC 1017 : (1971) 1 SCC 349.

79. *I.L.I., GOVERNMENT REGULATION OF PRIVATE ENTERPRISE,* (1971).

80. *Dwarka Pd. v. State of Uttar Pradesh,* AIR 1954 SC 224 : 1954 SCR 803; *Partap Singh v. State of Punjab,* AIR 1975 P&H 323.

misuse of the discretion. In case of trades which are illegal, dangerous, immoral or injurious to the health, morality and welfare of the public, a greater discretionary power may be left with the Executive than is permissible in case of normal trades. The practical operation of these norms can be illustrated with reference to some judicial pronouncements.

A lot of discretionary power is conferred on the Central/State Governments under several labour laws to regulate labour-management relationship. Several cases have arisen based on these discretionary powers.

In *Bijay Cotton Mills v. Ajmer*,[81] the Minimum Wages Act, 1948, was challenged on the ground that it put unreasonable restrictions on employers (who could not carry on their trade without paying minimum wages), the employees (who could not work on terms mutually agreed upon between them and their employers), and that the procedure to fix minimum wages was arbitrary as it left everything to the unfettered discretion of the government. The Supreme Court held the Act valid. Securing of living wages to labourers is in public interest for it is necessary to ensure not only bare physical subsistence but also health and decency to labourers. It is necessary to curb the freedom of contract to prevent the exploitation of labour. Though the powers enjoyed by the government are wide, yet there are sufficient procedural safeguards, *viz.*, the government is to take into consideration, before fixing the minimum wages, advice of the committee or representations of the people so affected; consultation with advisory bodies is obligatory for revision of minimum wages; there is a Central Advisory Board to advise the Central and State Governments in the matter of fixing and revision of minimum wages and to act as a co-ordinating agency for different advisory bodies: each committee or advisory body is to consist of an equal number of representatives of employers and employees with a few independent persons who could take a fair and impartial view of the matter. There is no provision for review of the government decision, but that does not make the Act unreasonable as it has adequate safeguards against hasty or capricious decision by the government.

A provision in the Industrial Disputes Act [S. 25-O] requires an employer intending to close down his industrial undertaking to give a three months' notice to the government of his intended closure. The government could refuse to permit closure if it was satisfied that the reasons for the intended closure of the undertaking were "not adequate and sufficient" or that "such closure is prejudicial to the public interest". If an employer closed down the undertaking without observing this procedure, he could be punished with imprisonment up to 6 months, or fine up to 5000 rupees or with both. The closure would be illegal and the workmen would be entitled to all the benefits under any law as if no notice had been given to them.

In *Excel Wear v. Union of India*,[82] the Supreme Court declared this provision to be unconstitutional. Commenting on the above provision, the Court said that the reasons given by the employer for closure of the undertaking might be correct yet permission could still be refused if the government thought them to be "not adequate and sufficient". No provision has been made for review of the

81. AIR 1955 SC 33 : 1955 (1) SCR 752. Also see, *supra*.
82. AIR 1979 SC 25 : (1978) 4 SCC 2224.
Also see, JAIN, *CASES ON ADM. LAW*, III, 1887.

order, or for appeal from it. No reasons need be given in the government order granting or refusing the permission. So, the order could be whimsical and capricious. Government is enjoined to pass the order within the 90 days' period. The right to close down a business is "an integral part" of the right to carry it on.[83]

The Court rejected the contention that "an employer has no right to close down a business once he starts it." The right to close is itself a Fundamental Right embedded in the right to carry on any business guaranteed under Art. 19(1)(*g*). But as no right is absolute in scope, this right could also be restricted, regulated or controlled by law in the interest of the general public. The restrictions imposed on this right by the impugned provision in question were held to be unreasonable as there was no higher body to scrutinize the government order negativing employer's request to close down. The Court also rejected the contention of the employers that the right to close down business was at par with the right not to start a business at all. The Court said that while no one can be compelled to start a business, it is different from closing down a business. The two rights cannot be equated.

Thereafter, S. 25-N was enacted. This provision says that an employer cannot retrench any worker who has been in service for a year without the consent of the government. If the government fails to communicate its decision within two months, the permission shall be deemed to have been granted. In *Meenakshi Mills*,[84] the Supreme Court has held that S. 25-N constitutes a reasonable restriction on the employer's right to carry on trade. The discretion of the government is not absolute but subject to proper procedural safeguards. For example, the government is to make an inquiry according to natural justice before coming to a decision; the government is to record reasons for its decision and it has to decide the matter within a time frame of 10 days and, thus, cannot unduly delay matters.

In course of time, S. 25-O was amended the vices pointed out therein in *Excel Wear* were sought to be removed. The constitutional validity of the amended S. 25-O came to be considered by the Supreme Court in the undernoted case.[85] Under the amended section, the government order granting or refusing permission must be in writing and be a reasoned order. The government order was to be passed after giving a reasonable opportunity of being heard to the employer, the workmen and any one else interested in the closure. A review tribunal had also been established the government must pass its order in 60 days failing which the permission would be deemed to have been granted. In the circumstances, the Court upheld the validity of the amended provision.

A similar provision, S. 25-M of the Industrial Disputes Act, requiring government's prior permission to lay off any worker has been held to be valid in *Papnasam*.[86] S. 25-M contains all the procedural safeguards to be found in S. 25-N.

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83. Ref. *Hathisingh Mfg. Co. Ltd. v. Union of India*, AIR 1960 SC 923 : (1960) 3 SCC 528.

84. *Workmen, Meenakshi Mills Ltd. v. Meenakshi Mills Ltd.,* AIR 1994 SC 2696 : (1992) 3 SCC 336.
Also see, JAIN, *CASES, III*, 1890-1898.

85. *Orissa Textile & Steel Ltd. v. State of Orissa,* (2002) 2 SCC 578.

86. *Papnasam Labour Union v. Madura Coats Ltd.,* AIR 1995 SC 2200 : (1995) 1 SCC 501.
Also see, JAIN, *CASES, III*, 1899-1901.

(l) LICENSING

Regulation of trade through a licensing system is the order of the day,[87] In a number of cases, Courts have considered the permissible scope of the licensing power of the Administration with reference to Arts. 19(1)(*g*) and 19(6). It is now clearly settled that a system of licensing of a trade is not unreasonable provided that the licensing officers are not left with uncontrolled power to grant, revoke or cancel a licence. There should be reasonable norms, policy or principles to guide administrative power as well as some procedural safeguards. The Supreme Court has stated on this point in the following case:[88]

> "Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion the law *ex facie* infringes the Fundamental Right under Art. 19(1)(*g*)."

In *Seshadri v. Dist. Magistrate*,[89] a rule requiring a cinema licensee to show at each performance approved film of such length and for such length of time as the government might direct has been held to be unreasonable because the government is vested with an unregulated discretion to compel an exhibitor to show a film of any length and there is no principle to guide the government in this matter. Similarly, prescribing a minimum length of film to be shown at a performance without fixing a maximum, is also unreasonable for this confers an unfettered discretion on the government to interfere with the cinema licensee's right to carry on trade. No principle is laid down to guide the government. A condition couched in such wide language is bound to operate harshly upon the cinema business and, thus, cannot be regarded as a reasonable restriction.

A provision conferring wide power to grant or cancel a licence on an administrator, without mentioning the grounds on which he could exercise his power was held unreasonable in *Dwarka Pd. v. State of Uttar Pradesh*,[90] as the matter was left to the unrestrained will of a single individual. The only safeguard against improper exercise of power was that the licensing officer would record reasons for the action taken by him. This was not regarded as an effective safeguard as there was no higher authority to examine the propriety of these reasons, and revise or review his decision, and the reasons recorded by him were thus only for his own subjective satisfaction and not for furnishing any remedy to the aggrieved person.

To the same effect is the case noted below.[91] A regulation imposed a licensing system for non-tribal orders. If the licence was refused, the reasons for refusal had to be recorded. The Supreme Court quashed the regulation as it did not provide any principles or standards on which the licensing authority was to act. "There being no principles or standards laid down in the Regulation there are obviously no restraints or limits within which the power of the Executive Committee to refuse to grant or renew a licence is to be exercised". There was no provision for appeal against the decision of the authority refusing to grant the licence. On the other hand, where law gave guidance to the licensing authority in the matter of issuing licences, obligated

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87. LAKSHMI SWAMINATHAN, Right to be heard in Licensing Cases, 12 *JILI* 657 (1970).
88. *Municipal Corporation, Ahmedabad v. Jan Mohammed,* AIR 1986 SC 1205, 1210 : (1986) 3 SCC 20.
89. AIR 1954 SC 747 : (1955) 1 SCR 686.
90. AIR 1954 SC 224 : 1954 SCR 803.
91. *Hari Chand Sarda v. Mizo District Council,* AIR 1967 SC 829 : 1967 (1) SCR 1012. Also see, JAIN, *CASES, III,* 1867-1873.

it to record reasons in case licence was refused, and provided for appeals and revision against his decisions, it was held reasonable.[92]

The provision in the Gold Control Act for licensing of dealers of gold ornaments was held invalid in *Harakchand v. Union of India*,[93] because it conferred unguided power on the executive. The administrator in granting licences was to have regard to such factors as 'suitability of the applicant', 'anticipated demand as estimated by him for ornaments in the region' and 'public interest'. The Supreme Court held that these terms were vague, not capable of objective assessment, provided no objective norm to guide the administrator's discretion and, thus, unfettered power had been given to him to grant or refuse a licence. The Court also held it unreasonable to prescribe the same conditions for renewal as for initial grant of licence as that rendered the entire future of business uncertain and subject to arbitrary administrative will.

A Tamil Nadu Act introduced a system of licensing of private educational institutions. The relevant statutory provision merely said that the State Government "may grant or refuse to grant permission". The only procedural safeguard laid down was that the permission would not be refused "unless the applicant has been given an opportunity of making his representa-tion". Thus, the licensing authority could grant or refuse to grant a license but he could not refuse without giving to the applicant an opportunity to make a representation.

The Supreme Court held the provision unconstitutional under Art. 19(1)(*g*) in *Parasuraman.*[94] There was no criteria laid down for the government to adopt in exercising its licensing power. "The result is that the power to grant or refuse permission is to be exercised according to the whims of the authority and it may differ from person to person holding the office." The government was left with "unrestricted and unguided discretion" which rendered the provision "unfair and discriminatory" *vis-a-vis* Art. 19(1)(*g*). The power to cancel a license on contravention of any direction issued by the competent authority was held to suffer from the vice of arbitrariness.

The criteria laid down in the Railway Tourist Agent Rules for recognition of a person as an authorised railway tourist agent have been held to be not irrelevant or arbitrary.[95] A rule in the Motor Vehicles Rules laying down a scheme for the evaluation of the merits of various applicants for a stage carriage permit, and giving preference to new entrants for short routes, has been held valid under Art. 19(1)(*g*) as it is salutary and avoids monopoly.[96] A provision giving preference to an application from state transport undertaking for operating in any interstate route has been held valid.[97]

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92. *Vishnu Dayal v. State of Uttar Pradesh*, AIR 1974 SC 1489 : (1974) 2 SCC 306; *M.G. Beedi Works v. Union of India*, AIR 1974 SC 1832 : (1974) 4 SCC 43; *S.C. Dogra v. State of Himachal Pradesh*, AIR 1984 HP 29.

93. AIR 1970 SC 1453 : (1969) 2 SCC 166. But see, *Manick Chand v. Union of India*, AIR 1984 SC 1249 : (1984) 3 SCC 65.

Also see, JAIN, *CASES*, Ch. XV, Sec. D(V); *Union of India v. Annam Ramaligam*, AIR 1985 SC 1014.

Also see, JAIN, *CASES*, 1854-1856.

94. *A.N. Parasuraman v. State of Tamil Nadu*, AIR 1990 SC 40 : (1989) 4 SCC 683.

95. *Inder Mal Jain v. Union of India*, AIR 1984 SC 415 : (1984) 1 SCC 361.

96. *P. Venkaiah v. G. Krishna Rao*, AIR 1981 SC 1910 : (1981) 4 SCC 105.

97. *Sher Singh v. Union of India*, AIR 1984 SC 200 : (1984) 1 SCC 107.

In a scheme for distribution of foodstuffs through fair price shops run by government, giving preference to co-operative societies is not violative of Art. 19(1)(*g*).[1] Co-operative societies play positive and progressive role in country's economy and, most surely, in the fair and effective distribution of foodstuffs.

The Customs House Agents Licensing Rules, 1960, restricted the number of such licences to be issued. This was held valid for "a profession or trade has sometimes to be limited in the public interest", *e.g.*, porters at a railway station, taxi cabs, etc. A rule vesting authority in the customs collector to reject an application for licence if the applicant was not considered "suitable" was held invalid as it vested discretion in the collector to reject a candidate for 'trumpery reasons'. The collector was not required to state his reasons for rejecting an application. The rule authorising the collector to cancel a licence for failure to comply with the rules was held valid as rules were made for compliance and not for breach, and there was the safeguard of an appeal to a higher authority.[2]

A provision in the Calcutta Municipal Act required a licence for use of premises for a purpose which in the opinion of the corporation was dangerous to life, health or property. The opinion of the corporation was made conclusive as it could not be challenged in a Court. The provision was declared to be unreasonable under Art. 19(6) as it put carrying on of a business entirely at the mercy of the corporation.[3]

Similarly, a rule conferring an uncontrolled power to cancel a licence, without stipulating that reasons be given and some procedure be followed by the licensing authority for the purpose, is not reasonable.[4] A provision providing for cancellation of licence for specified causes, and after giving reasonable opportunity of hearing to the licensee, is valid.[5] Even under a valid provision, an administrative order cancelling the licence will be quashed if it does not fulfil the condition laid down, or if the concerned administrative officer is biased against the licensee, or if a reasonable opportunity of hearing is not given. The function of cancelling a licence has been characterised as *quasi*-judicial and, therefore, rules of natural justice must be followed.[6]

The Bihar Mica Act, 1948, introduced a licensing system to regulate trading in mica in the State. S. 25 authorised the State Government to cancel the license on the grounds stated therein. Before cancelling a license, it was necessary to furnish the grounds to the licensee and afford him a reasonable opportunity to show cause against cancellation. The Supreme Court in *Mineral Development Ltd. v.*

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1. *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471; *M.P. Ration Vikreta Sangh Society v. State of Madhya Pradesh*, AIR 1982 SC 2001.
Also, *Krishna Kakkanth v. State of Kerala*, (1997) 9 SCC 495 : AIR 1997 SC 128.

2. *Chandrakant Krishnarao Pradhan v. Collector of Customs*, AIR 1962 SC 204 : 1962 (3) SCR 108; JAIN, *CASES, III*, 1859-1867.

3. *Corp. of Calcutta v. Tramways Co. Ltd.*, AIR 1964 SC 1279 : (1964) 5 SCR 25.

4. *Ganpati v. Ajmer*, AIR 1955 SC 188 : (1955) 1 SCR 1065. *Kishan Chand Arora v. Commr. of Police*, AIR 1961 SC 705 : (1961) 3 SCR 135, sustaining power to cancel a licence without any procedure being followed does not now represent good law.

5. *Sukhwinder Pal Bipan Kumar v. State of Punjab*, AIR 1982 SC 65 : (1982) 1 SCC 31; *Fedco v. Bilgrami*, AIR 1960 SC 415 : (1960) 2 SCR 408.

6. *Mahabir Prasad v. State of Uttar Pradesh*, AIR 1970 SC 1302 : (1970) 1 SCC 764; *supra*; *Mohd. Hameed v. Collector, Hyderabad*, AIR 1974 A.P. 119.

State of Bihar[7] held the provisions reasonable. The discretion to cancel the licence was vested in the highest executive authority in the State which ordinarily could be relied upon to discharge the duties honestly and in public interest. The provision provided clearly ascertainable standards for the State Government to apply to the facts of each case and due procedural safeguards had been provided to the licensee.

Video games being games of chance and not of skill, broad discretion may be conferred on the licensing authority to regulate such games. However, a restriction imposed must not be arbitrary. Action of the concerned authority must be informed by reason. An action uninformed by reason may be regarded as arbitrary. The action of the concerned authority must be founded upon relevant grounds of public interest.[8]

S. 4(1) of the Chit Funds Act, 1982, says that no chit is to be commenced without the previous sanction of the State Government. S. 4(3) gives guidance to the State Government for granting and/or refusing to grant previous sanction. The Supreme Court held the provisions to be regulatory in nature and not violative of Art. 19(1)(g) of the Constitution.[9]

Ordinarily a licence may be suspended (pending inquiry for cancellation) without giving any hearing to the licensee, for suspension is a preliminary stage and inquiry must be held before cancellation.[10]

S. 8B of the Imports Control Order empowers the Central Government or the Chief Controller of Imports and Exports to keep in abeyance applications for licences or allotment of imported goods for 6 months in public interest where any investigation is pending into any allegation against a licensee or importer. No reasons need be given.

The Supreme Court has ruled in *Liberty Oil Mills v. Union of India*[11] that such an order cannot be made without due investigation and without giving a reasonable opportunity to the affected party. "Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties." The abeyance order must be communicated to the concerned person. Reasons must exist for the decision since "the decision may only be taken if the authority is satisfied that the grant of the licence or allotment of imported goods will not be in the public interest." An outline of the allegations must be given to provide an opportunity to the person affected to make representation. In this case, however, the opportunity of hearing had to be post-decisional.

The trade of money lending was sought to be regulated through a licensing system. The power given to the licensing officer to forfeit security furnished by a licensee on contravention of the licence terms was held to be unreasonable as there were many other adequate provisions for ensuring compliance with the conditions of the licence.[12]

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7. AIR 1960 SC 468 : 1960 (2) SCR 609. Also see, *Chandrakant Saha v. Union of India,* AIR 1979 SC 314 : (1979) 1 SCC 285.
8. *M.J. Sivani v. State of Karnataka,* AIR 1995 SC 1770 : (1995) 6 SCC 289.
9. *Shriram Chits and Investment (P.) Ltd. v. Union of India,* AIR 1993 SC 2063.
10. *Sukhwinder Pal Bipan Kumar v. State of Punjab*, AIR 1982 SC 65 : (1982) 1 SCC 31; JAIN, *CASES, III,* 1856-1867.
11. AIR 1984 SC 1271 : (1984) 3 SCC 465.
12. *Sate of Kerala v. Monarch Investments,* AIR 1992 SC 493 : 1992 Supp (3) SCC 208.

(m) MOVEMENT OF GOODS

Clause 3 of the Cotton Textiles (Control of Movement) Order, 1948, provided that no person should transport by rail, road, sea or inland navigation any cloth or yarn except under a permit issued by the Textile Commissioner. The restriction was held valid for to leave transport of essential commodities uncontrolled would seriously hamper the supply of such commodities to the public. The Textile Commissioner did not have an unregulated and arbitrary power to refuse or grant a permit, because the discretion given to him was to be exercised so as to effectuate the policy underlying the order, *viz.*, to regulate the import of cotton textiles so as to ensure its even distribution in the country and make it available at a fair price to all. The conferment of such discretion could not be regarded as invalid.[13]

A perusal of the Court's opinion leaves the impression that the Court has taken a more relaxed view with respect to movement permits than trading licences. The reason for this may be that whereas without a licence a person could not at all carry on his trade, a restriction on movement affects only one aspect of the total trade leaving the rest free. Therefore, Courts insist on better safeguards in case of administrative discretion relating to trading licences than in the case of issue of movement permits.[14]

(n) REQUISITIONING OF STOCKS

The Rajasthan Foodgrains Control Order authorised administrative authority to freeze any stocks of foodgrains held by a person and also to requisition and dispose of such stocks at the government procurement price. Objection was taken to it on the ground that an absolute discretion had been conferred on the administrative authority. The Court, however, observed that though the specific rule in question did not mention the grounds on which stocks could be frozen, yet the parent Act, *viz.*, the Essential Supplies Act, 1946, did lay down the policy, and the freezing of stocks was reasonably related to that object, and so the clause was valid. The power to requisition stocks at a rate fixed by it and dispose of such stocks at any rate in its discretion vested an unrestrained authority to requisition stocks of foodgrains at an arbitrary price and so was invalid.[15]

(o) PRICE FIXING

A regulatory power over trade and commerce, of great significance in modern times, conceded to the Administration under several legal provisions, is that of price-fixing of commodities. A balance has to be drawn here between the interests of the manufacturers as well as of the consumers. The Courts have in several cases considered the question of scope of such a power and subject to what safeguards it should be conferred on the Administration. The basic norm in this case, as in other cases, is that unlimited discretion to fix prices should not be conferred on administrative authorities.

In the earlier cases, the Supreme Court appeared to insist that the relevant law should lay down the considerations which the price-fixing authority must keep in

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13. *Harishankar Bagla v. State of Madhya Pradesh,* AIR 1954 SC 455 : 1955 (1) SCR 216.
Also, *Chinta Lingam v. Union of India,* AIR 1971 SC 474 : (1970) 3 SCC 768.

14. *Chinta Lingam v. Union of India, ibid.*

15. *State of Rajasthan v. Nathmal,* AIR 1954 SC 307 : 1954 SCR 982.
Also see, *supra,* sub-sec. (f).

mind while fixing prices. Thus, in *Dwarka Prasad*,[16] the very first case on price-fixing, the statutory formula for fixing prices mentioned 8 items, of these, six were fixed but two left some marginal discretion to the executive. The formula was held to be good, the Court stating that "arbitrary power unregulated by any rule or principle" was bad, and that discretion should not be absolute. But, in later cases, the rigours of this judicial stand have been very much diluted.

Clause 11B of the Iron and Steel Order, 1941, issued by the Central Government, authorised the Iron Controller to fix maximum prices to sell iron. Such prices could differ for iron and steel obtainable from different sources, and could include allowances for contribution to, and payment from, an equalisation fund established by the Controller. No more guidance was given to the Controller in the matter of fixing prices, yet the Order was held valid on the ground that since the parent Act, the Essential Supplies Act, laid down the policy, the Order could not be regarded as conferring uncontrolled power on the Controller to fix prices.[17]

This judicial approach does not appear to be satisfactory. The parent Act [The Essential Commodities Act, 1955] applies not only to iron and steel but to a number of commodities, and not only to price-fixing but to regulation of all aspects of trade in essential commodities. Therefore, the policy laid down in the Act is in very general terms, and is hardly of much efficacy to control administrative discretion. The necessary elements going into price-fixing are bound to vary from commodity to commodity, and one general formula applicable to all commodities can hardly be adequate. It is, therefore, necessary that specific considerations applicable to price-fixing of individual commodities be laid down separately. It is only when this is done that Courts can evaluate whether or not relevant considerations have been followed by the administration in fixing the price of the concerned commodity.

An order authorised the controller to fix the price of ice. Four factors were stated in the order which the controller had to take in view while fixing the price. The High Court upheld the formula saying that it gave enough, clear and effective guidelines to the controller to fix prices, and it excluded any chance of capricious or arbitrary fixation of price for the manufacturers.[18]

The Courts do not insist on any procedural safeguards in this area.[19] Price-fixing is regarded more in the nature of a legislative power than an administrative power and, consequently, the rules of natural justice are not required to be followed.[20] The Supreme Court once emphasized that the price fixed should be fair and not arbitrary; that it should not be below the cost of production: that the price should not be fixed on extraneous considerations; and if the price is fixed in such a manner that the producer is enabled to recover his cost of production and secure a reasonable margin of profit, no aspect of Fundamental Right under Art. 19(1)(*g*) is infringed.[21]

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16. *Dwarka Pd. v. State of Uttar Pradesh,* AIR 1954 SC 224 : 1954 SCR 803.
17. *Union of India v. Bhanamal Gulzarimal,* AIR 1960 SC 475 : 1960 (2) SCR 627.
18. *New India Industrial Corp. Ltd. v. Union of India,* AIR 1980 Del 277.
19. *Diwan Sugar Mills v. Union of India,* AIR 1959 SC 626 : 1959 Supp (2) SCR 123.
20. *Saraswati I. Syndicate v. Union of India,* AIR 1975 SC 460 : (1974) 2 SCC 630.
21. *Shree Meenakshi Mills v. Union of India,* AIR 1974 SC 366 : (1974) 1 SCC 468.

In spite of this norm, except in one case, *viz., Premier Automobiles*,[22] the Supreme Court has not interfered with any price-fixing order. In the *Iron price* case,[23] the Court said that in considering the validity of a price fixed, it was not enough to show that a particular stock-holder suffered loss in respect of particular transactions. What was to be proved was the general effect of the price in question on all classes of dealers taken as a whole. If it were shown that in a large majority of cases, the impugned price fixed would adversely affect the Fundamental Right of the dealers guaranteed by Art. 19(1)(*g*), then it might constitute a serious infirmity in the price fixed. In *Meenakshi*,[24] a case dealing with fixation of yarn prices, the Supreme Court refused to intervene stating that even if some producers sustained loss for sometime, it would not be regarded as an unreasonable restriction for the purpose of price fixation was not only to consider the profit of the manufacturer but also to hold the price line. Trade and commerce undergoes periods of prosperity and adversity because of economic, social or political factors. The price fixed had not been shown to be 'arbitrary' or 'so grossly inadequate that it not only results in huge losses but also is a threat to the supply position of yarn'.[84]

In the matter of fixation of sugar price, items of cost have to be standardised on the basis of representative cross-section of reasonably efficient and economic manufacturing units in a region and it is impractical to take into account the costs incurred by each individual unit.[25] In *Saraswati Syndicate*,[26] the Court rejected the writ petition challenging an order fixing ex-factory price of sugar issued under Cl. 7 of the Sugar (Control) Order, 1966. The Court ruled that the price fixed was not shown to be inadequate and there was no breach of any mandatory duty which could justify the issue of *mandamus*. The Court would not interfere if the basis adopted was not shown to be so patently unreasonable as to be in excess of the price-fixing power. In fixing fair price, no doubt, the criteria adopted must be reasonable and reasonable margin of profit judged by average standard of efficiency should be provided for, but in the instant case, however, the price fixed was not shown to be erroneous or unreasonable, and the government had not acted arbitrarily or unreasonably or taken into consideration any extraneous matter.

The Central Government fixed the retention price for each producer of aluminium and its sale price under the Aluminium Control Order, 1970, made under the Essential Commodities Act, 1955. The difference between the two prices was paid into the Aluminimum Regulation Account. Out of this fund, contributions were made to the producer whose retention price was higher than the sale price. The scheme of price fixation was held valid in *Union of India v. Hindustan Aluminium Corp. Ltd*.[27] as it was adopted in the interest of the consumer which was of paramount consideration. "The interest of producers or manufacturers of an

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22. *Premier Automobiles v. Union of India,* AIR 1972 SC 1690 : (1972) 2 SCR 526, see below.
23. *The Bhanamal Gulzarimal* case, *supra*.
24. *Meenakshi Mills'* case, *supra*, footnote 21.
25. *Anakapalle Co-op. Society v. Union of India,* AIR 1973 SC 734 : (1973) 3 SCC 435; *Panipat Co-op. S. Mills v. Union of India*, AIR 1973 SC 537 : (1973) 1 SCC 129.
In these cases, the Supreme Court considered the fixation of ex-mill price of sugar under s. 3(3C) of the Essential Commodities Act, 1955, which lays down the elements for the purpose. On Essential Commodities, also see, *supra*, sub-sec. (f).
26. *Supra*, footnote 20.
27. AIR 1983 Cal. 307.

essential commodity is no doubt a factor to be taken into consideration, but surely it is of much lesser importance and must yield to the interest of the general public who are the consumers." The loss to industry for a temporary period is no ground to set aside the price fixation of an essential commodity. The Court, however, did emphasize that the government should see that the loss was not perpetual and huge resulting in the closure of the industry.

In *Premier Automobiles*, the Court considered the concept of fair price under section 18G of the Industries (Development and Regulation) Act, 1951, in relation to the fixing of car prices. The Court explained that it "takes in all the elements which make it fair for the consumer leaving a reasonable margin of profit to the manufacturer without which no one will engage in any manufacturing activity". In the instant case, the Court asked the government to review car prices every six months. The fact that in *Premier Automobiles*, the Court showed some consideration for the interests of the manufacturers may be because a car is not an essential commodity.

In *Deepak Theatres, Dhuri v. State of Punjab*,[28] the Supreme Court has ruled that the power to fix rates of admission to cinema theatres can be validly conferred on the Administration *vis-a-vis* Art. 19(1)(*g*) as such a power is clothed with public interest.

On the whole, it appears that the Courts have no inclination to police the area of price-fixation. The Courts have conceded a great deal of discretion to the executive in this area. The Courts lean more towards the interests of the consumer rather than that of the manufacturer. As the Supreme Court has said: "No price fixation order need guarantee profit to an establishment in respect of each unit of article served or sold. It is the over-all picture in the trade and commerce that needs to be examined."[29] The Administration enjoys quite a good deal of flexibility and it is extremely difficult to challenge successfully a price-fixing order in a Court. The main reason is that the considerations entering into this area are primarily of an economic nature which the Courts can evaluate only superficially, and most of the time they would defer to the administrative judgment in this regard. In this connection, the Supreme Court has said in *Prag Ice & Oil Mills*.[30] "In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of operators, the processual basis of price fixation has to be accepted in the generality of cases as valid."

In the area of the regulation of trade and commerce, the judiciary has hitherto laid more stress on social control and has devalued the individual interest of the trader or the manufacturer. So far, the tenor of Court cases by and large has been to expand the area of social control over trade and commerce and correspondingly to reduce the scope of protection and safeguard to individual interest.

In the *Chintaman Rao* case,[31] the Supreme Court had emphasized that a reasonable restriction is one which is not in excess of the requirements of the case. This test involves a drawing of balance between, and a relative evaluation of, the interest of the individual and the exigencies of public control. In the judicial

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28. AIR 1992 SC 1519 : 1992 Supp (1) SCC 684.
29. *Welcome Hotel v. State of Andhra Pradesh*, AIR 1983 SC 1015 : (1983) 4 SCC 575.
30. *Prag Ice & Oil Mills v. Union of India*, AIR 1978 SC 1296 : (1978) 3 SCC 459.
31. *Supra.*

evaluative process of the restrictions under Art. 19(6), however, this approach has by and large been ignored. The consideration whether in a given situation the restriction imposed is in excess of the needs of social control has been rather absent in judicial pronouncements.

In this area, the Courts have shown much deference to the legislative and administrative judgment. Hitherto, the judicial approach appears to have been very much coloured by the prevailing philosophy of a socialist pattern of society in the country. But, it remains to be seen, whether, in course of time, this judicial attitude will undergo a change in view of the toning down of the socialist rhetoric and the contemporary philosophy of liberalisation and privatisation.