

THE ROLE OF 'REASONABLE RESTRICTIONS' IN THE  
INDIAN CONSTITUTION

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## PREFACE

~~The study of~~ Judicial review of written constitutions is seen by most modern researchers as a value-ridden, policy-making exercise. A rapid (I do not say superficial) analysis of the judicial process tends to see it, in the end, in terms of judicial activism or restraint. In explanations of such 'activism' or 'restraint' it is not uncommon to see references to factors personal to the judges such as their preferences on social and economic matters.

Studies of the 'irrational factors' in judicial policy-making, convincing as many of them are, could easily become exaggerated and tend to become one-sided. It is fair to ask that Judges should be 'conscious' of their preferences in whatever choices they make, but it may not be right to ask them to transcend themselves in a totally unrealistic fashion.

Admitting that judicial policy-making exists and that presuppositions pervade decisions interpreting a written Constitution, it still remains to be said that Judges do, in the course of their work, try to express their concept of 'justice', albeit legal justice.

Every general, unspecific expression in a written legislative document gives rise to judicial review and there constantly arise opportunities for the Judges to express their notion of 'justice' in the circumstances of the cases before them. Such a flexible expression as 'reasonable

restrictions' (on Fundamental Rights) used in Article 19 of the Indian Constitution provides a good field in which to see how Judges develop the notion<sup>s</sup> of 'reasonableness' or 'fairness' which are inseparable from the very idea of judicial review. Among the many valuable and comprehensive treatments of the constantly shifting subject of Indian constitutional law, there appears no treatise devoted to 'reasonableness'. It is not hard to see why (as will be explained below).

One often hears that the notion of 'reasonableness' varies from case to case, from one set of circumstances to another. This platitude is true so far as it goes, but not being the product of detailed research into judicial attitudes, it has no secure foundation and thus cannot dispense with the need for an inquiry into the acute problem it poses with regard to judicial method.

The notion of reasonable restrictions is a vital and growing area of the law relating to fundamental rights guaranteed by the Indian Constitution. The potentiality of this notion has already been realized in such areas as freedom of the press in India, freedom of assembly and freedom of association. Further growth, we find, is possible in the area of free movement and free pursuit of profession.

Needless to say there are considerable pressures in an underdeveloped country of India's complexity and size. A hypothetical judicial notion of reasonableness may be but one of hundreds of factors that constitute the basis of the Indian nation. The immediate impact of judicial attitudes

expressed in decisions is felt by the administration and the State. Only indirectly does the citizen perceive the effects. Nevertheless, a link must exist between the judicial view of 'reasonable restrictions' on the basic freedoms and the evolving notions of society and government in India. It would take more than a thesis to explore such a complex subject.

As long as Courts are taken seriously in India, in the sense in which they have been since 1772, the constitutional requirement of reasonableness expressly referred to in Article 19 will play a vital role. It is not too much to speculate that in the long run the Courts could by being sensitive to the problems faced both by the public and the executive when the latter seeks to curtail the established rights of the former (the 'litigation situation'), repel the charge presently levelled against them that they represent, as in other underdeveloped countries, the values of an elite. India's judiciary undoubtedly works a Constitution that has borrowed ideas from the West. But the 'liberal' democratic view of fundamental rights and permissible limitations on them may not be incompatible with perfecting the administration and erecting new institutions to help raise the standard of living. Already the impact of Article 19 on the administration can be seen. The result has amounted to a pruning of statutory rules and administrative regulations. No unwieldy or casually-framed rule could survive on the touchstone of procedural or substantive reasonableness. Further Indian Courts have insisted on subordinate legislation keeping strictly to the purpose of the statute under which they were framed.

Judicial attempts to expand their jurisdiction under Article 19 to other areas of the fundamental rights part have not been successful so far. The Supreme Court's claim, for example, to review the reasonableness of expropriatory legislation has been consistently thwarted by Constitutional Amendments. Thus, the accident of one party domination in Parliament and its command of the required majority to pass the amendments to the Constitution have stultified a natural growth of the Courts' jurisdiction. This state of affairs may well change. With more and better possibilities, the Indian judiciary may also become more innovative. Such innovativeness may even be appreciated so that criticisms, which are inevitable, will be kept in perspective.

The language of Indian law is English. Yet what is conveyed in that language are not necessarily English thoughts, nor do they relate to English problems. There are not less than twenty-two languages *aptek* for the purpose. Any number of rules of English origin can be traced in Indian legal practice. It will not come as a surprise that many have been adopted, or continued selectively, and that when adopted to Indian conditions, the adoption has been sometimes unconscious and often partial. We are in a transitional stage in which a nation is being welded into a unit and many theses will be necessary over the coming century to document movements partially charted in the pages that follow.

A good introduction to the geo-political factors making up modern India would be B.L. Sukhwai, India, A

Political Geography, Bombay, 1972. From J.D.M. Derrett, Religion, Law and the State of India, Faber, London, 1968, one may have a view of Indian society and practice before the arrival of the British and the subsequent changes under the impact of British administration of Justice. For the evolution of modern Indian law, one may profitably look at the following:

Alan Gledhill, The Republic of India, the Development of its Laws and Constitution, Volume 6, The British Commonwealth Series (Gen. ed. George E. Keeton), Stevens, London, 1964.

M.P. Jain, Outlines of Indian Legal History, 2nd edn., Bombay, 1966.

T.L. Venkatarama Ayyar, The Evolution of the Indian Constitution, University of Bombay, 1970.

Bo No Rau (ed. B. Shiva Rao), India's Constitution in the Making, Longmans, 1960.

P.K. Ghosh, The Constitution of India, How it has been Framed, Calcutta, 1966.

For a much shorter work on the subject one may consult:

M.V. Pylee, Constitutional History of India, Asia Publishing House, London, 1967.

Other works are referred to in the thesis itself. A short and valuable introduction to Indian Fundamental Rights is Alan Gledhill, Fundamental Rights in India, Stevens, London, 1956. Also useful in that connection is C.H. Alexandrowicz, Constitutional Developments in India, O.U.P., Bombay, 1957.

The volume of constitutional litigation in India is such that no book can remain up-to-date for long. Several have become obsolete incredibly soon after their publication. This thesis brings the law up to about the end of 1973. Allowing for the five or six months it takes Indian law reports and journals to arrive here by Sea Mail, this work is as nearly 'up -to-date' as possible.

T.K.K. Iyer,

London.

ABBREVIATIONS

A.C.	Appeal Cases
All E.R.	All England Law Reports
AIR	All India Reporter
All.	Allahabad
A.P.	Andhra Pradesh
Bom.	Bombay
Bom. L.R.	Bombay Law Reporter
C.A.	Court of Appeal (English)
C.A.D.	Constituent Assembly Debates
Cal.	Calcutta
Cr.L.J.	Criminal Law Journal
Cr.P.C.	Criminal Procedure Code
C.W.N.	Calcutta Weekly Notes
E.R.	English Reports
F.C.	Federal Court
F.C.R.	Federal Court Reports
Guj. L.R.	Gujarat Law Reports
H.L.	House of Lords
I.A.	Indian Appeals
I.C.L.Q.	International and Comparative Law Quarterly
I.L.R.	Indian Law Reports
I.P.C.	Indian Penal Code
I.R.	Irish Reports
J.C.P.S.	Journal of Constitutional and Parliamentary Studies (New Delhi)
J.I.L.I.	Journal of Indian Law Institute

K.B.	Kings Bench
K.L.T.	Kevala Law Times
Lah.	Lahore
L.Ed.	Lawyers Edition (U.S.)
L.R.	Law Reports (English)
L.Q.R.	Law Quarterly Review
Mad.	Madras
M.L.J.	Madras Law Journal
M.P.	Madhya Pradesh
Mys.	Mysore
Pat.	Patna
P.C.	Privy Council
Punj.	Punjab
Q.B.	Queens Bench
Raj.	Rajasthan
S.C.	Supreme Court
S.C.J.	Supreme Court Journal
S.C.R.	Supreme Court Report
S.C.W.R.	Supreme Court Weekly Reporter
Supp.	Supplement
T.L.R.	Times Law Reporter
U.S.S.C.	United States Supreme Court
W.L.R.	Weekly Law Reporter

INTRODUCTION: THE NATURE OF THE SUBJECT-MATTER GENERALLY

In an atmosphere of renewed concern for freedom in civil society many post-war constitutions accepted the principle of incorporation of a Bill of Rights.<sup>1</sup> The Universal Declaration of Human Rights adopted by the United Nations Assembly lent added significance to the idea of such an incorporation. There is not a single notable exception amongst the post-war constitutions: all have a set of 'Fundamental Rights'. Mere incorporation, however, did not always imply the enforceability of the rights enumerated. A distinction must be drawn between those constitutions that regarded the 'rights' as mere declarations of state policy and those that envisaged full judicial review and enforceability.<sup>2</sup>

In the constitutions of the latter type the provisions embodying the rights soon came to occupy the centre of much debate in court as well as in academic circles. Experience

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1. The earliest charter of rights seems to be the English Bill of Rights, 1 Will. and Mar. Sess. 2, Cap. 2, 1689. The Bill consisted of 'the general heads of such things as are absolutely necessary to be considered for the better securing our religion, laws and liberties.' See C. Grant Robertson, Select Statutes, Cases and Documents, 3rd edn. London, 1919, 129. Ian Brownlie (ed.), Basic Documents on Human Rights, Oxford, Clarendon Press, 1971.
  2. In the former category are the Constitutions of the Formosan Republic (Dec. 25, 1946), Indonesia (Aug. 18, 1945), Afghanistan (1964) and Cambodia (1947, as amended, Jan. 1964). See Amos J. Peaslee, Constitutions of Nations, 4 vols. Ed. Dorothy Peaslee xydis, 3rd edn., The Hague, 1965-70. There should be a third category of extravagantly-worded provisions such as Art.15 of the Constitution of Japan (Nov. 3, 1946): "The people have the inalienable right to choose their public officials and to dismiss them." Perhaps it was put in with the pre-war history of Japan in mind.

with the Bill of Rights in the United States Constitution, which provided the inspiration for some of the newer ones, had already shown that litigation relating to the rights becomes prominent and controversial. This is so not only because of the importance of the rights in themselves but also due to two other equally important reasons. First of all, the determination of the question, what limitations might lawfully be imposed on the guaranteed rights, has, perhaps surprisingly, but inevitably given rise to wide-ranging questions of social, political and economic consequences. This, in turn, has provided unprecedented scope for judicial creativity,<sup>3</sup> which in fact, has come to be associated with almost every decision on fundamental rights under these newer constitutions. Any effective Bill of Rights must, in one way or the other, produce this inter-related phenomenon. So intense and varied were the questions decided by the United States Supreme Court in the last three or four decades that the whole of the judicial process was subject to

- 
3. It is too sterile to enter into the question whether judges make law and if so, how and when. The following comment may, however, be of interest. Recognizing that judicial law-making exists, Lord Radcliffe, a member of the House of Lords, observes:

It is to me a matter of surprise that so much pen and ink has been employed by commentators in demonstrating this fairly obvious conclusion. If judges prefer to adopt the formula - for that is what it is - that they merely declare the law and do not make it, they do no more than show themselves wise men in practice. Their analysis may be weak, but their perception of the nature of the law is sound. Men's respect for it will be the greater, the more imperceptible its development.

Law and its Compass, Faber, London, 1960, 39. Also M.D.A. Freeman, 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling', (1973) 26 Current Legal Problems, 166-207.

microscopic analysis by American writers.<sup>4</sup> As a result of this study and scrutiny at least two schools of jurisprudence arose to enrich legal thought. Of the two schools, viz. Roscoe Pound's Sociological Jurisprudence,<sup>5</sup> and the Realists,<sup>6</sup> the former is of great relevance to the question of social control through law which is what restriction on freedoms is about.

- 
4. The following views of an American political scientist is a good illustration of the extent to which the analysis has gone:

Even American jurists and commentators, accustomed as they are to viewing judicial review in its political context, too often fail to see the logic of their own views. A large part of the debate over judicial self-restraint is coloured by the inability of its proponents to recognize that self-restraint is just as political as activism: i.e., that it reflects political attitudes in general, and that in specific cases it constitutes (in fact if not in theory) judicial sanctification of the political solution.

...  
It requires an act to refuse to act, and the consequences of refusal are as socially and politically far-reaching as those of activist decisions.

Loren P. Beth, The Development of Judicial Review in Ireland, 1937-1966, Dublin, 1967, 11-2. [The author was an American visiting scholar in Ireland].

While I find this enlightening, I cannot help feeling that this needs qualifying.

Non-interference may be politically inert. May not a court restrain itself from interfering in the hope that the political forces in the rest of the community will find the solution? This becomes genuine self-restraint where the court may feel it can produce a good solution itself but that it is not the forum in which to do so. Self-restraint in this sense is desirable at times and is exemplified in the United States by the 'New Deal' controversies.

5. See W. Friedmann, Legal Theory, 4th edn., Stevens, London, 1960, ch.25.
6. How the view of legal systems was changed by these theories and how the present Indian legal system figures in the light of these theories is dealt with in good detail by Raina, 'Judicial Law Making', 8 Jaipur Law Journal (1968), 67-184.

However detailed the provisions that lay down the circumstances under which the rights are to be curtailed, judicial creativity in course of review cannot be circumscribed by the draftsman of the constitutional document.<sup>7</sup> Framing a lengthy and elaborate constitution, the Indian Constituent Assembly did not mean to eliminate judicial review, but imagined they would narrow down its scope and make matters more certain by specifying the grounds upon which 'reasonable restrictions' could be imposed by the legislatures on the rights guaranteed. Were they right in their assumption? At any rate, did it really make any difference to the quality of judicial review exercisable by Indian courts?

The Assembly succeeded in propounding, as it were, a summary of the United States constitutional experience and the well-known Common Law grounds (for example, public order, defamation, contempt of court and obscenity) that generally justify restricting the rights.<sup>8</sup> Still there must be, and

7. See Michael Coper, 'Freedom of trade in India and Australia: Nature of Judicial Choice', 10 Jaipur Law Journal (1970) for an analysis of constitutional concepts and judicial choice.

8. To take one of the seven freedoms guaranteed by Article 19,

Right to Freedom

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

a) to freedom of speech and expression;

...

...

...

...

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

has been in India, the definite scope of judicial review, for it is the courts that judge the reasonableness of the restrictions imposed by legislative and executive measures.

'Reasonable Restrictions'

The expression 'reasonable' is both a compendious and a vague term. Compendious, in the sense that it necessarily pervades the whole of the transaction under examination, though it may be possible to put the emphasis on certain aspects of it, and vague because pre-determined standards cannot always be applied in a predictable way since the ruling factor must be the nature of the transaction.<sup>8a</sup> The

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Note 8 - continued from p.4:

(the expression in italics was introduced by Section 2, Constitution (16th Amendment) Act, 1963, with effect from 5 October, 1963). For the full text of Article 19 and other articles, see Appendix II. Though the exceptions look more impressive than the right, all of them are, as observed, well-known exceptions. In any statute the recital of any of the exceptions is not conclusive as to its merits but justiciable. See Romesh Thapper v. Madras, AIR 1950 S.C.124, (1950) S.C.J.418; Ram Manohar Lohia v. Supdt., Central Prison, AIR 1960 S.C.633, (1960) S.C.J.567, where it was held that the connection between the restriction imposed and the exception referred to in the statute was too remote and therefore, inoperative. But the general presumption is "legislative judgment holds", F.N. Balsara v. Bombay AIR, 1951, S.C. 318 (1951), S.C.R.682.

- 8a. For the word 'reasonable' has a number of different meanings and it has become more and more apparent that in different legal contexts its significance is not always the same; and the danger is that its use in one context may be improperly borrowed to fit another context. Professor Gluckman speaks of the 'reasonable liar' (Max Gluckman, The Judicial Process among the Barotse of Northern Rhodesia, 1955, 359) and the 'reasonable wrong-doer' (Ibid., 137). Sir Alan Herbert made an English court hold that the 'reasonable woman' does not exist in English law (A.P. Herbert, The Uncommon Law, 1935, 1 et seq.). Raphael Powell, 'The Unreasonableness of the Reasonable Man', (1957) 10 Current Legal Problems, 104, 107.

relative and indeterminate character of this term poses a challenge. It seems to call for a study somewhat in the style of the 'due process' clause of the United States Constitution but on a reduced scale. The Indian Constitution is only about a quarter of a century old and though there are a number of decisions bearing on this subject, the time has as yet been too short for any work on the scale appropriate to 'due process' in the United States. But there is enough material for us to be able to assess the judicial review that rests on the corresponding Indian clause. The expansion and reduction in the scope of the clause, its bearing on the other provisions of the Chapter on Fundamental Rights and judicial attitudes in general will found the question to be dealt with in the following pages.

The intellectual ancestry and origin of the reasonableness notion can be traced to England and English Law.<sup>9</sup> This will be dealt with in Chapter I, Section 3, to follow. But here some further observations are necessary to put this study in its proper setting.

One of the several factors that lend importance to a

9. Indeed, the very concept of the reasonable man, which is so characteristic of the many legal systems founded upon the Common Law, is an expression of that aspect of the legal protection of the rights and freedoms of the individual.

Sir Humphrey Waldock, 'The Legal Protection of Human Rights - National and International' in Sir Francis Vallat (ed.) An Introduction to Human Rights, London, 1970. But see Raphael Powell, note 8a above, concludes that there is no such being as a 'reasonable man'.

... Master Diamond and I were about to cross a busy road when I remarked: 'we must now use the care of a reasonable man'. He said: 'He doesn't exist, does he?' I replied: 'I doubt it'. But we still crossed the road safely."! Note 8a above at 126, f.n.7.

study of this kind is the 'ideology'<sup>10</sup> behind the notion of reasonableness. While there cannot be universal national consensus on the courts' pronouncements as to which are and which are not reasonable restrictions, there must be some degree of appreciation and understanding of what the courts have done. With no supreme Legislature immediately to rectify a harsh or unpopular judicial decision, in normal times the community's appreciation of the courts' stand is essential for the viability of its decisions. Constitutional issues are bound to be controversial; often the disagreement pertains to matters of policy and at times to basic political considerations, however mildly these may be expressed in words. The Indian Supreme Court's stand on the question of compensation payable for private property, compulsorily acquired by the State (for 'public purpose' as authorised by Article 31(2)), has been consistently rejected by the Indian Parliament and State Legislature. Matters only became worse when the narrow majority in the Supreme Court decided in Golaknath v. Punjab,<sup>11</sup> that Parliament acting as the amending body with a special majority (under Article 368) could not amend the Fundamental Rights. This result, achieved by a technical and dry reasoning, was interpreted by Parliamentarians as an 'obstructionist' attempt to stop Parliament reversing the Court's decisions on property matters by simply

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10. This need not always mean political ideology. Here the term's primary sense is to indicate the differing standpoints putting different emphasis on what an impugned law does and how it does it. These are serious enough without having to bring in political creeds.

11. AIR, 1967, S.C. 1643, (1967) II S.C.W.R. (Supp.), 1006.

amending the Constitution.

In all such controversies the term 'reasonable restriction' itself is not invoked as the central issue: but one can see the connection between 'ideological presuppositions' and the judicial view of what is right and reasonable in each case.<sup>12</sup> In other areas, the Supreme Court has adjudicated upon delicate social and religious issues without giving rise to any notable controversy.<sup>13</sup> The Supreme Court is likely to face many more similar questions of social policy, some at least of which will come directly under Article 19's provisions. Indian Judges have, indeed, recognized that their views on social questions, and on matters of public interest generally, may influence their decisions.<sup>14</sup>

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12. The recent decision in Kesavananda Bharathi v. Kerala, AIR, 1973, S.C. 1461, can be seen as providing for judicial review of the 'reasonableness' of the Constitutional amendments themselves. For a detailed analysis of the problem of amendment with comparative references, see D. Conrad, 'Limitation of Amendment Procedures and the Constituent Power', The Indian Year Book of International Affairs (1966-67), 375-430.
13. In Mohd. Hanif Quareshi v. Bihar, AIR, 1958, S.C. 731 (1959), S.C.R. 629, and in Abdul Hakim v. Bihar, AIR, 1961, S.C. 448, (1961) 2 S.C.R. 610, the Court determined the reasonableness of anti-cow-slaughter laws (passed to respect Hindu sentiments) vis-a-vis the right of the Muslim butchers to carry on their trade in slaughtering animals for meat; in Shaikh Piru Bux v. Kalandi Pati, AIR, 1970, S.C. 1885, the right of religious communities to take out processions; in Hamdard Dawakhana v. Union, AIR, 1960, S.C. 554 (1960) 2 S.C.R. 671, the question of advertising magical remedies for serious afflictions.
14. The State of Madras v. VG Row, AIR, 1952, S.C. 196, which has been repeatedly quoted and followed in subsequent decisions. A more explicit recognition has come from the Judges' extra-judicial pronouncements - M. Hidayatullah (Chief Justice of India), Judicial Methods, I.C.P.S., New Delhi, 1970, 21-2; P.B. Mukharji (Chief Justice of the Calcutta High Court), The Critical Problems of the Indian Constitution, University of Bombay, 1968, 123-4.

While this element of 'ideology' should not be exaggerated and read into each and every issue coming before the courts, to deny its presence and scope may not help. That to pronounce on the 'reasonableness' of a law enables the judges to be creative is well recognized:

In the second place, the function of 'reasonableness' is to enable the judge to be creative where a gap in the law, conflicting authorities, or a widely framed provision of a statute allows him to be creative. The test of reasonableness thus is nothing substantially different from 'social engineering', 'balancing of interests', or any of the other formulas which modern sociological theories suggest as an answer to the problem of judicial function.<sup>15</sup>

To dispute the judicial discretion in this matter seems hardly possible 'without indulging in terminological contortions or over-refined distinctions.'<sup>16</sup>

But there is at least one question that seems to present some obvious theoretical if not practical, difficulties. Many authorities have stated that the test of 'reasonableness' is an objective test.<sup>17</sup> The meaning of the word 'objective'

15. W. Friedmann, Legal Theory, 4th Edn., Stevens, London, 1960, 86.

16. S.A. de Smith, Judicial Review of Administrative Action, 3rd edn., London, Stevens, 303-4.

17. English authorities include Associated Provincial Pictures v. Wednesbury Corporation (1948) 1 K.B. 223, (1947) 2 All E.R. 680, per Lord Greene at 230:

... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.

Skipping several cases in between, Fawcett Properties v. Bucks County Council, (1961) A.C. 636, (1959) 2 All E.R. 321, Lord Evershed at 327 of the All E.R. Approved in Re W. (An Infant) (1971) A.C. 682 (H.L.) Lord Hailsham L.C.:

is put in issue.

'Subjectivity' and 'Objectivity' in Reasonableness

There seems to be a contradiction between, on the one hand the ideological content of 'reasonableness' and on the other, its objective examination and treatment by the courts. If by objectivity it is meant that the judges' personal views will not govern the final outcome then the statement is correct. Equally, if it means that a methodical examination by a trained and impartial judiciary will be brought to bear upon the question, then also it is correct. But if it means that there cannot be honest differences between the judges on issues that can be traced to the realms of public policy and political matters then it is not correct. The considerable number of decisions on reasonableness which have produced

Note 17 - continued from p.9:

Indeed I cannot myself readily visualise circumstances in which the words 'reason', 'reasonable' or 'unreasonable' can be applied otherwise than objectively. And be it observed, 'reasonableness' or 'unreasonableness', where either word is employed in English law, is normally a question of fact and degree and not a question of law so long as there is evidence to support the finding of the court.

Ibid. at 699. This has not stopped W. Friedmann from comparing the decisions in Roberts v. Hopwood, (1925) A.C. 578, and Prescott v. Birmingham Corporation (1954), 3 W.L.R. 990 (C.A.) with the 'policy' decisions of the United States Supreme Court under the 'due process' clause. See W. Friedmann, Law in a Changing Society, 2nd edn., Penguin, London, 1972, 394, f.n.39. (287, f.n.62 of the first Indian reprint, University Book House, Delhi.)

Indian authorities include VG Row v. Madras, AIR, 1951, Madras<sup>147</sup> on appeal, The State of Madras v. VG Row, AIR, 1952, S.C. 196, per Patanjali Sastri C.J. at 200, col.1.

The test of reasonableness laid down there has been followed in innumerable decisions. See also Seervai, Constitutional Law of India, Bombay, Tripathi, 1967, 288-90.

strong dissents<sup>18</sup> can only be explained on the basis of such honest differences amongst the judges. Of these different opinions of equal authority, it is only those that evolve criteria which make sense in the light of the general policy pursued by the community that are eventually accepted. The others are either cast away or lie dormant to be resurrected when the general policy of the community comes to be changed through time. These apparently conflicting elements in this 'indeterminate' expression justify study whether or not the results appear in the form of concrete propositions of law. The task becomes even more necessary when the expression is used in the vital provisions of a constitutional document.

The generation of Indian lawyers who participated in the framing of the Indian Constitution were familiar with the English legal idea of reasonableness and for other reasons, too, the English notion qualifies to be the closest to the clause found in the Indian Constitution. Soon this clause and other similar clauses were included by several commonwealth countries in their constitutions. Notable amongst them are Pakistan, British Guyana, Trinidad & Tobago, Zambia and more recently, Western Samoa.<sup>19</sup> Malaysia and recently,

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18. Lord Atkin's dissent in Liversidge v. Anderson, L.R. (1942), A.C. 206, is a good example. There are many in the United States., the classic being Holmes' in Lochner v. New York, (1905), 198 U.S.45, (1905) 49 L.Ed. 937. "Dissenting judgments not only indicate the lack of legal compulsion but also that more than one answer may be reasonable." Michael Coper, op.cit., note 7 above, 4.

19. Articles 8, 8, 10 and 11 of the Pakistan (1956) Constitution, and Article 6, Right Nos. 5, 6, and 7 of the Pakistan (1973) Constitution; Article 13(1) & (2) of the Constitution of Guyana, 1966; Articles 14, 17 and 18 of the Constitution of Sierra Leone, 1966, and Articles 11, 12 and 13 of the Constitution of Swaziland, 1968, adopt the 'reasonably required' formula; Constitution of Trinidad and Tobago, 1962, uses

Sri Lanka are notable in that they have not used the term 'reasonable' anywhere in the fundamental rights provisions of their Constitutions, thus clearly indicating their original intention of not providing for judicial review.<sup>20</sup> Singling out here the expression 'reasonably justifiable in a democratic society' used in the Zambian, Maltese and Kenyan Constitutions, it seems vaguer than 'reasonable restrictions', apart from begging the inevitable question as to what is meant

Note 19 - continued from p.11:

the 'reasonable' (Article 5(1)) as well as the 'due process' (Article 1(a)) formulas; Zambia and Kenya have used 'reasonably justifiable in a democratic society' as a characteristic of constitutionally valid restrictions on rights; Constitutions of Barbados, 1966, Botswana, 1966, and that of Western Samoa, 1960, have used the same 'reasonable restrictions' clause as in the Indian Constitution. For the text of these Constitutions, see Blaustein and Flanz (ed.), Constitutions of the Countries of the World, Oceana, New York, 1971-1974. See further, S.A. de Smith, The New Commonwealth and its Constitutions, Stevens, London, 1964, Ch.5, also James S. Read, 'Bills of Rights in "The Third World". Some Commonwealth Experiences', Verfassung und Recht in Ubersee, Hamburg, 1/1, 1973, 21-47. D.O. Aibe, 'Neo-Nigerian Human Rights in Zambia', vol.3 -4, Zambia Law Journal, (1971-72), 43, 48 ff. Article 24, United Nations Declaration of Rights, 10 December, 1948, this the only provision there that talks about "reasonable limitations". "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

20. Constitution of Malaysia, Article 10. The Malaysian Parliament can impose such restrictions as "it deems necessary and expedient" (Article 10). While the Constitutional draft was being discussed in the Parliament, the then Attorney-General it seems, maintained that the question of 'reasonableness' was a political one to be ultimately decided by Parliament and not the Courts. Constitution of Sri Lanka, 1972, Section 18. In Sri Lanka, the new arrangements consisting of a continental-style 'Constitutional Court' to which Bills are referred, largely at the initiative of the Speaker of the National Parliament, do not appear to be working very well. The first Constitutional Court resigned (in protest?) after difficulties over the government's controversial Press Bill. Thus Sri Lanka provides one example of an alternative to the Anglo-American notion of judicial review. But other commonwealth countries may hesitate to follow the example of Sri Lanka.

by 'democratic'.<sup>21</sup> Therefore, it seems hardly a better alternative to the Indian clause.

The proliferation of the 'reasonableness' notion in the Constitution of many nations gives it an importance far beyond its occurrence in the Indian Constitution. However, this work is confined primarily to the Indian provisions.

Relevant from a comparative angle is the frequent reference made by Indian courts and commentators to the 'due process' clause while discussing the ambit of judicial review in India. The point made by these references seems to be that by using 'reasonable' instead of 'due process' the framers of the Indian Constitution have narrowed down the scope of judicial review - narrowed relatively to the power supposedly enjoyed by the United States Supreme Court under the 'due process' clause. Yet even if preventive detention without trial is permitted by the Indian Constitution and the right to property has been curtailed,<sup>22</sup> it seems doubtful if any or all of these would make a difference to the quality of judicial review where it is clearly meant, as under Article 19 of the Indian Constitution. Such comparisons as have been made with the 'due process' clause have been inconclusive and somewhat misleading. This point needs to be explored further.<sup>23</sup>

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21. Many provisions of the European Convention on Human Rights limit the rights by stating they are subject to such restrictions "as are necessary in a democratic society", e.g. Articles 9(2), 10(2), 11(2).

22. The Constitution (Twenty-fifth Amendment) Act, 1971, see Appendix I.

23. See below, Section 2 of Chapter 1.

An Introduction to Article 19 of the Indian Constitution

Article 19 whose sub-clauses contain the 'reasonable restrictions' formula occupies a central position in the scheme of Fundamental Rights. The dictates of Article 19 other than the requirement of reasonableness of restrictions are as follows:

- 1) The restrictions on a fundamental right must be imposed by a law and not by a mere administrative or executive order which is not supported by a law. Article 19(2) to (6) referred to 'reasonable restrictions' imposed by law made "in the interests of" etc.<sup>24</sup>
- 2) When it comes to constitutional challenge, however, it is possible to say that an order or notification made under a valid law, yet imposes unreasonable restrictions. This may be simply 'ultra vires', or unreasonable because the order took into account extraneous matters or was excessively harsh.<sup>25</sup>
- 3) The grounds enumerated in Article 19 'in the interests' of which 'reasonable restrictions' can be imposed are exhaustive and possibilities of judicial decision adding new grounds are remote.<sup>26</sup>

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24. Rashid Ahmad v. Municipal Board, Kairana, AIR, 1950, S.C. 163 (1950) S.C.R. 566, (1950) S.C.J. 324. Ram. Krishna v. Union, AIR, 1969, Cal.18. See Appendix II.

25. Oudh Sugar Mills v. Union, AIR, 1970, S.C.1070. Ramakrishna Hegde v. The Market Committee, AIR, 1971, S.C.1017.

26. Cf. Article 18, European Convention on Human Rights: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

- 4) On the other hand, the existing grounds have received restrictive interpretations.<sup>27</sup>
- 5) Counsel have often pointed out that the adjective 'reasonable' qualifies 'restrictions' and therefore, the entire law is not to be judged as to whether it is reasonable or not.<sup>28</sup> But in practice, this distinction has been found to be a difficult one to maintain and the test of reasonableness laid down in V.G. Row<sup>29</sup> recognizes that the entire law has to be reviewed.

The task of a Court under Article 19 would consist in

- a) defining the scope of the Fundamental Right in question;
- b) determination of the nature of the restriction imposed;
- c) the object for which it is imposed;
- d) the determination of the ambit of the ground supporting the restriction such as 'public order' or 'in the interests of the general public', etc.<sup>30</sup>

The scheme of Article 19 itself clearly indicates that the duty of the Court is to find the right balance between freedom and social control. This inevitably brings the

27. Dr. Lohia v. Supdt. Central Prison, AIR, 1960, S.C. 633; (1960) 2 S.C.R. 821; (1960) S.C.J. 567. Madhu Limaye v. Supt. Dt. Magistrate, Monghyr, AIR, 1971, S.C. 2486, holding that in cases of preventive detention the ground of 'public order' would receive a narrow interpretation. See below, Ch.3, Section 1.
28. Dr. N.B. Khare v. State of Delhi, AIR, 1950, S.C.211; (1950) S.C.R. 519; (1950) S.C.J. 328.
29. AIR, 1952, S.C. 196, 200.
30. D.D. Basu, Commentary on the Constitution of India, 5th edn., Vol.I, Calcutta, 1965, 545-604; H.M. Seervai, Constitutional Law of India, Tripathi, Bombay, 1967, Ch.XI; A.S. Chaudhri, Constitutional Rights and Limitations, Vol.I, Agra, 1955.

judges into contact with legislative policies represented through the laws impugned before them. Admittedly, theirs is a passive role to the extent that they do not approve or disapprove such policies.

Finally, the current criticisms <sup>30a</sup> in India concerning the role of judicial review cannot be meaningful without a consideration of what the courts have done under the sub-clauses of Article 19. How do the courts see 'reasonableness' under Article 19? How have they drawn the balance between Fundamental Rights and social control? To answer these questions we must first step back a little into legislative history, of which the judges must be taken to have considerable background knowledge.

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30a. See below, Conclusion.

## CHAPTER 1: HISTORY AND COMPARISONS

### Section 1: The Indian Constituent Assembly and Limitation of Rights

In the 1920s the British Government's answer to Indian demands <sup>31</sup> for constitutional guarantees was that such a course would prove to be troublesome in practice, and in any case would be less effective than imagined. Not least of the objections, in its view, was the difficulty of formulating such rights and enabling them to be suitably enforced when violated.

The statutory provision would therefore have to be drawn so widely as to be little more than a statement of abstract principle, affording no precise guidance to courts which would be asked to decide whether a particular group constituted a minority, and whether the action complained of was discriminatory. Moreover, having regard to the ingenuity and persistence with which litigation is carried on in India, we should anticipate that an enactment of the kind would result in the transfer to the law-courts of disputes which cannot be conveniently disposed of by such means ... These objections are decisive against the proposal to prevent

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31. The demand for written guarantees to secure minority rights (particularly of religious minorities) was a familiar and old theme when the Nehru Report, 1928, was published. See Granville Austin, The Indian Constitution, Cornerstone of a Nation, Oxford, 1966. Representatives of the Muslim, Indian Christian and Anglo-Indian communities spoke for such guarantees in the Round Table Conferences. See Indian R.C. Proceedings, 1930-1, Cmnd. 3778. For details, see K.C. Markandan, Directive Principles in the Indian Constitution, Allied publishers, New Delhi, 1966, Ch.2; see also, Report of the Indian Statutory Commission, Vol.II, Recommendations, 129-130 (1930); A. Gledhill, 'The Twilight of India's Fundamental Rights' in De L'Independance politique a la Liberte Economique et a L'egalite sociale en Asie du Sud-est, Colloque, Brussels, November 1964, 225.

discriminatory legislation by attempting to define it in a constitutional instrument. 32

The reaction of the then Government of India to these recommendations was slightly more positive while it did agree with the Commission's views.

The subjects to be covered by these rights are by no means matters of agreement. Their nature would require careful scrutiny. If they are expressed in the Constitution merely as so many general political maxims, they are unlikely to serve the purpose for which they are framed. On the other hand, at first sight there seems to us to be objections to making at least some of such rights justiciable. If administrative decisions of all kinds can be taken to the Courts, grave disadvantages and embarrassments may be expected to ensue. There may, however, be some via media between these two alternatives. 33

When it came to framing a Constitution for independent India, the Advisory Committee on Fundamental Rights in the Constituent Assembly faced all these questions and fully evolved the answers only towards the final stages of their proceedings. The exceptions justifying restrictions on the rights guaranteed were not in place until fairly late. It is indeed possible to urge that, difficult as the task was, the Advisory Committee left a

32. Report of the Indian Statutory Commission ... op.cit., 130. On "Anglo-Saxon Attitudes" to Bills of Rights, see S.A. de Smith, The New Commonwealth and its Constitutions, Stevens, 1964, ch.5. Note the change in British attitudes referred to there. There have been demands in Britain itself for written guarantees. It is known that the Liberal Party of Great Britain is advocating a Charter of Rights. Also see, "Who Cares about civil rights", The Times Saturday Review, 29 May, 1971. On Britain's adoption of the European Convention on Human Rights, see Charles L. Black Jr., 'Is there already a British Bill of Rights?', 89 (1973) L.Q.R.173.
33. Government of India's Despatch on Proposals for Constitutional Reform, Government of India Central Publication Branch, Calcutta, 1930, 45 (para.50). The Government of India Act, 1935, did have two sections guaranteeing non-discriminatory legislation - sections 298 and 299. See Tan Bug Taim v. Collector Bombay, ILR, 1946, Bom. 116, 232 quoted in A.S. Chaudri, Constitutional Rights and Limitations, Vol.I, Agra, 1955.

few clear gaps in the edifice they built.<sup>34</sup> This necessitated a major amendment of the Constitution within the first year of its commencement [Constitution (First Amendment) Act, 1951]. Many of the modifications were mostly necessitated by the land reform and nationalisation policies known in advance to the Advisory Committee as likely avenues of action by the independent government of India.<sup>35</sup>

The cautions administered by the Statutory Commission, however, did not go entirely unheeded by the Advisory Committee. It was the Committee and not the Assembly that wished to incorporate the detailed exceptions to the rights. The Committee was accused of being too cautious.<sup>36</sup> The formula 'reasonable restrictions', as we shall see, was a compromise

34. Some may have been mere oversight, such as the absence of the expression 'reasonable' in Article 19(2) limiting the right guaranteed by Article 19(1)(a). This was corrected by the Constitution (First Amendment) Act, 1951. More serious omissions were failure to provide for the Zamindari abolition - also corrected by the amending Act of 1951, and the failure to modify suitably the equality provisions to permit 'protective discrimination' in favour of tribal peoples, 'untouchables' and other backward communities. See below, 197.

35. Speakers in the Constituent Assembly demanded a 'straight-forward' declaration that a policy of nationalisation would be pursued and accurately prophesied how the courts would construe the right to compensation for expropriation but the Establishment would not heed them.

A. Gledhill, 'Twilight of India's Fundamental Rights', op.cit. note 31 above, at 254. One reason may well be that the Congress party has always been, so the experts tell us, an 'umbrella party' holding within it diverse and opposing interest groups.

36. A member of the Assembly, Somnath Lahiri, described the rights as having been framed from the 'point of view of the police-constable', C.A.D., III, 2, 384. See Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford, 1966, 68-75.

agreed to between the majority of the members of the Assembly who were against the exceptions and the Advisory Committee, which favoured them.

#### Proceedings of the Advisory Committee

B.N. Rau, the Constitutional Advisor to the Assembly, referred to the problem of limiting the rights as the most vital part of the task facing the Assembly. In his very first 'Notes on Fundamental Rights', he observed:

The difficulty is in defining the precise limits in each case and in devising effective protection for the rights so limited. Some of the constitutions have attempted to define the limits of some of these rights and in doing so have gone far towards destroying them. As an example, we may take Article 153 of the German Constitution of 1919, which runs:

'Property is guaranteed by the Constitution. Its extent and the restrictions placed upon it are defined by law. Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation save insofar as may be otherwise provided by a law of the Reich.'

In other words, rights of private property are said to be inviolable except where the law otherwise provides, which means that the rights are not inviolable.<sup>37</sup>

It is clear that B.N. Rau would not have recommended mere political declarations of a general nature but would have required instead, as in fact he did, a justiciable set of rights with a balanced list of exceptions to their exercise. All the members of the Advisory Committee were in

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37. B. Shiva Rao, The Framing of India's Constitution, Vol.1I, The Indian Institute of Public Administration, New Delhi, 1968, 22.

favour of justiciable rights and would not have countenanced mere 'educational' declarations of Rights. Directive principles were another question altogether. For the goals included there, such as the community's health, education and welfare, were regarded as of relatively less direct interest to the individual compared with Fundamental Rights.<sup>38</sup>

Alladi Krishnaswamy Ayyar in a note submitted to the Sub-Committee on March 14, 1947, alluded to the very general and comprehensive rights of the United States Constitution and the manner in which the United States Supreme Court had carefully delimited them. Many later constitutions (which he did not specify) he said, had expressly incorporated the effect and substance of many United States cases. Accordingly, he stated that in formulating the rights "the question before the Constituent Assembly of India is whether to follow the model of the U.S.A. or of the later constitutions".<sup>39</sup>

K.M. Munshi, another lawyer who took a prominent part in the business of the Assembly, submitted a note to the Sub-Committee in which he referred to four requisites essential, in his opinion, in the formulation of the rights:

- a. Enforceability must be the essence of any instrument defining fundamental rights and duties;
- b. A person or a State under an obligation cannot claim the right to determine whether he would comply with the obligation and if so, to what extent;

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38. The United Nations Declaration of Human Rights is a mixture of what in Indian terms would be Fundamental Rights and Directive Principles of State policy.

39. B. Shiva Rao, op.cit., Vol.II, 67-8.

- c. The observance of the fundamental rights and duties must be determined by a procedure and a machinery common to the Union as a whole;
- d. Limitations to such law whenever necessary must only be imposed by the law of the Union.<sup>40</sup>

The second of these principles is as good an approximation to the final form of 'reasonable restrictions' as was anticipated at that time.<sup>41</sup>

Dr. Ambedkar's draft of March 24, 1947, guaranteed amongst others the right to freedom of speech, press, association, assembly, religion and residence and subjected all of these rights to considerations of 'public order and morality'. Put in that form, there would have been no knowing whether legislative judgment as to the justification in imposing restrictions would have been final and, therefore, not reviewable by the courts. Presumably, Dr. Ambedkar had not yet given mature thought to the matter. But he was subsequently to accept the 'reasonable restrictions' formula put forward by Thakurdas Bhargava, a member of the Assembly. To that history we proceed now.

#### The origin of the 'reasonable restrictions' formula

The Sub-Committee on Fundamental rights 'slipped' the clause in for the first time during its proceedings on the 24th March, 1947. The relevant note from the minutes runs

40. B. Shiva Rao, op.cit., 71. Also see K.M. Munshi's collected papers and impressions published as Pilgrimage to Freedom, Indian Constitutional Documents, Two Volumes, Bharatiya Vidya Bhavan, Bombay, 1967.
41. Attention may also be drawn to Article I(5) and Article V(2) of K.M. Munshi's draft articles, B. Shiva Rao, op.cit., 73 and 75.

as follows:

4. As regards Article II of Mr. Munshi's draft, it was decided to adopt Article I, sub.sections (1) and (2) of B.N. Rau's draft in the following modified form:

Article I(1). Every person born or naturalized in the Union of India and subject to the jurisdiction thereof shall be a citizen of the Union.

.....

- (2) Every citizen of the Union shall be free to move throughout the Union, to reside and settle in any part thereof, to acquire property, and to follow any occupation, trade, business, or profession subject to such reasonable restraints as the law may impose.<sup>42</sup>

We have no means of knowing what B.N. Rau's draft was. It has not been appended to the minutes or reproduced anywhere else in the four volumes of documents in the series The Framing of India's Constitution. B.N. Rau's collected papers edited and published by B. Shiva Rao<sup>43</sup> do not have amongst them the draft referred to here. B.N. Rau,<sup>44</sup> as the Constitutional Advisor, did prepare a draft Constitution in the October of 1947 well after the Sub-Committee had finished its work (April, 1947). Since that draft could not be the one mentioned, we cannot be certain whether the clause owes its origin to B.N. Rau. However, since none of the draft provisions produced by K.M. Munshi, Professor K.T. Shah,

42. B. Shiva Rao, op.cit., Vol.II, 116, my emphasis.

43. B. Shiva Rao (ed.), B.N. Rau, India's Constitution in the Making, Longmans, Bombay, 1960.

44. An account of Sir B.N. Rau appears in the work referred to in the footnote above, and also a short sketch is given in M. Hidayatullah, A Judge's Miscellany, N.M. Tripathi, 1972, 65.

Dr. Ambedkar or Harnam Singh <sup>45</sup> had the clause in them, it is a fair guess that B.N. Rau's draft carried it.

### B.N. Rau and Judicial Review

The main question to which this thesis addresses itself concerns the notion of judicial review, albeit from a specific angle. Consequently, every clue which throws any light on the notion or notions entertained by those instrumental in framing the constitution has to be weighed carefully. Individuals such as B.N. Rau, K.M. Munshi and Alladi Krishnaswamy Ayyar had considerable influence in the shaping of the constitution. B.N. Rau, in particular, dealt with the question of judicial review in greater detail than the others. His 'preliminary note on Fundamental Rights' <sup>46</sup> was a cautious assessment of the nature and effect of judicial review of legislation. It was a cautious assessment because it referred to the inconveniences rather more than the advantages of judicial review. The following passage is a good summary of his views:

The other difficulty, namely, that of devising effective protection for the rights defined, really arises out of the difficulty of definition already pointed out. Where a right can only be indicated in broad terms, there is an obvious risk in allowing it to be enforced in the ordinary courts, because there is no knowing how broadly they might interpret it. There are at least three alternatives possible in this connection:

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45. B. Shiva Rao, op.cit., Vol.II, 69-96.

46. See note 37.

1. to take this risk and allow the rights, however imperfectly defined, to be enforced in the ordinary courts;
2. to set out the rights as moral precepts for the authorities concerned and to bar the jurisdiction of the ordinary courts either expressly or by implication;
3. to allow the more easily definable rights to be enforced in the ordinary courts and keep the rest out of their purview. 47

Elsewhere B.N. Rau points out many more disadvantages attached to judicial review - (a) Parliament's room for doubt while enacting legislation as to the question of the constitutionality of the law when enacted; (b) a possible 'vast mass of litigation' subjecting the same laws to frequent challenges (several distinct provisions of the same law could be challenged separately without 'res judicata' acting as an impediment); and (c) an irremovable judiciary may not be adequately sensitive to the public needs and may exercise a veto on essential legislation.<sup>48</sup> The acuteness of some at least of these fears has been proved by recent experience.

The only advantage referred to by B.N. Rau is that judicial review would give racial and religious minorities a sense of security. The aptness of this expectation has also been proved. He was definitely in favour of circumscribing judicial review after his tour of the U.S.A. and Ireland. It is of great interest that in his report on the tour he recommended without any reservation that the

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47. B. Shiva Rao, op.cit., vol.II, 22, my emphasis.

48. B. Shiva Rao, op.cit., Vol.II, 30-31.

Fundamental Rights be made subordinate to the Directive principles:

... When a law made by the State in the discharge of one of the fundamental duties imposed upon it by the Constitution happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter: in other words, the general welfare should prevail over the individual right. Indeed Justice Frankfurter considered that the power of judicial review implied in the due process clause of which there is a qualified version\* in clause 16 of our Draft Constitution was not only undemocratic (because it gave a few judges a power of vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the judiciary; and Justice Learned Hand considered that it would be better to have all fundamental rights as moral precepts than as legal fetters in the Constitution. 49

It is significant that both names referred to by B.N. Rau were of judges known to be leading exponents of judicial 'restraint' in their country.<sup>50</sup>

49. B. Shiva Rao, op.cit., Vol.III, 218.

\*"16 No person shall be deprived of his life or personal liberty without due process of law, nor shall any person be denied equality before the law within the territories of the Federation."

50. K.M. Munshi, another prominent member of the Assembly and of the Sub-Committee on Fundamental Rights remarks:

Though this clause (Due process) was supported by a majority - almost all - of the members of the Constituent Assembly, at a later stage, Justice Frankfurter, Judge of the Supreme Court of the U.S.A., when he saw the draft of our constitution, conveyed to B.N. Rau that the Due Process clause would not be helpful and that it had created many complications in the U.S.A. If Justice Black of the Supreme Court of the U.S.A. had been consulted, possibly he would have given an opinion contrary to Justice Frankfurter's.

K.M. Munshi, Constitutional Documents, Vol.I, Bharatiya Vidya Bhavan, Bombay, 1967, 298. My emphasis.

But the essence of B.N. Rau's recommendation was that vital social legislation should not be hampered by judicial review on account of Fundamental Rights. B.N. Rau had, earlier in April 1947, recommended that a clause along the following lines should be included:

The State may limit by law the rights guaranteed by sections 11, 16 and 27 whenever the exigencies of the common good so require." 51

There is no sign that this recommendation was ever discussed at that time either by the Assembly or by the Advisory Committee on Fundamental Rights, but nearly twenty years later such a provision has been enacted by the Constitution (25th Amendment) Act, 1971, which now subordinates fundamental rights to two specified directive principles.<sup>52</sup> This amendment like most other preceding amendments, is expected to narrow the scope of property rights. There is strong evidence that B.N. Rau had in mind nationalisation and similar economic measures affecting the right to property when he made his recommendations.<sup>53</sup>

By the time the Sub-Committee completed its draft there were three clauses which employed the expression 'reasonable'. To take them one by one, first there was clause 10:

51. B. Shiva Rao, op.cit., Vol.II, 152.

52. Article 39(b) and (c). For these provisions and for the Constitution (Twenty-fifth Amendment) Act, 1971, see Appendix I.

53. B. Shiva Rao, op.cit., Vol.III, 199.

There shall be liberty for the exercise of the following rights subject to public order and morality ...

- (f) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession. Provision may be made by law to impose reasonable restrictions as may be necessary in public interests. 54

In terms of drafting there was some overlapping and incongruity between 'public order and morality' on the one hand, and 'public interests' in sub-clause (f) on the other. It appears that restrictions in pursuance of 'public order and morality' need not necessarily be 'reasonable'. If so, the freedom granted in clause 10(f) was greater than those in the other clauses of the article because none of them was qualified by 'reasonable restrictions' but they were subject to 'public order and morality'.

The second occurrence was in Article 28 of the draft: "No person shall be subjected to prolonged detention preceding trial, to excessive bail, or unreasonable refusal thereof, or to inhuman or cruel punishment." (emphasis supplied).

The third provision:

14. (1) Subject to regulation by the law of the Union, trade ... shall be free provided that any unit may impose reasonable restrictions in the interest of public order, morality or health or in an emergency.

B.N. Rau had indicated the source of inspiration behind clause 10(f) in a note he circulated on the 8th April, 1947.<sup>55</sup>

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54. B. Shiva Rao, op.cit., Vol.II, 172, cl.10.

55. B. Shiva Rao, op.cit., vol.II, 147.

"Clause 14 (it was then numbered (14)) embodies one of the chief privileges or immunities of the citizens of the U.S.A., which no state is permitted to abridge, see Amendment XIV, section 1. See also Weimar Constitution, Article III." The United States provision referred to does not use the term 'reasonable' but employs 'due process'. B.N. Rau might have regarded 'reasonable' as a positive compromise between due process and the absence of judicial review. Here again, we proceed on conjecture.

The draft prepared by the Sub-Committee was revised by the Advisory Committee on Fundamental Rights. The second of the three clauses quoted above relating to 'unreasonable refusal' of bail was dropped. The other two clauses, as revised, then read as follows: Clause 10(f) becoming clause 8(e)

Rights of Freedom 8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency ...

- (e) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession: Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minorities and tribes. 56

It is rather curious that of the five sub-clauses in clause 8, only sub-clause (e) quoted above carried the expression 'reasonable', since the two freedoms guaranteed by it, viz., the right to property and profession, were the two

most restricted by amendments later enacted by the Indian Parliament!<sup>57</sup> No one in any of the Committees tried to point out the anomaly of sub-clause (e) being the sole beneficiary of the 'reasonableness' clause. That they allowed this imbalance to continue certainly becomes a puzzle when we come to the next clause, viz. clause 14(1) in the Sub-Committee draft, re-numbered by the Advisory Committee as Clause 10, and retained in the same form as quoted above.<sup>58</sup> The puzzle lies in the awareness shown by the drafters of the difference between a general power to impose restrictions simpliciter and a power to impose only reasonable restrictions. Whereas the Union Government was given the power to regulate inter-state trade by imposing restrictions free from judicial review, the states were given the same power but subject to judicial review, such as would examine the state regulations as to their reasonableness "in the interest of public order, morality, or health, or in an emergency". This distinction between the powers of the Union and the States in respect of inter-state trade was carried into the Constitution and duly recognized by the Supreme Court.<sup>59</sup>

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57. The Constitution (First Amendment) Act, 1951; The Constitution (Fourth Amendment) Act, 1955, and The Constitution (Twenty-Fifth Amendment) Act, 1971.

58. Above, 29.

59. Article 302 with 304(b). See Atiabari Tea Co. v. Assam, AIR, 1961, S.C.232, where at 254 the following observation is to be found: "Prima facie the requirement of public interest [under Article 302] can be said to be not justiciable and may be deemed to be satisfied by the sanction of the President; but whether or not the restrictions [in 304(b)] imposed are reasonable would be justiciable and in that sense, laws passed by the State legislatures may on occasions have to face judicial scrutiny." (per Gajendragadkar J.) (words in square brackets supplied). The cautious language is due to the fact that the question was not directly raised in the

The majority of the Committee members may have assumed that judicial review would exist under Article 8 whatever phraseology was employed. The lack of adequate discussion on vital points affecting judicial review strengthens this view.

However, individual members of the Committee, as well as members of Constituent Assembly were aware of the special significance attached to the word 'reasonable'. Almost all these members saw it as a term imposing restraint on the exercise of the powers of Government. For example, F.R. Anthony, the Anglo-Indian leader, suggested in April that 'reasonable' be substituted for 'special' in the following draft provision:

25. Equal opportunities of education shall be open to all citizens; Provided that nothing herein contained shall preclude the State from providing special facilities for educationally backward sections of the population. 60

The member may have felt that judicial review should be available to judge the extent of the facilities provided for the backward sections of the population. 'Special facilities', in his view, could not, in practice, amount to unreasonable privileges.

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Note 59 - continued from 30:

case and the passage was obiter. See also Andhra Sugar Mills v. A.P., AIR, 1968, S.C.599. For a fuller discussion, see Chapter 2, Section 2(c).

60. B. Shiva Rao, Vol.II, 203, Sub-Committee on Minorities. For the text of the provision, see 174 of Vol.II.

Assembly Proceedings - Stage 1

Introducing clause 8 of the interim draft, Vallabhai Patel announced that the expression 'reasonable' in proviso (e) of the clause was to be dropped in accordance with an amendment proposed and to be moved by the Reverend Nichols Roy, a member from Assam. The member's justification for the amendment, in his own words, was as follows:

The word 'reasonable' will create a great deal of contention and confusion. If a State or a unit will impose (sic) restrictions, someone may go to the Supreme Court as provided in clause 2 and say they are not reasonable. So I consider that protection to be made by law for groups and tribes is not a proper and safe protection.<sup>61</sup>

Vallabhai Patel had already indicated his acceptance of the amendment, but formally once more signified his concurrence with the amendment.<sup>62</sup> The Constituent Assembly voted to drop the expression from clause 8(e).<sup>63</sup> The expression 'reasonable' in clause 10 of the draft was also purged without much discussion and apparently without any dissenting voices. K.M. Munshi supported Patel's wish to drop the term also from clause 10. He is reported as saying: "The word 'reasonable' gives a certain amount of vagueness and therefore, it is not necessary."<sup>64</sup>

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61. Vol.3, C.A.D. 461. One of the grounds for imposing reasonable restrictions in clause 8(e) was the protection of minorities and tribes. Reverend Nichols Roy's interest was to secure maximum benefits for the tribal groups without judicial interference on account of fundamental rights.

62. Vol.3, C.A.D., 409 and 466.

63. Vol.3, C.A.D., 468.

64. Vol.3, C.A.D., 475.

In the Fundamental Rights Sub-Committee, K.M. Munshi was a strong supporter of judicial review and was also in favour of the incorporation of the 'due process' clause in the chapter on Fundamental Rights. He confirms this in his recent memoirs.<sup>65</sup> In view of that, his observation as quoted above, seems surprising.

Thus both Clauses 10 and 8(e) were stripped of the 'reasonable' clause. Vallabhai Patel's definite move in omitting the term seems to suggest that he, amongst the select influential members of the leadership, had wished to keep judicial review to the minimum, if such a thing was possible. None of the other leaders such as Nehru, Maulana Azad or Prasad had expressed views in favour of, or against, the clause.<sup>66</sup>

Vallabhai Patel did not move provisos (a), (b) and

65. K.M. Munshi, Pilgrimage to Freedom (Indian Constitutional Documents), Vol.I, Part XIII, 291-314.

66. But Nehru's remarks about the function of a Supreme Court in India was in terms that did not encourage judicial review:

No Supreme Court and no judiciary can stand in judgment over the sovereign will of parliament representing the will of the entire Community. If we go wrong here and there, it can point out, but in the ultimate analysis, where the future of the Community is concerned, no judiciary can come in the way ... ultimately, the fact remains that the legislature must be supreme and must not be interfered with by the Courts of Law in such measures of social reform.

C.A.D., vol.9, 1195-6.

(c) of Clause 8.<sup>67</sup> This meant that 'public order' and 'morality' remained as the only grounds restricting the freedoms

67. Draft clause 8 as it was before the Assembly:

"Rights of freedom"

8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be, is threatened:

- (a) The right of every citizen to freedom of speech and expression: Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.
- (b) The right of the citizens to assemble peaceably and without arms: Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a legislature.
- (c) The right of citizens to form associations or unions: Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.
- (d) The right of every citizen to move freely throughout the Union.

After consideration by the Assembly, the clause read as follows:

"Rights of freedom"

8. There shall be liberty for the exercise of the following rights subject to public order and morality and except in a grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be, is threatened:

- (a) The right of every citizen to freedom of speech and expression.
- (b) The right of the citizens to assemble peaceably and without arms.
- (c) The right of citizens to form associations or unions.
- (d) The right of every citizen to move freely throughout the Union.
- (e) The right of every citizen to reside and settle in any part of the Union, to acquire, hold, and dispose of property and to exercise or carry on any occupation, trade, business, or profession: Provision may be made by law to impose such restrictions as may be necessary in the public interest including the protection of minority groups and tribes.

guaranteed. The exception to this was clause (e) which was also subject to restrictions in the 'public interest including the protection of minority groups and tribes'.

The Constituent Assembly probably acquiesced in the omission of the term 'reasonable' because clause 9 of the draft contained the due process clause guaranteeing life and liberty. The 'due process' history was widely known amongst the non-lawyers of the Assembly. Many regarded it as the bulwark against the legislature and executive.

#### Indian and Irish Provisions

The most crucial question to arise out of clause 8 as passed by the Assembly would have been, who would judge whether a restriction was imposed in furtherance of public order or morality? Would a declaration in the Preamble of the statute have been conclusive of the matter? In the scheme of clause 8 vagueness prevailed here. It might have been argued that since the legislature enacts laws to meet particular problems faced by the community its view or verdict would conclude the matter.<sup>68</sup> In that case the constitutional guarantee was hardly a guarantee at all. But if the judges were to review regularly each statute as to its policy and methods, to check if it was in furtherance of public order or morality, it might have proved cumbersome to all concerned not excluding the judges. Almost certainly

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68. The present law on the subject presumes legislative judgment on such matters to be correct or at any rate, not easily challenged, Bombay v. Balsara, AIR, 1951, S.C.318; S.I.S.Ltd. v. Union, AIR, 1972, Delhi, 159.

such a course would have been deplored or even rejected by the judges, but the result would have been feeble or no judicial review and a feeble or no guarantee of Fundamental Rights.

Article 40.6.1, of the Irish Constitution and draft clause 8 were very similar in their scheme and phraseology:

Article 40.6.1.

The State guarantees liberty for the exercise of the following rights, subject to public order and morality:- (i) The right of the citizens to express freely their convictions and opinions.

.....

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

(The other rights conferred are similarly restricted in the public interest).

A brief look at the Irish provision and its experience in Ireland indicates that clause 8 would not have played the role that Article 19 (its final offspring) has played, and continues to play, under the Indian Constitution of 1950.

The makers of the Irish Constitution, intended, it seems, to regard the declaration of Fundamental Rights as a resolution of good intention on the part of the State and nothing more.<sup>69</sup> Article 40.6.1. of the Irish Constitution is a good example of the restricted judicial review

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69. "It is obvious, in reading the reports of the debate, that the government was inviting the people to enact the Fundamental Rights Articles merely as 'headlines' for the Oireachtas; a situation in which judicial review of statutes in the light of these Articles would become common was far from its mind." J.M. Kelly, Fundamental Rights in the Irish Law and Constitution, 2nd edn., Dublin, 1967, 18.

intended. While there have been instances where the Irish Courts have held statutes unconstitutional as violating Article 40.6.1,<sup>70</sup> judicial activity has never been especially noticeable in this area. New ground, broken recently, centres upon Article 40.3.1.<sup>71</sup> Both the High Court and the Supreme Court of Ireland seems to have held that the wording of Article 40.3.1. read with Article 40.3.2 ("The State shall, in particular, by its law protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of the citizen".) meant that there was jurisdiction "to consider whether an Act of the Oireachtas respects, and as far as practicable, defends and vindicates the personal rights of the citizen and to declare the legislation unconstitutional if it does not." (Kenny J. in Ryan v. A.G.)<sup>72</sup> It was further held that the rights enumerated in Article 40 were by no means exhaustive of personal rights that "result from the Christian and democratic nature of the state." Thus Article 40.1. rights indirectly benefit from a residuary area yielding to judicial review.

Had the Indian rights been finalised in the form of the draft clause 8, Indian courts might, perhaps, have looked

70. For example, National Union of Railwaymen v. Sullivan and Others, 1947, I.R. 77.

71. 40.3.1. reads: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

72. 1965, I.R. 294.

elsewhere for a meaningful and effective source of review.

It was no coincidence that clause 8 of the Indian Constitutional draft and Article 40(6) of the Irish Constitution were similar. There is an impressive parallel between the constitutional histories of India and Ireland. The following passage concerning Ireland can easily be true of India:

Irish Government is a distinctive blend, consisting of three main ingredients: those inherited from Great Britain, those borrowed from the United States, and those indigenous to Ireland or invented by its founding fathers. The blend exhibits strong tinges of ambivalence and contradiction; for instance, the 1937 Constitution-makers were quite obviously undecided whether they wished to plump for limited Government based on court - enforced constitutional guarantees, or for Parliamentary supremacy limited only by the attachment of political leaders to the Constitution. In the event they did neither, and have spent thirty years suspended uneasily between the two, like a slack-wire performer in a circus. These characteristics are no doubt primarily the result of Ireland's unique history, although the personalities of her leaders - particularly that of Eamon de Valera - were also of great importance. 73

In India most constitutional controversies of the recent past and of the present time can conceivably be traced to similar historical conflicts.

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73. Loren P. Beth, The Development of Judicial Review in Ireland, 1937-1966, Institute of Public Administration, Dublin-4, 1967, 1-2.

Assembly Proceedings - Stage II

When the Drafting Committee got back the clauses as passed by the Constituent Assembly, it dropped the term 'due process' from clause 9 and substituted 'procedure established by law' in its place. This unauthorised elimination of 'due process' disturbed the members considerably when the draft constitution as a whole was taken up for consideration by the Assembly.<sup>74</sup>

Clause 8, now numbered 13, became a focus of attention. This time it was Dr. Ambedkar, and not Vallabhai Patel, who was piloting the draft rights through the Assembly. He had difficulty in convincing the members that 'due process' was dropped for good and sensible reasons. There was one other matter which made the Assembly rise up in anger: all the exceptions that were dropped by Vallabhai Patel and approved by the Assembly had been put back by the Drafting Committee.

How did Dr. Ambedkar, an eminent lawyer himself, convince the Assembly and sooth their righteous anger? He told them:

What the draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases fundamental rights are not absolute. 75

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74. See below, Section 2.

75. C.A.D., vol.7, 41.

This explanation related to the exceptions, but those given to justify the omission of the 'due process' did not convince the members fully and Dr. Ambedkar barely managed to get the draft accepted.

Members proceeded to scrutinise the draft Article 13 in earnest and were to produce the most full and realistic arguments bearing upon judicial review in the Constitution.

Sri Damodar Swarup set the ball rolling when he said that the exceptions to the rights were so sweeping that it would be impossible to get a law invalidated on the ground of violation of a fundamental right. He thought that except on the ground of mala fides the Supreme Court would have no option but to uphold almost all restrictive legislation. The member had, in fact, raised the basic question of review of the rights guaranteed whether or not his predictions were correct.

Another member, Mahboob Ali Baig, came to the point more directly:

But the question is when a certain citizen oversteps the limits so as to endanger the safety of the State who is to judge? 76

He gave the answer himself:

According to me, sir, and according to well-recognized canons, it is not the Executive or the Legislature, but it is the independent judiciary of the State that has to judge ... 77

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76. C.A.D., Vol.7, 714. Though one can understand what the honourable member intended to say, the expression as quoted here is incorrect. The judging is of laws passed to punish citizens endangering the safety of the State.

77. C.A.D., Vol.7, 734.

Sardar Hukum Singh joined in support. He asked:

If the other countries like the U.S.A. have placed full confidence in their judiciary and by their long experience it has been found that the confidence was not misplaced, why should we not depend upon similar guardians to protect the individual liberties and the state interests, instead of hedging round freedom by so many exceptions under these sub-clauses? 78

Thinking on the floor of the Assembly was sharpening on the question of judicial review and the appropriate form of expressing it in the Constitution.

Pandit Thakurdas Bhargava, the eventual author of the 'reasonable restrictions' formula, noticed the missing link when he said:

The question has been asked, if the legislature enacts a particular Act (restricting the rights) is that the final word? If you consider clauses (3) to (6) you will find that in the objects and reasons an enactment says (sic) that its object is to serve the interests of the public or to protect public order, then the courts would be helpless to come to the rescue of nationals of this country in respect of the restrictions. 79

He suggested, therefore, that 'reasonable' be added before 'restrictions'. In the result, in his view, the court would be able to examine the law to see if it was in the interests of the public, and secondly to see if the restrictions imposed could be considered reasonable.

Therefore my submission is that we must put in the words 'reasonable' or 'proper' or 'necessary' or whatever good word the

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78. C.A.D., Vol.7, 734.

79. C.A.D., vol.7, 739.

House likes. I understand that Dr. Ambedkar is agreeable to the word 'reasonable'. 80

Dr. Ambedkar had, indeed asserted earlier, in a different context, that there was such a standard as that of a 'reasonable and prudent man'. That assertion supports the view expressed here that there is a link between the Indian clause and the English notion of reasonableness.

Briefly, there the question agitating the Assembly was what would a 'backward community' amount to for the purposes of draft Article 10 which provided reservations in the public services in their favour. That determination had been left to the discretion of the local government. Dr. Ambedkar thought the matter was justiciable in a court of law, which would strike down any unreasonable classification as offending the equality guarantee.

The Courts would see if the local government had acted in a reasonable and prudent manner. At this stage, a member of the Assembly (Mr. T.T. Krishnamachari) asked: "Who is a reasonable man and who is a prudent man? These are matters of litigation." To which Dr. Ambedkar replied: "Of course, they are matters of litigation, but my honourable friend ... will understand that the words 'reasonable person and prudent person' have been used in very many laws and if he will refer only to The Transfer of Property Act, 1882,<sup>81</sup> he will find

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80. C.A.D., vol.7, 739.

81. For example, section 41 ("reasonable care"). See also sections 7 ("reasonable manner", "reasonable time") and 38 ("reasonable opportunity") of the Indian Contract Act, 1872.

that in very many cases the words 'a reasonable person and a prudent person' have been defined and the Court will not find any difficulty in defining it."<sup>82</sup>

In the face of his previous admission, Dr. Ambedkar accepted Pandit Thakurdas Bhargava's amendment,<sup>83</sup> even though the position of the term in the Constitutional provision would look very different from what it may stand for in the Transfer of Property Act, 1872.<sup>84</sup>

By an oversight, Article 19(2) qualifying the freedom of speech and expression did not carry the term 'reasonable' before restrictions but this was soon rectified by Section 2, Constitution (First Amendment) Act, 1951.

Indian experience shows that by far the most important task in framing a Bill of Rights is the matter of qualifying the rights which have to be framed in language that is absolute. The alternative of leaving the task to the judiciary, as we see from the history of the Constitution of the United States, results in prolonged and painful manoeuvres in judicial law-making. The various doctrines and principles developed by the United States Supreme Court and which have been frequently modified in the history of the Court show that some constitutional text is necessary, if only to enable the Courts

82. C.A.D., vol.7, 702.

83. C.A.D., vol.7, 741.

84. More on this below, Section 2.

to rest their decisions . . . on the constitutional provisions themselves.

But that is not all. There cannot be a bald proposition that all limitations said to be in the interests of public order or national security would be valid, and according to the Constitution. There simply could be no way in which judicial review of the limitations or restrictions can be kept out. It seems that once the basic decision was taken by the framers that judicial review (Constitutional rights can be mere declarations and non-justiciable) shall be permitted then, however elaborately the limitations may be spelt out, judicial review cannot be circumscribed. Nor is there any way of limiting the evolution and growth subsequently of that judicial review thus permitted.

A comparison between 'reasonableness' under Article 19 and the 'due process' under the United States Constitution is often made by Indian writers and judges with the object of showing that judicial review of fundamental rights in India was not the same as, but limited in comparison with the 'due process' jurisdiction exercised by the United States Supreme Court. This proposition can be very misleading and needs to be examined closer.

Section 2: 'Due Process' in American Law and 'Reasonableness' in India

The phrase 'due process' has come to mean judicial law-making of an 'activist' nature even though its chequered history in the Constitutional law of the United States does

not fully justify this attribute.<sup>85</sup> After the storm over the New Deal cases passed it was 'procedural due process' much more than the abused 'substantive due process' that was given prominence in the Supreme Court of the U.S.A.<sup>86</sup>

Indian Constituent Assembly and 'Due Process': In Outline

Operating as it did in the years 1946-1950, one would have expected the Indian Constituent Assembly to be most familiar with the version of 'due process' as it figured in the 'new deal' crisis. In the initial stages of its deliberations, the Assembly as well as the various expert committees favoured the clause notwithstanding its then recent implications. It was perhaps assumed that the future Indian supreme Court would not interpret it so extensively to produce the results obtained by the United States' Supreme Court. Alternatively, the Assembly and the expert Committees were willing to take a gamble in order to satisfy fully their 'liberal democratic' instincts in creating a powerful Supreme Court to guard the liberties of the future citizens

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85. William F. Swinder, Court and Constitution in the 20th Century, The New Legality, 1932-1968, New York, 1970. Alpheus T. Mason, 'Judicial Activism: Old and New', (1969), 55 Virg. L.R.385.

86. Chambers v. Florida, 309 U.S.227, 84 L.Ed. 716 (1940); In re Yamashita, 327 U.S.1, 90 L.Ed. 499 (1946). See the dissent by Justice Murphy; Adamson v. California, 332 U.S. 46, 91 L.Ed. 1903 (1947) Note Justice Black's dissent; Duncan v. Louisiana, 391 U.S.145, 20 L.Ed. 2d 491 (1968). The development of procedural due process is not, however, a matter entirely of the post-New Deal period. See, for example, Powell v. Alabama, 287 U.S.45, 77 L.Ed.158 (1932). There were similar cases in which the members of the black minority were officially and unofficially discriminated against in the trial procedures and such discriminations were held unconstitutional.

of India. The clause could well have become part of India's Constitution but for the strong opposition to it by three influential members of the Assembly, Sri Govind Vallabh Pant, Alladi Krishnaswamy Ayyar and B.N. Rau. The last two were regarded by the Assembly as their experts in constitutional matters and, very reluctantly, they bowed to the opinion of these two members. B.N. Rau's tour of the U.S.A., his meeting with Justice Frankfurter (a well-known advocate of judicial self-restraint) has already been mentioned.<sup>87</sup> K.M. Munshi's comments on this meeting and his regret at the omission of 'due process' has also been referred to.<sup>88</sup> Even now there are lawyers who wish the clause had been retained. They particularly regret that the Supreme Court did not take the opportunity in A.K. Gopalan's<sup>89</sup> case to read the clause albeit in its procedural aspect, into Article 21. Counsel who appeared on Gopalan's behalf, M.K. Nambyar, has said that the definition of law laid down by Daniel Webster in the Dartmouth College<sup>90</sup> case was described by the Supreme Court during the hearing to be the ancient Indian concept of

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87. Section 1 above, 25-26.

88. Section 1 above, 26.

89. AIR, 1950, S.C.27, (1950) S.C.R.88.

90. 4, Wheaton, 518. The definition of law given in Dartmouth College ran:

By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon enquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.

Dharma.<sup>91</sup>

Both Munshi and Ambedkar had also included the clause in their draft Fundamental Rights.<sup>92</sup> Alladi Krishnaswamy Ayyar and B.N. Rau appear to have taken a neutral stand in the initial stages.<sup>93</sup> For Alladi, as late as 31st October, 1947, during the Drafting Committee proceedings, added his assent to the retention of the clause.<sup>94</sup> Admittedly, he had already warned the Advisory Committee on Fundamental Rights during April, 1947, in the following prescient terms:

There is all the danger that it may stand in the way of what may be called expropriatory legislation. If you have got a set of judges who are more inclined to property, then they might put a wide construction upon the words so as to hamper what may be called social legislation and if you have another set of judges who are imbued with modern ideas, they might put a more liberal interpretation. There is that danger inherent in 'due process' whatever provision of law may be made in the different provinces in India.<sup>95</sup>

The proceedings of the Drafting Committee on 31st October, 1947, show one interesting change made in the 'due process' clause. In "No person shall be deprived of his life or

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91. Proceedings of the Seminar, Provincial Bar Federation, Madras, 23-25th October, 1963, 78. Dharma = Righteousness. For its function in ancient Indian law, politics and society, see J.D.M. Derrett, History of Indian Law (Dharmasastra), Leiden, Brill, 1973; the same, Dharmasastra and Juridical Literature, Wiesbaden, Harrassowitz, 1973, and references there cited.

92. See Article V, cl.(4) of K.M. Munshi's draft and Article II, Section 1, cl.(2) of Dr. Ambedkar's draft, both in B. Shiva Rao, Vol.II, 75 and 86 respectively.

93. See his note reproduced in B. Shiva Rao, Vol.II, 68.

94. B. Shiva Rao, vol.III, 327-329.

95. B. Shiva Rao, op.cit., vol.II, 241.

liberty without due process of law", "personal" was added before liberty. That altered reading would seem to reduce due process to procedural due process only and could have existed comfortably in the Constitution if it could have been reconciled with preventive detention<sup>96</sup> which was also provided for in the Constitution. Whether it would have been possible to accomplish it through techniques of 'harmonious construction' or by reading the one or the other provision narrowly is now a matter of mere conjecture.

The amazing fact to be noted here, however, is that it is not clear from the records at what stage 'due process' was substituted by "procedure established by law" - a formula used by the Japanese and Irish Constitutions.<sup>97</sup> In view of the significance of the change, one would have expected a full debate amongst the experts in the Drafting Committee. There was, however, a debate in the Constituent Assembly itself on 6th December, 1948, where the members clearly conveyed their displeasure at the omission of 'due process'.

It is possible to hazard a guess. Perhaps B.N. Rau and Dr. Ambedkar (the Chairman), with no other members present, made the substitution on 20th January, 1948. The guess is supported by the fact that Ambedkar bore the main brunt of the members' attack when they realised 'due process' had been omitted.

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96. Article 22.

97. Also the European Convention on Human Rights, Article 5(1) "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure established by law."

What now seems clear is, that it was omitted because the experts' fear of judicial interference with 'social legislation' meant to curb the property rights of large estate-owners such as Zamindars and other hated 'intermediaries' standing between the cultivator (the ultimate producer of revenue) and the State to which revenue is paid. The right to property, it can be said without exaggeration, shaped the form of this important provision of the Indian Bill of Rights. Yet the problems were not solved. It was the right to property that inspired constitutional development in India during the first decade. For the present, there is a lull in this controversy, perhaps to be renewed later in a different form.<sup>98</sup> Whether the question of property-right more truly 'bedevilled' or 'motivated' constitutional development must remain a matter of opinion according to one's view of property rights, and, in any case, according as one views judicial review.

#### The 'Ghost' of 'Due Process'

The power of constitutional amendment that the Indian Parliament possessed during most of the first decade, and which it exercised in amending several provisions of the Constitution, including those that dealt with the right to property, has made this discussion less relevant. In the light of amendments like the Twenty-fifth, perhaps it would have made little difference whether the phrase 'due process' had

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98. See below, Ch.3, section 2.

been included in the Indian Constitution or not.

But there is another point that is relevant and needs to be considered here. The omission of the clause from the Indian Constitution has led commentators <sup>99</sup> and the Supreme Court itself <sup>100</sup> to conclude that judicial review under the Indian Constitution was a somewhat reduced and 'scaled-down' version of the jurisdiction which the United States Supreme Court possesses under the 'due process' clause of the United States Constitution. H.M. Seervai, for instance, has this to say:

The framers of our Constitution did not create courts which could act as 'super-legislatures' or as permanent 'third chambers' revising the legislation enacted by the elected representatives of the people. The elimination of the 'due process' clause from our Constitution, and the detailed specification of restrictions to which fundamental rights were subject were important safeguards <sup>101</sup> against the abuse of judicial review.

It would certainly be correct to say that the framers might well have been anxious to summarise, or in other ways clarify, the rights vis-a-vis the necessary social or public control, in order that the courts might not produce conflicting interpretations regarding basic matters clearly established

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99. Seervai, The Position of the Judiciary Under the Constitution of India, University of Bombay, 1970, 56-62,

100. Collector of Customs v. Sampathu Chetty, AIR, 1962, S.C.316, per Rajagopala Ayyangar at 328, col.2, warning against reading American cases based on 'due process'. Amritsar Municipality v. Punjab, AIR, 1969, S.C.1100 per J.C. Shah J., 1103-4.

101. Seervai, op.cit., 58-59.

under many Constitutions, notably that of the U.S.A. It is also true that they did not wish to see any 'abuse' of judicial review. But they undoubtedly wished to see a use of judicial review, otherwise all their efforts in drawing up 'Fundamental Rights' would have been pointless. The mere omission of 'due process' certainly could not mean that judicial review was wiped clean out! That clause is not the only form in which to bestow judicial review. Even in the U.S.A., it is by no means true that the Supreme Court has consistently regarded the clause as enabling it to act as a "super-legislature". The New Deal cases (altogether about 12 statutes were held invalid between 7th January, 1935, and 25th May, 1936),<sup>102</sup> made several Americans, expert and lay, feel that the Supreme Court was acting contrary to the wishes of the majority and, what is of greater importance in this writer's view, it was employing a defective method of interpretation in reading its favourite economic notions<sup>103</sup> into the conflicts that came before it.

The point has to be made that the primary concern of a constitutional lawyer is not seeking out whether a court acts as a "super-legislature" (it is asserted here that judicial review itself by definition allows a court that role under certain conditions) but whether the reasoning by which

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102. See Benjamin F. Wright, The Growth of American Constitutional Law, University of Chicago Press, 1967, 180-181.

103. Such as 'Liberty of Contract' and economic 'Laissez-Faire'. Courts nowadays are unlikely to adopt any economic dogma, simple because economic matters are admitted to have become too complex.

it arrives at its decisions is explicit, and the implicit factors if any, are acceptable to the community's moral sense. Because in Constitutional Law, as in many other branches of the law, the initiative of the judiciary consists in its moral leaderships made manifest by its impartial, independent stand. In its main function the judiciary, whether by its 'activism' or in its 'restraint' or even in its 'neutrality', tends to implement this moral leadership.<sup>103a</sup> In this it has, as would occur in every leadership position, to take into consideration a number of complex factors.

The purpose of this seeming digression is to put in perspective the conclusions drawn from the omission of the 'due process' clause and the effect these have had on the existing arrangements for judicial review under the Indian Constitution - the most prominent of these arrangements being 'reasonable restrictions' under Article 19 of the Indian Constitution. The views adopted in India of 'due process' have tended to cloud the assessment of the power of review granted in the clauses of Article 19.

It is reasonable to ask whether the 'due process' and 'reasonableness' clauses are qualitatively different. Can the former be wider in its scope than the latter? Or is it really something for the courts to build on and, therefore, much depends on what they make of it? The United States

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103a. "If the judiciary is prepared to provide leadership, its voice will be listened to with respect and gratitude. Because the individual citizen is dwarfed by the State and because the legislature may be relatively subservient to the executive, the judiciary is the most immediately available resource against the abuse of executive power". Louis L. Jaffe, English and American Judges as Law-Makers, Oxford 1969, 19.

Supreme Court imported 'Natural law' into the 'due process' clause to secure property rights. That was in the last century and it is not likely that the United States Supreme Court or any other court in any other country, would seek to rely on notions such as that to secure any right. It should also be clear that whatever the expression, it is open to us to urge judicial restraint on particular issues. But H.M. Seervai appears to take the view that the question of 'reasonable' restrictions is a much easier matter for decision by Courts than - presumably - 'due process'.

With these departures from the American model of the Bill of Rights, the framers of our Constitution believed that they had removed any possibility of abuse of judicial review and had made it a bulwark of freedom. No doubt most of the fundamental rights were subject to 'reasonable' restrictions, and it was for the courts to decide what was 'reasonable' but to lawyers brought up in the Anglo-Indian law this would cause no uneasiness, for the concept of reasonableness ran right through the whole law. The reasonable man, reasonable doubt, reasonable time, reasonable care, reasonable price and reasonable notice, had presented no serious difficulties ... and it was assumed that 'reasonable restrictions' would present no difficulties ... 104

One of the departures was from 'due process' which Seervai mentions in the previous two sentences. The examples given by Seervai of reasonable doubt, reasonable care and reasonable notice are phrases occurring in statutes or case-law. No question of the validity of such phrases arises for consideration. 'Reasonable restrictions', unlike all the

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104. Seervai, The Position of the Judiciary Under the Constitution of India, University of Bombay, 1970, 57.

examples given by Seervai, will go to the root of a particular statute's validity and this is a very great distinction. Seervai's point is that the court will determine whether a doubt was reasonable, the care taken was reasonable, etc., and that it can equally easily decide whether a statutory restriction is reasonable - but the cases are hardly in pari materia for the legislature is not a 'reasonable man'. The court may readily decide whether reasonable notice was given, e.g., to a particular tenant by his landlord, or whether, under the Hindu Marriage Act, 1955, section 9(1), a spouse has withdrawn from the society of the other 'without reasonable excuse' (facts would vary widely) but it is quite a different operation to decide whether the legislature's curtailment of a fundamental right which is of general concern appertaining to all persons or citizens has been per se 'reasonable'. It seems Dr. Ambedkar himself was none too clear on this distinction.<sup>105</sup>

At all events, it makes hardly any difference whether a statute is held invalid because it violated 'due process' or because it imposed unreasonable restrictions. The quality of the exercise is the same and in constitutional terms, it will be judicial review. However to repeat, it should be always possible to urge judicial restraint where there are good reasons for doing so.

The decision in A.K. Gopalan<sup>106</sup> is often construed

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105. See above, 42.

106. AIR, 1950, S.C.27, below, 60 and 223.

to mean that 'due process' could not be invoked in India (correct so far) and therefore, the Indian courts' power of judicial review is limited (incorrect). Limited with reference to what? Presumably due process. This seems an erroneous process of reasoning but it has been doctrinally perpetuated.

Indeed, the judicial-review powers as understood in the U.S.A. with its own history, traditions and notions are different from the Indian courts' powers, given the Indian experience or perhaps expectations. There can never be an identity in this respect. The Indian Constitutional position needs to be examined in its own light without any confusion of thought created by the notion of 'due process' or any other test. What matters is judicial review as a fact, and that undoubtedly exists under the Indian Constitution.

A notable surmise as to the 'similarity' between the American and Indian clauses comes from Justice Douglas of the United States Supreme Court. While delivering his Tagore Law Lectures <sup>107</sup> in July, 1955, he remarked cryptically in his introduction:

Suffice it to say here that the concepts embodied in due process are also embodied in indian constitutional law, where other clauses do service for due process.<sup>108</sup>

Towards the end of Lecture VIII of the series, Justice Douglas

107. Published as From Marshall to Mukherjea, Studies in American and Indian Constitutional Law, Tagore Law Lectures, Calcutta, 1956.

108. Ibid., 12.

sees a qualitative similarity between the American and Indian clauses.

The power is a potent one, because it is undefined except by the judiciary itself. The judiciary today, however, is the first to recognize that the Due Process clauses should not be used to substitute its judgment on policy for that of the other two branches of Government.

.....  
 The Indian courts have powers narrower than ours in some respects and as broad as ours in others. There is no Due Process clause in the Indian Constitution. But Article 19(1)(f) and (g) guarantee important rights - the right to acquire, hold and dispose of property, and the right to practice a profession and carry on an occupation, trade or business. (Article 19(5) and (6)); and it appears that the Supreme Court of India is the ultimate interpreter of what is reasonable in a given case. 109

It is intriguing to see this contrast resting exclusively on the rights to property and occupation, trade, etc., while none of the other rights in Article 19 are mentioned. It is also ironical since it is these two rights that have been curbed most by various constitutional amendments in the last decade. On that basis, there would be very little judicial review in India. But the truth of the matter is that five other rights guaranteed by Article 19 have received full judicial attention. Curbs on the rights to property and business do not mean the end of judicial review. Even with respect to the two rights there is yet further scope for judicial review as the law-reports clearly demonstrate.

This writer's view is that comparison between the Indian 'reasonableness' clause and the American 'due process' clause is likely to be inconclusive and therefore, the scope of review under the Indian clause has to be estimated independently. Broad similarities between the two clauses can, however, be usefully drawn where one is looking for confirmation on doubtful points. However, 'due process' continues to figure in discussions on judicial review in India because it was first considered and then dropped by the Indian Constituent Assembly. Whatever the reason, there have been repeated references to 'due process' by Indian writers and, as pointed out above, by Indian courts. Though our reasoning is adequate, the concept cannot simply be dismissed on historical grounds.

An important Indian commentator, Dr. D. Basu, has consistently maintained that in their essential nature the 'due process' idea and the 'reasonableness' notion are similar.<sup>110</sup> Provided we follow him at his chosen level of discussion, it must be admitted that American material is instructive. Recently, he has put this view forward again in these words:

If the concept of 'due process' be founded on the universal principles of justice, it cannot but be that its essentials must enter into our constitutional jurisprudence, even though we may not agree with its detailed application to particular situations, or the scheme of our Constitution may not permit our judges to use

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110. D. Basu, Commentary on the Constitution of India, 1950, 1st edn., 71-72, the same, 5th edn., Calcutta, 561-574. Basu was a Judge of the Calcutta High Court.

it to the full length to which it has been stretched by the American Supreme Court.  
(Italics original). 111

Dr. Basu has sought to substantiate his point by actually tabulating the rationes in the United States and Indian cases, thus highlighting the similarities between the two clauses.<sup>112</sup>

Despite our conclusion above, it is necessary therefore, to examine some at least of the United States decisions by way of illustration of the manner in which 'due process' figures in them. It is also essential to appreciate and render meaningful the comparison - however loose it may be - between the 'due process' and 'reasonable restrictions' clauses.

'Due process' became famous, or perhaps infamous, with the 'New Deal' cases but its history predates the New Deal. The enactment of the Fourteenth Amendment to the United States Constitution appears to have attracted the attention of the legal profession and the bench to this clause though it has always been present in the Fifth Amendment to the Constitution.<sup>113</sup> The early decisions

111. Basu, Limited Government and Judicial Review, Tagore Law Lectures, Calcutta, S.C. Sarkar, 1972, 216-17.

112. Ibid., 226-30.

113. Fifth Amendment (1791): "No person shall ... be deprived of life, liberty or property, without due process of law." Fourteenth Amendment (1868): "No State shall ... deprive any person of life, liberty or property, without due process of law."

of the United States<sup>114</sup> Supreme Court in cases involving industrial and trade regulations such as the slaughter-house cases<sup>114</sup> and Munn v. Illinois,<sup>115</sup> show the Court's deference to legislative wisdom and policy and its reluctance to act as a censor in those matters.

The change in the Supreme Court's stand, from such caution to a fairly aggressive display of its powers, is attributed to a number of factors such as the rising American capitalism, and the views expressed by the American Bar Association favouring restricted use of legislative power so as to let the business enterprises grow as they wished.<sup>116</sup> It is beyond the scope of this work to go into the many and complex details of this change. However, the following decisions illustrate how the changed version of the court's jurisdiction worked.

To start with an early case, Chicago Milwaukee and St. Paul Railway Co., v. Minnesota,<sup>117</sup> the respondent State had enacted a law establishing a commission to fix "equal and reasonable rates of charges for the transportation of property". In other words, the Commission was to fix freight

114. 16 Wall. 36, 21 L.Ed. 394 (1873).

115. 94 U.S. 113, 24 L.Ed. 77, (1877).

116. See Alpheus T. Mason and William M. Beaney, American Constitutional Law, 5th Edn., New Jersey, 1972, 323-328.

117. 134 U.S. 418, 33, L.Ed. 970 (1890). The case is regarded as the one which opened the chapter on 'due process' of law. See Paul A. Freund, On Law and Justice, Cambridge, Mass., 1968.

charges that it considered reasonable which was done in the appellant's case. The Statute provided the manner in which such freight-rates were to be computed by the Commission. But there were no provisions for a formal notice or hearing afforded those affected by the rates-determination.

There was, therefore, scope for saying that procedural due process was absent. The Supreme Court went further and held that even the 'reasonableness' of the charges fixed was reviewable judicially.

The question of reasonableness of a rate of charge for transportation by a railroad company, involving as it does the elements of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. 118

Thus what was intended to be a determination by an administrative body was turned into a decision by the judiciary as any other substantive constitutional matter.

The dissenting opinion was that, "the legislature either fixes the charges at rates which it deems reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject."<sup>119</sup>

Lochner v. New York<sup>120</sup> is perhaps the most frequently

118. 134 U.S. 418, 458.

119. Ibid., 462.

120. 198 U.S. 45, 49 L.Ed. 937 (1905).

quoted decision contrasting the misuse by the majority, on the one hand, and the correct use by the minority - particularly Justice Holmes - on the other, of the 'due process' jurisdiction. A New York law limited to ten hours a day and 60 hours a week the working time in bakeries and confectionary establishments. The appellant, a bakery owner, challenged the law as a violation of the Fourteenth Amendment.

The majority upheld the challenge. They thought it was an unconstitutional interference with the 'liberty of contract' and therefore, in violation of due process.

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U.S. 578. 121

We do not believe in the soundness of the views which upheld the law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health or the health of the employees named, is not within that power, and is invalid. 122

In other words, whatever the State legislature might have thought about the law the judges thought the law did not relate to public health.

Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.

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121. 198 U.S.45, 53.

122. 198 U.S. 45, 61.

According to this view, bread prepared by bleary-eyed and tired men and women would still be wholesome bread.

Justice Holmes and three other justices dissented. Holmes' dissent began with the finger pointing at the 'inarticulate major premise' of the majority decision, "This case is decided upon an economic theory which a large part of the country does not entertain."<sup>123</sup>

That a dogmatic view of liberty or contract underlay the majority decision could not be denied.

While determining the constitutionality of statutes, judges should never identify themselves with any theory whatsoever, thought Justice Holmes.

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether the statutes embodying them conflict with the Constitution of the United States. 124

To complete Justice Holmes' view of the court's 'due process' jurisdiction:

I think that the word 'liberty', in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair

123. Ibid., 75.

124. Ibid., 75-76.

man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

.....

A reasonable man might think it a proper measure on the score of his health.<sup>125</sup>

The majority too, thought in terms of what was reasonable and what was not. These two cases so far considered would show that the primary question under the 'due process' test is: "Is the restriction imposed reasonable?" Yet this similarity need not make the Indian and United States clauses identical, i.e. the scope of judicial review need not be the same, more or less. One is not the yardstick for the other.

Adkins v. Children's Hospital<sup>126</sup> is yet another example of the majority in the United States Supreme Court invalidating a law on the basis of 'liberty of contract'. In this case, it was a minimum wages law passed by Congress and the majority felt it imposed unreasonable burdens on the employer and in any case, interfered unnecessarily between employer and employee.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum ...<sup>127</sup>

125. Ibid., 76.

126. 261 U.S. 525, 67 L.Ed. 785 (1923).

127. Ibid., 557.

Justice Holmes' dissent once again emphasised the need to respect legislative policy and wisdom. The belief entertained by Congress in the efficacy of the law in what it sought to achieve, thought Justice Holmes, "may be held by reasonable men". These decisions give the impression that the Supreme Court considered the preservation of vested interests important. It was prepared to express opinions clearly showing its preferences. There was no evidence that well-established principles of interpretation were applied in a systematic manner.

The view of the majority in the three cases so far discussed contrast well with what the majority in West Coast Hotel Co. v. Parrish<sup>128</sup> conceived to be the scope of due process.

Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process ... 129

In the case, a minimum-wage law of Washington similar to the one held invalid in Adkins was upheld as a reasonable exercise of police power. Thus one witnessed a change in the

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128. West Coast Hotel Co. v. Parrish, 300 U.S.379, 81 L.Ed.703 (1937), Emphasis added.

129. 300 U.S.379, 391.

Supreme Court's view of 'due process'.

Perhaps Ferguson v. Skrupa,<sup>130</sup> represents the modern view of 'due process'. There a "debt-adjusting" law of Kansas was upheld as not an unreasonable exercise of legislative power - something different from a 'reasonable exercise of power'.

The doctrine that prevailed in Lochner, Coppage, Adkins, Burns and like cases - that due process authorises courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional position that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.<sup>131</sup>

However, the duty to judge the reasonableness of the restriction imposed on guaranteed rights is still a part of the United States Constitution, as is well illustrated by the decisions on civil liberties of speech, association and fair-trial procedures.<sup>132</sup>

Returning to Indian decisions, we find there are at least three given by the Indian Supreme Court which distinguish the reasonableness clause in the Indian Constitution

130. 372 U.S. 726, L.Ed. 2d 93 (1963).

131. 372 U.S. 726, 730 $\frac{1}{2}$

132. Gitlow v. New York, 268 U.S. 652, 69 L.Ed. 1138 (1925); Whitney v. California, 274 U.S. 357, 71 L.Ed. 1095 (1927); United States v. Brown, 381 U.S. 437, 14 L.Ed. 2d 484 (1965), and Cohen v. California, 403 U.S. 15, 29 L.Ed. 2d 284 (1971). On Association, see N.A.A.C.P. v. Alabama, 357 U.S. 449, 2 L.Ed. 2d 1488 (1958). On fair-trial procedures, see note 86 to this section.

from 'due process' in the United States Constitution, to draw the conclusion that the Indian clause was narrower in its scope.

The earliest of these decisions is A.K. Gopalan v. Madras<sup>133</sup> which is often relied upon to show the supposedly narrower scope of judicial review enjoyed by the Indian courts.

A.K. Gopalan denied that the Court had any power under Article 21 of the Constitution<sup>134</sup> to read 'procedural due process' requirements<sup>135</sup> into laws relating to preventive detention or penal statutes generally. While it was considering the constitutionality of The Preventive Detention Act, 1950, the question was posed before the Supreme Court whether 'law' in Article 21 meant enacted law (lex) or law in the sense of natural law or 'due process of law' (jus). They rejected the view that what was meant was 'due process', and accepted that 'law' in Article 21 referred to enacted law. The Supreme Court pointed out that the framers of the Constitution were anxious to keep 'due process' out and, therefore, that clause could not be imported back into the Article by implication. So far they were right. But the learned

133. AIR, 1950, S.C. 27.

134. "21. Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law."

135. See K.K. Nigam, 'Due process of Law: A Comparative Study of Procedural Guarantee Against Deprivation of Personal Liberty in the U.S. and India', (1962) 4 J.I.L.I. 99.

Judges forming the majority in the case went on to hold that the Court's power of review was limited in any case, not merely because 'due process' has been dropped but also because under the scheme of Article 19, the Constituent Assembly had spelt out the grounds on which 'reasonable restrictions' could be imposed by a Legislature. In their view, both these points were clearly indicative of a narrower scope for judicial review under the Indian Constitution. It is difficult (with hindsight) to see how the spelling out of the grounds referred to could make the judicial task of review any narrower or easier.

It has already been mentioned that the framers wanted little judicial interference with certain social and property legislation. The constitutional experts in the Assembly did not like the expression 'due process'. When one examines the kind of legislation they had in mind, one would clearly see that they affect only the fundamental rights to property and to some extent, the right to trade and business. But, as we have seen, Article 19 guarantees other rights besides. Therefore, could one justifiably derive the conclusion, as the Supreme Court seems to have done, that the Indian Courts were to exercise a narrower or limited judicial review with respect to every constitutional matter that might come <sup>up</sup> for consideration? It is necessary to confine the anxieties of the framers to what they regarded as essential socio-economic measures which could have proved, in their operation, incompatible with a wholehearted guarantee of rights to property or

trade and business.<sup>136</sup>

It is true that the framers also, however reluctantly, acknowledged that in India preventive detention laws were necessary even in normal times. Thus it was provided for in Article 22 of the fundamental-rights part. Under these circumstances, the Gopalan court could not but say that there was no question of examining the reasonableness of the preventive detention law impugned before the Court.

But meanwhile the dictum on the scope of judicial review was too sweeping. It is not surprising that the Supreme Court subsequently disapproved of Gopalan's stance on judicial review of restrictions upon fundamental rights.<sup>137</sup>

#### 'Vagueness ' and Unreasonableness

The second decision to be considered is on a narrow specific point. The question that arose in Amritsar Municipality v. Punjab<sup>138</sup> was whether vagueness in a statute could be an infirmity justifying a constitutional challenge. The statute impugned before the Court, The Punjab Cattle-fairs (Regulation) Act, 1968, contained no definition of a

136. K. Subba Rao, both as a judge and then Chief Justice of India, made it part of his view of fundamental rights that the only major exception to judicial review of the rights was matters relating to 'agrarian reform'. This view accorded with the wishes of the Constituent Assembly. It certainly would have made Indian fundamental rights more meaningful. But recent amendments, particularly the 25th Amendment may have over-ruled the case where K. Subba Rao J. expressed his view, K.K. Kochuni v. Madras & Kerala, AIR, 1960, S.C. 1080. See below, Ch.3, section 2.

137. R.C. Cooper v. Union of India, AIR, 1970, S.C. 564 (1970), 3 S.C.R. 530, see below Section 1(a), Chapter 2.

138. AIR, 1969, S.C.1100.

cattle-fair but purported to give the State a monopoly in conducting cattle-fairs. The Punjab High Court had struck down the Act as unreasonable on account of vagueness. The Supreme Court disapproved of the High Court decision because in its view 'vagueness' as a ground of challenge was associated with 'due process'. Since there was no question of 'due process', i.e., no question of the Indian Courts exercising such wide powers of review (relying on A.K. Gopalan), they would not entertain the plea. The Supreme Court was prepared to read a definition of 'cattle-fair' into the Act but the State Legislature had, in the meanwhile, supplied a definition in a new revised Act.

In England, when this same plea had been raised in Fawcett Properties v. Buckingham County Council,<sup>139</sup> no reference was made to 'due process' or any less foreign-sounding equivalent.

In granting planning permission to a farmer to build cottages for farm-labourers the respondent Council attached a condition that they should be used only for the purpose of occupation by 'members of the agricultural population'. The reason behind the condition being the cottages might not be used for any purpose likely to spoil the landscape. The appellants, a property company which bought the cottages, attacked the condition as unreasonable because the meaning of the expression 'agricultural population' was vague and uncertain.

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139. L.R. (1961) A.C.636.

The majority in the House of Lords rejected the plea that uncertainty would be a ground for holding the condition void. Lord Denning amongst the majority held that a court should give a construction to ambiguous words that would render them valid unless the words were totally meaningless or absurd.<sup>140</sup> At a more general level, Lord Denning made a distinction between uncertain and meaningless expressions in statutes. He held that there were no cases to support the plea that uncertainty would be a ground of challenge but held that meaninglessness could be a basis for striking down the provision.<sup>141</sup>

Referring to uncertainty, Lord Cohen who concurred with Lord Denning held:

It is based in the main on the principle relating to penal provisions of a statute which was concisely stated by ... Viscount Simonds, in London & N.E. Rly. Co. v. Berriman (1946 A.C. 278, 313-14) in these words: 'A man is not to be put in peril upon an ambiguity'. ... but the court should not, I think, strike a provision out of an Act on the ground of uncertainty unless it is impossible to resolve the ambiguity which it is said to contain.<sup>142</sup>

But Lord Morton, dissenting held the condition void for uncertainty. He approved of the decision given by the Court of Appeal below holding the condition void for un-

140. Relying on Manchester Ship Canal Co. v. Manchester Race Course (1900) 2 Ch.352, 360-1, and R. v. Saddlers' Co. (1963) 10 H.L.C. 404, 463.

141. He referred<sup>to</sup> the following authorities: R. v. King (1826) 2 C & P. 412; Green v. Wood (1845) 7 Q.B. 178, and Salmon w. Duncombe (1886) 11 A.C. 627 (P.C.).

142. L.R. (1961) A.C. 636, 662.

certainty.<sup>143</sup> It is clear that both uncertainty and meaninglessness of statutory expressions present a problem of construction. Admittedly, a court should try to construe the uncertainty in a manner consistent with the continued operation of the statutory provision concerned. If it is unable to do so it has no alternative but to strike out the provision.

Reverting to Indian Law, the Supreme Court in Harakchand v. Union,<sup>144</sup> notwithstanding Amritsar Municipality<sup>145</sup> (above, 68) proceeded to hold section 27 of the Gold (Control) Act, 1968, unreasonable because of vagueness. The Act was passed to combat the effects of widespread smuggling of gold into India where the demand and consequently, the price paid for gold were high. The Preamble provided that it was:

An Act to provide in the economic and financial interests of the community, for the control of the production, manufacture, supply, distribution, use and possession of, and business in, gold, ornaments and articles of gold and for matters connected therewith or incidental thereto.

Section 27 provided:

On receipt of an application for the issue of a licence under this section, the Administrator ... (may) either issue or renew the licence, or reject the application ... (if) having regard to the following matters, is satisfied that the

143. [1959] Ch.543.

144. AIR, 1970, S.C.1453.

145. AIR, 1969, S.C. 1100.

licence should be issued or renewed, namely:-

- (a) the number of dealers existing in the region in which the applicant intends to carry on business;
- (b) the anticipated demand as estimated by him, for ornaments in that region ... (c) ... (d) ...
- (e) the suitability of the applicant;
- .....
- (g) the public interests.

All the underlined words were held by the Supreme Court to be incapable of any objective assessment and therefore, bound to lead to uncertainty. They imposed unreasonable restrictions on the right guaranteed by Article 19(1)(g).

Very soon in K.A. Abbas v. Union of India<sup>146</sup> the Supreme Court was asked to examine the rules framed under Cinema-tograph Act, for vagueness. It proceeded to do so on the basis that vagueness could be a ground of challenge. When its attention was drawn to Amritsar Municipality and the view expressed there, the Court speaking through Hidayatullah C.J. distinguished it as obiter and therefore, inapplicable.<sup>147</sup>

The law as enunciated by the Supreme Court was very close to the reasoning of the House of Lords in Fawcett Properties.<sup>148</sup> It was held that a court should give a construction, 'as far as may be, language permitting', that would accord with the intention of the Legislature. But where

146. AIR, 1971, S.C. 481.

147. "These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the U.S.A. in the application of the Fourteenth Amendment were eschewed in our Constitution ..., it cannot be said as an absolute principle that no law will be considered bad for their vagueness." Ibid., 496, Col.1-2.

148. L.R. (1961) A.C. 636, above 69.

such a construction was not possible, and there was uncertainty, then invalidity would arise because of the 'probability of the misuse of the law to the detriment of the individual'. On the point about the association of vagueness with 'due process', he held:

While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the 14th Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth Article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. 149

The matter, however, does not end there. In a recent decision, the Indian Supreme Court had thrown doubts on the question by indicating that it prefers to keep it open.<sup>150</sup> In view of the strong decision in K.A. Abbas, the Court is surely having its doubts, if it is going to keep the matter open.

It seems clear that at least one of the reasons for these doubts is the intrusion of 'due process' into the discussion of issues before the Court which could have been decided without any such distractions.

This writer is inclined to support the treatment of the question of vagueness in K.A. Abbas. Vagueness in a

149. Ibid., 496. As a matter of law, the present writer does not challenge either the decision or the dictum.

150. Maharashtra v. Lok Shikshan Sanstha, AIR, 1973, S.C. 588, (1973) II, S.C.J. 224.

statutory instrument should, as a last resort, be a potential ground for constitutional invalidity. There are, in fact, some High Court decisions on the very point, but none of them was referred to in the Supreme Court decisions. It is proposed now to deal with two of these High Court decisions.

In Ajablal v. Bihar<sup>151</sup> Section 8(1) of the Bihar Maintenance of Public Order Act, 1949, enabled the State Government to impose 'a collective fine' if it appeared to the Government that the inhabitants of any area were concerned in the commission of offences prejudicial to the maintenance of public order. The Patna High Court, following Screws v. U.S.<sup>152</sup> and Joseph Burstyn v. Wilson,<sup>153</sup> held that a statute imposing a penalty for a course of conduct must be sufficiently definite so that the parties affected might have notice as to the conduct it was necessary to follow to avoid so large a penalty!

In the second case,<sup>154</sup> the following condition in the Mysore Foodgrains (Wholesale) Dealers Licensing Order, 1964, was impugned:

The licensee shall not -

- (i) enter into any transaction involving purchase, sale or storage for sale of foodgrains in a speculative manner, prejudicial to the maintenance and easy availability of supplies of foodgrains in the market.

151. AIR, 1956, Patna, 137.

152. (1944) 325 U.S. 91, 95.

153. (1952) 343 U.S. 495.

154. A.K.A. Chetty & Sons v. Mysore, AIR, 1970, Mys. 289.

The expression 'speculative manner' or 'speculation' was not defined in the Order. The Mysore High Court held that "in the absence of specific criteria for determining what transactions are speculative the condition ... in the license must be held to be void on account of vagueness ..." It was held that the impugned condition as it stood might be a laudable moral injunction, but it was legally invalid. The Court accepted the petitioner's argument that such vague conditions might mean harrassment of traders by state authorities. Therefore, it was held that buying and selling in the normal course of trade and doing so in a 'speculative manner' must be distinguishable by some definite criteria.

This, it is submitted, is a correct decision and the condition was rightly held invalid on account of vagueness. One hopes the Indian Supreme Court would see its way to accepting this position without bringing in considerations of 'due process'.

Finally, in the area of property-rights, references to doctrines allied to the 'due process' concept, such as police powers and eminent domain have been positively misleading, as shown by the confusing judgments delivered in the early cases <sup>155</sup> where these doctrines were invoked to explain Indian provisions.

In view of the intention of the framers, these references looked particularly uncalled for. This was perhaps

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155. Subodh Gopal v. West Bengal; Dwarka Prasad v. Shoalapur. See below, Chapter 3, Section 2. See P.K. Tripathi, Some Insights into Fundamental Rights, 216-230.

realised by the Indian Supreme Court and in cases later than 1954, such references ceased to appear in its judgments.

In conclusion, it has to be emphasised that it was not the intention in this section to repudiate the relevance of United States decisions based on 'due process' to problems faced by Indian courts. Indeed, as will be seen below,<sup>155a</sup> in the area of free speech, United States decisions have been freely referred to by Indian courts. For comparative purposes, United States or indeed, any other relevant material, may be consulted by Indian courts.

The main burden of the section has been to show how comparison with 'due process' has become an unnecessary part of Indian constitutional discussions. Such a comparison has, at the moment, resulted in a distorted view of the scope of judicial review in the Indian Constitution. The scope of review in India - the power to pronounce restrictions unreasonable - should be determined without reference to 'due process'.

### Section 3: The Role of Reasonableness in English Law

It has already been mentioned in the Introduction that the intellectual ancestry of the notion of reasonableness lies in English law. For that reason, and because Indians were familiar with that notion when their Constitution was framed, it is proposed to discuss the English legal position.

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155a. Chapter 3, Section 1.

The term 'reasonable' is unique in that it is used in both popular and legal speech in the same or closely similar senses. While most vague terms are given a consistent shape by the legal process, this term has eluded such treatment. Exception has been taken to this 'vague and ugly phrase' <sup>156</sup> both in England and from time to time in India. <sup>157</sup> Notwithstanding such adverse comments, the term continues to appear in English as well as in Indian statutes. Quite clearly, the draftsmen find it convenient to use it. 'Reasonable' and other cognate terms, such as 'fair', 'prudent' and 'intelligible' are used in judgments given in both countries. Every time one such expression is used, it represents not just one idea but several, all of which are subsumed under the term. <sup>158</sup>

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156. This was how the term was described at the meeting of the War Policy Committee (13th November, 1939) where the possibility of using the formula, "reasonably satisfied" in the regulation that subsequently became famous in Liversidge v. Anderson (1942) A.C. 206, viz., Reg.18-B, of the Defence (General) Regulations, 1939 - was discussed. This information and many others relating to the background to Liversidge v. Anderson is provided by Professor R.F.V. Heuston, 'Liversidge v. Anderson: Two Footnotes', (1971), 87 L.Q.R., 161, 163.
157. In India, the objections raised by K.M. Munshi, Reverend Nicols Roy and T.T. Krishnamachari are noteworthy. See above, Section 1. Professor Alan Gledhill called the notion of 'reasonableness' a 'priggish abstraction developed in the law of negligence', De L'Independance Politique, op.cit., note 31 above, 249.
158. When such an expression is used in a Constitution, the implications are enormous. "The conflicting ideas are represented by satellite categories which interpret the written word. No one satellite concept can control. The major words written in the document are too ambiguous; the ideals are too conflicting, and no interpretation can be decisive." Edward H. Levi, An Introduction to Legal Reasoning, Chicago, 1948, 13th reprint, 1970, 60.

The Concise Oxford Dictionary defines <sup>159</sup>the term as follows:

- a.1. Endowed with reason, reasoning (rare).
2. Sound of judgment, sensible, moderate, not expecting too much, ready to listen to reason.
3. Agreeable to reason, not absurd, within the limits of reason, not greatly less or more than might be expected, inexpensive, not extortionate, tolerable, fair ... (after L rationabilis). 160

Sir Frederick Pollock, who was one of the few writers to keep alive the link between the concept of Natural Law and the English legal system, defines the term 'reasonable' as

an ideal standard, which cannot be precisely defined, but is none other than the general consent of right-minded and rightly informed men which our ancestors in the profession called reason, and continental doctors the law of nature ... In modern terms, we say that the duty of the court is to keep the rules of law in harmony with the enlightened common-sense of the nation. 161

Reasonableness is, perhaps, the principle that stands for harmony. What Sir C.K. Allen says may add to our understanding of the term:

159. Oxford, Clarendon Press, 1964.

160. Raphael Powell, 'The Unreasonableness of the Reasonable Man', (1957) 10 Current Legal Problems, 104, demonstrates through cases that none of these meanings are adequate. He questions the adequacy of the notion of 'reasonable man' itself.

161. 'Judicial caution and valour' (1929), 45 L.Q.R. 293, at 294-5. Also quoted in F.E. Dowrick, Justice According to the English Common Lawyers, London, Butterworths, 1961, 75. The author discusses the idea of reasonableness mostly in his chapter on 'Moral Justice', thus perhaps indicating the moral basis of the idea.

The conception of harmony is a dominant theme in every aspect of justice and in every treatment of it, ancient and modern. It vibrates through the Greek exaltation of sophrosyne or moderation, as a capital virtue, and in Aristotle's identification of justice with a form of the golden mean. Subjectively, it is that balance or poise of self-government which is the true, indeed the only, disposition or hexis, of justice. 162

'Balance' may convey to some the impression that there is a desire to maintain the status quo. That impression may not be correct. An element of innovation can be compatible with 'harmony'.

Other older writers have also discussed the notion of 'reasonableness'.

It would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic, sounds now like the jingling of a child's toy. But mankind must be satisfied with the reasonableness within reach; and in cases not covered by authority, the verdict of a jury (or the decision of a judge sitting as a jury) usually determines what is 'reasonable' in each particular case; but frequently reasonableness 'belongeth to the knowledge of the law,' and therefore, to be decided by the justices. 163

It is essential to make a note of one more observation of Sir Frederick Pollock.

There is much to be said of the function of natural or universal justice, including the idea of reasonableness in its various

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162. Aspects of Justice, London, Stevens, 1958, 15.

163. Coke upon Littleton, 18th Edn., by Hargrave & Butler.

branches, in the later developments of our system. In particular an important part has been played by natural law, under the name of 'justice, equity and good conscience', or otherwise in the extension of English legal principles under British political supremacy, but beyond English or Common Law jurisdiction. 164

While the main interest of this work lies with the 'idea of reasonableness in its various branches' in English Law, a brief mention should be made of the other idea referred to by the eminent author; 'Justice, equity and good conscience' played a crucial role in Hindu Law,<sup>165</sup> and a less conspicuous part in the law of contract,<sup>166</sup> transfer of property and trusts in India. The concept is clearly wider than the idea of reasonableness and has been shown to be of Romano-Canonical origin. It does not play any part in the interpretation of the Indian Constitution.

Reasonableness unlike equity is not entirely a matter of the judge's conscience, or at least that is not the explained basis of the notion. This is not to deny their possible common origin in the theory of Natural Law.

Dowrick tells us that earlier Common lawyers, such as Littleton, Coke, St. Germain and Shepherd of late mediæval

164. Pollock, Essays in the Law, London, Macmillan, 1922, 61.

165. See J.D.M. Derrett, 'Justice, Equity and Good Conscience' in J.N.D. Anderson, ed., Changing Law in Developing Countries, London, Allen & Unwin, 1963, 114. A slightly modified version appears in ( 1962 ) 1 Bombay L.R. Journal, 129.

166. See for example, section 46, Indian Contract Act, 1872, and the invocation of 'Justice, Equity and good conscience' in relation to it in Bank of India v. Chinoy, AIR, 1950, P.C. 90 and Pandurangi Gopalan v. Chinnayya, AIR, 1958, A.P.630.

or early modern times "took into account at least occasionally as one factor in law-making and the judicial process, their own estimate of what was agreeable to citizens generally or to the majority of the class of persons affected."<sup>167</sup>

This idea was expressed vigorously by Parke, J. in the early part of the nineteenth century:

Our common law system consists in applying to new combinations of circumstances those rules of law we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, certainty, we must apply those rules when they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science. 168

This affirmation of the judicial discretion and the almost immediate qualification of it by a caveat has characterised English Law on this point. Mere affirmation of the discretion without qualifying statements, perhaps, could make it appear a very wide judicial power. The principle of Parliamentary supremacy apart, the analytical and positivist elements dominating English Law will find any such judicial discretion unacceptable.

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167. Dowrick, op.cit., 114-5.

168. Mirehouse v. Rennell (1833), 8 Bing. 490, 515-6, quoted in Dowrick, op.cit., 181-2.

Sir C.K. Allen, for example, disapproves <sup>169</sup>as being too wide, Brett J's dictum in Robinson v. Mollett (1875) that the Court had a duty to pronounce "unreasonable, contrary to law and void a business custom that infringed a 'fundamental principle of right and wrong', or a custom so entirely in favour of one side in a transaction as to be fundamentally unjust to the other." English Courts must clearly have felt the need to so pronounce upon commercial manners and customs in the rapidly expanding economy of England at that time. This is similar to the need felt by Indian Courts to pronounce upon social and religious customs in nineteenth and early twentieth century India. J.W. Gough <sup>170</sup> discussing this point affirms the jurisdiction of the English Courts to so declare customs unreasonable, and goes so far as to say that it is "one of the oldest 'fundamental' ingredients in common law." Indian law notoriously cuts down alleged customs if they are shown to be 'unreasonable'. <sup>171</sup>

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169. C.K. Allen, Law in the Making, Oxford Paperbacks, 1961, 136-7.

170. J.W. Gough, Fundamental Law in English Constitutional History, Oxford, 1955, 213. The modern principle of 'reasonableness' dates back to cases decided about the middle of the nineteenth century. See, Raphael Powell, 'The Unreasonableness of the Reasonable Man', (1957) 10 Current Legal Problems, 104, 105.

171. J.D.M. Derrett, Introduction to Modern Hindu Law, Bombay, Oxford University Press, 1963, para.15.

English Law on 'Reasonableness'

Even at the present time English Courts show an unwillingness to treat 'unreasonableness' as an independent head of invalidity - <sup>172</sup> invalidity that is, of subordinate or delegated legislation.<sup>173</sup> There is no question of the English Courts' pronouncing upon the reasonableness of statutory provisions. Needless to say, this is a vital distinction between Indian and English Laws.

English Courts can, however, hold ultra vires an unreasonable exercise of statutory power or statutory discretion. There is an implied requirement <sup>174</sup> that such power or discretion shall be exercised reasonably. Bye-laws made in furtherance of statutory enablement and in many cases, administrative discretion are reviewable on the ground of unreasonableness.<sup>175</sup>

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172. The plea of 'manifest unreasonableness' is not easily substantiated before English Courts.

173. Associated Provincial Picture v. Wednesbury Corp., (1948) 1 K.B. 223, (1947) 2 All E.R. 680. The authority of this decision has never been doubted. Applied by the House of Lords in Smith v. East Elloe, (1956) A.C. 736, 762 and Fawcett Properties v. Buckingham County Council, (1961) A.C. 636, 660.

174. S.A. de Smith, Judicial Review of Administrative Action, 3rd Edn., London, 1973, 303-4.

175. Alty v. Farrell (1896) 1 Q.B. 636; Westminster Corpn. v. London & N.W. Rly. (1905) A.C. 426; Arlidge v. Islington Corpn. (1909) 2 K.B. 127; O. Hood Phillips, Constitutional and Administrative Law, 4th Edn., 625; C.K. Allen, Law in the Making, Oxford Paperbacks, 1961, 555; S.A. de Smith, Constitutional and Administrative Law, 2nd Edn., Penguin, 1973, 592-4.

Today it is in the field of administrative law that 'unreasonableness' is more frequently invoked. While there is a category described as 'manifest unreasonableness'<sup>176</sup> English Courts are not keen on entertaining a plea of unreasonableness on its own without anything more specific. The following are some of the ways in which 'unreasonableness' could be successfully pleaded and substantiated:

(1) The bye-law or statutory regulation is shown to be partial and unequal in its operation as between different classes.<sup>177</sup>

(2) While administering the bye-laws or statutory regulation, the authority addressed itself to the wrong questions or took into account irrelevant considerations or conversely,

176. Halsbury's Laws of England, 4th Edn., (Lord Hailsham), London, 1973, Vol.1, Administrative Law, 72-4. An example of manifest unreasonableness would be the dismissal of a red-haired teacher because she had red hair! This example was given by Warrington, L.J. in Shoat v. Poole Corporation, [1926] Ch.66, 90-1, and referred to by Lord Greene, M.R. in Associated Provincial Picture Houses v. Wednesbury Corporation, (1948) 1 K.B. 223, 229.
177. Kruse v. Johnson (1898) 2 Q.B. 91, "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their application as between different classes; if they were manifestly unjust; if they disclosed bad faith if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires". Lord Russell, at 99-100; Repton School Governors v. Repton Rural Dt. Council (1918) 2 K.B. 133; Cumings v. Birkenhead Corpn., ~~1912~~ (1972) Ch.12.

relevant considerations were left out of its deliberations in arriving at the decision.<sup>178</sup>

(3) A statutory discretion ought to be exercised to further the purposes and policies of the statute concerned. Deviations may be regarded as evidence of unreasonableness. Where a minister or a statutory authority does not provide any reasons at all for his refusal to exercise his statutory discretion to entertain complaints from those affected by the operation of the statute, then the Court would assume that the refusal was without good reason.<sup>179</sup>

(4) Evidence of bad faith or personal bias would render the decisions unreasonable,<sup>180</sup> though the reverse position that manifest unreasonableness proves bad faith or bias may not follow.<sup>181</sup>

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178. Associated Provincial Picture v. Wednesbury Corpn. (1948) 1 K.B. 223 (1947) 2 All E.R. 680; Pyx Granite v. Minister of Housing, (1958) 1 Q.B. 554, (1958) 1 All E.R. 625 (C.A.) approved on this point in Fawcett Properties v. Buckingham County Council (1961) A.C. 636, (1960) 3 All E.R. 503; Anisminic Ltd. v. Foreign Compensation Commission, (1969), 2 A.C. 147, (1969), 1 All E.R. 208. On the last case, see H.W.R. Wade, 'Constitutional and Administrative Aspects of the Anisminic Case', (1969) 85 L.Q.R. 198-212.
179. Padfield v. Minister of Agriculture, E.R. (1968) A.C. 997 (H.L.).
180. Breen v. Amalgamated Engineering Union, (1971) 2 Q.B. 175, (1971) 1 All E.R. 1148 (C.A.).
181. Horrocks v. Lowe (1972) 1 W.L.R. 1625; R. v. Roberts, Ex parte Scurr (1924) 2 K.B. 695, 719, see S.A. De Smith, Judicial Review of Administrative Action, 1st Edn., 214.

Notwithstanding this apparently neat classification, the extent of the Court's review in these cases is not settled, even in England, nor, it seems, it is possible to predict it. The following words of de Smith, though at first sight obvious, are of great weight against the Indian background:

Judicial standards of reasonableness are also variable. If a court holds that it has jurisdiction to determine the reasonableness of an administrative decision, it may try to imagine itself in the position of the competent authority when the impugned decision was taken and then determine what would have been a reasonable decision. This process may, in practice, verge on de novo review of the merits of the decision. At the other end of the spectrum, it may simply ask itself whether a reasonable body of persons could possibly have arrived at the impugned decisions; if the answer to that question is in the negative the administrative decision will be invalid. 182

A possible objection may be raised here that all these points arise in English administrative law and are not relevant to a discussion of the provisions of the Constitution of India. Firstly, whatever the area a general comparison will show similarities in the approaches of English and Indian Courts towards the question of unreasonableness.<sup>182a</sup> Clearly, any such comparison must be subject to the consideration that in India the question is one of 'reasonableness' of restrictions on the fundamental rights guaranteed by the Constitution. Secondly, the distinction between constitutional reasonableness and administrative reasonableness is not a valid one since the guarantees in Articles 19 and 14

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182. S.A. de Smith, Judicial Review of Administrative Action, 3rd Edn., 304.

182a. See below, Chapter 3.

of the Indian Constitution can be invoked whether the grievance is based on an administrative order or a legislative enactment. Thus, the Indian 'reasonable restrictions' clause has a wider applicability.<sup>183</sup>

Any doubts that may be entertained on this account would be dispelled when one considers that English cases on 'reasonableness' have given rise to the same dilemmas of constitutional policy-making which Indian and American Courts have faced.

#### Liversidge v. Anderson

A good illustration is the classic case of Liversidge v. Anderson<sup>184</sup> where the majority in the House of Lords maintained that the use of the expression 'reasonable' did not always indicate justiciability of the matters the adjective qualifies. The result of their decision was that the Home Secretary had an unhampered discretion to detain persons without trial. This power and its approval of it by the majority though it was at a time when Britain was fighting the Nazis was considered drastic by a number of

183. For the purpose of challenge a 'law' abridging a fundamental rights has been defined by Article 13(3)a as follows: "'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." The following decisions substantiate the point made. In all of them, Article 19 was invoked to impeach what were really administrative orders. Kishanchand Arora v. Commissioner of Police, AIR, 1961, S.C.705; Krishna Kumar v. State of J & K, AIR, 1967, S.C. 1368; Union v. Anglo-Afghan Agencies, AIR, 1968, S.C. 718; Abraham v. Kerala, (1972) K.L.T.165, and Kesava Mills v. Union, AIR, 1973, S.C.389.

184. (1941) 110 L.J.K.B. 724, (1942) A.C.206.

critics.<sup>185</sup> The regulation in question was 18-B, Defence (General) Regulations, 1939, issued under the Emergency Powers (Defence) Act, 1939:

- (1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm ... he may make an order against the person directing that he be detained ...

The majority in the House of Lords held that the words, "the Secretary of State has reasonable cause to believe" meant that in the Secretary's judgment there was reasonable cause to detain. The decision was his in his subjective judgment and a Court could not go into the grounds or causes of decision. The petitioner's contention was that the words 'reasonable cause' clearly meant there existed external standards as to the cause. The Court could go into the grounds supporting the 'cause'. The majority's answer, in the words of Viscount Maugham L.C. was:

I am not disposed to deny that in the absence of a context the prima facie meaning of such a phrase as 'if AB has reasonable cause to believe' a certain circumstance or thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if AB believes it<sup>1</sup>/<sub>2</sub>. But I am quite unable to take the view that the words can only have that meaning. 186

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185. C.K. Allen, 'Regulation 18-B and Reasonable Cause', (1942) 58 L.Q.R. 232. W. Friedmann, Law in a Changing Society, 2nd edn., Penguin, London, 385.

186. [1942] A.C. 206, 219-20.

Still with the majority, Lord Wright answered the same point by saying:

I cannot accept that contention, which seems to me to subordinate the whole substance of the enactment to a single word, which itself is ambiguous and inconclusive. The word 'reasonable' does indeed imply instructed and intelligent care and deliberation, the choice of the course which reason dictates. But the choice is not necessarily that of an outsider; ...

'Reasonable' connotes a quality or characteristic. Who is to decide on reasonableness is a different matter which depends on the circumstances. 187

The lone dissenter, Lord Atkin, was quite emphatic that the expression 'reasonable' always meant a court's review.<sup>188</sup>

But in all cases the words indicate an existing something the having of which can be ascertained. And the words do not mean and cannot mean "if A thinks that he has". "If A has a broken ankle" does not mean and cannot mean "if A thinks that he has a broken ankle"; "if A has a right of way" does not mean and cannot mean "if A thinks that he has a right of way". "Reasonable cause" for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. 189

The intimate relationship between the expression 'reasonable' and the judicial process itself is shown by another remark of Lord Atkin:

187. Ibid., 268.

188. His Lordship referred to a number of decisions to support this point. Some of them are: Broughton v. Jackson, (1852) 21 L.J.Q.B. 265, 267-8; Wallace v. W.H. Smith (1914) 1 K.B. 595; R. v. Secretary of State, Ex parte Lees [1941] 1 K.B. 72. Most of the decisions referred to by him related to police powers of arrest.

189. [1942] A.C. 206, 227-8.

I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject show themselves more executive-minded than the Executive. Their function is to give words their natural meaning, not perhaps in war-time leaning towards liberty, but following the dictum of Pollock C.B. in Bowditch v. Balchin (1850) 19 L.J. Ex 337; 5 Ex. 378) cited with approval by Lord Wright in Barnard v. Gorman (1941, 110 L.J.K.B. 557; 57 T.L.R. 681) 'in a case where the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.' In this country, amidst the clash of arms, the laws are not silent. 190

Thus, Lord Atkin expressed his view of the judicial function. Is the task one of protection of civil liberty or is it self-restraint in the 'context' of a serious crisis that the Executive government and the country have to face? Reference to the term 'reasonable' indeed created a dilemma in Liversidge and continues to create the same difficulty of choice in India. This compendious term waits with, as it were, its lid open for the judge to fill it! A complete denial of review, as did the majority in Liversidge, appears to be incompatible with what the term stands for. On the other hand, total lack of restraint on the part of the judges and thus, an undue interference with the Executive's work would itself be unreasonable by the same standards that demand some review as the necessary connotation of the term. Though here Lord Atkin held that the grounds were reviewable, in an appeal heard at the same time as Liversidge, he appears to have been satisfied with less than strict proof of the

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190. Ibid., 244 (Contradicting in the last-quoted words, an ironical Roman maxim).

reasonableness of the grounds.<sup>191</sup>

Liversidge v. Anderson<sup>192</sup> has not been generally considered in terms of the differing views held by the majority and minority on the judicial function that traditionally British Courts have played or are expected to play. The majority thought they must look at Parliament's intention behind the words. It could not, in their view, have intended that the grounds of detention should be gone into at a time when Britain was faced with a serious military threat. The 'context' was an over-riding consideration. Lord Atkin could not read a contextual meaning into the words of a statute so as to give the Home Secretary full powers to detain persons without trial. To him the law must speak the same language in war as in peace. His task as a judge was, "to stand between the subject and any attempted encroachments on his liberty by Executive; alert to see that any coercive action is justified in law."<sup>193</sup>

Professor Heuston is of the view that the majority were correct in their assumption that every statute must be construed in its own particular context. He says, "Lord Atkin's opinion is based upon the heresy of supposing that

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191. Greene v. Home Secretary [1942] A.C. 284. "Lord Atkin, therefore, clearly showed that he was not imposing an absurdly difficult onus of proof on the security authorities, and decisively forestalled any criticism that he was theoretical, impractical, or lacking in common-sense - always serious charges in English public life." R.F.V. Heuston, 'Liversidge v. Anderson in Retrospect' (1970) 86 L.Q.R. 33, 40.

192. (1942) A.C.206.

193. Ibid., 244.

the construction of words in a statute is a matter of law and not of fact."<sup>194</sup> But there are 'principles' of statutory interpretation which are matters of law and do not vary with facts; there may, also, be 'principles' which imply questions of both law and fact. The principle on which Lord Atkin relied, namely, in the matter of civil rights, courts cannot give to words in statutes more than their natural meaning even in emergencies, can be regarded as well-understood.

In any case, the strength of Lord Atkin's dissent and the concern with which it was written makes it difficult for us to believe that his disagreement with the majority was merely on statutory construction. In the subsequent development of the law in England as well as in many other Commonwealth countries, it was the dissent of Lord Atkin that came to be accepted.<sup>194a</sup>

W. Friedmann, a critic of Liversidge, was not impressed with the fact that the decision was given at a time of emergency. He proceeds to contrast <sup>195</sup> Liversidge with another decision of the House of Lords in Roberts v. Hopwood.<sup>196</sup> There a local authority fixed the minimum weekly wage of its lowest paid employees, whether men or women, at £4/- in

194. (1970) 86 L.Q.R. 33, 64. Some might question whether it is a heresy (too much emphasis should not be based on the dictum in Re W below, 97).

194a. Nakkuda Ali v. Jayaratne (1951) A.C. 66. Ghulam Jilani v. Government of West Pakistan, P.L.D. 1967, S.C. 373.

195. W. Friedmann, Law in a Changing Society, 2nd Edn., Penguin, London, 1972, 60-2.

196. (1925) A.C.578.

pursuance of the statutory/<sup>power</sup>it possessed to fix the wages "as they may think fit". The House of Lords agreed with the district auditor in his objections that the sum fixed was so excessive in relation to the cost of living as to amount to a gift disguised as wages. It was held that the statutory power should have been exercised reasonably taking into account the cost of living as computed through a recognized method.

The Borough Council's contention that it wished to be a model employer and therefore, it could not be content with cost of living indices was rejected. With evidence before them that the cost of living in the post-First War period actually dropped the House of Lords had no difficulty in holding that, as they saw it, the power to fix wages was exercised unreasonably.

Friedmann points out that Lord Atkinson went so far as to condemn 'eccentric principles of socialist philanthropy' which in His Lordship's view, were responsible for the impugned exercise of power. To provide the context, Lord Atkinson may be quoted in full:

The Council would, in my view, fail in their duty if, ... .. they put aside all these aids to the ascertainment of what was just and reasonable remuneration ... .. and allowed themselves to be guided in preference by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour. 197

From this Friedmann draws the conclusion<sup>198</sup> that though wedded to a 'strict' construction of statutes, the House of Lords has not hesitated in establishing other canons of construction if the problem before the House appeared to justify it. Presumably the reference is to Liversidge.

Friedmann has said more. In 1951 he regarded Roberts v. Hopwood as a solitary example of the use of judicial power to frustrate a social purpose.<sup>199</sup>

Writing about it in 1972, he seems far more critical of the decision and compares it with those given by the United States Supreme Court invalidating Congressional and State laws as being in violation of the 'due process' clause.<sup>200</sup>

He refers to Prescott v. Birmingham Corporation<sup>201</sup> as another example of a policy decision. There the plaintiff, a rate-payer in Birmingham, questioned a scheme of free travel provided by the respondent Corporation for certain categories of old people. The cost of the scheme was met from out of the general rates paid by people like the plaintiff.

His complaint was the Corporation could not thus employ its power to benefit a section of the public at the cost of

198. Op.cit., note 195 above.

199. W. Friedmann, Law and Social Change in Contemporary Britain, Stevens, 1951, 164-5. He contrasts the decision with Re Decision of Walker, (1944) 1 K.B. 644.

200. W. Friedmann, Law in a Changing Society, 2nd edition, Penguin, London, 1972, 393-4, f.n.39. (287, f.n. 62 of the first Indian reprint, University Book House, Delhi, 1970.)

201. (1954) 3 W.L.R. 990 (C.A.).

the general body of the public. The Corporation argued that under the relevant statutory provision, they could charge fares for bus travel 'as they think fit' provided they did not exceed a statutory maxima. They interpreted their power as enabling them to waive fares in their discretion. They wished to point out that they had not taken irrelevant factors into consideration in devising the scheme which they argued was reasonable. There was no equality clause subject to which they were required to exercise their power - the general principle being authorities empowered to levy charges could differentiate.

Jenkins L.J. held for the Court that the objection to the Corporation's scheme arose from the duty it owed to all the rate-payers to apply the funds contributed by them for general benefit. Though it was not a trustee to its rate-payers, the Corporation owed "an analogous fiduciary duty". It was not entitled, "merely on the strength of a general power" to charge different charges to different passengers. A clear statutory authority was required to do so.

Such power as the Corporation had, meant that the transport undertaking should be run along "ordinary business principles". The scheme went beyond anything that could be reasonably regarded as authorised.

In comparison with Roberts v. Hopwood<sup>202</sup> the decision in Prescott v. Birmingham was less beset with value considerations. The latter could be seen as an application of

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202. L.R. (1925) A.C. 578.

'narrow' ultra vires principle. Was the decision indicative of judicial conservatism? It may well be but courts need not be criticised for fearing possible misuse of power by statutory bodies. Even a laudable act such as the one intended to benefit old folk may set a precedent for something far less laudable and difficult to distinguish from the earlier precedent. One may disagree with judicial caution in particular cases but it is always possible to understand it.

No doubt the three cases discussed so far are remarkable examples. But an appreciation of policy matters is, in any case, necessary before a decision on the reasonableness of action taken under the statute can be given. It seems altogether better (because more objective and less doctrinaire) to accept this, rather than deny it even on grounds of 'strict' or 'technical' ideas of statutory interpretation.

A recent English decision on adoption, though it relates to private law, illustrates the degree of divergent opinions amongst Judges on what are really matters of policy. Some background is necessary to understand this case. In Britain, unmarried mothers or young mothers deserted by their partners are known to offer their babies for adoption. Something that also happens frequently is that they require, presumably after a change of heart, their babies to be returned to them whether or not the legal formalities had been completed. This raises many difficult questions likely to arouse feelings, not just of the parties concerned, but of the entire community. Is the natural mother to be denied her baby? But on the other hand, would it be right to

disappoint the foster-parents who, in most cases, are exemplary in the affections they lavish on their adopted children? It was against this background that In re W. (An Infant)<sup>203</sup> was decided.

Section 5 of the Adoption Act, 1958, was the provision relevant to the case:

- (1) The Court may dispense with any consent required by para.(a) of section 4(1) of this Act if it is satisfied that the person whose consent is to be dispensed with - (a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found, or is incapable of giving his consent or is withholding his consent unreasonably. (Italics supplied).

The question was whether the natural mother in the case, who appeared to have no matrimonial home, had 'withheld her consent unreasonably' thus blocking the completion of the adoption proceedings. Two different benches of the Court of Appeal had disagreed in similar cases on what constituted 'withholding consent unreasonably'. Sachs L.J. in the instant case,<sup>204</sup> thought it was the culpable behaviour of the natural mother that constituted unreasonable behaviour enabling the court to waive her consent. Cross L.J. of the same bench, interpreted unreasonable behaviour as merely indifference towards the infant and its proper care. In a later case, a different bench of the Court of Appeal disagreed with these formulations.<sup>205</sup>

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203. [1971] A.C. 682 (H.L.).

204. In Re W. (An Infant), [1970] 2 Q.B. 589.

205. In Re B. (C.H.O.) An infant (1971) 1 Q.B. 437. A more 'contextual' standard was preferred, thus leaving it to the court to assess each case in its special circumstances.

The House of Lords disapproved all such singling out of factors amounting to 'withholding of consent unreasonably'. It was held that courts should not add explanations to embellish language used by Parliament. The test, therefore, was "reasonableness and reasonableness in the totality of circumstances."<sup>206</sup> The Lord Chancellor observed:

And be it observed, reasonableness, or 'unreasonableness' where either word is employed in English law, is normally a question of fact and degree and not a question of law so long as there is evidence to support the finding of the court.<sup>207</sup>

It is submitted that too much emphasis should not be placed on this dictum since unfortunately, the Lord Chancellor has not referred to any authorities in support, and this writer was unable to trace a clear precedent that would justify the view that reasonableness is not a question of law.

The scope and power of the English Courts to hold an exercise of statutory power unreasonable can have constitutional implications of considerable interest to Indian students. A recent illustration of this is the decision in

206. L.R. (1971) A.C. 682, 699, per Lord Hailsham.

207. Ibid., 699. In India, the Assam High Court held that whether the test of reasonableness under Section 41, Transfer of Property Act, 1882, has been applied properly in a case, was not a question of fact precluding review on appeal. Sarju Kairi v. Panchananda, AIR, 1959, Assam, 15.

Cumings v. Birkenhead Corporation.<sup>208</sup> The respondent-corporation sent out a circular to parents of children about to begin secondary education, that if the children had attended Roman Catholic primary schools, then they would be considered for admission only to Roman Catholic secondary schools. The plaintiff parent, and others affected, complained that the corporation discriminated unfairly and without lawful justification against one class of rate-payers, i.e. Roman Catholic parents and their children by denying them fair opportunity in the matter of education. They argued that the power given the Corporation under Section 8 of the Education Act, 1944, was exercised unreasonably because it took into account irrelevant considerations (such as the religious affiliation of the parents) and failed to take into account the relevant ones (such as the aptitude and abilities of the children). There was no evidence that Roman Catholic secondary schools were inferior.

Lord Denning M.R. held that it was open to an administrative body like the Education authority to frame a general policy affecting individual cases provided the policy was not

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208. L.R. [1972] Ch.12, cf. Bombay v. Bombay Education Society. AIR, 1954, S.C. 561, (1955) 1 S.C.R. 568 - a decision arising under Article 29(2) of the Indian Constitution: "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State Funds on grounds only of religion, race, caste, language or any of them." And also Madras v. Champakam, AIR, 1951, S.C. 226. Where admission to colleges was allotted according to community and caste, (it) was held unconstitutional under Article 15(1) and Article 29(2). The cases must be read subject to Article 15(4) introduced by the First Amendment, 1951, below, 199.

unreasonable and was supported by good educational reasons.

So here, if this education authority were to allocate boys to particular schools according to the colour of their hair, or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether, and this court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance, in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English.<sup>209</sup>

The following reason had been given by the respondent-corporation in justification of the circular impugned in the case. The Corporation did not have enough room for all comers. So as a temporary measure, they decided to send those from Roman Catholic primary schools to secondaries of the same denomination, since these had ample places. Presumably, the idea was that those of the Roman Catholic faith would have less objection to going to such schools than non-Roman Catholics. The Court found this a satisfactory reason and upheld the circular as reasonable and in reasonable exercise of the power under the Education Act, 1944. This was certainly a review of the Corporation's decision against the background of public policy as the Court understood it.

In India the plaintiffs in such a case would have probably pleaded Articles 14 and 15 of the Constitution.

Finally, the decision in A.G. v. Independent Broadcasting

Authority,<sup>210</sup> is another example of recognition of a constitutional liberty of the subject through the operation of the court's power to declare administrative decisions unreasonable. In this case, an individual citizen sought a writ against the respondents to prohibit them from showing in their television channels a film that newspaper previews had characterised as offensive to decency and morality. Since it was argued that the feelings of many people would be outraged by the film, the Attorney-General was joined as a party to the action. The main contention in the case was that the television authority had not fulfilled their statutory duty to satisfy themselves 'as far as possible' and 'reasonably' that the film met the statutory requirements of proper and fit exhibition to the public.

It was found by the Court that in discharge of its duties, the authority must view such films itself before exhibition to the public, instead of relying on someone else's opinion of the films. After the court had seen the film, it came to the conclusion that the original decision of the authority to show it was not unreasonable since a reasonable body could have done so. The Court had no hesitation in putting itself into the respondent's shoes.

The English notion of reasonableness (or unreasonableness) has the greatest claim to be uppermost in the minds of the Indian lawyers of the generation of the 1940s

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210. [1973] 1 All E.R. 689.

who framed the Constitution. These lawyers, more than the present-day ones in India were close to most of the concepts of the Common Law system. Therefore, it seems appropriate to say that the inspirations for the Indian 'reasonable restrictions' clause lies with the English notion.

### Bye-Laws and Indian Courts

The current law in India does indeed admit the existence of the power in Indian Courts to declare bye-laws of municipal bodies unreasonable. This would be independent of the Constitution. A recent example is the decision in V.G. Panneerdas & Co. v. Corporation of Madras,<sup>211</sup> where the High Court followed the English decision in Kruse v. Johnson<sup>212</sup> to uphold a bye-law prohibiting display of advertisements in specified places in the City of Madras as not unreasonable.

Many older authorities are referred to by Satya Ranjan Das in his Tagore Law Lectures, 1903.<sup>213</sup>

It is clear from such cases as Ganga Narain v. The Municipal Board of Cawnpore<sup>214</sup> that two propositions were well-established early on in Indian law:

211. (1967) I M.L.J., 253.

212. L.R. (1898) 2 Q.B.91.

213. The Law of Ultra Vires in British India, University of Calcutta, 1924.

214. I.L.R. (1897) 19 All. 313.

- a) Bye-laws should be strictly construed where they infringe on the liberties of a subject, and
- b) the powers conferred by bye-laws should be exercised reasonably.

That case arose out of the respondent board's annoyance at the popularity of the plaintiff's market as compared to their own! They appeared to have made every attempt to have his market closed even though his rights and title to run the market appeared clearly established in law.

It is worth reproducing the passage in the judgment from which the above two propositions have been deduced:

There is another reason against our construing this clause as the Board contends we should, and it is this. We do not believe it is possible that the Legislature could have intended to give a power to the Board by the exercise of which they might confiscate private rights for the purpose of increasing their own revenues; and that in truth is what the Board has been trying to do with regard to the plaintiff and his market. The Legislature could not have intended that a Municipal Board should, of its own free will, and at its own indiscretion, have a right to treat that as a nuisance which by no possible view could be regarded by the public or by the lawyer as a nuisance. 215

Finally, an old privy council decision in an appeal from India provides a link between the principle there established and Article 19 of the Indian Constitution.

In Gaekwar Sarkar v. Gandhi Kachrabhai,<sup>216</sup> the Privy Council confirmed a decision of the Bombay High Court that where a railway company governed by the Indian Railways Act,

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215. Ibid., 323.

216. I.L.R. (1903) 27 Bom. 344.

1890, was negligent in constructing an embankment while making the railway was liable for damages notwithstanding the provision of the Act which immunised the company in relation to all authorised work. Lord Macnaghten observed:

Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood - expressed in the Act of 1890, but if not expressed always understood - that the undertakers 'shall do as little damage as possible in the exercise of their statutory powers'. 217

The principle behind Article 19 is similar. The legislature while enacting laws of social control shall do as little damage as possible to the liberties of the subjects. The Indian judiciary is, if we are to judge from its performance, in its own eyes there to see to it.

In conclusion, it may be said that the question of reasonableness can be as difficult in English law as it can be, and has been, under the Indian Constitution. Though the origin of the notion of 'reasonableness' in English law shows its lofty connections with such concepts as 'natural law' or 'reason' in its application by English Courts, it is kept much closer to the ground and the circumstances under which it may be pleaded are laid down in workable terms, if not with legal precision.

It is very much to be desired that Indian Courts develop similar workable terms under which the law regarding

'reasonable restrictions' could be considered with greater predictability and confidence. Indian Courts have gone some way towards doing this even though their tasks are far more difficult than anything that English courts have to face. It is undoubtedly going to be a long process.

Yet another point to emerge in this section is the way the wishes of the executive - in the English cases the local authorities, such as borough councils - to do something, be it granting free travel for old folk or giving minimum wages, have to be confronted by the Courts. How much sympathy or consideration should a Court have towards these executive plans while determining the question of reasonableness? This is bound to be a crucial factor in the Indian Constitution. But as we shall see in the next section, it is a crucial factor in any system of fundamental rights.

#### Section 4: European Convention and Restrictions on the Rights

The reason for including this small section is that the European Convention - one of the more serious international attempts at protection of human rights - offers some instructive parallels to Indian law on 'reasonable restrictions'. Particular attention is paid here to the principle developed by the European Commission and the European Court described as the doctrine of 'margin of appreciation'. Given this limited interest, no comprehensive discussion of the Convention

or its jurisprudence will be gone into. Principally, two standard works on the Convention are relied upon in giving the following information and facts.<sup>218</sup>

### Introduction

The reason behind the formation of the Council of Europe (5th May, 1949) and the signing of the Convention on Human Rights in Rome (4th November, 1950) was the horror of the War of 1939-45. The nations of Europe emerging from the destruction and suffering resulting from that war seemed resolved to prevent recurrence of that history.

The rights guaranteed by the Convention are largely based on the United Nations Declaration of Human Rights, 10th December, 1948. Any individual citizen or group or institution in any of the member states of the Convention may resort to the European Commission only after exhausting local or national remedies. The European Commission which processes the applications, acts also as a conciliating body which attempts a friendly settlement between the individual who has come to assert his convention rights and his government. If no such settlement could be arrived at, and if the Commission feels there is a prima facie case, the application is referred to the Committee of Ministers which on further consideration may refer it to the European

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218. J.E.S. Fawcett, The Application of the European Convention on Human Rights, Oxford, Clarendon Press, 1969.  
Clovis C. Morrisson, Jr., The Developing European Law of Human Rights, Leiden, 1967.

Court.<sup>219</sup>

As examples of the rights referred to by the Convention, the following selected provisions that bear similarity to Indian Fundamental Rights may be reproduced:

Article 9 (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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219. The following figures indicate the way the stages of the Convention work. By 1st August, 1966, there were over 2,700 applications, ten applications reached the Committee of Ministers and only three the European Court itself. Therefore, the Commission has done the bulk of the work in disposing of 2,690 applications. Information taken from Clovis C. Morrisson, Jr., op.cit.

Professor Fawcett, in a lecture delivered at University College, London, 14th January, 1971 (as part of the Current Legal Problems series), stated that in the early days it was feared that too many frivolous applications might pour in. This might have been the reason why several stages were established before applications reach the European Court.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security of public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Professor Fawcett has classified <sup>220</sup> the grounds <sup>221</sup> on which the restrictions may be imposed as follows:

- (a) Order 'national security and territorial integrity', 'prevention of disorder or crime', 'the protection of public order' and 'maintaining the authority and impartiality of the judiciary'.

220. Op.cit., 26.

221. He describes them as 'purposes'. But in India one is most used to calling them 'grounds of restrictions' or sometimes simply the 'justifying grounds'.

- (b) Welfare 'the economic well-being of the country' (Article 8) and 'the protection of health and moral's.
- (c) Conflict of rights 'protection of the rights and freedoms of others' and 'preventing the disclosure of information received in confidence'.

The grounds in the sub-clauses of Article 19 of the Indian Constitution may be classified likewise.

#### Margin of Appreciation

The doctrine amounts to this: In examining the justifications for the restrictions put on the rights of an individual by his State, the latter must be allowed a margin of discretion in the manner it has 'appreciated' the necessity of imposing the restrictions.

The doctrine has its role to play when the Commission asks the question: 'Are the restrictions covered by one or more of the "exceptions" indicated in the provisions of the Convention?' Only after this question is answered does the Commission proceed to examine if those restrictions were such as would be 'necessary in a democratic society'.<sup>222</sup>

Thus, when a State says it imposed a certain restriction, say, on the ground of 'public order', a margin is allowed

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222. See the de Becker case, application number 214/56. Judgment, 27th March 1962, Publications of the European Court of Human Rights, Judgments and Decisions, Series A, published by the Registry of the Court, 1962. See Fawcett, op.cit., 215-19.

in the State's favour before the Commission begins to evaluate the reasonableness of the restrictions.

A possible immediate reaction to this doctrine from an Indian or American lawyer may well be that this is similar to the doctrine of presumption of constitutionality of enactments. However, it will be difficult to equate the two doctrines. There are similarities but they are not on all fours. The 'margin of appreciation' idea is concerned only with the justification for the imposition of restrictions while presumption of constitutionality can be wider, embracing the question of legal competence in the Legislature which enacted the impugned law.

One other difficulty in any such equation is that it is doubtful whether one may apply the general presumption in favour of constitutionality to a provision such as Article 19 of the Indian Constitution. It cannot be presumed that legislative restrictions that prima facie violate rights are, notwithstanding that, reasonable. The reasonableness of restrictions is what the Court has to determine. In that context, therefore, the presumption of constitutionality can be nothing more than that there is a legislative entry from which legal competence was derived in passing the impugned law.<sup>223</sup> But the question of judicial deference to the opinions and views of the other two branches of Government is crucial in the determination of the reasonable-

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223. See below, Chapter 2, Section 1(b) on Burden of Proof.

ness of the restrictions on Fundamental Rights. This is what is behind the 'margin of appreciation'. Hence, this has a greater relevance than the doctrine of 'presumption of constitutionality' to the Indian Article 19. We will return to this shortly.

There is another idea present in both the United States and in India which may be closer to the 'margin of appreciation' doctrine.

When it is alleged that a law unconstitutionally discriminates by selecting a subject and leaving out others similar to it in imposing a liability or limitation, an Indian Court may well say that the legislature should be presumed to understand and correctly appreciate the needs of its people and the subject it selects is the result of what in its experience it conceives to be appropriate.<sup>224</sup> But this has to be confined to the 'equality' guarantee and could not be fully recognized under a provision like Article 19.<sup>225</sup>

Commenting on the 'margin of appreciation' idea, Clovis C. Morrisson Jr. contends that narrowly construed the doctrine would be defensible.

Applied very cautiously, the doctrine of margin of appreciation is defensible. Some latitude must be given the govern-

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224. Bombay v. Balsara, AIR, 1951, S.C. 318; Ramakrishna Dalmia v. Tendolkar, AIR, 1958, S.C. 538, (1959) S.C.R. 279.

225. See below, Chapter 2, Section 1(b).

ments in difficult situations. But the Commission must be very judicious in granting this latitude. 226

He proceeds to limit the doctrine when he says,

The Commission must always be free to question the judgment and the actions of the Government if it sees fit. Any question of the reasonableness of the grounds for the actions should only be raised if these actions are within a narrow margin granted the Government. 227

There must be particular executive or legislative actions which it would be difficult for any Court to question. On such occasions, a Court may well deny that the law applied to the facts of the case before it. This may, for example, be achieved by defining such wide expressions as 'public order'.<sup>228</sup>

A salutary principle that may be deduced from the doctrine of margin of appreciation is this: in constitutional adjudication, one should bear in mind that responsibility and initiative lie with the executive Government while the judges' role is to protect the rights of the citizens without impeding the legitimate aims and purposes of the executive.

226. Op.cit., 151.

227. Op.cit., 151-2.

228. See Dr. Lohia v. Supdt., Central Prison, AIR, 1960, S.C. 633, (1960) 2 S.C.R. 821, (1960) S.C.J. 567. Madhu Limaye v. S.Dt. Magistrate, Monghyr, AIR, 1971, S.C. 2486. Both cases are examples of restrictive reading of 'public order'. See below, Chapter 3, Section 1.

### Judicial Deference to Legislative Policies

Reverting to the question of judicial deference, the views of Professor Archibald Cox may be referred to in conclusion. He supports the need for judicial deference towards legislative opinions on two grounds.<sup>229</sup> Firstly, the Legislature is, or can be, a better fact-finding body than an appellate Court. Particularly on socio-economic matters, the Court can hardly manage an inquiry into the 'rightness' of the action taken. As an example, he refers to the decision in Brown v. Board of Education<sup>229a</sup> where, according to him, the Supreme Court instead of entering into controversy by quoting sociologists to the effect that separate schools hampered the education of black children, should have simply asserted the norm (a 'political proposition') "that a State cannot be the government of all the people if it supports a caste system by racial segregation."<sup>230</sup> One questions how the Courts arrive at such a 'political proposition'.

Secondly, judicial deference 'partly met' the charge that the Court was acting as an unrepresentative Council of Revision in reviewing legislative enactments.

Having said this much, Professor Cox raises the most crucial question affecting judicial review. Where would

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229. 'The Role of Congress in Constitutional Determinations', 40/2, University of Cincinnati Law Review, 1971, 199.

229a. 347 U.S. 483, 98 L.Ed. 873 (1954).

230. Ibid., 209.

the Court 'round off' its judicial deference? That there is no simple answer to this is clear:

Theoretically, the Court can set outer limits to what the legislature can 'reasonably' conclude, but where the variety of acceptable justifications is great and the ultimate balance depends as much upon the facts and their characterization as upon ultimate values, the theoretical check has little practical meaning and, if the Court is faithful to the formula any constitutional limit virtually disappears. 231

It is clear that the Court cannot always be faithful to the formula of deference to legislative opinions forming the basis of legislative measures. Besides, not every decision that a statute is unconstitutional is necessarily a rebuttal or adverse commentary on what the legislature has done. It is undoubtedly part of the judicial function to enunciate constitutional standards to which every law ought to conform. Even where the standards are occasionally applied to thwart the fulfilment of vital aims and objects, it has to be regarded as the price paid for the protection judicial review gives. It needs to be emphasised, however, that judicial review should not operate to impede normal executive and legislative functions.

Professor Cox, after tracing the ups and downs in judicial deference in the United States, raises the point whether there can be judicial deference when constitutional rights are sought to be limited by Congress? It was easy to practise the formula when Congressional determinations

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231. Ibid., 211.

supported measures that broadened the application of constitutional rights - which seems to have been the case in the United States. But will it be so easy when the operation of the rights are curtailed?

It can safely be predicted that it will not be easy. In India it was not easy when it came to the controversial amendments to the Constitution which gave many the impression that the amendments were made without care of mature deliberation.

It is hoped the following pages will show that in the two areas of law and order and economic and trade regulations, Indian Courts have shown as much deference to legislative plans as could be wished for. In the determination of the reasonableness of restrictions under Article 19 there has been (to anticipate a conclusion) sufficient and imaginative deference shown to what the other two branches of Government have tried to do. Too often the Courts' insistence on full compensation for expropriated property has been relied upon to criticise the judiciary. In the process much else has gone unsaid.

Whenever the State marshalled its facts and properly presented the purpose behind the impugned law, Indian Courts have appreciated such material.

As with the American experience, there has to be in India too, it seems, ups and downs in this respect. Two recent decisions of the Supreme Court at New Delhi suggest,

or even indicate, the end of judicial deference and the beginning of an assertion of minimum constitutional standards.<sup>232</sup>

In concluding this section, the need for such a principle as 'margin of appreciation' may be emphasised. But the essential function of a Court of law may be frustrated if this principle is not carefully limited. That is not easy to achieve. Any casual observer of Indian constitutional law today can see that the Indian judiciary is being urged not merely to increase its margin of appreciation but to give up judicial review altogether when it comes to socio-economic measures. This makes nonsense of judicial review and the notion of fundamental rights. More on this later.<sup>233</sup> But perhaps, one need not be too disconcerted by these pressures tending to upset an imagined ideal balance. Says an American writer, "[The] basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution - the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity - lies the clue to creativity that will endure."<sup>234</sup> But first it is

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232. Bennett Colemand & Co. v. Union of India, AIR, 1973, S.C. 106 (1973) 1 S.C.J. 177. Sambhunath Sarkar v. West Bengal, AIR, 1973, S.C. 1425. See below Chapter 3, Section 1.

233. See below, Conclusion.

234. Paul A. Freund, On Law and Justice, Cambridge, Mass., 1968, 23.

essential to know the convention and hence, the following section looks at how the Indian Courts view the scope of their inquiry regarding reasonableness.

## CHAPTER 2

### NATURE AND SCOPE OF JUDICIAL REVIEW OF THE REASONABLENESS OF RESTRICTIONS ON FUNDAMENTAL RIGHTS

#### Section 1

##### a) Scope of Review under Article 19

However relative and changing the notion of reasonable restrictions may be, some judicial dicta can be expected giving some insights as to how the courts view their task in pronouncing statutory restrictions reasonable or otherwise. That it is the responsibility of the court to pronounce finally upon the question is well-understood and beyond any challenge.<sup>235</sup> The legislative judgment and wisdom in imposing restrictions will be respected by the courts but have no finality and would hence be overruled, where necessary. Indian courts have often declared that they are not concerned with legislative policy or details of its motives (provided the question of mala fides does not arise) and that they will not challenge or comment upon the policy chosen by the legislature or the Executive.<sup>236</sup> However, in determining the reasonableness of a restriction, it is difficult scrupulously to exclude a judgment, even if it be en passant, upon the policy behind that restriction. The important point is that the Court's concern should be, and should be seen to be, with determining the constitutionally permissible area of State

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235. A.K. Gopalan, AIR, 1950, S.C. 27, per B.K. Mukherjea J. at 90, col.2; Das. J. at 109, col.1-2.

236. R.C. Cooper v. Union, AIR, 1970, S.C. 564.

action. It is, therefore, desirable that criteria of a general application are evolved so that all criticism may be avoided that the Court has disapproved of legislative policy. This the Indian Courts have done to a notable extent.

Under Article 19, the Indian judiciary sees its duty as holding the balance between freedom and social control.<sup>237</sup> While this is the general description, the notion of reasonableness itself has been variously characterised as 'proper care and deliberation' or as meaning the opinion of a 'prudent and reasonable individual'.

Indian Courts have also often stated that there are no general standards nor any pattern of reasonableness. The way was led by the classic account of the test of reasonableness given by Patanjali Sastri C.J. in Madras v. V.G. Row.<sup>238</sup>

It is important in this context to bear in mind 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. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. 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

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237. Golaknath v. Punjab, AIR, 1967, S.C. 1643 (1967), II, S.C.W.R. (Supp.) 1006, 1022-3, per Subba Rao C.J.

238. AIR, 1952, S.C. 196, 200.

Judges participating in the decision should play an important part, and the 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, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions considered them to be reasonable.

Notwithstanding this, some general principles did emerge in that very case. But first some details of the case. Acting under Section 16 of the Criminal Law Amendment Act, 1908, the State Government declared an association, The People's Education Society (of which the respondent was the Secretary) unlawful. The relevant provision was section 15(2)(b) of the Act:

15. In this Part:

- (1)'association' means any combination or body of persons whether the same be known by any distinctive name or not; and
- (2)'unlawful association' means an association:
  - (a)which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or
  - (b)which has been declared by the State Government by notification in the official gazette to be unlawful on the ground (to be specified in the notification) that such association:
    - (i)constitutes a danger to the public peace ...
    - (ii)has interfered or interferes, with the maintenance of public order or has interference for its object, or
    - (iii)has interfered or interferes with the administration of the law, or has such interference for its object.

The order made gave no reasons or facts in support of the Government's conclusion that the association was unlawful. The copy of the order was published in the Official Gazette

but no attempt was made to serve it on the office-bearers of the association. There was an opportunity given to those affected to make representations to the government against the order within a period of ten days. There was an Advisory Board constituted under the Act to consider such representations and to submit a report to the government as to whether the original notification was necessary. The government was obliged to cancel the notification if the Advisory Board recommended such a course. Though no reasons were given in the order itself, the State informed the Court that the Society in question was helping the Communist Party in Madras which was declared an unlawful association in 1949.

The respondent had successfully argued in the Madras High Court that his fundamental right to form associations under Article 19(1)(c) was violated by the law. It imposed unreasonable restrictions and was, therefore, unconstitutional. He also questioned the lack of proper notice to those affected by orders made under the section impugned.

The Supreme Court in an unanimous judgment upheld these contentions, and held that Section 15(2)(b) was unconstitutional. At least the following points made by the court do lay down specific criteria of reasonableness.

(1) The first point in the words of the Court is:

The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable

restrictions on fundamental rights.<sup>239</sup>

- (2) Secondly, the general rule of reasonable restrictions established by the case is that grounds upon which the State seeks to deprive a citizen of his fundamental right are justiciable in a court of law - a conclusion that is doubly fortified by the existence of a guaranteed right under Article 32 to resort to the Supreme Court for a judicial remedy. In the Court's own words:

We are unable to discover any reasonableness in the claim of the Government in seeking, by a mere declaration, to shut out judicial enquiry into the underlying facts (arising) under clause (b).<sup>240</sup>

Therefore, there should be an objective estimation by the judiciary of the grounds upon which a citizen's Fundamental Rights are curbed, and the only exception to this is where some anticipatory action is required in order to meet an emergency. It was on this basis that the Court distinguished its decision in Dr. N.B. Khare's case.<sup>241</sup>

- (3) The final point relates to notice and the right to make representations. Publication in the Official Gazette was held to be inadequate. In order that the right to make representations may be exercised, notice must be adequate and full. In the Court's view an attempt should have been made to serve the order at the premises of the society or at any one of the office-bearers' residences.

239. Ibid., 200, col.1.

240. Ibid., 200, col.2.

241. AIR, 1950, S.C. 211, (1950) S.C.J.328, below 129.

Yet another important criterion was laid down by the Supreme Court in Chintamanrao v. Madhya Pradesh.<sup>242</sup> The Central provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, 1948, authorised the State Government to prohibit the manufacture of bidis (small cigars) during the agricultural season so that enough labour would be available for essential agricultural work. The prohibition was to apply to those villages where manufacture of bidis went on as a 'cottage industry'. The petitioner, a manufacturer of bidis, argued that the restriction was excessive insofar as there were old and handicapped men and women who were unsuitable for agricultural work but who could roll bidis in their homes. He contended that his right under Article 19(1)(g) was infringed.

The Supreme Court accepted the petitioner's contention that the restriction was excessive and therefore, unreasonable. It was held that to be reasonable, a restriction must not be arbitrary to excessive but must reflect 'intelligent care and deliberation'. It must mean choosing the course reason dictates. The Court would examine the law to see if it has struck the proper balance between social control and freedom.

A total prohibition of the manufacture of bidis was not necessary to achieve the purpose of the Act. The Act might have been confined to agricultural labour alone. The restriction imposed was excessive and therefore, the Act was unreasonable and void. This instance certainly shows

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242. AIR, 1951, S.C.118.

an ample concern for 'reason' and affords less opportunity than do many cases for detecting a political appreciation in the Court's process of thought.

There are some early High Court decisions on the scope of the court's inquiry in determining reasonableness of restrictions. They discussed the point more thoroughly than the Supreme Court ever did.

We could begin with the Patna High Court decision in Brajnandan Sharma v. Bihar.<sup>243</sup> The petitioner was served with an externment order under Section 2(1) of the Bihar Maintenance of Public Order Act, 1949:

- 2(1) The Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, may make the order -
- a) .....
  - b) directing that, ... he shall not be in any such area or place in the Province of Bihar as may be specified in the order;

There were no provisions for the supply of grounds to the person affected by an order made under the section. Therefore, there was no scope for making representations against the order. Meredith C.J. and Das J. of the High Court held the law unconstitutional as imposing unreasonable restrictions on the right of free movement guaranteed by Article 19(1)(d). Shearer J. dissented mainly on the view he had taken of the scope of the court's inquiry in determining the reasonableness of restrictions.

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243. AIR, 1950, Pat. 320; ILR [1950] Pat. 461.

The dissenting views of Shearer J. may be considered first. According to him, the court could not review the entire law to see if it was a reasonable law but could only examine the substantive provisions. If they were shown to impose restrictions that were not excessive then there was no scope for scrutinising the procedural provisions of the law, nor any other ancillary provisions in it. Thus examined, the impugned law, a temporary measure with a full life of only two years, was valid in his view.

Shearer J.'s view of the court's power under Article 19 was important at that early period of the Constitution's life and hence deserves to be quoted in extenso.

What is the question to which the courts are bound to address themselves? The answer given by the Constitution is that the question is this: 'Are the restrictions which have been or can be imposed reasonable restrictions in the interests of the general public?' That, it seems to me, is equivalent to saying:- Are the restrictions reasonably necessary in the interests of the general public? or, to depart still further from the language used in the Constitution:- Is the extent to which the rights of individuals are or are liable to be interfered with no more than is reasonably necessary for the protection of the public? If that is the criterion to be adopted, then it is, I think, immaterial that there may be ancillary provisions in the statute which may lead to hardship in individual cases. Whether such provisions were reasonable or not was a matter for the legislature to determine, and the judiciary cannot now sit in review over what the legislature has done. My learned brothers, as I understand their judgments, are of opinion that the question to which the courts should address themselves is this:

'Are the restrictions reasonable restrictions?' and that restrictions which, imposed by one authority and in one manner are reasonable restrictions may not be reasonable restrictions if imposed by another authority and in another manner. For more than one reason, however, I am of opinion that the criterion to be adopted is the former and not the latter criterion. 244

Shearer J. felt that the introduction of the word 'reasonable' in the last stages of the Constituent Assembly proceedings was 'unfortunate'. For it meant that the judiciary could review decisions taken by the Legislature after a very full deliberation and with a knowledge of local conditions which the judiciary itself never could possess.

Perhaps the most interesting point made by the learned Judge was that some statutes in England did use the term 'reasonable' but always as qualifying some such word as 'cause' or 'belief' or 'suspicion' and never 'restriction'.<sup>245</sup> Used in that manner it was not open to import the meaning the expression bears under English law. It must, according to the learned judge, bear a narrower meaning under Article 19 of the Indian Constitution. He felt that the majority had assigned an 'esoteric' sense to the term.

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244. ILR, 1950, Pat. 461, 483-4 (FB). Shearer J. relied on Liversidge v. Anderson, L.R. (1942) A.C. 206, 268, Union Colliery v. Bryden, L.R. (1899) A.C. 580, 585, Legal Tender Cases (1870) 12 Wall 531 (U.S.), and Fletcher v. Peck (1810) 6 Cranch 86.

245. Law Lexicons and Dictionaries invariably deal with such categories. Nowhere is there "reasonable restrictions" defined. E.g. Wharton's Law Lexicon, 14th Edn. (4th reprint 1953), 1938, 842.

According to the majority view taken by Meredith C.J. and Das J. the law purported to restrict the right to free movement of the citizens of India on the subjective satisfaction of the executive without the latter's being compelled to furnish the grounds on which the restrictions were imposed. Relying on Emperor v. Vimlabai Deshpande,<sup>246</sup> Meredith C.J. held that the burden was on the State to show reasonable grounds for its action. In Vimlabai it was held by the Privy Council that R.129, Sub-rule (1) of the Defence of India Rules, 1939, under which "any police officer ... may arrest without warrant any person whom he reasonably suspects of having acted ... (a) ... in a manner prejudicial to the public safety or to the efficient prosecution of the war", meant (distinguishing Liversidge and confining it to "cases ... which may involve disclosure of secret and confidential information") that the police officer must satisfy the court that he had reasonable grounds of suspicion. Thus, according to Meredith C.J. the onus was on the State to show that the restriction was reasonable.

On the test of reasonableness, the Chief Justice held:

It is well-settled that there can be an objective test of reasonableness, and that is what the courts apply. They do not ask themselves, do we, as individuals feel satisfied that the restrictions are reasonable? But, would that fictitious individual, 'the reasonable man', that is to say, the normal average man, regard them as reasonable? 247

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246. L.R. (1946) 73 I.A. 144, AIR, 1946, P.C.123.

247. I.L.R., 1950, Pat. 461, 468.

Das J. held:

The words 'objective' and 'subjective' have a philosophical flavour; but put in ordinary language, e.g. the language used by Lord Wright in *Liversidge's* case - the objective test merely means 'external standard to be applied by some one other than the authority imposing the restriction, namely a judge; whereas the subjective test excludes an external yardstick and means the decision of the person who acts ... 248

In another case <sup>249</sup> of externment, the Bombay High Court discussed what it could do and not do in determining the reasonableness of restrictions imposed by the Bombay Public Security Measures Act, 1947. The main ground of attack on the statute was that, (a) it did not provide for supply of the grounds of externment, and (b) it did not provide for a time limit for the operation of the order. Thus, the first infirmity was common to the Bombay and the Bihar statutes. The majority in the Court held the Act of 1947 unconstitutional as imposing unreasonable restrictions.

Chagla C.J. for the majority held that the Court should look upon the restrictions from 'every point of view'. That would mean examining not merely the substantive provisions and the procedural provisions imposing restrictions, but also the 'manner' in which the restrictions were imposed in individual cases.

As in the Bihar case above, in this case the High Court was not impressed with the fact that the impugned law was a

248. I.L.R., 1950, Pat., 461, 475.

249. Jeshingbhai v. Emperor, AIR, 1950, Bombay, 363.

temporary measure.

The minority judge, Shah J., held that the test of reasonableness should be confined to: (a) whether the restrictions infringed a fundamental right, and (b) if so, whether they were 'reasonable in the interests of the general public'. That a law in its operation might produce hardships in individual cases was no ground for holding it unreasonable. In other words, the circumstances of individual cases should be excluded from the test of reasonableness under Article 19.

The Supreme Court of India discussed all these points in Dr. N.B. Khare v. Delhi.<sup>250</sup> Here too, the statute impugned provided for externment of individuals in the subjective satisfaction of the executive authorities. The East Punjab Public Safety Act, 1949, was ambiguous as to whether the authorities were obliged to supply the grounds of externment to the citizen externed. There was no time limit fixed by the Act as to the duration of orders made under it. But the Act had a total life of only two years.

The majority of three to two emphasised the temporary nature of the Act, construed the provision that grounds 'may' be supplied as 'must' be supplied, and upheld the Act. The minority of two were not so confident about the constitutionality of the Act. Their views will be considered presently.

The question before the court was whether it should confine itself to looking at the reasonableness of the restriction on the exercise of the fundamental right or whether

it could consider in addition the reasonableness of the circumstances and manner of imposition of the restriction in individual cases. For the majority, Kania C.J. said:

While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the court the question of reasonableness of the procedural part of the law. 251

It is not clear from this whether the Chief Justice answered the question posed. The result of the majority view appears to be that the substantive provisions that are directly <sup>251a</sup> responsible for the restriction(s) and the procedural provisions of the impugned law would be examined by the court. B.K. Mukherjea J. and Mahajan J. gave a dissenting judgment in which they assigned a wider scope for the inquiry into the reasonableness of restrictions. They refused to consider the restriction in the abstract without reference to the attending circumstances in individual cases. Mukherjea J. said:

With respect to clause (5), the learned Attorney-General points out at the outset that the word 'reasonable' occurring in the clause qualifies 'restrictions' and not 'law'. It is argued that in applying the clause all we have to see is whether the restrictions that are imposed upon the exercise of the right by law are reasonable or not, and we have not to enquire into the reasonableness or otherwise of the law itself. The reasonableness of the restrictions can be judged, according

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251. Kania C.J. at 214, col.1.

251a. A.K. Gopalan v. Madras, AIR, 1950, S.C. 27, (1950) S.C.R. 88. See below, 223.

to the learned Attorney-General, from the nature of the restrictions themselves and not from the manner in which or the authorities by which they are imposed. The question whether the operation of the law produces hardship in individual cases is also a matter which is quite irrelevant to our enquiry.

I do agree that in clause (5) the adjective 'reasonable' is predicated of the restrictions that are imposed by law and not of the law itself; but that does not mean that in deciding the reasonableness or otherwise of the restrictions we have to confine ourselves to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent, and that it is beyond our province to look up the circumstances under which or the manner in which the restrictions have been imposed. 252

His lordship held that it would not be possible to dissociate the actual contents of the restrictions from the manner of their imposition. He found that the whole scheme of the legislation and the circumstances under which the individual restrictive orders were made would have to be taken into account.

The dissenting judgments of Mahajan and Mukherjea JJ. clearly wished to give a wider scope for the inquiry. The distinction between the majority and minority judgments in this respect has not been sufficiently recognised in India. When in V.G. Row,<sup>253</sup> Patanjali Sastri C.J. laid down the classic test of reasonableness, it was a wider, comprehensive test that would have included the views of the dissenting

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252. AIR, 1950, S.C. 211, 216-17.

253. AIR, 1952, S.C. 196, 200, col.1.

minority in Dr. N.B. Khare.<sup>254</sup>

It seems inevitable that a court should be influenced by the circumstances under which the restrictions have been imposed in a given case. However, it seems too wide a statement if each individual case coming before the court has to be examined for a reasonable application of the rules, i.e. examined to see if under the circumstances of the case, there has been a reasonable application of an otherwise valid statute. This may seem to lead to undue judicial interference in the administration. But as we see from the two cases below, it has not had that consequence.

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In Oudh Sugar Mills v. Union, an order made under an otherwise reasonable rule but which was harsh under the circumstances and could not possibly be complied with was held unreasonable. Under the Sugar Control Order, 1966, the government could order sugar mills to release quantities of sugar for sale in the free, uncontrolled market. The petitioners were ordered to move their stocks within 28 days when in fact, there were no railway <sup>wagons</sup> ~~wagons~~ available to move the bags within that time.

The Supreme Court held that the period of 28 days was unrealistic under the circumstances, and instructed the authorities to vacate the order. It was held that not merely the law restricting Fundamental Rights but every order made under it should be reasonable. This may mean hard work for the

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254. AIR, 1950, S.C. 211.

255. AIR, 1970, S.C.1070.

administration but that (it would seem) is how it should be.

Another recent decision confirming this is Ramakrishna Hegde v. The Market Committee.<sup>256</sup> There an order made under the Bombay Agricultural Produce Markets Act, 1939, asking the petitioner to shift his market to a different site within ten days was held unreasonable while the Act itself had been held reasonable previously.<sup>257</sup> The Court suggested a period of one year as a reasonable time to comply with the order.

Both these cases can be fairly described as to do with the 'manner' in which the restrictions have been applied. Therefore, the wider view canvassed by Mukherjea and Mahajan JJ. in Dr. N.B. Khare, derive support from these two decisions. Even then there is a need to clarify what is meant by 'manner' of imposition of restrictions and 'circumstances' of individual cases. If they merely indicate an undefined area of judicial review, it has to be accepted as inevitable. This, in this writer's opinion, is how it has to be viewed. In any case, what circumstances are relevant and what are not will have to be arrived at by a process of elimination through decided cases. To start with, we can distinguish the two following situations as those in which the Court will not pronounce an order unreasonable:

- a) Possible hardship in individual cases due to fortuitous circumstances that bear no relation to the executive order.

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256. AIR, 1971, S.C. 1017.

257. Md. Hussain v. Bombay, AIR, 1962, S.C. 97.

- b) The possibility that if the order is held reasonable in the case before the Court that may possibly give rise to abuse of statutory power in future cases .

These two instances are no grounds for holding an order or even a law unreasonable. Point a) needs no further elaboration. Point b) has been formulated in different ways, such as, for example, where power is given validly its possible unreasonable exercise would be no ground for holding it invalid.

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. 258

Decided cases show that Indian courts have looked into the 'circumstances' prevalent at the time a law was passed in order to determine the objects for which it was enacted.<sup>259</sup> Some of the things taken into consideration are: legislative history which would include any report produced by a specially appointed commission of inquiry, the condition

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258. Per Ayyangar J. in Collector of Customs v. Sampathu Chetty, AIR, 1962, S.C. 316, 332, col.1. The observations are obviously not meant to allow colourable exercise of power. In the case, the Attorney-General sought to prove in evidence that certain departmental instructions governing the administration of section 178-A, Sea Customs Act, 1878, impugned before the Court, were reasonable and hence the section itself, he argued, should be held reasonable.

259. Express Newspapers v. Union, AIR, 1958, S.C. 578, (1959) S.C.R. 12; (1958) S.C.J. 113. See below, Collector of Customs v. Sampathu Chetty, AIR, 1962, S.C. 316, (1962) 3 S.C.R. 786. See below, 208. Arunachala v. Madras, AIR, 1959, S.C. 300, (1959) S.C.J. 297.

of those benefitted or adversely affected by the law, the duration of the law if the restriction it imposes is a serious one and so forth. The nature of the restriction imposed will be an independent factor: Is the restriction more in the nature of a punishment<sup>260</sup> or an undue interference with no saving features?<sup>261</sup> Is it a part of a well-organised trade mechanism?<sup>262</sup> Finally, is the restriction excessive<sup>263</sup> in view of the statutory purpose? Almost all these are elusive factors and it is difficult to describe these collectively more precisely than the 'circumstances' surrounding a given case.

A specific question as to the interpretation of 'circumstances' arose in the Supreme Court: Can the Court look at something done under a different statute while deciding the issue of reasonableness? This was the issue on which the Indian Supreme Court divided in Lord Krishna Sugar Mills v. Union.<sup>264</sup>

The Sugar Export Promotion Act, 1958, envisaged an export promotion scheme by which a quantity of sugar produced by various mills (operating the 'vacuum-pan process') was reserved for export. The quantity reserved in the case

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260. Raghubir Singh v. Court of Wards, AIR, 1953, S.C. 373.

261. Kavalapara K. Kochuni v. Kerala and Madras, AIR, 1960, S.C. 1080; (1960) 3 S.C.R. 887; (1961) 2 S.C.J. 443. See below,

262. Daya v. Chief Controller, AIR, 1962, S.C. 1796. See below,

263. Chintaman Rao v. M.P., AIR, 1951, S.C. 118.

264. AIR, 1959, S.C. 1124; (1960) 1 S.C.R. 39; (1960) S.C.J. 1119.

of each mill was not to exceed 20% of the total quantity produced by the mill and the export was to be handled by an agency composed of all the mills.

The cost of the export was to be deducted from the price obtained for the exported sugar. The export price happened to be lower than the home-market price and the payments were not received immediately. However, in order to offset the loss suffered by the sugar mills, the Government came to an understanding with them which was the mills were to be allowed an increase in the price of sugar to be sold in the home-market. This was accomplished under powers derived from Section 3 of the Essential Commodities Act, 1955, which enabled the Government to fix the price of essential commodities, including sugar.

Under these circumstances, the petitioner filed a writ complaining of infringement of its Fundamental Right under Article 19(1)(f) and (g). The contention was that the mill was forced to sell a part of what it produced at a loss. The constitutionality of the Sugar Export Promotion Act, 1958, it was argued, should be considered within its four corners and therefore, the reasonableness of restrictions imposed could not be determined with reference to other circumstances, such as price agreements or other adjustments made under other independent enactments. No other laws could be referred to unless any of them had been incorporated into the impugned measure by reference.

The majority in the Court (Hidayatullah J. writing

that judgment) held <sup>265</sup> that the whole legislative plan should be looked at by the Court. There was an export promotion scheme and whatever was done in connection with it should be taken into account. On that view, it was held that the Government had made adequate arrangements for compensating the loss suffered by the mills, and therefore, there was no infringement of the Fundamental Rights. In the majority view, the petitioner before them was also guilty of unreasonable conduct in that it employed delaying tactics to confuse and frustrate the administrative authorities.

The concurring judgment of Subba Rao J. laid emphasis on the point that the Essential Commodities Act, 1955, was a separate enactment and not part of any scheme or purpose for which the impugned Act was passed. To rely on a temporary notification (fixing the price of home sugar) amounted to placing the statute in a 'fluid state'. To decide the reasonableness of the statute on that view was 'to destroy the stability of legislation'. But the judge upheld the Act of 1958 on the basis of a compelling need to earn foreign exchange for the country's benefit. On that view, he found the restriction imposed reasonable.

Sarkar J. dissented on the following grounds:-

- a) The object of earning foreign exchange, however laudable, could not by itself and without more, make a restriction on the fundamental right to trade reasonable.

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265. Relying on Pillai v. Mudanayake, L.R. [1953] A.C. 514; [1955] 2 All E.R. 833 (P.C.).

A restriction on person's right to carry on his trade does not become reasonable, simply because it had been imposed on him to achieve an object of great necessity and undoubted merit. The reasonableness has to be judged in all the circumstances of the case and the object to be attained is only one of such circumstances. This, in my view, is too clear to require elaboration.<sup>266</sup>

One may be tempted to comment that if the national need is not a decisive factor, and the Court has no jurisdiction to discover an alternative solution to the emergency, challenge of the Act could create an impasse.

- b) It was quite obvious that the impugned law resulted in a loss to the manufacturers of sugar. It did not matter how much loss was caused. Even a small loss would be an infringement of their fundamental right.
- c) It was not certain that the machinery of Essential Commodities Act, 1955, could be utilised to allow the manufacturers to recoup the loss caused by the export scheme. The power under that Act was "for maintaining or increasing the supplies of any essential commodity or for securing their equitable distribution and availability at fair prices".
- d) Even assuming that there was power under the Act of 1955 to make adjustments in favour of the manufacturers, the impugned statute's validity would depend upon an executive act to which the impugned law gives no right. There was no compulsion or duty on the part of the Government to

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266. Ibid., 1143, para.56.

do or not to do anything under the Act of 1955. The test of the statute's constitutionality could not be based on such shifting ground. On that view, the impugned Act failed as it imposed an unreasonable restriction.

No doubt, in the majority judgment, the Act of 1958 was valid but the minority judgments are important for the draftsmen to study and take note of. It seems courts would be happy if the factors decisive of a statute's reasonableness appear in the statute itself rather than lie scattered elsewhere in the form of notifications or understandings between the Government and individuals. Temporary arrangements introduced an element of uncertainty and change, though in the case discussed it is possible to view the understanding between the Government and sugar manufacturers as legitimate. Therefore, the complaint in the minority judgments that the notification under the Act of 1955 might be changed by the Government at any time, seems unjustified. Ordinarily Governments are trusted to keep to their side of the bargain. If anything, it appears from the facts in the case that it was the petitioners who were intransigent and unreliable, and not the Government of India.

#### Reasonableness, Object of Legislation and the Directive Principles of State Policy

In the case discussed above, the majority attached sufficient importance to the object of the impugned statute to hold it constitutional. The concurring judge, Subba Rao J., saw serious objections to resting the decision in favour of its constitutionality on factors extraneous to the statute.

Yet he considered the object of earning foreign exchange so important that his concurring judgment can be said to rest entirely on it. The dissenting judge, Sarkar J., considered the object important but maintained that however laudable that may be, it could not be conclusive but was only one amongst many factors to be weighed by a court determining the question of reasonableness.

In terms of the classic test of reasonableness laid down by Patanjali Sastri C.J. in V.G. Row,<sup>267</sup> both the majority and minority judgments had something in their favour. The factors mentioned by Patanjali Sastri C.J. (which could only have been illustrative and not exhaustive) were: (a) The nature of the right alleged to have been infringed, (b) the underlying purpose of the restrictions imposed, (c) the extent and urgency of the evil sought to be remedied thereby, (d) the disproportion of the imposition and (e) the prevailing conditions at the time.

The majority judgment could be supported on the strength of (b) and (c) above, if not also of (d) since the extent of the restriction imposed on the petitioner was held not to be disproportionate by the majority. It is clear that the difference between the majority and the dissenting judgments lay in the emphasis they put on the object of the statute.

Commenting on the decision in Lord Krishna Sugar Mills,<sup>268</sup> M.C. Setalvad, the former Attorney-General of India, finds that

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267. AIR, 1952, S.C. 196, 200, col.1, above, 119.

268. AIR, 1959, S.C. 1124, above, 135.

the majority judgment cast the 'net far too wide' in determining the reasonableness of restrictions imposed by the impugned statute.

Not only does it consider the surrounding circumstances, but it has also taken into consideration contemporaneous legislation on the ground that they form part of a single scheme. The reasonableness according to this test is not to be judged from the object which the impugned legislation (itself) seeks to achieve but the Court is required to embark on a scrutiny of the related legislation and notifications based on them to discover its unity or wisdom (so far as the object is concerned). 269

There has always been controversy surrounding the exercise of judicial veto against laws designed to achieve objectives strongly desired by the Legislature and the executive. Whenever such 'favourite' legislation founders on the rock of judicial review, the cry goes out that the 'wrong' type of judicial policy-making goes on in the higher courts of the land. That is the time when the price to be paid for judicial review seems excessive. At present, the Indian judiciary is faced with demands 270 that it should be more

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269. M.C. Setalvad, The Indian Constitution, 1950-1965, University of Bombay, 1967, 160. (Words in brackets supplied).

270. Jai Jai Ram Vpadkhiyaya, 'Sociological Theory of Reasonableness' (1969) IX /January-June, The Indian Advocate, 61-68. The author urges that the notion of reasonableness should reflect the social and economic values pursued by the community. These values are embodied in the directives. Narayana Nettar, 'Fundamental Rights and Directive Principles', (1969) IX/October-December, The Indian Advocate, 24-32, maintains that the Indian Constitution is not politically 'neutral' but has the tone set by the Directives. That tone should govern the interpretation of the fundamental rights. V.S. Deshpande, 'Rights and Duties under the Constitution', (1973) 15/I, J.I.L.I. 101, maintains that the Directives and Rights equally govern judicial interpretation. V.R. Krishna Iyer, Law and the People, New Delhi, 1972, especially 158-173.

'sympathetic' to the ideals of the Indian Constitution as expressed in its Preamble and in the Directive Principles of State Policy,<sup>271</sup> while determining the reasonableness of restrictions imposed by laws passed to further those ideals. It will be no exaggeration to describe these demands as a movement, both in terms of the number of people who voice it, and that includes non-lawyers as well as lawyers, and in terms of the demand itself. The issues of compensation (the courts have insisted on full 'market value' for expropriated private property) and that of amendability of fundamental rights (the Supreme Court denied that power to Parliament in Golaknath v. Punjab) have provided<sup>the opportunity</sup> for the critics of the judiciary to point out that the mode of literal or grammatical interpretation of laws impugned before them is inadequate and unsuitable. It is argued that in an underdeveloped country such as India, what is required is a sociological interpretation which will emphasise the social purpose sought to be achieved by the impugned law.<sup>272</sup>

The Directive Principles of State Policy above everything else provide a point of pressure on the judiciary urging

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271. Articles 36 to 51 found in Part IV of the Constitution. Article 37 states that the principles "shall not be enforceable by any Court" but "are nevertheless fundamental in the governance of the country".

272. Jagat Narain, 'Equal Protection Guarantee and the Right of Property under the Indian Constitution' (1966) 15/1, I.C.L.Q. 199, 203 ff. The author argues that the idea of 'reasonable classification' under Article 14 of the Constitution cannot be based on any doctrinaire idea of equality but should take into account the disparities of wealth and opportunities between different groups of people in India.

them to conceive of a different, perhaps, broader notion of reasonableness in regard to 'socio-economic' laws. Thus, V.S. Deshpande, a judge of the Delhi High Court, finds the test of reasonableness laid down by Patanjali Sastri C.J. in V.G. Row inadequate.

With great respect ... one may doubt whether these observations (of Patanjali Sastri C.J.) sufficiently emphasise the duty of the judiciary in interpreting the Constitution and social legislation intended to implement the directive principles of state policy. 273

H.M. Seervai put the matter differently when he commented on Sastri's test of reasonableness:

You will have noticed that Sastri C.J.'s test of reasonableness omits one concept to which Holmes rightly attached great importance - the right of the majority to embody its opinion in law. I think that this is implicit in Sastri C.J.'s classic test, but his failure to state it expressly was unfortunate. 274

In other words, judicial deference to the objectives embodied by legislative majorities in their laws should be an important factor in the determination of reasonableness. But as we have seen from Lord Krishna Sugar Mills (above, 135-7) how much emphasis that should carry is not easy of decision.

There is enough evidence from decided cases to show

273. V.S. Deshpande, 'Rights and Duties under the Constitution', (1973) 15/1, J.I.L.I., 94, 101. Words in brackets supplied.

274. H.M. Seervai, The Position of the Judiciary under the Constitution of India, University of Bombay, 1970, 66.

that Indian courts have appreciated the object of the statutes impugned before them. Much detailed information will be given in Chapters 3 below. In doing so, they have not demanded hard proof of the element of public interest, but have been willing to deduce it from the statute itself or even the attendant circumstances. They have done so mainly through the acceptance of the 'mischief Rule', otherwise known as the Rule in Heydon's case.<sup>274a</sup>

But to turn for a moment to another aspect of the matter, in one of the rarer studies of its kind B.N. Mukerjee and David Willcox (below, 145) focussed attention on a new element affecting the question of reasonableness, which element, in this writer's opinion, takes priority over the type of demands made on the judiciary as outlined above. The main point of their essay has to do with the need to present the judiciary with realistic and sensible laws - sensible because they grasp Indian problems competently and grapple with them adequately - before the judiciary's performance can be tested and criticised. The assumption beneath their essay is that this has not been done in India. With this the present writer agrees. It is rightly argued by them that the draftsmen of statutes working with the policy-makers can achieve a great deal by an able grasp of what they mean to achieve and how they could do so within the constitutional 'room' available to them. They rightly see

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274a. (1584) 3 Co. Rep. 7b.

the draftsmen's responsibility and judicial responsibility as complementary.

This expansion of judicial responsibility brings with it, in turn, an extension of the obligation of those who initiate governmental action and, in particular, of those who frame statutes touching upon fundamental rights. In addition to their traditional responsibility to get programmes going, they now owe to the courts, in greater measure than ever before, a responsibility to elucidate the constitutional implications involved.

... ..  
 In such circumstances, it is the duty of the draftsman to examine analogous cases, to note the trend of judicial opinion, and to make his own interpretation of applicable constitutional provisions. On the basis of this interpretation, his statute will be shaped; and it is incumbent upon him to indicate, through the use of clear statutory language and explicit provisions, the theory of the act supporting its validity. 275

The authors view government planning as an evolving process in which a continuous decision-making goes on. It is essential, therefore, for the draftsmen to deduce as clearly as possible, the substantive and procedural requirements or limitations with which the planning statute should conform. They urge that draftsmen should be able to project present judicial trends into fair predictions as to future reactions of the judiciary to their statutes. Then they go on to point out the main defect in present-day statutory drafting in India.

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275. B.N. Mukherjee and David L. Willcox, 'A Constitutional Balance, The Needs of Government Planning v. The 'When' of Procedural Reasonableness - A Draftsman's Task', (1967), 9 J.I.L.I. 275, 321.

One result of this approach would be some relaxation in the overly rigid conformity to pre-existing pattern that unhappily characterizes much of Indian statute law. Reliance upon the language of past statutes can be dangerous unless it reflects an independent analysis of their present applicability.

... ..  
 The 'safety' to be gained from copying pre-Constitution statutory language, therefore, is more apparent than real. Furthermore, such uncritical reliance is all the more dangerous because too often it tends to draw the attention of the draftsman from his main purpose; instead of shaping the statute to suit the programme of action, he begins to shape his programme to suit the statute. 276

After discussing two cases, one decided by the Bombay High Court,<sup>277</sup> and the other by the Calcutta High Court,<sup>278</sup> the authors come to the conclusion that:

these cases establish beyond doubt the willingness of the judiciary to accept both a planning statute, and such plans or other recommendations as may be formulated and adopted under it, as reflecting a valid public interest. 279

The Bombay case involved acquisition of lands to develop industrial areas. The High Court was prepared to hold the acquisition as being for a 'public purpose' though the actual provision in the statute was very generally worded and could have been held unconstitutional for that reason.

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276. Ibid., 321-2.

277. Sadrudin Suleman v. J.H. Patwardhan, AIR, 1965, Bom.224.

278. Jibaneswar Bose v. A.B. Mukherjee, AIR, 1964, Cal. 45.

279. (1967) 9 J.I.L.I. 275, 291.

the acquisition of land for the purposes of the development of areas from public revenues or from some funds controlled by or managed by a local authority and subsequent disposal thereof in whole or in part, by lease, assignment or sale with the object of securing further development.  
Land Acquisition (Bombay Amendment) Act, 1953.

In the Calcutta case, the High Court was prepared to view the filling of canals in a low-lying area of the city of Calcutta as part of a major plan for the whole of Calcutta and the Court overruled the objections raised by the petitioners in the case.

Much of what the authors say <sup>has</sup> ~~was~~ been echoed by Mr. Atul Setalvad's discussion of planning aspects of acquisition under the Land Acquisition Act, 1894.<sup>280</sup> One of the points of coincidence between the two articles is the procedural reasonableness enabling the owner of the land or house sought to be acquired, an opportunity to present his objections. The wrong timing of the occasions on which he could so raise his objections has resulted in prolonged litigation and the result has been frustration of State plans.

Extremely unfortunate to this discussion are two pronouncements of the Supreme Court which are misleading unless seen in the context of the two cases concerned.

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280. 'A Study into Certain Aspects of the Land Acquisition Act, 1894', (1971) 13 J.I.L.I. 1.

In the first of these, R.C. Cooper v. Union, the Supreme Court after discussing A.K. Gopalan (below, 223) observed in disapproval of its own earlier decision:

But it is not the object of the authority making the law impairing the right of the citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. 280a

Again in Bennet Coleman & Co. v. Union, following R.C. Cooper, the Supreme Court held:

The object of the law or executive action is irrelevant when it establishes (sic) the petitioner's contention about fundamental right. 280b

These observations appear to suggest that the Court would disregard or pay no deference to the object of the law, but that is not what the Supreme Court meant to convey. The Court was answering the Union's contention which stretched the idea of 'incidental effect' of legislation unreasonably. A line had to be drawn between an 'incidental effect' and 'direct effect' of legislation curbing fundamental rights. That was the context in which the observations were made. The Supreme Court did not deny that its task included establishing the relationship between the object of the law, the restrictions it imposes and the right that belongs to the citizen.

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280a. AIR, 1970, S.C. 564, 596, col.1. See below, 389.

280b. 1 S.C.J. 177, 193, col.1. See below, 264.

Whether it is described as 'sociological interpretation' or by any other name, the inclusion of the Directives in the judicial notion of reasonableness has become a compelling demand. As has been observed above, the search is on for some consistent formula through which the Directives can 'come in' without spoiling the essence of fundamental rights. At first glance, it seems an impossibility. To think of it in strictly juridical terms, the immediately available answer is that it should be left to the judiciary to strike the balance between the Directives and the Rights. But it seems too vague to leave it there. That has been the position adumbrated by the Supreme Court, namely, the Directives were subordinate to the fundamental rights but were to be considered as one of several factors relevant in the determination of reasonableness of restrictions imposed on the rights.<sup>281</sup>

Therefore, it was up to the judiciary to weigh all these factors. But the present demands in support of the Directives imply that they wish to see more concrete evidence that the judiciary does indeed take the directives into account. The Constitution (Twenty-fifth Amendment) Act, 1971,<sup>282</sup> has not waited for such proof but has gone ahead and by-passed judicial review altogether. By adding Article 31C two directive

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281. Madras v. Champakam, AIR, 1951, S.C. 226, (1951) S.C.J.313. Mohd. Hanif Quareshi v. Bihar, AIR, 1958, S.C. 731, (1959), S.C.R. 629. See below, 394.

282. See Appendix I.

principles (in Article 39(b) and (c)) <sup>283</sup> have been given special constitutional status. Laws passed to further these directive principles are now immune from constitutional review based on Articles 14, 19 and 31. This amendment represents a serious blow to judicial review and to constitutionalism.

The primary responsibility for furthering the interests represented by the Directives lies on the Legislatures and Governments in India. It is also their responsibility to adequately articulate those interests in the laws passed by them. The present demands make it appear that somehow the initiative lies with the judiciary to articulate and overtly support the Directives in their judgments. Indeed judges have expressed their support and have also based their findings of reasonableness on the Directives. But the fact remains that initiative will always lie with the Legislatures and not the Courts. Therefore, putting the whole responsibility on the judiciary amounts to viewing the priorities in the wrong order.

One major difficulty regarding the Directives is that most of the important ones are couched in very general terms capable of any interpretation that may be put on them. In

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283. 39. Certain principles of policy to be followed by the State - The State shall, in particular, direct its policy towards securing -
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
  - (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

the Directives quoted above expressions like 'concentration of wealth' or 'common good' or 'common detriment' can mean a variety of things to a variety of men and women. To give them the special status that the Twenty-Fifth Amendment has, it seems, amounts to inviting controversy in the coming years. Each successive Government is different from the preceding one and therefore, to give a carte blanche to all of them is surely inviting controversy. The generality of the language used in formulating the Directives and the range of subjects covered, from the encouragement of Panchayats<sup>284</sup> (Article 40) and preservation of cattle wealth (Article 48, under which comes the need to protect cows) to respect for International Law (Article 51(c)), make it by far the most difficult part of the Constitution for any one to interpret decisively. Indeed, this was the main reason why the Directives were made non-justiciable by the framers - a position which has not changed now.

e/ Nor do we find as much conscientious drafting attention being given to the principles as to fundamental rights or any other vital provisions of the Constitution. In fact, some of the directives are so broadly formulated that one can derive whatever policy guidance one wants from them. 285

Everything points to the need, first in the order of priorities, for imaginative but realistic laws. That is the only way in which to evoke judicial response. This fact is

284. Self-governing village council considered to be one of India's indigenous institutions.

285. Upendra Baxi, "'The Little Done, The Vast Undone' - Some Reflections on Reading Granville Austin's The Indian Constitution", (1967) 9 J.I.L.I., 321, 345.

supported by the history of Constitutional development in the United States. Apart from B.N. Mukerjee and David Willcox (above, 145) another contributor to the Journal of Indian Law Institute, Sheldon D. Elliot who like Willcox is an American lawyer, has emphasised <sup>286</sup> the basic need for focussing one's efforts at the drafting stage. Only then he goes on to point out that,

Statutory interpretation as a component of the judicial task and function is not - and indeed, in its nature it cannot be - an exact science. It calls for the exercise of judicial discretion and judicial statemanship of a high order. To aid the courts in the proper and wise performance of this function, a basic rule of construction like the 'mischief rule' should be accorded preference over a too rigid adherence to the strict letter of the law with its concomitant policy of 'letting the chips fall where they may'. 287

Another American contributor to the Indian journal, Arthur Taylor von Mehren, appears to take the view <sup>288</sup> that it is judicial thinking that ultimately governs everything else, not only the argument in the bar but legal thinking in general, and therefore, we may conclude the thinking of draftsmen too.

The extent to which the judicial process in a given society realizes its potential depends in some considerable measure on the kind and quality of thinking encouraged by the court. For example, if courts in their judgments react mechanically and

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286. 'Statutory Interpretation and the Welfare State', (1959-60), 2 J.I.L.I., 255, 270-1.

287. Ibid., 271.

288. 'The Judicial Process with particular Reference to the United States and to India', (1963) 5 J.I.L.I., 271.

unimaginatively to problems they encourage corresponding habits of mind in the legal profession as a whole; lawyers naturally enough tend to present to judges the kind of arguments that have, in the past, been persuasive. The ultimate vice of the rigid rule of stare decisis that has emerged in England lies here: the profession, even the academic lawyer, is encouraged to consider that the essence of the judicial process lies in a kind of verbalistic logic chopping. 289

It is certainly true that by training and by inclination the Indian judges have belonged to the English legal tradition. The implications in many recent writings have been that that tradition has been responsible for the narrow and legalistic approach to the Constitution adopted by the Indian judges. 'Legalism' has come to mean an apparently outmoded and perhaps, even harmful idea. But at the same time, the critics of legalism do not seem to want a modern version of 'palm-tree justice' (not meant to be pejorative) devoid of all 'legalism'. What lies in between must indeed be a very subtle process.

It is this writer's view that grammatical or (better still) a natural interpretation of statutes will continue to be the basic rule even for constitutional purposes. Hence, it is that the draftsmen can achieve so much and yet very little attention has been paid to what can be done to improve that task. None of this is meant to belittle the central role of the judiciary. But theirs is a mainly passive role with possibilities of 'controlled activism'. It is agreed by everyone that the way that opportunity for 'controlled activism' is handled qualifies the judiciary

for greatness.

Contemporary essays critical of the judiciary in India make it appear that there is a special version of judicial review in the case of laws enacted to further the Directives and another more ordinary version in the case of laws that have no direct bearing on the directives but which nevertheless, are in the public interest. Postulating such a dual standard would be absurd. It seems an altogether more feasible proposition to frame realistic laws with clear objectives. Judicial reaction may then <sup>be</sup> justifiably scrutinised.

#### Retrospectiveness and Reasonableness

The view that has been consistently maintained in India is that the retrospective operation of a law (except where it is a penal ex post facto law in which case it would be hit by Article 20) will not render it ipso facto unreasonable.<sup>290</sup> It is conceded that retrospectiveness is an element in the determination of the reasonableness of restrictions on a fundamental right but it could be overlooked if the statute in many of its other aspects appears to be reasonable.<sup>291</sup>

Thus the Indian Supreme Court in West Bengal v. Subodh Gopal<sup>292</sup> reversed the decision of the Calcutta High Court, which held that West Bengal Revenue Sales (W. Bengal Amendment) Act, 1950, retrospectively affected the vested rights of purchasers of properties at revenue sales to evict under-

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290. West Bengal v. Subodh Gopal, AIR, 1954, S.C.92. Mysore v. Achiah Chetty, AIR, 1969, S.C. 477.

291. Rai Ramakrishna v. Bihar, AIR, 1963, S.C. 1667. R.L. Arora v. U.P., AIR, 1964, S.C. 1230.

292. AIR, 1954, S.C. 92.

tenure holders and therefore, amounted to an unreasonable restriction on their right to property.<sup>293</sup>

The Supreme Court's view was that tenancy legislation like the Act of 1950 ~~were~~<sup>was</sup> usual in India and from that long-established tradition the Act was reasonable, its retrospective operation notwithstanding.

This decision needs to be distinguished from a later case, Jayavatsingh v. Gujarat,<sup>294</sup> where too the impugned legislation related to tenancy matters and was retrospective in character. The difference was that the legislation was not a fair scheme to benefit tenants but was a device to reduce the present value of a landlord's interest, with the consequence that any possible compensation payable to him on his interest being transferred to his tenants would be less. The Supreme Court held that such retrospective adjustments adversely affecting vested rights, in this case a straightforward cut in the value of the rights, would be unreasonable and void.

With the exception of this case, so far as this writer is aware, there has not been any other holding a law unreasonable because of its retrospective operation. One good reason for this may be that most retrospective laws have been taxation measures which have amended inadequate provisions or loopholes in previous measures in order to sustain taxation throughout a given period. The Indian Supreme Court has

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293. See Subodh Gopal v. Bihari Lal, AIR, 1951, Cal.85.

294. AIR, 1962, S.C. 821.

consistently held that taxation as an attribute of a sovereign Parliament and State legislatures implies the widest discretion and that would include validating taxes retrospectively.<sup>295</sup>

The two following decisions illustrate another aspect of the same question where the Indian Supreme Court refused to strike down retrospective measures.

In Narottamdas v. Madhya Pradesh<sup>296</sup> by passing the M.P. Minimum Wages Fixation Act, 1962, the State Government prescribed retrospectively rates of minimum wages for workers in the bidi manufacturing units. In so doing, the Government reversed earlier High Court decisions holding similar rates fixed under the Minimum Wages Act, 1948, ultra vires the Act. In other words, the Government armed themselves with more power but did so retrospectively.

The Supreme Court held that the Act of 1962, impugned before them, was enacted on the basis of Legislative Entry No.24, List III (concurrent List), dealing with minimum wages. The power given there enabled the passing of such a legislation as the Act of 1962. There was no question of viewing the matter as one affecting the petitioner's right under Article 19(1)(g).

A similar decision emphasising the plenary powers of Indian legislatures is to be found in Mysore v. Achiah Chetty,<sup>297</sup>

295. Rai Ramakrishna v. Bihar, AIR, 1963, S.C.1667.

296. AIR, 1964, S.C. 1590.

297. AIR, 1969, S.C. 477.

where one of two procedures governing the same matter was discarded by legislation which was retrospective. The existence of two procedures giving the authorities an unexplained discretion to resort to either one has been held unreasonable under Article 14. It was in order to obviate any challenges that one of the procedures was done away with altogether. But it was done while petitions challenging that very thing were pending in the High Court. The petitioner's case was that notifications were issued while the two procedures were in existence but subsequently, they were validated by the abolition of one of the procedures. This according to him was unreasonable. The Supreme Court rejected the contention. This does seem hard. But on the other hand, the clear right enjoyed by a legislature to enact retrospectively could not be denied.

There is a need in this area to limit the extent to which Legislatures can pass retrospective laws. The emphasis put by the Indian Supreme Court on the plenary nature of legislative power to pass prospective or retrospective laws cannot be a full answer to the problem of retrospective legislation taking away vested rights. There must be some indication that the citizen's fundamental rights do exist and matter.

Taxation laws have been regarded by Indian Courts as belonging to a special category of privileged legislation. Even conceding that to be the case, a pronouncement qualifying the generality of legislative power to enact retrospective laws is called for.

On the main theme of this section, the early decision of the Supreme Court in Dr. N.B. Khare<sup>298</sup> did not favour a too generalised view of the Court's power to determine the question of reasonableness. But the ratio of that case that the Court could examine the substantive as well as procedural provisions of the statute means full review of the laws. Except for Dr. N.B. Khare and perhaps V.G. Row,<sup>299</sup> there has been very little general discussion in the Supreme Court of the nature of the review in determining reasonableness. At times one looks for such a general framework in the context of particular cases and one is disappointed to find none. Perhaps, it is felt, that for the actual decision of the cases no such general theoretical outline is required.

Whatever the theory, there is at least one practical question involved in the determination of reasonableness of restrictions. That is the question of burden of proof.

#### SECTION 1(b) BURDEN OF PROOF UNDER ARTICLE 19

The inconsistencies in the law relating to burden of proof in determining constitutionality of statutes in India affects the scope of judicial review under the Indian Constitution. Relevant here is the question of presumption in favour of constitutionality or validity of statutes, a notion that the Indian Supreme Court first entertained in A.K. Gopalan's

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298. AIR, 1950, S.C. 211.

299. AIR, 1952, S.C. 196, 200, col.1.

case.<sup>300</sup> The position early commentators have argued for is that as far as the rights guaranteed by Article 19 are concerned, the presumption in favour of constitutionality could not apply. The rights under Article 19(1) are regarded as the rules and the other clauses of Article 19 are considered the exceptions. On that basis the argument goes that the burden of proof is on those who seek the protection of the exceptions.<sup>301</sup> None of the early Supreme Court decisions deals with this question. Neither Dr. N.B. Khare<sup>302</sup> nor V.G. Row,<sup>303</sup> considered authorities on the test of reasonableness under Article 19, deal with the point about burden of proof. But the remark made by Bose J. in Ram Singh v. Delhi<sup>304</sup> that it was the rights which were fundamental and not the limitations<sup>305</sup> was perhaps made to show where the

300. Per Mahajan J. "The benefit of reasonable doubt has to be resolved in favour of legislative action, though such a presumption is not conclusive." (1950) S.C.R. 88, 222. A recent example is Rayala Corpn., v. Director of Enforcement, AIR, 1970, S.C. 494, 499.

301. "To such a scheme the presumption of prima facie constitutionality has no scope. The judges are asked the question - is the legislation good? There is something hazy in the idea that they may begin by saying that it is good because it is legislation. And if nothing else appears the restrictions are 'reasonable restrictions' because they are legislative restrictions." Atul Chandra Gupta, Reasonable Restrictions, (1951) 5 Indian Law Review, 72, 74-5.

302. AIR, 1950, S.C.211.

303. AIR, 1952, S.C. 196, 200, col.1.

304. AIR, 1951, S.C.270; (1951) S.C.R.451; (1951) S.C.J. 374.

305. Ibid., 276, col.1.

burden of proof was under Article 19. This view of Article 19 as embodying rules and exceptions is unfortunately not the consistently accepted view.

Sarkar J. in his dissent in Khyerbari Tea Co. v. Assam<sup>306</sup> held that the fundamental right guaranteed by Article 19(1)(g) was what was left after the restrictions in 19(6) were taken into account. In other words, he denied that Article 19(6) enabling the imposition of reasonable restrictions was an exception to Article 19(1)(g).

This dissenting view of a single judge has now become the view of the Delhi High Court. In S.I.S. Ltd. v. Union<sup>307</sup> the facts were these: the petitioner challenged the mode in which the price of sugar was fixed by the Government acting under Section 3(3)(c) of the Essential Commodities Act, 1955,<sup>308</sup> They contended that it was up to the Government to show that the price they fixed was not unreasonably low and further, that the manner in which they arrived at the price was also not unreasonable.

The High Court held that the burden was on the petitioner to show that the mode in which the price was calculated was unreasonable. Further, the following view was

306. AIR, 1964, S.C. 925; (1964) 5 S.C.R. 975.

307. AIR, 1972, Delhi, 159.

308. 3(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices ... it may, by order, provide for regulating ...

(3)(c) where neither clause (a) nor clause (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale.

expressed by the court:

The object of the imposition of restrictions on a fundamental right is to secure the interests of the society and the State as against the excesses which may be committed by an individual in exercising a fundamental right. It does not take away from the individual anything or any right or liberty for any wrong done by him. The restriction which appears to be imposed on a fundamental right is, according to the scheme of Part III of the Constitution, really a built-in part of the limited fundamental rights which are conferred by Part III: The right possessed by the individual was limited from its very inception. 309

It was held that the analogy of onus of proof being borne by the State in proceedings under penal statutes could not be extended to Article 19. This holding means that a citizen complaining that his fundamental right has been infringed must prove not only that he has a prima facie case but also that what the legislature or the executive has done was clearly unreasonable.<sup>310</sup> This may not appear to be such an unconscionable proposition and citizens may well be able to discharge this burden in most cases. But it does seem to derogate from the idea that these rights are fundamental and that the State can impose only those restrictions that would be judged by the courts to be reasonable. Since it enables the State to do something, that is to say, to impose restrictions, it seems more natural to put the burden on the

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309. AIR, 1972, Delhi 159, 164 col. 2.

310. In regard to two earlier cases where price-fixing laws were employed, no such burden was expressly cast on the petitioner. It appears the State justified the prices fixed as reasonable. M/s Diwan Sugar & General Mills v. Union, AIR, 1959, S.C. 626; (1959) Supp. (2) S.C.R. 123 and Rohtas Industries Ltd. v. Union, AIR, 1971, Patna, 414.

State to show that what it has done in abridging the fundamental right was reasonable. Moreover, it is the State which is in a better position to put all relevant facts and material in favour of the restriction imposed. This may, in practice, prove to be an opportunity for the public to know the background to many a statute or statutory instrument which it may not otherwise do. However, that is only incidental.

The decision in S.I.S. Ltd. v. Union <sup>311</sup> has an unsettling effect on the law. In this connection a similar unsatisfactory decision, though it relates to an administrative law point, may be referred to. Article 19 was not directly invoked there, but the decision has a bearing on the question of reasonableness. In V.V. Iyer v. Jasjit Singh <sup>312</sup> the appellant, a businessman, imported agricultural machinery on the strength of an import licence which he obtained by representing that the machinery to be imported was manually operated. The customs authorities maintained that it was, in fact, mechanically operated equipment and they charged the appellant with having obtained an import licence through misrepresentation and in violation of the import regulations. The appellant was fined Rs.80,000 and the goods imported, worth Rs.30,000 were confiscated.

The appellant demonstrated to the authorities that the machinery could be operated manually. The Supreme Court assumed that the machinery could be operated in either

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311. AIR, 1972, Delhi, 159.

312. AIR, 1973, S.C. 194.

way, but held that unless the order of the customs authorities was manifestly unreasonable, of the two possible views the one favourable to the administration would prevail.

This result was arrived at exclusively from the standpoint of the High Court's jurisdiction under Article 226 to review the decisions of administrative tribunals. The Supreme Court had in an earlier decision in Collector of Customs v. K. Ganga Setty<sup>313</sup> held that a High Court could not interfere with the finding of the customs authorities as to which entry of the import regulations governed a particular item of import unless the finding was perverse or manifestly unreasonable.

This decision was reinforced in Girdharilal v. Union<sup>314</sup> where the Supreme Court laid down that a High Court, acting under Article 226, was not sitting in appeal over the decisions of customs authorities.

But these two cases did not fully explain an earlier decision in A.V. Venkateswaran v. R.S. Wadhvani<sup>315</sup> where the Bombay High Court did reverse a finding of the customs authorities and the Supreme Court upheld the High Court's decision as valid. The Supreme Court and the High Court below disagreed with the authorities' determination, but there was no basis for saying that that determination was perverse or manifestly unreasonable. Yet the courts interfered and the

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313. [1963] 2 S.C.R.277.

314. [1964] 7 S.C.R.62.

315. AIR, 1961, S.C.1506.

Supreme Court both on procedural and substantive grounds upheld the citizen's case.

It is quite clear that it is not feasible to have every decision of an administrative tribunal reviewed by a High Court or the Supreme Court. What is contended for here is that the presumption in favour of the administration has to be considerably modified where penal consequences must follow <sup>316</sup> if the administration's view is to prevail and where the citizen's case is not an attempt to defraud <sup>317</sup> the laws of custom and excise. If indeed, the petitioner in V.V. Iyer intended the machinery he imported to be operated manually it was plainly unfortunate to let the customs authorities insist that there were other possibilities. This is particularly so in view of the Supreme Court's admission that the machinery enabled manual as well as mechanical operation.

The decision in V.V. Iyer <sup>318</sup> gives the impression that the administration exists not for the citizen but for its own sake. The man in the street is understandably tempted to comment that the sooner the presumption stated by the Supreme Court in this case is modified the better for the citizens.

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316. So held in I.T. Commr. v. G. Bannerjee & Co., AIR, 1965, S.C. 1977. The Supreme Court applied the 'yardstick of a prudent businessman'.

317. See Fedco (P) Ltd. v. Bilgrami, AIR, 1960, S.C.415, a licence obtained by fraud or misrepresentation could be cancelled under Section 9(a) of the Imports (Control) Order, 1955. That was held to be a reasonable restriction.

318. AIR, 1973, S.C.194.

The correct view on the question of burden of proof under Article 19 was, it is submitted, taken in the very first year of the Constitution's life in Brajnandan Sharma v. Bihar<sup>319</sup> - a significant decision in many respects. There Meredith C.J. held that once a citizen establishes that prima facie there has been an infringement of his fundamental right or rights the burden was on the State to bring the law within the 'exception' in clauses 2-6 of Article 19.

This clear and workable proposition was adopted by the Supreme Court on at least three occasions, only to be contradicted by other decisions of which S.I.S. Ltd. v. Union<sup>320</sup> is the most recent one.

Decisions taking the right view call for consideration. In Saghir Ahmad v. Uttar Pradesh<sup>321</sup> the Supreme Court stated:

There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. If the respondents do not place any materials before the court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation

319. I.L.R. [1950] Pat.461. Above, 125 ff.

320. Above , 160.

321. AIR, 1954, S.C.728.

was not reasonable and was not conducive to the welfare of the community. 322

In Khyerbari Tea Company Ltd. v. Assam,<sup>323</sup> Gajendragadkar J. (for the majority) after confirming the above dictum in Saghir Ahmad (above, 165) went further and held that different considerations applied to cases under Article 14 (The Right to Equality: see Chapter 2, below, 171 ). There the 'initial presumption of constitutionality may have a larger sway' and the petitioner may have to show that the impugned law denied equality before the law, or equal protection of the laws.<sup>324</sup>

A third decision is to be found in Vrajlal Manilal & Co. v. Madhya Pradesh<sup>325</sup> where the court put the onus on the State to show the restriction to be reasonable after the petitioner had shown a prima facie infringement of his fundamental right.

#### Distinction between Articles 14 and 19

The distinction between Article 19 and Article 14 in the matter of presumption of constitutionality was for the first time recognised by the Supreme Court in Khyerbari.<sup>326</sup> But before that decision much confusion prevailed in the past in the judgments of the / <sup>Supreme Court</sup> which did not maintain

322. Ibid., 738, col.2.

323. AIR, 1964, S.C. 925; (1964) 5 S.C.R.975.

324. Ibid., 1003-1004.

325. AIR, 1970, S.C. 129, 135, col.1; see also Mohd. Faruk v. Madhya Pradesh, AIR, 1970, S.C. 93, which takes the right view.

326. AIR, 1964, S.C.925; (1964) 5 S.C.R. 975.

the distinction and freely quoted passages applicable to Article 14 in support of a similar presumption in cases arising under Article 19. This has been a substantial cause of contradictory statements on the point from the Supreme Court Bench.

Thus, in Hamdard Dawakhana v. Union of India<sup>327</sup> both Articles 19 and 14 were invoked. But the Court laid down a common rule of presumption in favour of constitutionality in all cases.

There have been discussions in High Court decisions where a similar confusion appears to have prevailed. In Shersingh v. Rajasthan,<sup>328</sup> a case where the Rajasthan Produce Rents Regulating (Amendment) Act, 1952, was challenged on the ground that Article 19(1)(f) was violated, the majority held that there was always a presumption that a statute was constitutional, and the burden was upon him who assailed its constitutionality to prove that there was 'a clear transgression' of constitutional principles. The majority mistakenly relied on a dictum of the Supreme Court from the judgment in Chiranjit Lal v. Union<sup>329</sup> case on Article 14. There, Fazl Ali J. had observed:

It is the accepted doctrine of the American Courts, which I consider to be well founded on principle, that the presumption is always in favour of the constitutionality of an enactment, and the

327. AIR, 1960, S.C. 554; (1960) 2 S.C.R.671; (1960) S.C.J.611.

328. AIR, 1954, Raj. 65 (F.B.).

329. AIR, 1951, S.C. 41.

burden is also upon him who attacks it to show that there has been a clear transgression of the constitutional principles. (Emphasis supplied). 330

The Rajasthan High Court disagreed with Meredith C.J.'s view expressed in Brajnandan Sharma<sup>331</sup> that the petitioner attacking the constitutionality of a law had merely to show that prima facie the law violated his fundamental rights.<sup>332</sup> But the concurring judge, Bapna J., held that different considerations applied to Article 14 and Article 19 respectively. He preferred the view expressed by Meredith C.J. in Brajnandan Sharma (above) and held that the burden was on the State to show that a restriction on a right guaranteed under Article 19 was reasonable.

Harris C.J. of the Calcutta High Court had already applied the same observations of Fazl Ali J. in Charanjit Lal v. Union and held:

Where such relief depended upon whether a legislative provision was ultra vires and void the onus of establishing such invalidity rested on the party challenging the provision in question. 333

The challenge there was to section 7 of the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950, on the ground that it violated the right to hold property guaranteed by Article 19(1)(f). Unlike the Rajasthan High Court, the Calcutta High Court did not demand proof of 'clear trans-

330. Ibid., 45.

331. I.L.R. [1950] Pat.461.

332. AIR, 1954, Raj. 65, 70.

333. Subodh Gopal v. Behari Lal, AIR, 1951, Cal. 85, 89.

gression of constitutional principles' before the petitioner's case could be accepted. After all, there is a difference between a prima facie case to be made out by the petitioner invoking Article 19 and a burden on him to prove that the impugned law clearly transgressed the rights.

The presumption has, indeed, been rightly applied <sup>334</sup> in the case of Article 14, to mean that the legislature does not ordinarily pass unequal laws, i.e. laws that discriminate between classes and people. That seems different from a similar presumption applied to Article 19 to mean that an enactment prima facie violating a fundamental right in Article 19 must be taken to impose only reasonable restrictions. A 'short' presumption that laws are passed in good faith is not the same as a 'long' presumption which goes further and holds that the laws are presumed to impose reasonable restrictions on fundamental rights.

It is clear from the discussion so far that the presumption of constitutionality is a crucial question and its application to Article 19 has a special significance. A general presumption in favour of the statute can be compatible with the main burden being on the State to prove that a law which is prima facie violative of a fundamental right imposes only reasonable restrictions. The general presumption in favour of the statute's validity is rebutted once a prima facie violation of a fundamental right is shown. As will be seen in the next <sup>section of this</sup> chapter, Article 14 is governed by a different set of considerations. The unique position of Article 19,

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334. Chiranjit Lal v. Union, AIR, 1951, S.C.41, 45.

therefore, must be recognised for the purposes of burden of proof.

CHAPTER 2

SECTION 2(a) REASONABLENESS OF DISCRIMINATORY CLASSIFICATION  
UNDER ARTICLE 14

14. Equality before law:- the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

An examination of the idea of reasonableness in the Indian Constitution cannot be complete without a look at Article 14. As a check against arbitrary exercise of State power this provision is as important as Article 19 and is more often invoked, in many cases along with Articles 15 and 16. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and Article 16 secures equality of opportunity in public employment. These provisions have an ancestor in Section 298(1) of the Government of India Act, 1935,

No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

Matters arising under Articles 15 and 16 are not strictly within the scope of this work. However, the notion of 'protective discrimination' incorporated in Articles 15 and 16 and which poses a challenge to the idea of equality will be dealt with below.<sup>335</sup>

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335. See below, 197 and ff.

Any state action whether it be legislative, executive, administrative or even judicial could be challenged as being in violation of Article 14.<sup>336</sup>

The first important point to be noticed with regard to this provision is that, behind the seemingly absolute guarantee of equality, lies what has come to be known as the 'doctrine of classification' which permits the State to classify people, facts, circumstances or cases in enacting legislation so long as such classification is reasonable. This doctrine of classification has given a practical expression to this difficult idea of equality. The doctrine was developed by the United States Supreme Court and adopted by the Indian Courts on the assumption that Article 14 is partly based on section 1 of the United States 14th Amendment.<sup>337</sup>

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336. Chief Settlement Commr. v. Om Prakash, AIR, 1969, S.C.33, where the Supreme Court rejected the concept of 'dual State' which places state action in a privileged position giving it immunity from the courts. It was held that all administrative action would prima facie be liable to be tested for their legality in law courts.

A recent decision that summarises case law on the point is Abraham v. Kerala, 1972, K.L.T. 165, where an administrative circular exempting an individual from conditions laid down for promotion within the Education Department was held discriminatory under Article 14.

Union v. Anglo-Afghan Agencies, AIR, 1968, S.C. 718: administrative promises held binding.

Budhan Choudhry v. Bihar, AIR, 1955, S.C. 191; I.L.R.(1955) 34 Patna 194; (1955) 1 S.C.R. 1045. Jagmohan Singh v. Uttar Pradesh, AIR, 1973, S.C. 947.

337. For example, Barbier v. Connolly (1885) 113 U.S. 27:

Class legislation, discriminating against some and favouring others, is prohibited but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the Amendment.

per Field J.

Some American writers have made a distinction between the 'old' and 'new' equal protection: The 'new' protection cases dating from the 1960s do not seem to regard legislative policy with the same deference as the 'old' equal protection cases

/Cont'd. on next page:

Meaning of 'Reasonable Classification'

Equality in Article 14 has been construed by Indian courts<sup>338</sup> to mean that separating people who are prima facie similarly situated into groups with different rights and liabilities should be accounted for on the basis of differences that could be said to be reasonable: (a) from the point of view of the purpose for which the law is enacted, and (b) from the standpoint of the classification actually made by the law.<sup>339</sup> Taking the first condition in point (a) here the Courts are obviously looking for a definite public interest or State interest as the aim or purpose of the law. In India that interest could be anything from levying income tax at varying rates on people with different incomes to favouring "backward classes" of citizens<sup>340</sup> (a large part of whom were described as 'untouchables' in the past) in public services and educational institutions.

Note 337 - continued from 172:

assumed. For an example of the 'new' protection see Shapiro v. Thompson, 394 U.S. 618, 22L.Ed. 2d 600 (1969). See S.M. Huang-Thio, 'Equal Protection and Rational Classification', (1963) Public Law, 412.

338. H.M. Seervai, Constitutional Law of India, Bombay, 1967, Chapter IX. D.D. Basu, Commentary on the Constitution of India, Vol.1, 5th edn., Calcutta, 1965, 444-465.

339. Chiranjit Lal v. Union, AIR, 1951, S.C.41, 45; (1950) S.C.R. 869, 879. West Bengal v. Anwar Ali Sarkar, AIR, 1952, S.C. 75, (1952) S.C.R. 284. J.K. Mittal, 'Right to Equality in the Indian Constitution' (1970) Public Law, 36-72 (Part I), (1972) Public Law, 232-255 (Part II).

340. Janki Prasad v. Jammu & Kashmir, AIR, 1973, S.C. 930. These are communities that could be considered both educationally and socially backward. See also Balaji v. Mysore, AIR, 1963, S.C. 649. See below, 202.

The second condition in point (b) means that the Court would examine if the classification has been reasonably and fairly drawn in the light of the aim of the impugned legislation. The primary judicial task under Article 14 is somewhat generally described as examining the reasonableness of the classification made by the impugned law. But as in most constitutional adjudication relating to fundamental rights the courts in practice examine the entire statute for 'clarity' of purpose and, perhaps, the 'viability' of the means adopted - 'clarity' and 'viability', of course only to the extent the court is able to see that the infringement of a fundamental right is not without good reason.

Whether or not a particular classification should be made at all in order to achieve the statute's purpose is very often a policy matter but can occur to a court of law,<sup>341</sup> and the Court may be tempted to trace unconstitutional discrimination through any number of ways. Even otherwise the scope of judicial review in pronouncing upon unconstitutional discrimination appears to be large. It has been stated by the Indian Supreme Court that the Indian provision comprehends both English and American notions<sup>342</sup> of equality before the

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341. A pronouncement on this very point is Willie E. Williams v. Illinois, (1970) 26 L.Ed. 586, also AIR, 1971, U.S.S.C.63.

342. "... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." Dicey, Introduction to the Study of the Law of the Constitution, 10th edn., London, 1961, 193.  
 Section 1, 14th Amendment to the United States Constitution, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." See Chiranjit Lal v. Union, AIR, 1951, S.C. 41, 45; (1950) S.C.R. 869, 879.

law and the equal protection of the laws. Perhaps realising that there was an uncomfortably large scope for review under Article 14, the Indian Supreme Court, following the example of the United States Supreme Court, has limited that scope through the presumption that a legislature ordinarily does not pass discriminatory laws.<sup>343</sup>

It is presumed that the legislature understands and correctly appreciates the needs of the people who elected it and would only pass such laws as would provide remedies for the problems manifest in its experience.<sup>344</sup> Further in choosing its subject-matter "the legislature is free to recognise degrees of harm and it may confine its restrictions to those cases where the need is deemed to be the clearest."<sup>345</sup> The inequality relied on must be shown to be unreasonable and arbitrary. Vague allegations of inequality would have no effect.

It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced ... must be 'actually and palpably unreasonable and arbitrary. 346

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343. Chiranjit Lal v. Union, (1950) S.C.R. 869, 879; AIR, 1951 S.C. 41, 45 per Fazl Ali J.

344. Ibid., 913, per Mukherjea J. quoting the United States case of Middleton v. Texas Power and Light Company, 248 U.S. 152, 157.

345. Per Mukherjea J. in Chiranjit Lal (1950) S.C.R.869, 914, quoting Radice v. N.Y., 264 U.S. 294.

346. Per Das J. in Chiranjit Lal (1950) S.C.R. 869, 932. Also see Twyford Tea Co., v. Kerala, AIR, 1970, S.C.1133.

In Chiranjit Lal v. Union,<sup>347</sup> the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, provided for the dismissal of the managing agents of the company named, and for the removal of its directors, and held certain provisions of the Indian Companies Act inapplicable to this company. The Government was authorised to appoint new directors. The petitioner, a share-holder, whose rights were affected by the provisions of the Act, contended that Article 14 was violated inasmuch as the company was singled out for special legislation. The State produced the following reasons for enacting the impugned measure:

- (a) The company's textile-mill, then one of the largest in Asia, employing 13,000 workers, was closed down due to 'appalling mismanagement'.
- (b) This finding was reached after proper enquiry and discussion by Government officials after consultations with non-governmental sources.
- (c) The closing down of the company has meant unemployment to a considerable workforce. So both for that reason and in the interest of continued production of a commodity vital to the community, the Government decided to take over the management. (It is not clear whether this was for a temporary period and if so, for how long).

The petitioner argued that there must be other companies and mills who were suffering from mismanagement but the law

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347. AIR, 1951, S.C. 41, (1950) S.C.R.869.

does not cover them.<sup>348</sup> The Supreme Court sustained the Act. The majority of 3 to 2 (Patanjali and Das JJ. dissenting, and Mukherjea J. writing the main majority judgment) upheld the Act on the ground that a single company or individual or group could be in a class by themselves. The presumption, as outlined above, was in favour of constitutionality and it was up to the petitioner to show that the company in question was singled out from amongst many similarly situated.

The dissenting judges, accepting that the presumption was in favour of constitutionality, held that discrimination was too obvious in the Act, which contained no classification and which did not attempt to treat the question of mismanagement as a general problem.

Patanjali Sastri J. could not gather the element of public interest which could support the Act. Both the dissenting judges were certain that the petitioner was being asked to discharge an impossible burden of proving that other mills in a similar situation were left out of the government's consideration. In the words of Patanjali Sastri J.:

How could the petitioner discharge such a burden? Was he to ask for an investigation by the Court of the affairs of other industrial concerns in India where also there were strikes and lock-outs resulting in unemployment and cessation of production of essential commodities? Would those companies be willing to submit to such an investigation? 349

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348. There certainly are now several such sick mills. A recent Act entitled The Sick Textile Undertakings (Taking over Management) Act, 1972, includes forty-six mills. See Schedule 1 to the Act, which provides for government take-over of the mills specified in Schedule 1.

349. (1950) S.C.R. 869, 892.

A decision similar to Chiranjit Lal, where the same emphasis was laid on the presumption in favour of constitutionality, is to be found in Board of Trustees, Tibia College v. New Delhi,<sup>350</sup> where a private medical institute with reasonably large assets was put under a new board of trustees by the impugned Act after squabbling members had jeopardised its proper management.

The Supreme Court showed an even greater readiness than it did in Chiranjit Lal (where at least some proof of public interest was available) to assume an element of public interest and held that Article 14 was not violated by the impugned Act.

Not only in this, but in every such case of an individual company or institute forming the subject matter of special legislation, it seems necessary that the court devote some space in its judgment to explaining how and to what extent public interest is involved. This has been noticeably lacking in more than a few judgments of the Indian Supreme Court. It is important to note that such 'single entity' legislation has not (unfortunately) been rare, but arises periodically.<sup>351</sup> The emphasis on presumption of constitutionality can only be given a reduced status where prima facie the law is discriminatory. Then the State must supply enough facts to highlight the element of public interest.

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350. AIR, 1962, S.C. 458.

351. A recent example of what in effect amounts to a 'single-person' legislation is to be found in Vice-Chancellor, Osmania University v. Chancellor, Osmania University, AIR, 1967, S.C. 1305, where however, the statute impugned was held unconstitutional.

Two more decisions where the Indian Supreme Court rightly upheld executive action affecting individuals are to be found in Ram Krishna Dalmia v. Justice Tendolkar,<sup>352</sup> and State of Jammu & Kashmir v. Bakshi Ghulam Mohammad.<sup>353</sup>

In the first case the question was whether the power of the executive government to appoint a Commission of Inquiry to investigate "any matter of public importance" could be validly exercised in relation to an individual and his financial operations, which in fact, had resulted in considerable financial loss to members of the public. The Supreme Court answered in the affirmative.

In the second decision, appointment of a Commission of Inquiry to investigate alleged acts of corruption committed by a Chief Minister of the State of Jammu & Kashmir was held not to violate Article 14. The Supreme Court held that the matters which the Commission was asked to inquire into were matters of public importance. Public men who fail to conduct themselves properly could be subject to such investigations in the larger public interest.

A corollary to presumption of constitutionality is that the legislature has freedom to choose its subject-matter and the distinctions or classifications made by a law could be based on geographical, historical or other like considerations. Secondly, each legislature should be treated as a separate source of legislative authority and laws enacted by one cannot be compared or contrasted with any other on similar

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352. AIR, 1958, S.C.538.

353. AIR, 1967, S.C.122.

or same subject-matters.<sup>354</sup>

As illustrations of differences based on area, two decisions can be looked at. In the first case S.M. Transports (P) Ltd. v. Sankaraswamigal Mutt,<sup>355</sup> a Madras law relating to protection of residential tenants in cities but which also extended the protection to commercial tenants in some selected towns was attacked as discriminatory for having left commercial tenants in other towns without such protection.

The Court sustained the law on the basis that those towns selected were commercially more important than those left out. This decision can make sense only if it is understood that the protection extended to commercial tenants was regarded as a concession both by the State and the Court. Why it should be thus seen as a concession is (on the face of the report) beyond all cogent explanation. One would have thought all commercial tenants wherever they were would have qualified for protection of their tenancy.

Many cases have come before the Supreme Court where discrepancies in the operation of tax laws from area to area have been challenged. Some of these discrepancies arose as a result of the reorganisation of the old Presidencies of Madras, Bombay and Calcutta into a number of old and new States. The old Madras Presidency, for example, was divided to form Madras, Kerala and Andhra States in 1956. In

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354. Madhya Pradesh v. Mandawar, AIR, 1954, S.C.493; Purushottam v. Desai, AIR, 1956, S.C.20.

355. AIR, 1963, S.C.864.

Khadinge Sham Bhat v. Agricultural Income Tax Officer,<sup>356</sup> differences in the computation of Agricultural Income-Tax between areas of Kerala that were originally part of the old Madras Presidency and the rest of Kerala (Travancore-Cochin) was continued for a long time after 1956. When challenged, the Supreme Court upheld the differences as being not discriminatory. One would have thought that the people of Kerala should be liable for payment of agricultural tax at uniform rates throughout the territory of the State. From the administrative point of view too, this would make sense. But the Supreme Court did not see any constitutional compulsion derived from Article 14 to enforce uniform rates of agricultural tax throughout the State. Taxes vary according to situations and the policies behind the levy. But to continue a discrepancy created by the reorganisation of States but which could be put right appears to be discriminatory because it has no good reason to support it. It would seem that inertia as such is not violative of Article 14.

Another recent decision of the Supreme Court that permitted such an anomaly is to be found in Nazeera Motor Service v. Andhra Pradesh.<sup>357</sup>

Quite rightly in matters of taxation the legislature is given maximum freedom to choose the subject-matter and the manner of tax levy. The presumption in favour of <sup>of</sup> constitutionality applies with particular force in such cases.<sup>358</sup>

356. AIR, 1963, S.C.591.

357. AIR, 1970, S.C.1864.

358. Krishnan Nayar v. Kerala, AIR, 1961, Kerala 72, as long as a tax was meant for legitimate revenue purposes it could not be held to be discriminatory. Also see T.K. Abraham v. T.C. AIR, 1958, Kerala, 129.

In Twyford Tea Co. v. Kerala,<sup>359</sup> the argument was raised that the Kerala Plantation (Additional Tax) Act, 1960, imposed a uniform tax on plantations and took no account of the varying profits and incomes out of different types of plantations viz., those growing tea or coffee or cardamom or coconuts. The law did, however, prescribe that for purposes of taxation in relation to each type of plantation the number of plants would be divided by a standard figure appropriate to it. But these figures were attacked as arbitrary and as bearing no relation to the extent of profits made.

The Supreme Court held that a tax law could not be held discriminatory because it 'touches purses of different lengths'. As long as there was some classification providing for the different types of plantations the law could not be discriminatory.

Relying on the American writer Willis,<sup>360</sup> the Supreme Court held a legislature could pick and choose districts, objects, persons, methods, and even rates for taxation as long as it does so reasonably.<sup>361</sup>

In Madhya Pradesh v. G.C. Mandavar,<sup>362</sup> the Supreme Court unanimously held that:

359. AIR, 1970, S.C.1133.

360. H.E. Willis; Constitutional Law of the United States, Bloomington, Indiana, 1936, 587.

361. Another recent decision confirming this position is M/S Jullundur Rubber Goods Manufacturing Association v. Union of India, AIR, 1970, S.C.1589.

362. AIR, 1954, S.C.493.

Article 14 does not authorise the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject its provisions are discriminatory ... The sources of authority of the two statutes being different Article 14 can have no application. 363

There the petitioner's grievance was that the scale of pay for the Central Government employees in the State was more than that of the comparable State government servants. This was sought to be assailed as discriminatory. Purushottam v. B.M. Desai <sup>364</sup> reinforces the present point by holding that each State legislature frames its own land revenue recovery laws and there was no question of comparing them to see if one was more severe than the others.

India's 'welfare state' ideals combined with her socialist aims were given implicit recognition by the Supreme Court when it held that it would be reasonable for the State to discriminate in its own favour not merely in respect of its essential governmental functions but also in its trading activities.

In Manna Lal v. Collector of Thalawar <sup>365</sup> the petitioners objected to a provision in the impugned law treating loans owed to a government-owned bank as a 'public demand', thus giving those loans priority over others.

It was argued that Article 14 was violated by making a distinction between private commercial banks and government commercial banks. It was held by the Supreme Court:

363. Ibid.

364. AIR, 1956, S.C.20.

365. AIR, 1961, S.C.828.

It seems to us that the Government, even as a banker, can be legitimately put in a separate class. The dues of the Government of a State are the dues of the entire people of the State. This being the position, a law giving special facility for the recovery of such dues cannot ... be said to offend Article 14 ... 366

S.R. Das J. and Reasonable Classification

An embellishment was added to the reasonable classification notion by S.R. Das J. of the Supreme Court in West Bengal v. Anwar Ali Sarkar.<sup>367</sup> He mentioned two conditions:

- 1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and
- 2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

Further S.R. Das J. laid down:

The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. 368

In that case, the Attorney-General had argued that the test of reasonable classification should not be considered universal. If the discrimination was in the general interest of the administration and was not aimed at any particular individual or group then it should be held valid. Das J. rejecting that contention held that, if accepted, the words

366. Ibid., 831, col.2.

367. [1952] S.C.R.284.

368. [1952] S.C.R.284, 334-5.

'except in good faith and in the general interest of the administration' would have to be added to the wording in Article 14.

In that same decision, however, both Patanjali Sastri C.J. and Bose J. disapproved of any "wordy 'tests'" of equality or of reasonable classification to solve individual problems that come before the Court. Patanjali Sastri J. held that the test of classification was not a universal test since, in his view, orders under the Land Acquisition Act, 1894, or orders under a variety of laws made against individuals could not always be scrutinised with the help of the classification test. He held that courts could not insist on "delusive exactness" (quoting Holmes J. in Truak v. Corrigan, 257 U.S. 312) by applying doctrinaire "objective tests".

Bose J. was happy to stop at the view that the judges could say when a law was arbitrary and unreasonable under Article 14. There was no need for the judges to look at the object of the law in judging the arbitrary or discriminatory nature of that law. They must look at the constitutional limits laid down by Article 14. It was possible for the court to make up its mind without laying down any such general proposition.

I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The Common Law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that particular case. 369

West Bengal v. Anwar Ali Sarkar (above, 184) is an authority for the proposition that where there was no classification at all but yet the administration was given a power to discriminate between similar cases, Article 14 would be violated.

Section 5 of the West Bengal Special Courts Act, 1950, had provided:

A special court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing direct.

Trial by the special courts meant that certain features of a regular trial under the Criminal Penal Code such as the presence of judges or assessors, committal proceedings and a right to ask for adjournments were dispensed with. All the other requirements of a fair trial were retained. The Preamble of the impugned Act stated that it was expedient to provide for the speedier trial of certain offences. But which type of offences were to be sent to the special courts was not clarified by the Act. In fact, the object of the Act, viz., the need for speedier trial, was not itself clear to the court.

The opinion of the majority of the Supreme Court is summed in the following passage taken from the judgment of Chandrasekhara Aiyar J.

The policy or idea behind the classification should at least be adumbrated, if not stated, so that the court which has to decide on the constitutionality might be seized of something on which it could base its view about the propriety of the

enactment from the standpoint of discrimination or equal protection. 370

According to the majority, the impugned Act gave no indication as to what offences needed speedier trial and why it was that such speedier trial was necessary.

Patanjali Sastri CJ. dissented. He appeared to indicate that the Act was passed to deal with a number of offences arising out of near riot conditions. None of the other judgments referred to this aspect of the case. He held:

The discretion vested in the State Government in selecting cases for reference to a special court may not be subject to judicial review and may, in that sense, be absolute, but that is very different from saying that it was intended to be arbitrary. Its exercise must involve bona fide consideration of special features or circumstances which call for a comparatively prompt disposal of the case or cases proposed to be referred. 370a

The Chief Justice made the further point that if the discretion was shown to be arbitrarily exercised in any given case that administrative action or order was open to challenge under Article 14.

Soon after the decision in Anwar Ali Sarkar, another legislation similar in most respects except one, was challenged in Kathi Raning v. Saurashtra.<sup>371</sup> The difference was this: whereas the statute in Anwar Ali Sarkar simply stated in the Preamble that speedier trials were necessary, the statute here provided in the Preamble that the Act was:

370a. Ibid., 293. Emphasis original.

371. AIR, 1952, S.C. 123.

to provide for public safety, maintenance of public order and preservation of peace and tranquility in the State of Saurashtra.

The Supreme Court held this Act as not discriminatory under Article 14. The Act had laid down a clear policy to be achieved, and therefore, a lack of classification of the offences to be tried by the special courts would not be fatal to the Act's constitutionality. Mukherjea J. held:

A statute will not necessarily be condemned as discrimination, because it does not make the classification itself but, as an effective way of carrying out its policy, vests the authority to do it in certain officers or administrative bodies. 371a

#### Discriminatory Procedures

Discriminatory procedures have been a particular matter that the Indian Courts have disapproved of whatever the merits of the law otherwise, such as being in the public interest.

In Suraj Mall Mohta & Co. v. A.V. Viswanatha Sastri,<sup>372</sup> the Taxation of Income (Investigation Commission) Act, 1947, was challenged under Article 14. A Commission set up under the Act investigated tax evasion, it seems, mostly in regard to excessive profits made during the war of 1939-45. The petitioner was one such alleged war profiteer.

The Commission had under the Act special powers which the authorities investigating evasion under the regular procedure provided for in Section 34 of the Income Tax Act, 1922,

371a. Ibid., 132.

372. AIR, 1954, S.C.545.

did not have. The Commission could require written statements of accounts from a bank or other savings company, could compel production of account books and could exercise powers of a civil court in the matter of production of evidence and witnesses. The impugned Act did not, however, specify adequately the conditions and circumstances under which the provisions of the Act would be invoked by the Government. In other words, the Supreme Court found that all tax evaders would be within the ambit of both Section 34 of the regular Income Tax Act and the impugned Act. The court wished to know under what circumstances would some of the evaders be subject to the rigorous procedure under the impugned Act and under what circumstances would they be spared from its operation and the less rigorous procedure under the Income Tax Act applied?

In the absence of a sufficiently clear answer, the impugned Act was struck down as discriminatory and bad under Article 14.

The presumption of constitutionality could have been usefully invoked to save the Act. The attending circumstances in the case showed that the Act was presumably passed to deal with war profiteers who could easily be imagined as in a class by themselves, separate from all other tax evaders. War profiteers took advantage of a grave situation to make unconscionable profits. The huge sums of tax evaded would certainly have justified the rigorous procedure adopted. The decision of the Supreme Court in the event has proved less than satisfactory. The petitioner, if indeed, he was a war profiteer, won the case with costs awarded to him by

the Supreme Court! A cynic might enquire how much more the State could have lost.

In the second illustration of the Supreme Court's sensitivity to 'discriminatory' procedures, Northern India Caterers v. Punjab,<sup>373</sup> Section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959, was challenged. The pattern here was the same as in the previous case. The Government had a discretion, or so it seemed, to resort to either a rigorous or less rigorous of two possible procedures. The impugned Act contained a drastic procedure for evicting unauthorised occupants of public premises (or in regard to whom original authorisation had come to an end) while the Civil Procedure Code, 1908, provided for a comparatively milder procedure to achieve the same object.

The Supreme Court struck down the impugned provision by a three to two majority. The provision was held to enable discrimination insofar as it departed from the regular procedure without clarifying the circumstances under which it could be invoked. The two dissenting judges maintained that Article 14 did not always prohibit discretionary powers in the Government to choose an appropriate procedure to achieve the object. This was particularly so in the recovery of revenue due to the State. In saying so, the minority relied on Mannalal,<sup>374</sup> a case we have already dealt with.

From the facts it appears that the petitioners had been plainly unreasonable in their conduct as occupiers of

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373. AIR, 1967, S.C.1581.

374. (1961) 2 S.C.R.962; AIR, 1961, S.C.828 above, 183.

premises let out to them by the State. They were unreasonable because it was plain that they wished to frustrate government attempts to realise rents due from them by prolonging litigation which advanced the case no further. Considering their conduct and such conduct in possible future cases, and bearing in mind that the government as landlords would not harass their tenants whatever the law the Supreme Court should, I submit, have upheld the statute.

Here again, the presumption of constitutionality was nowhere evident. Above all, the fact was forgotten that sadly, many in India, while dealing with the administration, try to postpone their obligations by initiating endless litigation. While resolving constitutional issues, the Supreme Court has wide scope for moulding public policy by discouraging such trends and encouraging or at least approving, other healthier trends.

#### Where Presumption of Constitutionality Neutralised

Although the presumption of constitutionality is strong, there are circumstances where it has been expressly neutralised by the Court. Thus, in R.P.N. Sahi v. Bihar,<sup>375</sup> the Supreme Court held that where there was no evidence of any differentiation marking those singled out from the rest, then there was no presumption in favour of the statute's constitutionality. There the Sathi Lands (Restoration) Act, 1950, purported to nullify a transaction thought to be inadvisedly entered into by the Court of Wards administering a large well-known estate. The transaction consisted of a settle-

ment of lands on the petitioners. In the objects and reasons the impugned Act stated that the lands were settled contrary to law and public policy and that it was necessary to nullify the transaction.

The Supreme Court held that the law had singled out the petitioners amongst similar other lease-holders. If the Court of Wards had entered into a transaction inadvisedly then a Civil Court could see if it could be set aside under the Courts of Wards Act.

The petitioners, it was held, were discriminated against in that they were denied the opportunity of having the matter settled by a regular court of the land. Mukherjea J. referring to the question of presumption stated:

It is true that the presumption is in favour of the constitutionality of a legislative enactment and it has to be presumed that a legislature understands and correctly appreciates the needs of its own people. But when on the face of a statute there is no classification at all, and no attempt has been made to select any individual or group with reference to any differentiating attribute peculiar to that individual or group and not possessed by others, this presumption is of little or no assistance to the State. 375a

This point is further illustrated by the decision in K.T. Moopil Nair v. Kerala <sup>376</sup> where the State imposed a land tax at a 'flat rate' on all lands whether dry forest land or fully cultivated. The Supreme Court found that there was no classification along such lines as the income yielded by the land or the potential of the land or any such generally

375a. Ibid., 390-1.

376. A.I.R., 1961, S.C. 552.

acceptable criterion. Under the circumstances it was held that Article 14 was violated. The essence of Article 14 is thus not merely discrimination through unreasonable classification but also discrimination through lack of any classification where one is required in order to avoid equating situations that are dissimilar in nature.

Similarly, a law that levied tax on buildings according to their floor-area ('flooorage') wherever the buildings might be, whether in a central urban area or in a small rural area would be in violation of Article 14 for failing to make a classification.<sup>377</sup> The Indian Supreme Court has indeed held that in matters of taxation the State must have ample freedom to determine when to levy a tax, the extent of the tax and the means of realising the tax.<sup>378</sup> However, even a tax law will be hit by Article 14 if it makes an unreasonable classification or makes no classification at all.<sup>379</sup>

#### Criticisms of the 'Nexus' Test

Before concluding this section, notice must be taken of a recent criticism of what has come to be known in India as the 'nexus' test of reasonableness under Article 14.

S.R. Das J.'s two conditions laid down in Anwar Ali Sarkar<sup>380</sup>

377. Kerala v. Haji K. Kutty, AIR, 1969, S.C. 378. Also see New Manek Chowk Spinning & Weaving Mills v. Municipal Corporation, AIR, 1967, S.C.1080.

378. Jullundur Rubber Goods Manufacturing Association v. Union of India, AIR, 1970, S.C. 1589.

379. A.P. v. Raja Reddy, AIR, 1967, S.C. 1458.

380. AIR, 1952, S.C. 75; (1952) S.C.R. 284.

as explanations of how reasonable classification would be tested has already been mentioned: the passage following the two conditions is the relevant one, which may be conveniently repeated here:

The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.<sup>381</sup>

Recently Professor P.K. Tripathi, a well-known writer on Indian Constitutional matters, has queried whether it is right to treat the 'nexus' test, as he describes it, as universal and well established in Indian law as many Court decisions seem to suggest.<sup>382</sup> He has argued that there are cases where this 'nexus' test has not proved satisfactory and has perhaps impeded a proper inquiry. He has also shown that it was by a coincidence of circumstances that the 'nexus' test has come to be regarded as the uniformly accepted ruling of the Supreme Court.

The learned author appears to suggest that the test focuses solely on an examination of how the object of the statute is related to the basis of classification envisaged by it. In his view, there is one more area that needs to be examined by the courts viz. the actual persons or circumstances that are grouped or classified. In other words, the courts are not to forget how this rather abstract 'basis' or

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381. (1952) S.C.R. 294, 334-5.

382. P.K. Tripathi, Some Insights into Fundamental Rights, University of Bombay, 1972.

'criterion' of classification works in practice. This is important even where the type of cases according to the classification are foreshadowed in the statute itself.

Treated as a caution, these suggestions are, in this writer's opinion, valid and correct. After all, any kind of 'test' broken up into explanations can, in course of time, become an ossified formula, if the explanations take over while the essence of the 'test' is forgotten. We have noticed that in the early decision of Anwar Ali Sarkar,<sup>383</sup> Patanjali Sastri, Bose and Chandraasekhara Aiyar JJ. did express their disapproval of the 'nexus' test. They would have disapproved of any embellishments to the basic requirement <sup>and</sup> under Article 14, the Court would see if the differential treatment complained of was reasonable.

Tripathi contends that the 'nexus' test is comprehensive only where the law itself is straightforward, indicating its object, the criterion of differentiation and the persons or things actually differentiated. Such a law leaves very little to the executive in selecting persons or cases. Therefore, there is no room for executive discrimination.

But where the law indicates only its object and the basis of differentiation in general terms, the author suggests, the court's task is not over until it examines how these two relate to the third element, viz., the cases selected by the executive in implementing the law.

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383. See above, 184-186.

This is no doubt true, but it must be qualified by the need to permit the executive some discretion in selecting the cases or persons, as otherwise administration would be impossible. The Supreme Court has held that an individual order made under such a law could be challenged though the law itself need not be.

In conclusion, it has to be emphasised that Article 14 has to be interpreted, like all other commandments of that nature, according to the circumstances of the cases arising under it. One very important aspect is, of course, the public interest. A reasonable discrimination in the public interest will not amount to unconstitutional discrimination. It is necessary, therefore, that the law is clear and simple in stating what it wishes to achieve and how it proposes to do it. That will help a great deal but that is not all. The court will still have to balance the public interest (including its political aspects, if necessary) against the extent and nature of the discrimination involved to see if the ultimate result is reasonable under the given circumstances. Indian courts have, rightly, been cautious in treating this difficult and subtle area covered by Article 14. They have chosen to err, if at all, in favour of the ostensible public interest, setting their faces against any hasty condemnation of the statute. This, with respect, is the right attitude in this difficult area of constitutional adjudication, for otherwise the judges must figure as a non-elective super-legislature.

Reasonableness of 'Protective Discrimination' and an Aspect of Welfare State in India

Incorporated firmly as a constitutional norm 'Protective Discrimination' in India means that certain backward sections of the country's population get preferential treatment in matters of education, employment and in a number of others where the State has, or can have, a say. Underlying the idea of 'Protective Discrimination'<sup>384</sup> is a regret that certain sections of Indian society have been treated with indifference and at times, with hostility by the rest and the hope that with easy and adequate opportunities given to those sections thus badly treated in the past (and to a muted extent in the present) they would be able to emerge as more influential citizens than they have been. Thus 'Protective Discrimination' forms an exception to the notion of equality guaranteed by the Constitution.

The two most important provisions incorporating 'Protective Discrimination' are Articles 15(4) and 16(4).

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

... ..  
 (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

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384. Marc Galanter, "'Protective Discrimination' for backward classes in India', (1961) 3 J.I.L.I., 39-70.

16. Equality of opportunity in matters of public employment. - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

... ..  
 (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Also relevant are Articles 340, 341(1) and (2) and the Directive in Article 46. Article 340 empowers the President of the Country to appoint a Commission 'to investigate the conditions of socially and educationally backward classes' in India. Article 341(1) and (2) empower the President to specify the tribes, castes and groups who will be the Scheduled Castes and Tribes entitled to favoured treatment. Article 46 reads:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections - The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Thus classifying groups as 'backward' for preferential treatment is largely a question for fact-finding commissions. However, the wishes of the State and its discretion in the matter will play an important part. It has been held <sup>385</sup> that the State may in the exercise of its executive power,

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385. M.R. Balaji v. Mysore, AIR, 1963, S.C.649.

without having to show legislation in support, specify the classes and groups to be considered eligible for reservations in colleges and government offices.

The first question of some importance to the reasonableness of classification of this kind is, <sup>is</sup> caste, that ubiquitous Indian phenomenon, to be the basis of preferential treatment?<sup>386</sup> Mention of Scheduled Castes in Articles 46 and 341 above seems to suggest that it is or can be. Caste, after all, is the basis of bias and prejudice and hence, it can be argued, caste should be the factor.

But one must remind oneself first that non-discrimination on the ground of caste is also a constitutional norm. Therefore, rightly Indian Courts have closely examined the question and have drawn limits within which 'caste' may be a consideration. They have rightly realised that creating vested interests on the basis of caste would only deepen caste divisions in Indian society and not help towards eradicating it. In any case, the matter deserves attention in the Indian context. Secondly, any classification under Article 15(4) and 16(4) must be reasonable and also intelligible. This point was settled early on by the Supreme Court in the case of Madras v. Champakam.<sup>387</sup> The appellant Government issued an Order regulating admissions

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286. Marc Galanter, 'Caste Disabilities and Indian Federalism', (1961) 3 J.I.L.I., 205-234.

387. AIR, 1951, S.C. 226, (1951) S.C.J. 313.

to Government run medical and engineering colleges not only on the basis of caste but also religious faith. Thus, for every fourteen seats the allocation went as follows:

Non-Brahmins (Hindus)	....	6
Backward Hindues	....	2
Brahmins	....	2
Harijans	....	2
Anglo-Indians & Indian Christians	....	1
Muslims	....	1

The respondents, applicants to some of the colleges, impugned the order as being in violation of Article 15 as it stood before the insertion of sub-clause (4). They had successfully argued before the High Court that the classification was solely on the basis of caste and community and was unconstitutional.

The State contended before the Supreme Court that it was only discharging its obligations under the Directive in Article 46 (above, 198). In so implementing the Directives, it was argued, fundamental rights could not stand in the way!

An unanimous Supreme Court rejected the State's arguments and held the Order unconstitutional. On the Directives it was held:

The Directive Principles of State policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights. ... However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions of Part III, there can be no objection

to the State acting in accordance with the directive principles ... 388

After referring<sup>to</sup> Article 16(4), which was part of the Constitution as originally enacted, and noting that a similar provision was absent<sup>in</sup> Article 15 (or Article 29) the Court observed:

It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. 389

As an immediate consequence of the decision, the Indian Parliament which was considering an amendment to several provisions of the Constitution included a new sub-clause in Article 15 making it possible to discriminate in favour of 'backward' sections in matters of education also. It is generally believed that the Supreme Court decision has thus been over-ruled. But as J.K. Mittal<sup>390</sup> rightly pointed out that classification according to religious faith was unconstitutional still stands. As for the other part, that classification on the basis solely of caste was bad, may, as we shall see, have much force behind it even now.

The Supreme Court considered in some detail the constitutionality of reservations on the basis of caste in

388. AIR, 1951, S.C. 226, 228, col.1.

389. Ibid., 228, col.2.

390. 'Educational Equality and the Supreme Court of India', (1965) V/Jan.-June, The Indian Advocate, 31-39.

M.R. Balaji v. Mysore.<sup>391</sup> The case dealt with two questions. What is the basis of classifying 'backward classes'? What could be the extent of reservations in their favour? After a few unsuccessful attempts when their orders had been held unconstitutional, the State of Mysore appointed a Commission to report on the matter of 'backwardness'. In view of the earlier experience, the Commission reluctantly concluded that caste was, after all, the best guide in approaching the matter.

This Report proceeds on the basis that higher social status has generally been accorded on the basis of caste for centuries; and so, it takes the view that the low social position of any community is, therefore, mainly due to the caste system. According to the Report, there are ample reasons to conclude that social backwardness is based mainly on racial, tribal, caste and denominational differences even though economic backwardness might have contributed to social backwardness. 392

On the strength of the Report, the State issued a fresh Order reserving nearly 68% of the seats in medical and engineering colleges of the State. This meant only 32% of the seats were available to the 'merit pool'. Most of the numerically greater castes were classed as 'backward'. Perhaps, to avoid political controversy, Muslims were all included in the castes chosen for favoured treatment. Ultimately, nearly 90% of the State's population were found to have been classified as backward.

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391. AIR, 1963, S.C. 649.

392. Ibid., 656-7.

While thus the index of social backwardness was solely caste, educational backwardness <sup>393</sup> was calculated by the State on the basis of the average of student population in the last three High School classes of all the High Schools in the State in relation to a thousand citizens of that community. That figure was compared with the State average of student population calculated on the same basis. Any community that came below the State average was to be classed 'backward' and any that was less than 50% of the State average was to be regarded as 'more backward'.

The petitioners, applicants to some of the colleges raised the following arguments against the State's Order:

- (a) The percentage of reservations is so high it is a fraud on the Constitution. Article 15(4) did not envisage such high percentages.
- (b) The classification adopted by the State is unreasonable and irrational. What they have done is to separate the most advanced sections of the population from the rest who were termed 'backward'.
- (c) Caste, in any case, could not be the sole index of social backwardness. There were other factors such as one's occupation or income.

The State argued that there was no constitutional limitation on its power to make adequate provision for the backward classes. What percentage of places it reserves has

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393. Article 15(4) states that the advancement is of 'socially and educationally backward classes'.

to be seen in the light of the problem the State is called upon to face.

The Supreme Court agreed with the petitioners that the percentage of 68 was beyond what was envisaged by Article 15(4).

It is because the interest of the society at large would be served by promoting the advancement of the weaker elements in the society that Art. 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of society, that<sup>394</sup> clearly is outside the scope of Art.14(4).

Special favoured treatment given to the less advanced should not be, the Court stated, at the cost of quality in the scientists, doctors and engineers these institutions of Higher Education are to produce.<sup>395</sup> Merit and talent was the rule and favoured treatment was the exception.

That eventually the State had approached the problem from the wrong angle was accepted by the Court. In identifying the groups to benefit from 'Protective Discrimination', the State could not set up ideal standards that do not have a bearing on the immediate needs of those that require prompt assistance. These that are badly in need of help could not be submerged by a great number of others joining their rank, thus reducing the availability of full assistance to them.

Finally, the Supreme Court accepted the petitioners

394. Ibid., 662, col.1.

395. Ibid., 662. "If admission to professional and technical colleges is unduly liberalised it would be idle to contend that the quality of our graduates will not suffer." Ibid., 662, para.34.

contention that caste could not be the sole criterion of social backwardness. Other criteria like occupation, place of habitation, and others related to these may well be important. The petitioners succeeded in getting the Order of the State quashed.

The Supreme Court repeated its view laid down here in several subsequent cases, notably, in Chitralekha v. State of Mysore.<sup>396</sup> There, Subba Rao J. for the majority in the Supreme Court stated:

It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong. 397

An example of how far the Courts' notion of reasonableness is itself put under strain is to be found in Janki Prasad v. Jammu & Kashmir,<sup>398</sup> The extraordinary story of how the respondent State misused or mismanaged its powers to classify classes for favoured treatment is too long to be

396. AIR, 1964, S.C. 1823, (1964) 6 S.C.R.368. For a criticism of the case, see N. Radhakrishnan, 'Units of Social, Economic and Educational Backwardness: Caste and Individual', (1965) 7 J.I.L.I., 262-272. The author makes the point that the case carried the objection against treating caste as a factor of backwardness beyond what Balaji (above, 198) intended to lay down. He maintains that in any case the framers of the Constitution wanted to favour certain castes as backward. For a rejoinder, see Mohammad Imam, 'Reservation of Seats for Backward Classes in Public Services and Educational Institutions', (1966) 8 J.I.L.I., 441-449.

397. (1964) 6 S.C.R. 368, 388.

398. AIR, 1973, S.C.930.

meaningfully narrated here. In spite of repeated warnings from the Supreme Court that reservations in favour of backward classes should not be confused with sectarian or religious factors, the respondent State failed to grasp the point or did not, more likely, want to grasp the point made. As a result, litigation with respect to the same matter was prolonged over several decisions. One cannot help admiring the Court for the patience it showed. Underlying the problems is the fact that favoured treatment has become a means of distributing political and sectarian patronage in India. The litigations show signs of this.

In the matter of promoting school teachers, the State had adopted a simplistic formula along sectarian lines. Since Muslims were in a slight majority in the province, 50% of the posts were reserved for Muslims and the rest were distributed between Hindus and other minority groups. The Supreme Court disapproved of the procedure as being unconstitutional and emphasised the law as laid down in Balaji above.

The problems arising in this area of Indian Constitutional law reach out into the administration and its political character. The Indian Supreme Court has acted as a restraining hand where temptations are great for the State to cross the constitutional limits. It has stuck to its assessment of what is reasonable under Articles 15(4) and 16(4). The pressure and influence the Court's judgments exert will continue to affect this area of constitutional law in India.

SECTION 2(b): THE RELATION OF ARTICLE 14 TO ARTICLE 19

So far we have seen that detecting an unreasonable discrimination under Article 14 is a recognised, viable method of bringing down a statutory provision. There have been a few occasions when the inquiry regarding reasonableness under Article 19 has been compared to that under Article 14. The possibility of an overlap between the two areas covered by the provisions justifies a study of the relationship between them. The points made in two of the decisions, in one of which the matter appears to be obiter, could be shortly disposed of.

In Surajmull v. Income Tax Commissioner,<sup>399</sup> the question raised amounts to whether there was a common standard of reasonableness in the two articles so that there need be only one inquiry covering both. This question did not appear to be material to the decision in the case which was about the constitutional validity of Section 37(2), Income Tax Act, 1922, which authorised search and seizure of business documents during a raid by tax officials.

One of the judges of the Calcutta High Court, P.B. Mukharji, J. (as he then was), answered the question raised in the negative. He held that a law might pass the test of 'reasonable classification' under Article 14 and yet might fail under Article 19 as an unreasonable restriction. Prima facie, this is sound. The learned judge clearly meant that the inquiry under Article 19 was wider in scope than that

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399. AIR, 1961, col. 578.

undertaken under Article 14. He stated that the Court's task under Article 14 was to see how the discrimination made by the law helped the purposes of the law and how reasonable was the equation between the discrimination and the objectives. Under Article 19, on the other hand, the reasonableness of the restriction imposed by the law in all its aspects is examined as against the element of 'public interest' which the restriction is intended to serve.

The Indian Supreme Court likewise recognised a wider inquiry in the case of Article 19. In Collector of Customs v. Sampathu Chetty,<sup>400</sup> the Court was told that the constitutionality of section 178-A, Sea Customs Act, 1878, had already been determined by the Court with respect to Article 14 and in view of the similarities in the adjudication of cases arising under Articles 14 and 19, the matter would be res judicata for an inquiry under Article 19. It was contended that the standard of reasonableness was the same under the two provisions.

Rejecting the contention, the Court held that while there might be cases where a violation of the one article was also a violation of the other, there was no question of equating the two in order to pre-empt inquiries under the two, after all, separate provisions.

An example of a case of agreement between the two articles would be where the statute conferred unguided discretion on administrative or executive officers to deprive citizens of their fundamental rights. In that event, it would be unreasonable under both Articles 19 and 14. But,

where, however, there is (proper) guidance and the legislation is challenged on the ground that the law with the definite guidance ... it provides has (nevertheless) outstepped the limits of the Constitution by imposing a restraint which is either uncalled for or unreasonable in the circumstances, the scope and content of the inquiry is far removed from the test of conformity to rational classification adopted for judging whether the law has contravened the requirement of equal protection under Article 14. 401

There is undoubtedly no general equation between the two Articles. But it has to be borne in mind that in several cases arising under either of the provisions, courts do examine the impugned law as a whole to determine its objectives, the extent of the restrictions imposed and to see how convincing is the relationship between the objects of the law and the restriction it imposes. It is this similarity that tempted the arguments in the two cases dealt with. However, the difference lies in the emphasis and conclusions drawn, this similarity notwithstanding.

Recently, Professor P.K. Tripathi, has asserted that:

So far as the validity of the legislation ... is concerned the position is that if the legislation ... satisfies the demands or survives the attack of Article 19, it will definitely satisfy and survive Article 14 also. 402

In so asserting, he refers exclusively to statutes which confer an unguided discretion on executive or administrative officers. We have seen already the Supreme Court acknowledging that this type of case would be an area of

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401. Ibid., 325 (para.16), words in brackets supplied ed.

402. P.K. Tripathi, Some Insights into Fundamental Rights, University of Bombay, 1972, 96.

overlap between the two articles. But Professor Tripathi illustrates <sup>403</sup> through his discussion that (a) Article 19 enjoys predominance in such cases, and (b) that Article 14 could be pressed into service where Article 19 was not available, such as in the case of a nationalisation measure protected by Article 19(6)(ii) or in the event of a declaration of national emergency which has the effect of suspending Article 19 but not 14. Even otherwise, a measure plainly supported by national needs and public requirements might be directed in a discriminatory manner, as the early 'protective discrimination' cases showed.<sup>404</sup> Moreover, as for point (a), there is always the possibility of an individual executive order being challenged as discriminatory under Article 14. Professor Tripathi does not appear to dispute it. Further, there are cases where a restriction would have to be separately examined under Articles 14 and 19.<sup>405</sup> This also is not, it seems, denied by Professor Tripathi who, in fact, confines his point to a select group of cases (see f.n. 403 ).

The second point made by him shows how, by varying the emphasis, courts could bring the same matter either under Article 19 or 14. The decision in Bank Nationali-

403. Relying on the following cases, Dwarka Prasad v. U.P., AIR, 1954, S.C.224, Hari Shankar Bagla v. M.P., AIR, 1954, S.C. 465, and Rajasthan v. Nathmal, AIR, 1954, S.C. 307. Ibid., 96-99.

404. Madras v. Champakam, AIR, 1951, S.C.226, M.R. Balaji v. Mysore, AIR, 1963, S.C. 649.

405. Such as Collector of Customs v. Sampathu, AIR, 1962, S.C. 316, and Moopil Nair v. Kerala, AIR, 1961, S.C. 552.

sation, <sup>406</sup> is a good illustration of this. This is, perhaps, the most important point of interest which justifies our brief attention to the relationship of Article 14 to Article 19.

SECTION 3: REASONABLE RESTRICTIONS ON INTER-STATE TRADE

The word 'reasonable' occurs in yet another area of the Constitution and one might suppose that light might be gained from the Courts' interpretation of it. The application here of the law developed under Articles 14 and 19 seems a possibility.

Article 304. Restrictions on trade, commerce and intercourse among States - Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law -

- (a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
- (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest;

provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Part XIII of the Indian Constitution is probably a most complex piece of drafting which has at the end managed

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406. See below, 241, 389 and 413.

to stultify its own basic purpose.<sup>407</sup> After several decisions of the High Courts and the Supreme Court one is not certain how free this freedom of trade and intercourse is. The position in other federal constitutions of Australia and the U.S.A. is no more clear.

Turning first to the non obstante clause in the beginning of article 304, article 301 referred to states that subject to the provisions of Part XIII trade, commerce and intercourse throughout the territory of India shall be free. Article 303(1) prohibits Parliament and the Legislatures of States passing laws giving preference to one State over the rest or another. Article 303(2) states that Parliament, however, can make laws giving preferential treatment to a State or States over others in situations of scarcity of goods in any part of the territory of India. The States, however, are also prohibited from discriminating between goods manufactured locally and outside the State, (304(a)).

Article 304(b), our special concern here, though it gives the power to the States to impose reasonable restrictions, has immediately qualified it by requiring Presidential sanction before the restrictions can be passed into law. There is the further question whether Article 304(a) indicates that a tax would not be considered a restriction for the purposes of Article 304(b). Seervai would support

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407. For a general study on the subject, see Interstate Trade Barriers and Sales Tax Laws in India, Indian Law Institute, Tripathi, Bombay, 1962. Seervai, Constitutional Law of India, Tripathi, Bombay, 1967, 980-1006. S.N. Jain, 'Freedom of Trade and Commerce and Restraints on the State Powers ...' (1968) 10 J.I.L.I., 547-582.

such a view on the basis that the two sub-clauses in Article 304(a) and (b) are distinct and exclusive. Otherwise the proviso to 304(b) would seem to apply to Article 304(a) as well, which could not be right. The conclusion is that 'reasonable restrictions' referred to in Article 304(b) refer to restrictions other than by way of taxation.<sup>408</sup>

In the earliest case on the point, Atiabari Tea Co. Ltd. v. Assam,<sup>409</sup> the Assam Taxation Act, 1954, was impugned. The Act aimed to tax tea carried through the roads or waterways in the State of Assam on its way to Calcutta. Assamese territory was traversed only for a short distance during this inter-State movement of tea.

The Supreme Court clearly regarded the tax as a restriction on the movement of inter-State trade. Whenever a State wished to tax directly any inter-State commercial transaction the State would have to satisfy the conditions laid down in Article 304(b). The Court did not appear to be asking the question, "is the tax a reasonable one?" but asked, "Does the impugned restriction operate directly or immediately on trade or its movement?" In the event, the tax imposed was found to be such a direct restriction and held unconstitutional.

Thus in Atiabari the question of reasonableness did not at all figure in the discussions as an issue and the impression created by the decision that all tax laws affecting

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408. H.M. Seervai, Constitutional Law of India, Bombay, 1967, 1000.

409. AIR, 1961, S.C. 232.

inter-state trade were unconstitutional was dispelled in the next decision. The Supreme Court, in Automobile Transport v. Rajasthan <sup>410</sup> mentioned the element of reasonableness in upholding the Rajasthan Motor Vehicles Taxation Act,

On examination, the tax imposed by the Act was found to be a 'compensatory tax', i.e. compensatory for the facilities provided by the State <sup>to</sup> bus operators. It was held:

Compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; such taxes could, of course, be made prohibitive,

in which case they would be unreasonable.

It can be taken as settled law that taxation is not exempt from the operation of the guarantee in Article 301 but taxation per se would not be unconstitutional. It is subject to the reasonableness test. <sup>411</sup>

There are forms of restrictions other than taxation though tax laws have figured most in litigation on this topic. <sup>412</sup> An example of this is the case in Andhra Sugar Mills Ltd. v. Andhra Pradesh <sup>413</sup> where the constitutionality of Section 21, Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961, was attacked as a violation of free inter-state trade. The impugned section in addition to levying a tax on the purchase of sugarcane by 'occupiers of

410. AIR, 1962, S.C.1406.

411. Firm Mehtab Majid & Co. v. Madras, AIR, 1963, S.C.928. Madras v. Nataraja Mudaliar, AIR, 1969, S.C.147.

412. Singareni Collieries Co. Ltd. v. Commissioner, Commercial Taxes, AIR, 1966, S.C. 563; Bengal Timber Trading Co. v. Commissioner, Sales Tax, AIR, 1967, S.C.1348.

413. AIR, 1968, S.C.599.

sugar factories' provided that such occupier was bound to enter into a contract to buy sugarcane if it is offered to him from any one of the designated zones at the statutory minimum price. The price was determined by the State and considered by it reasonable to the buyer and seller. It was argued by the petitioner that there could be no 'sale' simply because the contract was not entered into voluntarily. His freedom to buy sugar cane from anywhere he wished at any price he wished to pay was, it was argued, curbed in violation of the guarantee in Article 301.

The Supreme Court held, relying <sup>413a</sup> on an old English case in Lane v. Cotton <sup>414</sup> and the authors Cheshire and Fifoot <sup>415</sup> that:

It is now realised that in the public interest persons exercising certain callings or having monopoly or near monopoly powers should sometimes be charged with the duty to serve the public, and, if <sup>416</sup> necessary, to enter into contracts.

The restriction imposed was held to be in the public interest and therefore, reasonable. Before this conclusion could be wholly accepted one must remind oneself that for centuries sugarcane growers have been at the mercy of sugar manufacturers who dictated the price the sugarcane fetched. With that background, Indian courts have suitably adjusted the limits of reasonableness as far as questions pertaining to deals in

413a. Ibid., 604.

414. (1701) 1 Ld Raym = 91 E.R.17.

415. Law of Contract, 6th Edn., 23.

416. AIR, 1968, S.C. 599, 604, col.2.

sugarcane were concerned.

A second example of a similar restriction other than taxation is to be found in the case of Koteswar v. K.R.B. & Co.<sup>417</sup> Without going into the rather complex facts in the case, the restriction took the form of prohibition of certain speculative contracts.

The link between Articles 19 and 304(b) was commented upon by the Supreme Court in Vrajlal Manilal & Co. v. M.P.<sup>418</sup> It held that the requirements of reasonableness in Articles 19(5), 19(6) and 304(b) were the same. It is, indeed, to be expected but clearly the standards will vary amongst these provisions.

In comparison with Articles 14 and 19, Article 304(b) is yet to develop. When such development comes, Indian Courts will benefit from the decisions under Articles 14 and 19. The decisions under Article 19 will now be considered in the next chapter.

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417. AIR, 1969, S.C. 504.

418. AIR, 1970, S.C. 129, see below, 388.

### CHAPTER 3

#### THE COURTS AND THE RESTRICTIONS - ILLUSTRATIONS

##### SECTION 1: REASONABLENESS OF RESTRICTIONS ON THE FREEDOM OF SPEECH AND EXPRESSION - ARTICLE 19(1)(a)

##### Introduction

Prior to the enactment of the Constitution (26th January, 1950) most of the well-recognized limitations on this freedom, such as Contempt of Court, Defamation, Obscenity and Sedition figured in the Indian Penal Code, 1860.<sup>419</sup> There were other restrictions special to Indian Law, such as Section 153-A, I.P.C. (promoting class and communal hatred by words spoken or written) and 295-A, I.P.C. (deliberate insult to the religious feelings of any class of citizens by words spoken or written). In spite of the strict sedition laws<sup>420</sup> free expression was tolerated. After the enactment of the Constitution, the grounds mentioned in Article 19(2) were expected to sustain, between them, the constitutionality

419. Section 228, I.P.C. (Contempt in the face of the Court. Contempt otherwise was governed by the Contempt of Court Act, 1926); Section 499, I.P.C. (Defamation); Section 292, I.P.C. (Obscenity) and Section 124 -A, I.P.C. (Sedition).

420. In addition to Section 124-A, I.P.C., there were others that made Sedition punishable in different ways - The Dramatic Performance Act, 1876; The Prevention of Seditious Meetings Act, 1911, and The Criminal Law Amendment Act, 1932, are some of the examples. Two special measures often used against the Press were, Section 99-A of the Criminal Procedure Code, 1898, which empowered the State Government to prescribe any newspaper or any document that 'appeared' to be seditious, and the Indian Press (Emergency Powers) Act, 1931.

of many of the old restrictions that were continued. It was known that some of the severe laws of the past would be held unconstitutional.<sup>421</sup> Article 19(2), as it stands now,<sup>422</sup> enables the State to impose reasonable restrictions on the freedom guaranteed by Article 19(1)(a), in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency, or morality, in relation to contempt of court, defamation or incitement to an offence.

The reasonableness of restrictions imposed on the grounds of Obscenity, Contempt of Court and Public Order has been determined in the same manner as the British-Indian courts used to.<sup>423</sup> Thus some basic Common Law notions have survived in these areas of the law. Indian Courts have not shown any doctrinaire anxiety to hold pre-Constitutional

421. The Indian Press (Emergency Powers) Act, 1931, for example, was so held in Keshavan Madhava Menon v. Bombay, AIR, 1951, S.C.128.

422. It was reconstituted by the Constitution (First Amendment) Act, 1951 (Sec. 3(1)). There was a second amendment which introduced the ground of 'the sovereignty and integrity of India', Constitution (Sixteenth Amendment) Act, 1963. For fuller details, see below, 344 and ff.

423. On Obscenity, Ranjit Udeshi v. Maharashtra, AIR, 1965, S.C. 881, Chandrakant Kalyandas v. Maharashtra, AIR, 1970, S.C. 1390. (Both decisions reiterated the Hicklin test, see below, 277 ).  
On Contempt of Court, Brahma Prakash v. Uttar Pradesh, AIR, 1954, S.C.10; Madhya Pradesh v. Revashankar, AIR, 1959, S.C. 102. (Both decisions approved and relied on Ambard v. A.G. for Trinidad, AIR, 1936, P.C. 141, (1936) A.C. 322.)  
For decisions on Public Order, see below, 310.

tutional laws and restrictions invalid, enacted, as they were, by the British-Indian Governments. Such restrictions as were held unreasonable under Article 19(2) were so held on generally acceptable grounds and for well-understood constitutional reasons that were seldom revolutionary. The Supreme Court has rejected, on the one hand any 'preferred-position' <sup>424</sup> for the liberty of speech, and on the other, has interpreted narrowly the scope of 'Public order' <sup>425</sup> and 'Sedition' <sup>426</sup> in order to favour the liberty of the citizen.

Preventive Detention, Article 19 and (in particular) Freedom of Speech

In addition to developing the law relating to free speech as guaranteed by Article 19(1)(a), Indian Courts have faced two specially difficult tasks. These are: (a) where a citizen is preventively detained for making speeches or publishing material which are, in the opinion of the Executive, prejudicial to the security of the State or public order. No doubt, mostly such detentions have taken place after the Executive has, legitimately, feared communal or sectarian violence of one sort or another. Even so it is clear that the power to detain people preventively without a proper trial could be easily misused, i.e. used for purposes not sanctioned by the detention statute. Much as one would sympathise with the Indian Governments having to face street

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424. Madhu Limaye v. S.Dt. Magistrate, Monghyr, AIR, 1961, S.C. 2486.

425. Dr. Ram Manohar Lohia v. Supdt. Central Prison, AIR, 1960, S.C. 633, also Madhu Limaye, above, 317.

426. Kedarnath v. Bihar, AIR, 1962, S.C.955.

violence by demonstrating mobs (the leaders of the mobs are generally detained preventively) the danger of Executive over-reaction has to be taken into account; (b) secondly, the regulation of the Press by laws supposedly curbing 'monopolistic tendencies'. How far can such, otherwise innocuous regulations apply to the Press? <sup>426a</sup>

As for (a) it has generally been assumed that it is strictly a matter of preventive detention and there is very little Courts can do. While this was the reasoning of the Supreme Court of India in A.K. Gopalan v. Madras <sup>427</sup> academic writers in India have not raised the question with enough persistence to change the Supreme Court's stand on the matter of preventive detention and the freedoms guaranteed by Article 19.

The acuteness of the question lies in the fact that the Constitution itself provides for preventive detention. Article 22 of the fundamental rights chapter lays down the 'safeguards' subject to which detentions can be made. This subjects the fundamental rights to an acute and embarrassing test. The Supreme Court in A.K. Gopalan certainly faced an embarrassing task. The Court's decision has, of late, been criticised by the Court itself and by many writers. Before stating the decision of that case, some more details as to the law of preventive detention may be briefly referred to.

One of the most valuable rights that a detained citizen (hereafter detenu) has is the right to be supplied with

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426a. See below, 257.

427. AIR, 1950, S.C.27, (1950) S.C.R.88.

the grounds of his detention.<sup>428</sup> Following that right is the right to make representations against the order of detention. Such representations will have to be considered by the Government and Advisory Board. The Courts examine the grounds with these matters in mind. Vagueness of any one or more of the grounds supplied is fatal to the detention order.<sup>429</sup> Unable to question the reasonableness of the Executive authorities' decision to detain Courts have instead concentrated on the grounds supplied to the detenu. They have emphasised that the grounds should be relevant<sup>430</sup> to the purposes of the detention statute. They have demanded strict proof that the authorities applied their minds to each case of detention. Especially important is that the Executive should consider the representations made by the detenu against the order.<sup>431</sup> Thus, the existence of the Advisory Board does not relieve the Executive itself of this duty to consider, independently, such representations

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428. Article 22(5). "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

429. Bombay v. Atmaram, AIR, 1951, S.C.157, (1951) S.C.R.167. Dwarkadas v. Jammu & Kashmir, AIR, 1957, S.C.164. See M.C.J. Kagzi, 'Judicial Control of Executive Discretion under the Preventive Detention Law: An Indian Experience', (1965) Public Law, 30.

430. In addition to Atmaram, above, Shyamal Chakravarty v. Commr. of Police, AIR, 1970, S.C. 269.

431. Jayanaryan v. West Bengal, AIR, 1970, S.C.675.

made by the detenu.<sup>432</sup> Under the Preventive Detention Act, 1950, the Executive is given the power to detain persons preventively for the attainment of objectives that are substantially similar to those found under Article 19(2) which contains the restrictions that could be imposed legally on the freedom of speech. Section 3 of the Act of 1950 is as follows:

**3. Power to make orders detaining certain persons:-**

(1) The Central Government or the State Government may -

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to -

- (i) the defence of India, the relations of India with foreign powers, or the security of India, or
- (ii) the security of the State or the maintenance of public order, or
- (iii) the maintenance of supplies and services essential to the community; or ...

It is necessary so to do, make an order directing that such person be detained.

Thus, a person who in the opinion of the State Government has made a seditious speech can be detained either under sub-clause (i) or (ii) above. The courts will in that case be unable to review the decision of the Government that the speech in question was seditious. Whereas if the author of the same speech had been prosecuted under Section 124-A of the Indian Penal Code, which is not a preventive detention measure, the court would have been in a position to

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432. Pankaj Kumar v. West Bengal, AIR, 1970, S.C.97.

to examine not merely the reasonableness of the provision itself but also the speech in question to see that when construed fairly it could be said to be seditious.<sup>433</sup> This very important difference would be inevitable according to the reasoning of the Supreme Court of India in A.K.Gopalan v. Union of India<sup>434</sup> where the reconciliation between the freedoms guaranteed by Article 19, in particular, and Article 22 envisaging preventive detention was achieved by holding that Article 19 could not be invoked by a person preventively detained. The Supreme Court held that for a citizen to be able to invoke Article 19, the state action must relate 'directly' to one of the rights guaranteed by Article 19. An 'incidental' consequence of punitive or preventive detention which restricts the rights cannot be challenged. The arguments in that case did not pose this specific problem of free speech and preventive detention. Unfortunately, it was not contended there that there was a possibility of a person being held in preventive detention for the views he might express on political or other controversial matters. It was possible for the supreme Court to have confined their reasoning to Article 19(1)(d), (Right to 'free movement throughout the territory of India') for it is obvious that a person detained preventively or punitively cannot complain on the basis of Article 19(1)(d) for the simple reason the

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433. Kedarnath Singh v. Bihar, AIR, 1962, S.C.955; Bihar v. Shailabala Devi, AIR, 1952, S.C. 329, (1952), S.C.R.654.

434. AIR, 1940, S.C.27. In Sarju v. State, AIR, 1956, All 589, the petitioner argued that detention orders should be reviewable if Article 19(1)(a) was pleaded. The Court rejected the argument, relying on A.K. Gopalan v. Madras.

Constitution itself provides for preventive detention. But in holding that all Article 19 freedoms were precluded to a detenu, the Supreme Court, as it were, foreclosed itself from exercising any direct control over Executive discretion in the matter of preventive detention.

There are two more considerations bearing on this matter. Firstly, the Preventive Detention Act, 1950,<sup>435</sup> and the powers thereunder are available during relatively normal, peaceful conditions (taking into account local disturbances of varying severity which have generally accounted for the bulk of the detention cases under the Act of 1950). Secondly, there is room for thinking that at times the Executive authorities have tended to use their powers under a preventive detention law instead of acting under the ordinary criminal law. The justification for resorting to the preventive detention measure was then either non-existent or very weak. Judges have not failed to express their anxiety at such misuses of power. Hidayatullah J. for example, in Ram Manohar v. Bihar, issued a warning to the District Magistrate who had made the order of detention (allegedly after the petitioner, a politician, had made a strong speech):

(H)e could not run the law and order problems in his district by taking recourse to the provisions for detention under the Defence of India Act. 436

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435. From 1971 also the Maintenance of Internal Security Act, 1971, (2nd July, 1971) provides for preventive detention.

436. Ram Manohar v. Bihar, AIR, 1966, S.C. 740, 759, col1-2. The point was made again in P. Mukherjee v. West Bengal, AIR, 1970, S.C.852.

The problem as described, arose in the case of Ram Singh v. Delhi.<sup>437</sup> There was disagreement in the Indian Supreme Court over the balance between free speech and the need to prevent communal disturbances, though the disagreement was technically expressed in terms of the adequacy of the facts supplied to the detenus. The petitioners were leaders of a political party with sectarian inclinations, called the Hindu Mahasabha. They were arrested and detained by the order of the Delhi District Magistrate. The following ground was supplied to them as the reason for their detention:

In pursuance of Sec. 7, Preventive Detention Act, you are hereby informed that ... your speeches generally in the past and particularly on ... August 1950 at public meetings in Delhi has been such as to excite disaffection between Hindus and Muslims and thereby prejudice the maintenance of public order in Delhi and that in order to prevent you from making such speeches it is necessary to make the said order. 438

The petitioners argued that: (1) the provisions of the Preventive Detention Act, 1950, were not meant to be used to prevent a citizen making speeches; (2) that (adopting an obiter passage of Falshaw J. of the Simla High Court, the Court of First instance which tried their case) while pre-censorship of news was not possible, a person could be placed under preventive detention (to stop him making more speeches) which was an "even greater restriction on personal

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437. AIR, 1951, S.C.270.

438. Ibid., 271, col.2.

liberty than any restriction on a newspaper ever could be! (3) the ground supplied to them, they said, did not specify the offending passages and as a result, it was impossible for them to make effective representation against the order. Alternatively, at least the gist of the alleged inflammatory passages should have been supplied to them in order that they might suitably represent their case before the Advisory Committee, which must eventually recommend whether or not to continue the detention.

For the majority in the Supreme Court none of these contentions created any difficulty. They fell back upon A.K. Gopalan,<sup>439</sup> and held that the matter before them was one of preventive detention and therefore, Article 19 could not be relevant. In their view, it could not be laid down as a general requirement in preventive detention cases that actual passages whether from speeches made or documents that came into the possession of the authorities should be provided to the detenus. Moreover, there were difficulties in proving information obtained from confidential sources (in the case before them, the petitioners were addressing public meetings when the speeches in question were made). It was held by the majority that the Court could not judge, in such cases, whether or not the speeches in question constituted a prejudicial act falling within Section 3 of the Act of 1950. Thus, the majority emphasised the responsibility of the Executive authorities to stop breaches of

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439. AIR, 1950, S.C.27.

the peace by those who make intemperate provocative speeches. It is a matter of common knowledge that such provocations were offered during that period by members of the Hindu and Muslim communities to each other, which resulted in riots and running battles between the communities. Indeed, the possibility that similar offences will occur unpredictably is still with us.

The minority, while accepting the need to preserve public order, dissented on the question of the adequacy of the information supplied to the detenus. One of the dissenting judges, Mahajan J. held:

Without a knowledge of the offending words or passages it is not possible to argue ... that the words used fall within the ambit of legitimate criticism permissible in law and cannot be considered to excite disaffection amongst Hindus and Muslims ... Again, without knowing the substance of the offending words from which the inference has been drawn by the detaining authority, it is not even possible to urge that these words were merely a quotation from some known author or that the words used fall within legitimate religious propaganda permitted by Art. 25 of the Constitution or concern the propagation of some political creed to which no objection could be taken. 440

The learned judge went on to point out that if the allegation was that the speeches in question were such as to excite disaffection between Hindus and Muslims, the petitioners were guilty of an offence under Section 153-A of the Indian Penal Code. Thus, a regular prosecution might well have been launched. Instead the State chose preventive detention. The two dissenting judges did their utmost to protect

interests of Free speech though what they could do was limited by the ratio in A.K. Gopalan. Ram Singh showed how sweeping the ratio in A.K. Gopalan was and how there existed a need to qualify that ratio severely. Later decisions of the Indian Supreme Court and several High Courts did precisely that, as we shall see.

There are certainly difficulties in dismantling the A.K. Gopalan ratio into its elementary constituents and in restructuring it in order that free speech, or indeed all the freedoms in Article 19, except the right to free movement, could be made compatible with the power of preventive detention. Seervai, a supporter of A.K. Gopalan, sees Ram Singh entirely in terms of the requirements of preventive detention.<sup>441</sup> No doubt this is correct in a technical sense but the basic problem remains unattended. If more safeguards are not erected, preventive detention could in theory at any rate, erode the content and scope of the Fundamental Rights guaranteed by Part III of the Indian Constitution. Another author, M.P. Jain, has recognized the problem created by Ram Singh.<sup>442</sup>

One way in which the Indian Courts could protect the freedoms guaranteed by Article 19 is to increase their control

441. H.M. Beervai, Constitutional Law of India, 312, 457. The learned author's observations in support of A.K. Gopalan are to be found in The Position of the Judiciary Under the Consitution of India, 62.

442. M.P. Jain, Indian Constitutional Law, 2nd Edn., Tripathi, Bombay, 1970, 574. "Ram Singh's case creates an anomalous situation ... [a] law of preventive detention which, ... does not restrict the freedom of speech as such, is immune from judicial scrutiny even though action may be taken under it to restrain a person from making speeches regarded prejudicial by the executive."

over preventive detention matters through the concept of 'Personal Liberty' incorporated in Article 21. It has been held in A.K. Gopalan itself that a contravention of the requirements of Article 22 would mean that personal liberty guaranteed by Article 21 would be violated. Even though there are other propositions in A.K. Gopalan that would have to be explained, there is clearly scope for action in the direction suggested.

Indeed, this is what the Supreme Court did in a later case which, in this writer's opinion, has thrown considerable doubt on the ratio in A.K. Gopalan. In Maharashtra v. Prabhakar,<sup>443</sup> the respondent was detained under R.30(1)b of the Defence of India Rules which provided for preventive detention. While serving his detention, he wrote an essay on the structure of the atom and wished to send the manuscript out of the gaol to be published. The gaol authorities refused him permission to do so and when challenged in the High Court, they took up the position that they were not obliged by law to accede to the detenu's request. They confidently pointed out that the detenu could not, under the ratio in A.K. Gopalan, invoke his rights under Article 19 since he was detained under a law of preventive detention, and therefore, could appeal solely to Article 22. More specifically, the gaol authorities argued that The Bombay Conditions of Detention Order, 1951, which governed the petitioner's detention, did not provide for such 'privileges' as the petitioner was claiming.

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443. AIR, 1966, S.C. 424.

The High Court had found that the contents of the work in question were not, in any way, prejudicial to the defence of India, public safety, and/or maintenance of public order - the grounds on which the petitioner was detained. The High Court rejected the gaol authorities' contention. The Supreme Court too, in its turn, rejected their contention but made remarks that have clearly undermined the authority of A.K.Gopalan:

(T)here are five distinct lines of thought in the matter of reconciling Art.21 with Art.19, namely, (1) if one loses his freedom by detention, he loses all the other attributes of freedom enshrined in Art.19, (2) personal liberty in Art.21 is the residue of personal liberty after excluding the attributes of that liberty embodied in Art.19; (3) the personal liberty included in Art.21 is wide enough to include some or all of the freedoms mentioned in Art.19, but they are two distinct fundamental rights - a law to be valid shall not infringe both the rights; (4) the expression 'law' in Art.21, means a valid law and, therefore, even if a person's liberty is deprived by a law of detention, the said law shall not infringe Art.19; and (5) Art.21 applies to procedural law, whereas Art.19 to substantive law relating to personal liberty.

... ..  
 We have only mentioned the said views to show that the view expressed by Das J., as he then was, in A.K. Gopalan's case is not the last word on the subject. 444

Das J.'s view referred to have, in fact, been regarded as the received ratio in A.K. Gopalan. On the second of the arguments raised by the gaol authorities, viz. that the relevant law, Bombay Condition of Detention Order, 1951, did not provide for the 'Privilege' claimed by the respondent, the Supreme Court held:

If this argument were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu. In the matter of the liberty of the subject such a construction shall not be given to the said rules ... unless for compelling reasons. 445

There are two very closely similar cases decided by the Bombay High Court. They may be conveniently dealt with here. In George Fernandes v. Maharashtra<sup>446</sup> decided before the one just discussed, the gaol authorities raised the same argument about 'privileges' not conferred by the Bombay Conditions of Detention Order, 1951. The 'privilege' claimed by the petitioner, a trade-unionist, detained under R.30 of the D.I.K., was that he wished to have some fifty-odd books with him for study while serving the detention. The gaol authorities decided that he could have only twelve at a time. Such a regulation could have reasonably been applied to the borrowing of books from the gaol library. The books in question were the petitioner's own. While holding there was no power in the gaol Superintendent to refuse a book or books to the prisoner unless the book or books preached violence or were obscene, the Bombay High Court remarked, "Power of detention cannot be equated to a power of regimentation of personal life, thoughts and habits."<sup>447</sup> This could be interpreted to mean that there is more to the notion of 'personal

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445. Ibid., 428, col.1.

446. (1964) 66 BOM.L.R. 185.

447. Ibid., 193. The case also establishes a right to information. "Of all the restraints on ... a citizen, that on the opportunity to knowledge is ... is the most irksome and least to be justified." Ibid., 193.

liberty' whether it be derived from Article 21 or Article 19 than what is derived from A.K. Gopalan. There has to be more, even if what was involved in this case was a right to information and not to expression. But the former could reasonably be regarded as included in the latter. The second Bombay case reinforces this suggestion.

In M.A. Khan v. State,<sup>448</sup> the detenu wished to buy at his own cost, several journals and magazines not supplied by the gaol library. The gaol administration maintained that they had an 'approved list' of journals 'considered suitable' for the prisoners. The petitioner argued that the authorities could not stop him from buying journals that the public at large can freely obtain from the open market.

The High Court held that, subject to the requirements of maintenance of discipline, the 'reading habits' of the prisoners could not be regulated by the authorities. The Court held that the right of the petitioner in that respect was no less than that of any 'free' member of the public. Surely, this is not being faithful to A.K. Gopalan either.

Reverting back to the Supreme Court, in Ashutosh Lahiri v. State of Delhi,<sup>449</sup> the Court was presented with a case closely similar to Ram Singh<sup>450</sup> but the reaction this time was different. An unanimous Court warned the Executive that it may record a finding of mala fides if the powers of preventive deten-

448. AIR, 1967, Bom. 254.

449. AIR, 1953, S.C. 451.

450. AIR, 1951, S.C.270.

tion were used without restraint.<sup>451</sup> The petitioner was a member of the Hindu Mahasabha, the same organisation referred to in Ram Singh, and was detained under section 3 of the Preventive Detention Act, 1950. The ground supplied to him was:

You came to Delhi on ... you gave a highly exaggerated and communal version of happenings in Bengal and East Bengal. ... Your activities in the present atmosphere of Delhi where a communal riot took place on ... as a result of intemperate statements made in a public meeting, are likely to create hatred between different communities which may lead to disturbance of public peace and order. 452

No report of the alleged 'highly exaggerated and communal version' was reproduced in the ground supplied. The District Magistrate who made the order of detention appears to have ruled that no such facts were to be revealed to the petitioner. But clearly the petitioner was detained for something he had said. The Supreme Court at last recognized the implications, and though it upheld the detention order, there were strong words of caution addressed to the Executive authorities.

It was noted that many of the petitioner's colleagues were externed out of Delhi, which was less drastic than preventive detention. Use of extraordinary powers when the general law, as for example, Section 144, Criminal Penal Code, could well have been utilised to deal with the situation,

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451. "There could be no better proof of 'mala fides' on the part of the executive ... than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient", Ibid., 453, col.2.

452. AIR, 1953, S.C.452, col. 1.

created a strong suspicion of malafides which opened up possibilities of mala fides.

Now we must look at some more High Court decisions which illustrate how these Courts have tried to balance the reasonableness of the detention as against the liberty of speech. A most extraordinary decision in this connection is the one decided by the Bombay High Court in Anant Janardhan Karandikhar v. State.<sup>453</sup> The petitioner, a journalist, was detained under R.30(1)b (read with R.35(6)(a) to (s)) of the Defence of India Rules. In cases of detention under the Defence of India Act, 1962, there is no statutory obligation on the State to supply the grounds of detention. In view of that, it is remarkable that the Court not only obtained access to the materials upon which the Magistrate made the detention order, but proceeded to examine it. The court justified its action in the following words:

(I)t is necessary to note that the material does not comprise physical tangible acts, such as acts of assault, intimidation ... etc. [It] consists in the articles written by the petitioner. That means that we are in the realm of ideas, because the articles give expression to certain opinions or ... ideas. 454

These were three articles written by the petitioner on the theme and events leading up to the assassination of Mahatma

453. AIR, 1967, Bom. 11. For an earlier preventive detention case with a 'speech element', Bal Keshav v. Commissioner, AIR, 1956, Bom. 490.

454. Ibid., 16, col.2. But see Contra Abdul Hassan v. State, AIR, 1969, All 548, where forfeiture of books under R.35(6), Defence of India Rules, 1962, which was done "in the opinion of the government" was held non-justiciable.

Gandhi. It was alleged by the State that the petitioner was a sympathiser of the assassin of Gandhi. The people of India considered Gandhi to be the father of their nation and a saint. The petitioner's adverse comments on his non-violent attitude towards the Muslims would have had the effect of creating hatred between Hindus and Muslims.

The petitioner, in his turn, alleged that the State had detained him for the views he had expressed and were also victimising him. They had detained a Muslim gentleman and to show that they were impartial, detained him, a Hindu.

The Court recognized this was an unique case. In an exhaustive judgment they held that however dear Mahatma Gandhi may be to the vast majority of Indians, the petitioner could not be made to suffer for expressing his own views on the history of a period and the men who participated in it. He had not used intemperate language likely to excite the feelings of normal men and women. The three articles responsible for his detention were analysed by the Court in detail (to this writer's knowledge, the first ever detention case in which this was done so thoroughly). The Court concluded that on reading the material with the surrounding circumstances in mind, such as the time of the writing, etc., it could not be said that it was detrimental to any of the objects, the protection of which was contemplated by the Defence of India, Act, 1962.

next the Court examined the question how 'subjective' was the 'satisfaction' of the Magistrate while acting under the Act of 1962? It gave the wholly acceptable answer that 'satisfaction' cannot be arbitrary or capricious but must be

'reasonable satisfaction'. For example, it relied on the following well-known observations of Lord Wright in Liversidge v. Anderson, to draw the conclusion that 'satisfaction' was justiciable:

The actual language is the acid test, and I see no ground for attaching so much weight to so slight a difference in words. 'Satisfied' must mean 'reasonably satisfied'. It cannot import an arbitrary or irrational state of being satisfied. I find the distinction between 'reasonably satisfied' and 'has reasonable cause to believe' too tenuous. 455

From this, the Court drew the conclusion which Lord Wright himself was trying to resist, viz., that it meant a decision arrived at by the application of objective, justiciable criteria. In the same vein, the Bombay High Court quoted Lord Denning's observations in D.P.P. v. Head<sup>456</sup> that,

the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record. ... And 'satisfied' in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed.<sup>457</sup>

The appositeness of these quotations to a case of preventive detention is rather doubtful unless the Court was implying that thenceforward it would review the reasonableness of

455. (1941) 3 All E.R. 338, 380.

456. (1958) 1 All E.R. 679.

457. Ibid., 691.

preventive detention cases. However, it concluded that the Magistrate was not 'reasonably satisfied' and had recited in his order, 'as if by way of chanting a Mantra'<sup>458</sup> that he had applied his mind to a report of a Police Officer (which had referred to the three articles in question) and felt satisfied about the need for passing the detention order. The Court was, however, on firmer ground when it relied on the observations of Viswanatha Sastri J. in M.R.S. Mani v. District Magistrate:<sup>459</sup>

This Court is entitled to say that the detention is bad either because the detaining authority had not exercised its mind at all on the relevant considerations or that the satisfaction of the detaining authority required by Section 2(1) did not exist. Similarly, if a person is detained merely on the ground of his religious, political or economic beliefs and opinions or because he is addicted to some personal vice, without anything relating to the maintenance of public safety or order appearing from the grounds, then also the detention would be held to be bad from the same reasons.

The Bombay High Court was also correct, it is submitted, when it referred to R. v. Vasudeva<sup>460</sup> in support of the proposition that the impugned activities of the person detained must have a reasonable and proximate connection with the likelihood of public disorder or disturbance of the public peace.

458. A Hindu sacrificial formula!

459. AIR, 1950, Madras, 162. Where the petitioner's detention on the ground that he campaigned on behalf of the Communist Party was held invalid.

460. AIR, 1950, F.C.67.

In Sitaram Kishore v. Bihar<sup>461</sup> one of the grounds supplied by the State to the petitioner who was detained under the Preventive Detention Act, 1950, was that he had made speeches accusing the then Indian Prime Minister of responsibility for the partition of Indian and for allowing cow-slaughter.<sup>462</sup>

The Court held that this was an insufficient ground under Section 7 of the Preventive Detention Act of 1950. The petitioner had given his personal views on these matters, it was held, and there was no link between his speech and public disorder.

The Allahabad High Court in Md. Ishaq v. Uttar Pradesh<sup>463</sup> employed the principle that each of the grounds supplied to the detenu should be relevant to the object of the detention law. The petitioner, printer and publisher of an Urdu newspaper was told in one of the grounds that he was detained under section 3 of the Preventive Detention Act, 1950, because he had incited the Muslim community against the ruling party. This ground was held by the Court to be irrelevant because disaffection against a party government without further incitement to violence was no offence in a democracy.<sup>464</sup> The whole detention order was held void.

461. AIR, 1956, Pat. 1.

462. See below, 394.

463. AIR, 1957, All 782. But see contra, In the matter of Saptaha, AIR, 1950, col.444, and decisions referred to therein.

464. The Allahabad High Court has consistently stuck to this view. See Ahmad Ali v. State, AIR, 1951, All 459, and Sarju v. State, AIR, 1956, All 589.

Yet another ground for invalidating preventive detention orders has been 'unreasonable delay' in either supplying the grounds of detention or in considering the representations made by the detenu. The following two cases contrast well showing how much the Supreme Court's opinion of what is 'unreasonable delay' can be affected by the 'speech' element in the cases before them. In the first of the two cases, a plea of free speech was advanced.

In K.I. Singh v. Manipur,<sup>465</sup> the petitioners were detained under the Orissa Preventive Detention Act, 1970, for inciting the students to resort to violence against the Government. They were all members of the teaching staff in various colleges in Manipur, a sensitive border state in India. The petitioners pleaded that all they had done was to write articles urging the recognition of the 'aspirations' of the people of Manipur. Under these circumstances, the Supreme Court held the period of seventeen days taken to consider their representations unreasonable, and held the detention orders invalid. On the other hand, in Nagendra Nath Mondal v. West Bengal,<sup>466</sup> a case decided a few months later, a delay of thirty-four days in considering the detenu's representations was held not unreasonable. The petitioner had, the detention order stated, set fire to a school and thrown a bomb at another - these attacks being ideologically motivated. Naturally enough, the Supreme Court took a grave view of the matter and were prepared to

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465. AIR, 1972, S.C. 438, (1972) II, S.C.J. 459.

466. AIR, 1972, S.C. 665, (1972) I S.C.J. 547.

assume that the period of 34 days the Government took in communicating the grounds must have been with good reason.

Thus, working through these apparently technical issues the Indian Courts have evolved a scale of constitutional values in which free speech is given priority wherever there is not an overwhelming need to preserve public order.<sup>467</sup> It is submitted that the cases so far considered involve the same balancing act, the same weighing of interests as when the 'reasonableness' of restrictions under Article 19 is more directly in question.

Finally, there is a clear precedent in In the Matter of Tribune,<sup>468</sup> for saying that detention cases which involve a 'speech element' have always been scrutinised closely by Anglo-Indian Courts. A newspaper reporter was detained under Rule 129, Defence of India Rules, 1939, for having misrepresented a statement of the Deputy Commissioner while reporting it in his newspaper. Harries CJ, disapproved of his detention in no uncertain terms.<sup>469</sup> If it is remembered that this decision came at the height of the war in which the British-Indian government was engaged, then there is a greater reason for the present Indian Courts to maintain

467. In Jagan Nath Sathu v. Union, AIR, 1960, S.C.625, the petitioner had sent news-dispatches to Pakistan considered objectionable by the Government. His contention that the actual passages in question should have been specified in the grounds supplied was rejected.

468. I.L.R. (1944) 25 Lahore, 111 (F.B.) Sub nom In re Subrahmanyam, AIR, 1943, Lahore, 329.

469. AIR, 1943, Lahore, 329, 333.

their scrutiny. This has to be said since it is possible for a Court to be deceived by the label of preventive detention and for it to overlook a hasty or harsh decision by the Executive authorities. Obviously Indian Courts are not in a position to deny the power of preventive detention to the Executive. It has been constitutionally sanctioned. But the Courts will hardly be denying that power by recognizing that the Constitution has also intended them themselves to draw the limits of free speech. That decision is primarily theirs and not that of the Executive, unless it is confronted with a serious situation of disorder.

The one serious shortcoming in A.K. Gopalan was that it never left room for modifying the relationship between Articles 19 and 22. The ratio appears to insist on an 'either or' formula. We have seen that there are cases which do not fall into that pattern. We see that Courts have relied on the existing requirements of valid detention to protect, where necessary, free speech. Thus, the required result has been achieved and that so far as it went was good.

The Supreme Court found the ratio in A.K. Gopalan too wide in R.C. Cooper v. Union, where it came close to overruling the decision. After discussing the ratio in A.K. Gopalan, and cases that followed it, while interpreting the right to property,<sup>470</sup> the Supreme Court observed,

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470. Chiranjit Lal v. Union, AIR, 1951, S.C.41, 45 (above, 176 ); West Bengal v. Subodh Gopal (1954) S.C.R.587; Bombay v. Bhanji Munji (1955) 1, S.C.R.777, below, 410.

We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. 471

It is arguable if A.K. Gopalan intended to say that the form and object of State action was more important than what happens to the exercise of fundamental rights. As has already been noticed, the case was concerned with preventive detention and the relationship between Articles 19 and 22 in cases of preventive detention. It is doubtful if the Supreme Court in R.C. Cooper was right in attributing such a wide proposition as quoted above to A.K. Gopalan. It is also not accurate, it is submitted, to say that in the other three cases referred to by the Court, the decisions rested solely on the object and form of the State action. Unfortunately, R.C. Cooper has come to be known as the case that overruled A.K. Gopalan. This again may not be correct since the Court's view of A.K. Gopalan, as contended here, was inaccurate. 471

Following R.C. Cooper, the Gujarat High Court held A.K. Gopalan inapplicable in Narottamdas v. State.<sup>472</sup> The case involved free speech and therefore, ties up with our discussion here.

The appellant, editor of a newspaper was prosecuted

471. AIR, 1970, S.C. 564, 596, cd 1.

471a. See f.n. 470 above.

472. (1971) Gujarat Law Reporter, 894.

under Section 198B(1) of the Code of Criminal Procedure. The section punished defamatory remarks made against such officers of the State as President, Vice-President and Governor in respect of their conduct performed in discharging their public functions. Section 198B(5A) (introduced by the Code of Criminal Procedure (Amendment) Act, 1955) provided amongst other things:

Every trial under this section shall be held in camera if either party thereto so desires or if the Court of Session so thinks fit to do.

Thus, a distinction was created between the trial procedures on this point between ordinary defamation cases and those where high officers of the State were involved. The petitioner complained that his fundamental rights under Articles 19(1)(a) and 14. He complained that the procedure was discriminatory. According to the guarantee in Article 21, he should be tried by a procedure established by a valid law, i.e. valid in relation to Articles 19(1)(a) and 14. It may be recalled that A.K. Gopalan merely denied that in "procedure established by law" the 'law' meant 'due process of law' as distinguished from statutory law. So A.K. Gopalan here too was less guilty than the Gujarat High Court made it out to be, as we shall see.

The State raised its standard contention that the effect of the impugned section on 19(1)(a) was merely 'incidental' and 'indirect' - the sort of contention taken out of its context in A.K. Gopalan that has invited so much criticism towards A.K. Gopalan which, it is submitted, the case did not deserve.

The Gujarat High Court rejected the State's contention and held:

[T]he position that emerges after the decision in Cooper's case is that any law prescribing procedure as required by Article 21 must also satisfy the constitutional guarantees under Articles 19 and 14. In other words, the validity of a law prescribing the procedure for deprivation of personal liberty ... under Article 21 can also be examined to find out whether it in any way infringes the freedoms guaranteed by Article 19 or equality before law guaranteed by Article 14. 473

The impugned provision was held to be unreasonable, because the provision compelled a trial in camera at the instance of the parties without regard to the interests of administration of justice. The State officer could invoke the privilege under Section 123 of the Indian Evidence Act, which claim was, however, justiciable, thus showing the importance of the public interest in keeping trials open. That principle should give way only if other vital interests are proved to exist. The Court did accept that high officers of State required protection in course of trials of the type in question, but claimed it could not be compelled to hold the trials in camera under all circumstances.

In conclusion, this writer's plea is that Article 19 rights generally, and in particular, freedom of speech which is not merely a personal freedom but is also a political and civil right of considerable importance may be violated if in

a case of preventive detention the citizen is to be confined to his remedies under Article 22. Professor Tripathi has suggested that because detention is preventive, it need not exclude the applicability of Article 19. According to him, it should be made to depend upon the act sought to be prevented. If the act was murder or such acts of violence about to be committed, Article 19 might not figure but if the offensive act was sedition (or inflammatory speeches), he thinks, Article 19 should figure in the Court discussions.<sup>474</sup>

Finally, an illustration<sup>of</sup> how careful courts will be even if Article 19 is overtly introduced in preventive detention cases is the decision in K. Narayanan v. State.<sup>474a</sup> The petitioner was detained under the Maintenance of Internal Security Act, 1971. While in detention, he asked for three books by Mao-TseTung. These were denied him as per the Kerala Security Prisoners Order; clause 19 of the Order ran as follows:

19. Books, Newspapers and Periodicals -  
 (1) Security Prisoners may receive such books, newspapers and periodicals as are not (a) proscribed by the Government; or (b) considered by the Government as not permissible.

The Kerala High Court following Maharashtra v. Prabhakar<sup>475</sup> was willing to assume that the right to free speech and there-

474. P.K. Tripathi, "'Constitutional Law of India' - a Review article on Seervai's book on the Constitution", (July-September, 1968) II/3, J.C.P.S.

474a. AIR, 1973, Kerala, 97 (F.B.)

475. AIR, 1966, S.C.434. See above, 229.

fore to information but held that:

If the books are of such a nature as we have already adverted to conducive to instigate people to acts of violence to overthrow established Governments and to disturb public order and peace, they can be denied to a detenu. The very purpose of detention will be destroyed by allowing security prisoners to train themselves to a course of action which would overthrow established Governments or result in creating instruments that will disturb peace and public order of the State. 476

#### REASONABLE RESTRICTIONS ON THE PRESS IN INDIA

Since the press in India is one of the most common methods by which unduly 'free' expression may give, immediately, rise to communal disorder, the cherished freedom of expression finds in the freedom of the press an Achilles' heel.

Liberty of the press appears, nevertheless, to have been respected in India in the pre- and post-Constitutional periods, i.e. during the British rāj as well as in the Indian Republic. Pre-censorship as the most well-known restriction on the press was disapproved by Anglo-Indian judges. Liberty of the press and pre-censorship could not live together in the view of the Indian judiciary, then as now.

Thus, in the thirty-year old case of In re Ardeshir Phirozshaw <sup>477</sup> the Presidency Magistrate of Bombay passed

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476. AIR, 1973, Kerala, 97, 99, col.2.

477. AIR, 1940. Bom. 42.

an order under Section 144 of the Criminal Procedure Code, 1898, directing the appellant, editor of a Gujarati newspaper, to abstain for a period of two months from publishing any news about an agitation, then in progress, against a new tax. He could only publish such news as was approved by the public Relations Officer of the Bombay Government. Section 144 of the Code of 1898 ran as follows:

144 (1) In cases where, in the opinion of a District Magistrate, ... or of any other Magistrate specially empowered by the State Government ... there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in the manner provided ... direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot, or an affray.

Beaumont C.J. of the Bombay High Court struck down the order. He held that 'Prima facie in a country which enjoys liberty of the press'<sup>478</sup> the applicant was entitled to publish any news he chose. The Magistrate could restrict this liberty of the applicant only if (a) he set out cogently the material facts of the occasion justifying the necessity of such a restriction in the public interest; (b) thereby he

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478. Ibid., 43, col.2.

was also able to show the connection between the disorder and the applicant's newspaper; (c) and if he was able to show that the restriction imposed was not beyond the requirements of the case, and (d) he was able to show the character of the news or publication that he wished to see prohibited. In the Court's view, the impugned order did not fulfil these conditions and it was, therefore, held to be invalid.

Similarly in Editor, Tribune v. Emperor<sup>479</sup> Young C.J. dealing with a similar order made under Section 144, Criminal Procedure Code, observed:

*Censor* )  
 To justify an order under section 144 there must be a ~~casual~~ connexion between the act prohibited and the danger apprehended to prevent which the order is passed. It is not stated in the order, nor is it alleged, that the publication of news about the hartal [strike] had led in the past to the formation of unlawful processions. 480

The grounds that were advanced in these two decisions by the learned Chief Justices have been accepted by the Indian Supreme Court as applicable to Article 19.<sup>481</sup> But after the Constitution came into force, Section 144 does not appear to have been used to censor the press in any manner. The constitutionality of the section, however, came up for consideration in a different context.<sup>482</sup>

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479. AIR, 1942, Lahore, 171 (F.B.) reported sub nom. P.T. Chandra v. The Crown, I.L.R. [1942] Lah. 510 (F.B.).

480. At 172, col.1, I.L.R. [1942] Lah. 510, 514 (F.B.). The High Court in revision may examine the propriety as well as legality of the order.

481. The Superintendent, Central Prison v. Ram Manohar, AIR, 1960, S.C. 633; Ram Manohar v. Bihar, AIR, 1966, S.C. 740.

482. Babulal Parate v. Maharashtra, AIR, 1961, S.C. 884; Bihar v. K.K. Misra, AIR, 1971, S.C. 1667. See below., 312, 315.

The Indian Supreme Court was faced, early on, with settling the ambit of the freedom of the press in Romesh Thapper v. Madras.<sup>483</sup> The Madras Government had prohibited an English weekly called 'Cross Roads' from entry into, or sale or distribution in the province. The order was made under Section 9(1) of the Madras Maintenance of Public Order Act, 1949, which authorised such an order to be passed if the Governor was satisfied that it was necessary to do so "for the purpose of securing the public safety and the maintenance of public order" in the province.

"Public safety and maintenance of public order" were not amongst the grounds in Article 19(2) as originally enacted and before its amendment by the Constitution (First Amendment) Act, 1951:

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

The State of Madras sought to justify the Act of 1949 as a law relating to the security of the state. The contention being that "public safety and public order" would be included in or subsumed under "security of the State".

This was rejected by the majority in the Supreme Court, who held that the two grounds were not co-terminus, Acts aimed at undermining the security of the State were far more

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483. AIR, 1950, S.C.124.

grave than acts aimed at disturbing public order or public safety. Thus Patanjali Sastri J. (for the majority) held:

Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be upheld to be wholly unconstitutional and void. In other words, cl(2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved, 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. 484

While examining the merits of the impugned order, the Supreme Court unanimously recognized that 'freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation.'<sup>485</sup> So there was never any doubt and the impugned order and the law on which it rested, imposed restrictions in violation of the right guaranteed.

So also there was no doubt at all but that pre-censorship was unconstitutional. This was treated as an a priori proposition in the next case which is closely similar to

484. Romesh Thapper, AIR, 1950, S.C.124, 129.

485. Patanjali Sastri J. referred to two United States decisions in support of the point, Ex parte Jackson, 96 US 727, and Lovell v. City of Griffin, 303 US 444.

Romesh Thapper (above). In Brij Bhushan v. State,<sup>486</sup> the Punjab Government acting under the East Punjab Public Safety Act, 1949, imposed pre-censorship on a weekly called 'The Organiser'. The impugned order directed the publisher and the editor "to submit for scrutiny, in duplicate, before publication, till further orders all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by news agencies." As in the Madras Act, the power was exercised on the subjective satisfaction of the Governor for the purpose of "preventing or combating any activity prejudicial to the public safety, or the maintenance of public order." The factual background to the order was the communal hatred that continued from the days of partition of India. The majority in the Supreme Court applied the Romesh Thapper reasoning and held the statute unconstitutional.

The dissenting judge in both cases was Fazl Ali J. who, it may be of interest to note, also dissented in A.K. Gopalan.<sup>487</sup> His reasoning was that the two statutes were not meant to be applied to every petty act likely to disturb public order but were intended to deal with serious outbursts of a communal nature. His Lordship argued that if the basis of the offence of sedition<sup>488</sup> was disturbance of public tranquillity which,

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486. AIR, 1950, S.C.129.

487. Above, 223.

488. Reference was made to Niharendu Dutt v. Emperor, AIR, 1942, F.C. 22 (1942) F.C.R. 38.

if unchecked, could result in a threat to the security of the State, then the matters dealt with by the two statutes impugned were not different. The purposes of the statutes clearly indicated their selective application to those extreme acts of violence which, if unchecked, would become threats to the security of the State .

The ratio common to these two decisions was reversed by the Constitution (First Amendment) Act, 1951, which introduced the ground of public order in Article 19(2) along with two new grounds viz., 'incitement to an offence' <sup>489</sup> and 'friendly relations with foreign States'.

Any criticism that the majority in Romesh Thapper and Brij Bhushan were too technical in the construction they put on the grounds in the original Article 19(2) must take into account the need somehow to limit the general expressions used under that sub-clause and indeed, in all the sub-clauses of Article 19. Even before the reasonableness of a restriction arises for consideration the meaning of the terms justifying such restrictions has to be ascertained. This is something that no court can avoid. Whether or not the Supreme Court could have responded more positively to the urgency of the problem dealt with by the Punjab statute, if not the Madras statute, may be a debatable point. But about the need to ascribe definite contours to the grounds under

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489. This was inserted because of two High Court decisions which, on a mistaken interpretation of Romesh Thapper (above), held that speech urging the commission of murder could not be restricted under Article 19(2) as originally enacted - Re Bharati Press, AIR, 1951, Pat.12, I.L.R. (1951) 30 Patna 31, on appeal to Supreme Court, see Bihar v. Shailahala Devi, AIR, 1952, S.C.329, (1952) S.C.R.654.

Article 19(2) there can be no doubt.

On the other hand, it is understandable that the Indian Parliament showed an impatient concern over the two decisions.<sup>490</sup> The whole of Punjab, now divided into East (Indian) and West (Pakistan) Punjab was even around 1949 smouldering with the enmity and hatred unleashed at the partitioning of India in 1947. There was the young Indian Republic trying to see in reality the hitherto intellectual dreams of a secular India where all communities lived in peace under equal protection extended by the State. Provocative reports and comments carried by newspapers under not very responsible editors could not help the new Government in its efforts. So the Constitution (First Amendment) Act, 1951, was passed with some haste, permitting the State to curb free speech on the ground of 'Public order'.

One possible explanation for the Supreme Court's decisions in Romesh Thapper and Brij Bhushan may well be the influence United States constitutional decisions may have had on its mind. The 'Clear and present danger' formula and the view taken by United States Supreme Court Judges, like Black and Douglas, of a 'total' freedom of expression under the United States I Amendment, may have led the Indian Supreme Court to believe that it is only in such extreme situations as threats to the security of the State that the Indian

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490. Mehrchand Mahajan, a former Chief Justice of India, deplored the 'hasty' amendment that introduced 'Public order' in Article 19(2), The ground in his view, is too wide. M.C. Mahajan, Looking Back, Asia Publishing House, Bombay, 1963.

Constituent Assembly too wished to see imposed such severe restrictions as pre-censorship. The area of free speech has continued to be influenced by United States decisions, or so it appears from the frequency of references to those decisions in Indian cases on free speech.<sup>491</sup> This is so notwithstanding general caveats issued against reliance on United States decisions.<sup>492</sup>

Finally, on Romesh Thapper and Brij Bhushan (above, 249, 251) it must be pointed out that the two statutes in question were very widely phrased, enabling the Executive to impose some of the most severe restrictions on the press. If the statutes had been drawn more closely, and had indicated the nature of the effect or damage sought to be prohibited, such as communal provocations etc., legislative intention would have been made clear to the Court and the result of the cases would have been different. 'Public order' and 'security of the State' are wide expressions and if the discrepancy between these two expressions had been overlooked by the Supreme Court, it would have been the cause of some confusion subsequently.

These remarks are borne out by the Supreme Court's

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491. Express Newspaper Ltd. v. Union of India, AIR, 1958, S.C. 578. "It is trite to observe that the fundamental right to the freedom of speech and expression enshrined in Article 19(1) of our Constitution is based on these provisions in Amendment I of the Constitution of the United States ..." Bhagwati J. at 615. H.M. Seervai is critical of this equation, Constitutional Law of India, 311-12, paras. 11.33 and 11.34.

492. Bombay v. R.M.D. Chamarbagwala, AIR, 1957, S.C. 699, 712.

decision in Bihar v. Shailabala Devi,<sup>493</sup> where the Supreme Court held that utterances inciting the listeners to commit murder or other violent crimes could be restricted and such restrictions would be justified under the ground of 'security of the State'. Here the object of the law was very clear and the acts to be prohibited identified with reasonable clarity. The Patna High Court appears to have wrongly construed Romesh Thapper and held that restrictions cannot be placed on such incitements.<sup>494</sup> The point made is further illustrated by the following decision of the Supreme Court.

The statute impugned in Virendra v. Punjab,<sup>495</sup> as compared to the Madras and Punjab statutes impugned in the earlier cases, was more specific and tightly drawn. This was true also of the procedural parts of the law. Section 2(1) of the Punjab Special Powers (Press) Act, 1956, was as follows:

Section 2(1). The State government or any authority so authorised in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order, may by order in writing addressed to a printer, publisher or editor -

- (a) prohibit the printing or publication in any document or any class of documents of any matter relating to a particular subject or class of subjects for a specified period or in a particular issue or issues of a newspaper or periodical ;

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493. AIR, 1952, S.C. 329, (1952) S.C.R.654.

494. Re Bharati Press, AIR, 1951, Pat.12.

495. AIR, 1957, S.C. 1896.

provided that no such order shall remain in force for more than two months from the making thereof;

provided further that the person against whom the order has been made may within ten days of the passing of his order make a representation to the State Government which may on consideration thereof modify, confirm or rescind the order;

Two notifications were issued by the State Government under this section, one of which prohibited the printing and publishing of "any article, report, news item, letter of any other material of any character whatsoever relating to or connected with the 'Save Hindi Agitation'", and the second notification prohibited the bringing into Punjab of the newspaper which contained a report of the nature mentioned.

The Supreme Court stated that it recognized the primary responsibility of the Government to maintain law and order. Das C.J., who gave the judgment of the Court, stated:

Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. 496

The temporary nature of the orders made under the statute certainly helped the Court in supporting its constitutionality. Both the substantive and procedural parts of the statute were held to be reasonable restrictions.

In Ramnarayan v. Madhya Pradesh,<sup>497</sup> the impugned order

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496. Ibid., 900, col.1.

497. AIR, 1970, M.P. 102.

was made under a statute similar to the Punjab statute. Acting under Section 12 of the Madhya Pradesh Public Security Act, 1959, the State Government prohibited the entry or distribution of the petitioner's newspaper into the State on the ground that the paper's treatment of news of communal disturbances was likely to "promote feelings of enmity and hatred between the different classes of the citizens of India ..."

Reminiscent of Romesh Thapper<sup>498</sup> in its essential features, this case received the same kind of disapproval from the Madhya Pradesh High Court. The Court held that the total banning of the newspaper from the State was an excessive restriction and that the paper should be free to publish news and information about events other than those bearing on communal questions.

#### Press and Economic and Industrial Regulations

Whether or not, by contrast, a piece of industrial legislation imposing financial burdens on the press industry amount to infringement of Article 19(1)(a) was considered by the Supreme Court in Express Newspaper Ltd. v. Union of India.<sup>499</sup> A number of newspaper companies challenged the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), on the basis of Articles 19(1)(a), (g) and 14. After receiving persistent complaints about the inadequate conditions of employment of journalists, Parliament appointed a Press Commission to go into all relevant

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498. AIR, 1950, S.C.124 (1950) S.C.R.594.

499. AIR, 1958, S.C.578.

matters affecting the employment and working conditions in the Press industry.

The Report of the Commission (submitted on 14th July, 1954) stated that it was essential to improve the conditions of journalists because they played an important role in the dissemination of news and on the whole, were important in maintaining the quality of newspapers. It suggested legislation covering (i) Notice periods; (ii) Bonus; (iii) Minimum wages; (iv) Sunday rest; (v) Leave; and (vi) Provident funds and gratuities. So in essence the Act of 1955 was a minimum wage law which left the determination of such statutory minimum wage to a Wage Board whose decisions were to be binding on both employers and employees. The Board would consist of equal number of employers' and employees' representatives with a neutral Chairman. Section 17 of the Act provided that the coercive, extraordinary procedure used in the recovery of arrears of land revenue can be utilised to obtain any money due from an employer. It was admitted on all sides that the impugned law did impose additional expenditure on the companies.

The companies argued that the law interfered with the necessary means employed in the proper exercise of press freedom. By imposing these financial burdens, the Government was trying to destroy their independence and freedom by forcing them to seek government aid. In support of this contention they relied on a number of United States decisions.

The Attorney-General for the Union contended that the impugned law's purpose did not relate to the activities of the press at all but was aimed at regulating the conditions of employment of a class of workers. Any indirect or incidental effect the law may have was not to be considered in deciding the question of its constitutionality. He relied on the following observation of Kania C.J. in A.K. Gopalan:<sup>500</sup>

If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of article 19 does not arise.

The Supreme Court held that the concept of a minimum wage was supported not only by the Directive Principle in Article 43 of the Constitution, but also by its recognition and acceptance in many countries of the world. It found that the press was not immune from the "ordinary forms of taxation for support of the Government nor from the application of the general laws relating to industrial relations."<sup>501</sup>

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500. AIR, 1950, S.C.27, 34-35.

501. At 616. Grosjean v. American Press Co. (1935) 297 US 233, Associated Press v. National Labour Relations Board (1936), 301 US, 103 referred to.

The object of the law was industrial relations and hence, in its "intention or proximate effect and operation" it could not be said to have violated press freedom under Article 19(1)(a). Just because the law meant additional financial burdens to be borne by the employers, it could not be said there were ulterior motives in passing the law. The dire consequences of the law as described by the companies, such as the likelihood of the press seeking Government aid, thus losing its independence or being penalised for its choice of means in exercising its right, it was held, were remote. Such consequences would depend on a number of factors which might not come into play.

However, the Supreme Court went on to issue a caution in the matter of tax and industrial laws as applied to the press industry:

Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media (sic), prevent newspapers from being started and ultimately drive the press to seek Government aid in order to survive, would ... be struck down as unconstitutional. 502

Though successful here when the Government of India sought to implement the other recommendations of the Press Commission by passing the Newspaper (Price and Page Act, 1956, it encountered difficulties. This Act and the Daily News-

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502. Ibid., 5617, Oklahoma Press Publishing Co. v. Walling (1945) 327 US 186, referred to. Thomas v. Collins (1944) 323 US 516, and Terminiello v. Chicago (1949) 93 Law Ed. 1131 referred to.

paper (Price and Page) Order, 1960, made under it sought to prevent, what, in the Government's view, was unfair competition in the press industry.

The Press Commission's recommendation was to the effect that there was a need to prevent the growth of monopolistic combines in the Press industry which made it difficult for smaller newspapers to grow. The effect of the Act and the Order was to regulate the number of pages published according to a scale of prices provided by the Order. The desired result being a reduction in the advertisement space and therefore, in the revenue that the bigger newspapers collected. Section 3(1) of the Act was as follows:

3. (1) If the Central Government is of opinion that, for the purpose of preventing unfair competition among newspapers so that newspapers generally and in particular, newspapers with smaller resources and those published in Indian languages may have fuller opportunities of freedom of expression, it is necessary or expedient so to do, the Central Government may, from time to time, by notification in the Official Gazette, make an order providing for the regulation of the prices charged for newspapers in relation to their maximum or minimum number of pages, sizes or areas and for the space to be allotted for advertising matter in relation to other matters therein. 503

The Act and the Order of 1960 were challenged in Sakal Papers (P) Ltd. v. Union of India.<sup>504</sup>

The petitioners in the case argued that as a result of the impugned Act and Order, they would either have to increase

503. The Newspaper (Price and Page Act) (XLV of 1956).

504. AIR, 1962, S.C.305.

the price of their paper or reduce the number of pages, as an example, from 34, for six days of the week, to 24. In either case, in their view, their right under Article 19(1)(a) was curtailed. If they increased the price their circulation would drop, and if the other course were adopted, their right to disseminate news and views would be directly curbed.

The Union argued that the aim of the law was to make available to the public the maximum matter at fair prices. The law in no way dictated the contents of the newspapers. Any drop in circulation as a result of the operation of the law was only an 'indirect' consequence. Matters such as prices charged and the space devoted to advertisements were commercial in nature, and the reasonableness of the restriction imposed should, therefore, be considered under Article 19(6) - the sub-clause corresponding to Article 19(1)(g), which guarantees free pursuit of one's trade or profession - and not under Article 19(2). Thus, according to the Union neither the intention nor the effect - the direct and proximate effect - of the Act was to take away or abridge the freedom of speech and expression of the petitioner. Moreover, it was emphasised by the Union that the import of newsprint consumed by the newspapers was a matter that it was competent to regulate. Since the quantity imported was based on the total number of pages calculated as at 1957, no newspaper had an unrestricted right to raise its total of pages. Finally, it was said on behalf of the Union that the price-page ratio was adopted from the recommendations of the Press Commission which insofar as it took into account all the

relevant factors acted fairly and reasonably.

The Supreme Court made an a priori statement that the freedom of a newspaper to publish any number of pages or to circulate it to any number of persons was an integral part of the freedom of speech and expression. The freedom would be directly infringed when some integral aspect of it was sought to be curbed. The impugned Act and Order were intended to affect the circulation of newspapers and hence, were void as being unconstitutional. The alleged need to stop unfair competition was not considered by the Court as a sufficiently weighty or a sufficiently clear purpose to justify such interference with the liberty of the press. These evaluative judgments on matters of at least partly political complexion, are intriguing, and illustrate the Supreme Court's capacity, at any rate, to tread on delicate ground.

On the question whether the impugned Act had a direct or indirect effect on the right guaranteed by Article 19(1)(a), the Supreme Court appeared to ignore the A.K. Gopalan position<sup>505</sup> and offer a different view.

In Dwarkadas Shrinivas v. Sholapur Spinning Co., (1954) S.C.R.674, AIR, 1954, S.C. 119, this Court has pointed out that in construing the Constitution it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspect. The correct approach in such cases should be to enquire as to what in substance, is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction. 506

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505. Above, 223.

506. AIR, 1962, S.C.305, 311, col.2.

This provides another instance of the Supreme Court ignoring A.K. Gopalan (above, 223 ).

The Supreme Court's ratio in Sakal Papers (above, 261) when read in the light of the decisions in Romesh Thapper and Brij Bhushan shows that freedom of speech and expression is guaranteed in order to ensure free propagation of ideas which, in turn, is ensured only by free circulation. In Romesh Thapper,<sup>507</sup> circulation was denied when the paper was barred from a territory of the State, but in Sakal Papers, circulation was to be denied by reducing the pages or volume of material that the newspapers could carry. Thus, the meaning of freedom of circulation has been specified by the Supreme Court.

One more major opportunity was presented to the Supreme Court further to explore the area of free speech in Bennett Coleman and Co. and Others v. Union of India.<sup>508</sup> In substance, the same type of restrictions that were imposed by the News-paper (Price and Page) Act, 1956, were written into the Import Policy for Newsprint for the year April, 1972 to March, 1973, governing the distribution of imported newsprint. The import policy for each season is published by the Government of India in the form of handbooks made available to the public. The material contained in the handbooks are administrative in character, and the power to frame them is derived from the Imports and Exports Control Act, 1947, and a number of Orders governing individual commodities. In the present case, newsprint was also 'an essential commodity' under the Essential

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507. Above, 249.

508. (1973) 1 S.C.J.177, AIR, 1973, S.C.106.

Commodities Act, 1955.

The Newsprint Control Order, 1962, made in exercise of the powers conferred by the Act of 1955, restricted the acquisition, sale and consumption of newsprint. The impugned Newsprint Policy distinguished between "Common-ownership Unit", which it defined as newspaper establishments owning two or more 'news interest newspapers' and others. While a quota system was devised by the order of 1962, the Newsprint Policy imposed the following restrictions:

- (a) No new edition of a newspaper could be started by a 'Common-ownership Unit', even within the authorised quota of newsprint.
- (b) A limitation of ten pages was set as the maximum publishable by any newspaper.
- (c) No adjustment was permitted between the pages and circulation so as to increase the number of pages.
- (d) Newspapers with less than ten pages were allowed to bring them up to ten, i.e. newsprint enough to enable them to do it was to be supplied.

According to the Union Government, these policies were designed to help Indian-language newspapers which were unable to compete with English dailies. The latter attracted the most advertisement revenue.

The petitioners attacked the Newsprint Policy as discriminatory and therefore, violative of Article 14.<sup>509</sup> The maximum limit of ten pages was described by them as a violation

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509. See above, |7|.

of Article 19(1)(a). While they conceded the Government's right to devise a quota-system for scarce and essential commodities, they argued that the 'post-quota regulations', as in this case, would have to be examined for reasonableness. In the instant case, the regulations were, they argued, irrational and arbitrary, and therefore, unreasonable. It was not a case of newsprint control any longer, but was 'newspaper control'. They urged the Supreme Court to reject the Union's contention that the impugned matters related 'directly' to import control and only incidentally to freedom of the press. Petitioners argued that the Bank Nationalisation case,<sup>510</sup> had overruled the A.K. Gopalan approach to constitutional interpretation. The petitioners<sup>4</sup> contended that it was not directness in terms of the form of the legislation, as A.K. Gopalan would seem to imply, but directness in terms of the effect of the legislation that ought to be the deciding factor. The impugned Newsprint Policy may be in form, and partly in substance, an import control but its effect on press freedom was direct. What was more, the petitioners went on to say that the tests of 'pith and substance' of the subject-matter and of 'direct and incidental effect' of legislation were relevant to the question of legislative competence but were misleading and irrelevant to the determination of violation of fundamental rights. In any case, they argued, the Supreme Court had already shown in Sakal Papers that it did not accept the A.K. Gopalan approach.

Four out of five Judges of the Constitutional Bench

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510. AIR, 1970, S.C.564. See below, 389, 413.

accepted the petitioners' arguments. Mathew J. dissented. Ray J. (writing the majority judgment) held that freedom of the press was both qualitative and quantitative. In other words it comprised of free, unhindered circulation and free unspecified volume of news and views. In any event, it was not for the Government, boldly asserted the Court, to say which newspapers should grow both in page and circulation and which were not to grow in a specified direction. If a newspaper wished to increase its pages at the risk of losing circulation (since every newspaper had a limited quota of newsprint) it should be free to do so. The majority, applying its mind freely to the merits of the project, did not approve of the aim of the impugned policy in trying to reduce the advertisement revenue of the bigger dailies:

If as a result of reduction in pages, the newspapers will have to depend on advertisements as their main source of income, they will be denied dissemination of news and views. That will also deprive them of their freedom of speech and expression. On the other hand, if as a result of restriction on page limit the newspaper will have to sacrifice advertisements and thus weaken the link of financial strength (sic), the organisation may crumble. The loss on advertisements may not only entail the closing down but also affect the circulation and thereby impinge on freedom of speech and expression. 511

As far as advertisements were concerned, the question arose in Hamdard Dawakhana,<sup>512</sup> in which the Supreme Court had upheld a law prohibiting advertisements for magical remedies

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511. At 199 (S.C.J.)

512. (1960) S.C.J. 611, AIR, 1960, S.C.554.

for diseases and physical ailments on the basis that commercial advertisements, though prima facie expressions, will not be protected as free speech. An advertisement to further business interests as distinguished from an advertisement to convey an idea of a social, political or cultural nature would not be regarded as free speech. The Supreme Court in this instant case, did not see the need adequately to reconcile that interesting decision with their present ratio.

The Court was, however, more explicit in reiterating what appeared in the Bank Nationalisation decision to be a shift in the Supreme Court's interpretation of enactments restrictive of fundamental rights. It was held by the Court ~~was~~ that it was not the legal form - to be specific, the legislative entry relied on by the State - or the object of the law, viz., encouragement of newspapers published in Indian languages, but the consequences of the law in restricting fundamental rights that were to be looked at by the Court.

The action may have a direct effect on a fundamental right, although its direct subject-matter may be different. A law dealing directly with the defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have (sic) such law if the restriction is unreasonable even if it is related to matters mentioned therein. 513

The Court refused to be persuaded by an United States decision that arose under the Sherman Act.<sup>514</sup> Equally, it was

513. (1973) 1 S.C.J. 177, 193, col.1.

514. Citizen Publishing Co. v. United States (1968) 394 U.S.131, 22 L.Ed. 148.

not impressed by United States v. O'Brien,<sup>515</sup> wherein the United States Supreme Court held that when a substantial government interest was involved, the State could regulate the 'non-speech' element in conduct that contained both speech and non-speech elements. Instead, the Court relied on what Sir William Blackstone had said in his Commentaries:

Every free man has an undoubted right to lay what sentiments he places before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity. 516

In the view of the majority, the Government's discretion stopped with the determination of the quota that newspapers were entitled to. How they used the newsprint allotted was not a matter for the Government.

It is necessary to consider the minority view which the dissenting justice, Mathew J., expressed. According to the learned Judge it was essential to understand what the term "abridges" in Article 13(2) meant.

13(2). The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

He held that there was a distinction between abridgement of speech and abridgement of freedom of speech.

515. (1968) 391 U.S.367.

516. Commentaries, 4 B1, 151-2.

Surely, the reduction in page level or circulation is the direct result of the diminished supply of newsprint. Yet, I do not think that anybody will say that there is an abridgement of the freedom of speech of the petitioners. There might be an abridgement of speech, but not an abridgement of freedom of speech.<sup>517</sup>

The decisive test would be if the press has been singled out for unfavourable treatment.

In fact, regular tax measures, economic regulations, social welfare legislation ... and similar measures may, of course, have some effect upon freedom of expression when applied to persons or organisations engaged in various forms of communication. But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on expression seems clearly insufficient to constitute an abridgement of freedom of expression. 518

Mathew J. was, perhaps, the first Judge to examine the theory behind freedom of expression in some detail. The values sought by society in protecting this freedom were, in his view, (1) individual fulfilment; (2) the attainment of truth; (3) the participation by members of the society in the political or social decision-making, and (4) maintaining the balance between stability and change in society. To this we might well add Lord Denning's view that the right to dissent is part and parcel of free speech.<sup>518a</sup> The freedom was not primarily for the benefit of the press

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517. (1973) 1 S.C.J. 177, 210.

518. Ibid., 208, col.2.

518a. Lord Denning, "Freedom of Association and the Right to Work" in Sir Francis Vallat (ed.), An Introduction to Human Rights, London, 1970.

but rather for the benefit of the public. It was the public's right to be informed that was the basis of the guarantee. There was also the important aspect of the need of men to express their opinions. But in India, he felt there was a danger of "Common-ownership Units" dominating the well-recognized channels of communication.

A realistic view of our freedom of expression requires the recognition that right of expression is somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers. 519

Again the learned Judge stated <sup>that</sup> ~~the~~ Indian constitutional law was indifferent to the 'reality and implications of non-governmental obstructions to the spread of political truth'.<sup>520</sup>

On the question of interpretation of restrictions on fundamental rights, Mathew J. did not comment on the A.K. Gopalan approach or the 'pith and substance' test of legislation.

Thus, we see that the Supreme Court has stuck to the a priori proposition that freedom of the press includes freedom of circulation which is not confined to circulation spatially,<sup>521</sup> but includes also the volume of material put in

519. Ibid., 214, col.1. The political evaluation is evident.

520. At 213, col.1 (S.C.J.). Mathew J. also referred to the Report of the Committee on Distribution of Income and Levels of Living, (Mahalanobis Committee Report) "In a study of concentration of economic power in India, one must take into account this link between industry and newspapers which exists in our country to a much larger extent than is found in any of the other democratic countries in the World." Part I, 51-52.

521. Romesh Thapper v. Madras, AIR, 1950, S.C.214. (1950) S.C.R. 594.

circulation.

"Decency and Morality"

No one suggests that the freedom of the press extends beyond the restrictions laid down in the general law of India, as summarised above, . . . The constitutional guarantee of freedom of expression must be re-examined to observe the points of contrast and comparison.

Article 19(2) refers to 'decency and morality' which is plainly wider than the ostensibly analogous ground of 'obscenity'. It seems wide enough to support, e.g. the constitutionality of such a unique provision as section 509 of the Indian Penal Code, 1860, if the latter were to be challenged.

sec.509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Yet the antique provisions of the Indian Penal Code in this area neither escape the overall provisions of the Constitution nor prevent further penal legislation which is within their contemplation. Dr. D. Basu advocates a greater power in Indian courts to recognise acts offensive to 'decency and morality', his contention being that while 'obscenity' has come to acquire a technical meaning 'decency and morality' have not, and are in any case, wider in their connotation.<sup>522</sup>

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522. D. Basu, Commentary on the Constitution of India, 5th Edn., Vol.1, 635.

It certainly implies that the state may pass stricter laws.

The House of Lords' decision in Shaw v. D.P.P. 523 indicates the need for a ground other than 'obscenity' to cover cases that are not covered by that offence but could cause as much mischief as an obscene material. In this English case the appellant-accused published a "Ladies Directory" which was a detailed list of prostitutes and particulars of services available from each of them. The act of publishing such a 'directory' was not within the Obscene Publications Act, 1959. The House of Lords nevertheless, held, Lord Reid dissenting, that the appellant was guilty of the Common Law misdemeanour of "conspiracy to corrupt public morals". In the sphere of Criminal Law, held Lord Simonds:

there remains in the Court of law a residual power to enforce the supreme and fundamental purpose of law, to conserve not only the safety and order but also the moral welfare of the State, and it is their duty to guard against attack which may be the more insidious because they are novel and unprepared for. 524

#### The Offence of Obscenity in India 525

The main provision that punishes the sale, import, advertisement or offer of obscene literature or objects is to be found under section 292 of the Indian Penal Code. section 293 punishes sale or distribution of obscene material to persons under 20 years of age. Section 294 punishes any

523. L.R. [1962] A.C.220.

524. Ibid., 267.

525. See J.N. Mallik, Law of Obscenity in India, Eastern Law House, Calcutta, 1966 (includes a discussion of Ranjit Udeshi, below, 277. ).

one who sings or utters obscene songs or ballads in public places to the annoyance of others. None of the sections defined 'obscenity'.

Recently thorough-going amendments were introduced by the Indian Penal Code (Amendment) Act, 1969,<sup>526</sup> (Act 36 of 1969) incorporating in section 292 the main points made

526. Gazette of India, 8/9/1969, Part II, S.1, Ext. 667.

2. Amendment of section 292 of Act 45 of 1860.  
In the Indian Penal Code -

a) section 292 shall be re-numbered as sub-section (2) thereof and before sub-section (2), as so re-numbered, the following sub-section shall be inserted, namely:-

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.;

b) in sub-section (2) of section 292, as so re-numbered -

(i) ... ..

(ii) for the exception, the following exception shall be substituted, namely:-

"Exception - This section does not extend to -

a) any book, pamphlet, paper, writing, drawing, painting, representation or figure -

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, ... or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

b) any representation sculptured, engraved, painted or otherwise represented on or in -

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, or

/Cont'd. on next page:

by judicial decisions. The punishment for the offence under Section 292 is increased from up to three months imprisonment with or without fine to up to two years imprisonment with or without fine in cases of first conviction, up to five years imprisonment with or without fine (which has also been enhanced throughout) for any subsequent conviction.

Section 3 of the Amending Act of 1969 also amends Section 99-A of the Code of Criminal Procedure, 1898, to include obscene matter along with seditious literature. Now it seems obscene matter can be forfeited even while a charge under Section 292, Indian Penal Code is pending before the Court.

The enhanced punishment provided by the Act of 1969 seem excessive and not every citizen may be aware that there is a problem to be coped with. The general impression is that there is no special problem justifying such punishments.<sup>527</sup>

The test of obscenity laid down in Queen v. Hicklin<sup>528</sup> is still current law in India. Only recently a new element

Note 526 from 274 - continued:

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purposes.";

c) ... .."

For a detailed analysis of the laws bearing on the topic of obscenity, see Vishnu D. Sharma and F. Wooldridge, 'The Law relating to obscene Publications in India', 22, I.C.L.Q. (1973) 632-47.

527. This writer was unable to get at the Objects and Reasons, if any, for the Act. The Preamble to the Act says, 'An Act further to amend the Indian Penal Code and to provide for matters incidental thereto.'

528. (1868) 3 Q.B. 360.

of 'redeeming social value' was introduced as a defence to the charge of obscenity.<sup>529</sup> The earliest case which adopted the Hicklin test in India was Emperor v. Indarman,<sup>530</sup> a case where the facts were similar to those in Queen v. Hicklin. The accused in both cases had published partisan religious literature containing obscene passages. The ratio common to the cases was if the tendency of the passage was to 'deprave and corrupt' those whose minds were open to such influences and who might come to possess such literature then the offence was committed. That the object or intention in writing the passages was something else, such as in the above two cases, viz. religious discussion, would in itself be no defence to the charge.

Thus a book written, it was said, with a view to offer good advice to newly-weds, when found to contain detailed and ornamental description of the sex act with diagrams of coital postures supplementing the text, it was held to be obscene.<sup>531</sup>

#### The Indian Supreme Court on Obscenity

Admitted that a publication can be held to be obscene, the questions remain. When will such a factor justify a restriction on the basic freedom of expression, and subject to what conditions? What scope is there for the shift of

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529. Ranjit Udeshi v. Maharashtra, AIR, 1965, S.C.881. It was referred to in Emperor v. Harnam Das, AIR, 1947, Lahore, 383. Now the Act of 1969 gives statutory recognition to the principle.

530. I.L.R. (1881) 3 All 838.

531. Emperor v. Harnam Das, AIR, 1947, Lahore, 383.

public taste and fashion? Is the Court the ultimate arbiter of this?

In Ranjit Udeshi v. Maharashtra,<sup>532</sup> the Court heard an appeal by a book-seller who was charged under Section 292, Indian Penal Code, after he sold a copy of Lady Chatterly's Lover, to a plainclothes policeman! The appellant argued that the book was a piece of literature and not <sup>a</sup> merely a common pornographic work. He pleaded his right under Article 19(1)(a) and impugned Section 292, Indian Penal Code, itself.

The Court held that the important question regarding obscenity was, "What is obscenity as distinguished from a permissible treating with sex?" A mere mention of sex, the Court held, could not be punishable - something that may well have to be emphasised in the Indian context with its strict moral etiquette. Where the obscene, viz., immodest or repulsive, passages which offend public morality and decency did not further any public interest or profit, the offence under Section 292, Indian Penal Code, would be committed. Understood in that sense, it was held, the Section was constitutionally valid.

Next the Court reiterated the Hicklin test, incidentally expressing the view that it was likely to be the standard test in India for some time to come (!), and proceeded to examine the book. Summarising the story of the book and the impugned passages, the Court held that, viewed from Indian

standards there was no 'preponderant social gain' through the passages. The charge under appeal was held made out. The following passage from the judgment of the Court (written by Hidayat<sup>u</sup>Allah J.) may be profitably looked at:

An overall view of the obscene matter in the setting of the whole work ... (would) ... be necessary ... (t)he obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society ... must not be overlooked.

Today our National and Regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this court's determination is likely to pervert our entire literature because obscenity pays<sup>533</sup> and true art finds little popular support.

The law on this subject was considerably improved by the introduction in Ranjit Udeshi (above, 277) of the idea of 'social gain' as a defence to a charge under Section 292, Indian Penal Code. Whether the social and literary analysis and, still more, the prophecies, applied by the Supreme Court were adequate and proper may remain a matter of opinion.

A recent decision in Chandrakant Kalyandas v. Maharashtra<sup>534</sup> has further diluted the strictness with which the courts had viewed obscenity. A Marathi short-story which described in some detail the sexual relationship between a man and a woman was the occasion for a charge under Section 292, Indian Penal Code.

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533. Ibid., 888. Words in brackets supplied.

534. AIR, 1970, S.C. 1390.

Once again the Court purported to apply the Hicklin test. In the application of the well-known conditions, the Court appeared to adopt a 'positive tone' which favoured the work. It clearly emphasised that adolescents in India had access to a large number of classics, novels and other literature, all of which were freely available and which had a good deal of references to sex, love and romance. So viewed, the short story would not produce any such harm as envisaged by Section 292, Indian Penal Code.

These two decisions of the Supreme Court along with that in K.A. Abbas v. Union,<sup>535</sup> signify a far less strict view of obscenity as a restriction on freedom of expression. The cases show that the Supreme Court has preferred to move away from the traditional views on the subject, encouraging in so doing more 'open' trends in India today. From our general knowledge, it is clear that their conscious application of social and literary evaluation in what appears on the face of it a mere, technical factual decision is an example of leadership, in which conflict with the executive hardly arises, and in which the Court's subordination to the legislature cannot be doubted. Frustration in some other fields of their activity may strengthen the justices' determination to accept this leadership role without compunction. However, the same general knowledge warns us that India has no one standard of morals and decency, and that shifts in taste and fashion in some areas and social circles may be

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535. In K.A. Abbas, AIR, 1971, S.C.481, the Supreme Court held that censorship rules issued under the Cinematograph Act, 1952, should include 'directions to emphasise the importance of art to a value judgment by the censors'. Below 309.

irrelevant to others - so that the assertion of a single test, at any given time, of reasonableness in this area might be premature and unconsciously tyrannical. The prosecution for obscenity, or kindred offences, must be reasonable and it will be so if the definition of obscenity keeps in step with what the country considers reasonable. But as the country has, as yet, no one mind on these subjects, the role of the Supreme Court, although praiseworthy as an incident of leadership, is logically precarious. However, an alternative is as yet impracticable, for people of every religion and state of civilisation have in theory, and often in practice, access to the same bookstall, for example, and the most 'advanced' (well represented on the bench itself) cannot be held back by the evolving standards of the least advanced.

#### Restrictions on Account of Contempt of Court

English Common Law relating to this subject applied in India before Independence (August, 1947) and the passing of the Constitution,<sup>536</sup> later the Contempt of Court Act, 1952, and recently the Contempt of Court Act, 1971, have not meant any noticeable divergence from the Common Law position. Indian decisions continue to refer to old established English authorities.<sup>537</sup>

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536. Surendranath Banerjea v. Chief Justice and Judges, (1883) 10 I.A. 171. Re Amrita Bazar Patrika (1917) 45 Cal. 169.

537. See, for example, Jugal Kishore v. Sitamarhi Co-operative Bank, AIR, 1967, S.C. 1494, relying on Halsbury's Laws of England, 3rd Edn., Vol.8, 7.

The basic principle in India as in England is that punishing utterances likely to interfere with the fair administration of justice or likely to undermine public confidence in the administration of justice is a matter of public policy.<sup>538</sup> That the Indian Courts can exercise summary jurisdiction in a contempt matter, or the mere fact that evidence of the parties is not recorded, it has been held, will not render the law of contempt violative of Article 19(1)(a).<sup>539</sup> The punishment for contempt is not meted out in order to protect the individual judges. Therefore, a distinction has to be made between a mere libellous attack on an individual judge and comments likely to interfere with the administration of justice. Such defamatory remarks do not constitute contempt, but it may be open to the individual judge concerned to take any action available under the law of defamation.<sup>540</sup>

In Gobind Ram v. State,<sup>541</sup> the appellant, an advocate himself, had in a transfer application, made allegations about the trial magistrate's alleged misconduct. He alleged that the Magistrate was friendly with the opposite party to the case and accepted hospitality from them. The Magistrate had, in his view, compromised himself and proper justice

538. B. Ramakrishna v. Madras, AIR, 1952, S.C.149; Brahma Prakash Sharma v. Uttar Pradesh, AIR, 1954, S.C.10.

539. Sukhdeo Singh v. Chief Justice and Judges, AIR, 1954, S.C. 186; A.G., Andhra Pradesh v. Ramana Rao, AIR, 1967, A.P. 299.

540. Re Special Reference from the Bahama Islands, L.R. (1893), A.C. 138.

541. AIR, 1972, S.C. 989.

could not be hoped for from him. For the Supreme Court, Grover J. held that it might or might not amount to defamation of the Magistrate but certainly was not contempt. The Judge made a point of saying that allegations made in a transfer application stood on a special footing since it would be possible to verify them and the High Court could take action to rectify matters.

In B. Ramakrishna v. Madras <sup>542</sup> ~~with~~ similar allegations against a Magistrate were published in a newspaper and it was held to be <sup>in</sup> contempt. Frequent allegations against low-ranking Magistrates, particularly in rural districts, are made in India with disturbing frequency. There appear to be two separate questions relevant in this context. One is the procedure for making complaints against trial magistrates of the kind referred to in the two cases above. The other question is, can the defendant seek to substantiate the truth of the charges he has made public. The Indian Supreme Court could not have meant in Gobind Ram (above, 281) that all sorts of complaints and allegations could be made against magistrates in transfer applications. The proper complaint machinery, or at least a possible one, would be to approach the Advocate-General directly or through the Bar Council.

As for the second point, the well-established position that justification or truth is no defence will apply to complaints made against magistrates. In Brahma Prakash Sharma v. Uttar Pradesh. <sup>543</sup> the provincial Bar Association passed

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542. AIR, 1952, S.C. 149, also M.P. v. Revashankar, AIR, 1959, S.C.102.

543. AIR, 1954, S.C.10.

resolutions drawing attention to the incompetence of two named law officers. The meeting was held in camera and copies of the resolutions were sent to the High Court in envelopes marked 'confidential'. The Supreme Court held that the Bar Association (through its secretary) was guilty of contempt in a technical sense. In view of the care taken to keep the matter within the circle of those directly concerned, it was found, the remarks contained in the resolutions received little publicity. It was held that the 'surrounding circumstances' of the case and the degree of publicity given would be relevant factors in awarding punishment to the condemners. A token fine was imposed on the Bar Association. However, it was made clear by the Court that even a likelihood of interference would be enough to constitute the offence of contempt and actual interference with the administration of justice need not be proved.

As far as general comments on judicial decisions are concerned, Courts in India have adopted the view of Lord Atkin in Ambard v. A.G. for Trinidad and Tobago:

The path of criticism is a public way: The wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. 544

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544. AIR, 1936, P.C.141, 145-6; (1936) A.C. 322, 335. Referred to in Aswini Kumar v. Arabinda Bose, AIR, 1953, S.C.75, A.G. Andhra v. Ramana Rao, AIR, 1967, A.P.299, and Debi Prasad v. Emperor, AIR, 1943, P.C.202.

In Aswini Kumar <sup>545</sup> an article in the "Times of India", 30th October, 1952, deplored the decision of the Supreme Court affecting the question of continuing the dual system in the legal profession. (It was in vogue in Bombay and Calcutta). Quite unnecessarily the article concluded by wishing that Courts in India would be detached and not be influenced by policies and politics in deciding questions of law. The Supreme Court held that contempt was committed but discharged the editor of the paper after an unqualified apology from him. It was held that it was fair comment to say that Courts should be detached but to make remarks that impute 'motives' to Courts of law was certainly punishable.

We have an interesting decision in Debi Prasad v. Emperor, <sup>546</sup> where the Privy Council made a distinction, for purposes of contempt of court, between the judicial and administrative acts of Courts and comments on them. The Hindustan Times, a newspaper published from Delhi, carried a report about a circular issued to subordinate courts, supposedly by the Chief Justice (Sir Iqbal Ahmad) of the Allahabad High Court asking all the judicial officers to contribute, and get contributions, for the War Fund. It appears that a sessions judge asked some accused in a murder case to contribute to the War Fund (according to him after he had sentenced them to life-imprisonment!) In an editorial, the newspaper commented:

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545. AIR, 1953, S.C. 75.

546. AIR, 1943, P.C. 202.

If it is true that the new Chief Justice of the Allahabad High Court, Sir Iqbal Ahmad, in his administrative capacity, has issued a circular to the Judicial officers under his jurisdiction, enjoining on them to raise contributions to the war funds, then it must be said that he has done a thing which would lower the prestige of the courts in the eyes of the people. The presiding officer of a court, while asking for funds, may say that the contribution is voluntary, but he cannot remove the idea from the mind of a person, particularly a litigant, that the request is being made by one whom it may not be safe to displease. To be absolutely voluntary, war contributions ought to be raised only by non-official committees or individuals.     ...     ...     ...     ...

Sir Iqbal Ahmad himself and another judge constituting the bench, heard the contempt charge against the editor and printer of the paper. The Chief Justice delivered the judgment of the Court. It was held by him that the implication of the editorial was that the Chief Justice had done something which was unworthy of persons holding that high office. It was clearly contempt according to the judgment and the editor and printer were imprisoned.

On appeal to the Judicial Committee by the accused, the charge of contempt was held to be 'misconceived' and the editor and printer were held not to be guilty. Lord Atkin for the Committee held that the comments in question were not criticisms of any judicial matter. There was no comment on 'any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice'. If the facts alleged were true (it eventually transpired to be incorrect) they admitted of criticism.

No doubt it is galling for any judicial personage to be criticized publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet. But judicial personages can afford not to be too sensitive. A simple denial in public of the alleged request would at once have allayed the trouble. If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them. 547

Lord Atkin further stated that cases of contempt arising out of scandalising the court required to be treated with much discretion. Interference with the administration of justice or that which was calculated to so interfere alone would justify a charge of contempt.

The Supreme Court of India held in a similar case that indiscreet remarks made by a subordinate judicial officer in his communications with his superior officers would not amount to contempt. A mere question of propriety would be insufficient to constitute contempt.<sup>548</sup>

In his discussion of the law of contempt in England, Professor Harry Street appears to be critical of several aspects of the law there. In view of the great similarities between Indian and English laws on this subject some, at least, of the points made by him are worth noting. He questions<sup>549</sup> the summary nature of the proceedings in contempt cases and the possibility that a judge against whom the

547. L.R. (1942-3) 70 I.A. 216, 224, I.L.R. (1944) All 32, 41.

548. Rizwan-ul-Hasan v. Uttar Pradesh, AIR, 1953, S.C.104

549. Harry Street, Freedom, the Individual and the Law, 3rd Edn., London, Penguin, 1972, 154-5.

alleged contempt may have been committed may himself hear the charge of contempt. Debi Prasad (above, 284 ) illustrates the second point. There the Chief Justice whose conduct in issuing the circular was the subject of the comments heard the charge himself sitting with another judge. The Judicial Committee of the Privy Council did not refer to that aspect of the case at all.

As for the summary nature of the proceedings, it was raised in A.G., A.P. v. Ramana Rao.<sup>550</sup> It was argued there that the summary nature of the proceedings where evidence of the parties was not recorded offended Article 21 of the Indian Constitution which provides:

21. Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

It was said there was no 'procedure established' in this case. The Contempt of Court Act, 1952,<sup>551</sup> did not define 'contempt' or 'court'. Faced with this argument the Andhra Pradesh High Court could only rely on the long-established practice of the chartered High Courts of India in punishing contempt. G.K. Nair C.J. held that the Letters Patent granted to the three Presidency Courts in Madras, Bombay and Calcutta referred to this power being exercisable by them. There were also clear authorities confirming this right from the 1880s to the time

550. AIR, 1967, A.P. 299.

551. It is now repealed and replaced by the Contempt of Court Act, 1971.

of the decision. The Chief Justice referred to Peacock C.J.'s dictum in Re Abdool<sup>552</sup> as the earliest authority. Reference was made to the Indian Supreme Court's decision in Sukhdeo Singh v. Chief Justice,<sup>553</sup> as a modern authority.

It was held that the Court would not exercise its summary jurisdiction except in a case beyond reasonable doubt. Secondly, the power was not to be exercised for the vindication of a Judge as a person but only to protect the interests of the public in a proper administration of Justice. Thirdly, if the comment was a fair comment on the conduct of Judge relating to his judicial tasks then the power would not be exercised. Finally, if the contempt was merely slight or technical a straight apology or regret would satisfy the court and no further action would be taken. Professor Street<sup>554</sup> thinks that the decision in R. v. Almon (1765),<sup>555</sup> from which the power of the courts to punish contempt in summary proceedings is derived, was not correct, that the authorities relied on in 1765 did not warrant the decision and that the judges' power was usurped. He admits, however, that an Act of Parliament would be needed to take away the power. In India, Parliament has regularised the power by statute and impliedly endorsed it beyond question. How it is exercised is another

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552. (1887) 8 Sutherland W.R. Cr. 32, 33. An even earlier authority was Surendra Nath v. Chief Justice, (1883) 10 I.A.171, 179 (P.C.).

553. AIR, 1954, S.C. 186.

554. Op.cit., 154.

555. Reported in Wilmot's Judgments and Opinions (1802).

matter - and here the constitutional guarantees are, of course, relevant.

In India, unlike England, cases of contempt are generally those of the 'scandalizing-the-courts' variety and less of the 'prejudicing-parties-to-a-case' type. For the present, at any rate, there appears to be ample justification for the summary jurisdiction exercised by the Indian Courts in punishing contempt. With a public that takes litigation too seriously, perhaps, and which at the best of times remains sceptical of those holding public offices and exercising power over them, it seems necessary to curb irresponsible comments that are too often sharp in innuendos. It is fair and perhaps necessary to add that many of these comments by litigants and others are not taken seriously by the public and hence, it would only make matters worse if the Indian judiciary remain too sensitive to such comments.

The Indian Supreme Court in particular came under strong criticisms ever since the Court's decision in Golaknath and after.<sup>556</sup> The overtly political nature of many of these comments and their disproportionate zeal in attacking the Court has done much in recent years to damage the prestige of the Indian judiciary as a whole. Everyone except the Indian Supreme Court appears to be supporting a 'socialistic pattern of society'! In one case, at least, the matter was brought to the Court's attention. In E.M.S. Namboodripad v. T.N. Nambiar,<sup>557</sup> the appellant, a communist leader, made a

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556. AIR, 1967, S.C.1643.

557. AIR, 1970, S.C.2015. See also Noordeen v. A.K.Gopalan, 1968, K.L.T.157.

speech in which he denounced the law courts as defenders of the interests of the dominant classes. The Kerala High Court found him guilty of contempt. He appealed to the Supreme Court.

Hidayatullah C.J. held that under certain circumstances it was possible that contempt could be committed in respect of the whole of the judiciary or the judicial system. In the case before them, the appellant had committed just that sort of contempt. His Lordship went on to say that courts in India were concerned with upholding the Constitution and not any class interest. They were not sui generis but owed their existence to the Constitution. They were bound by their oath of conscience.

For those who think that the laws are defective the path of reform is open, but in a democracy such as ours to weaken the judiciary is to weaken democracy itself.

It was held that while Article 19(1)(a) guaranteed free expression of opinion to get political and social changes, such expressions would have to remain subject to the law relating to contempt of court.

Finally, a decision that shows an interesting and subtle form of contempt of courts may be dealt with. It may be described as 'contempt by flattery'. The condemner in Hiralal Dixit v. U.P.<sup>558</sup> distributed a pamphlet in the premises of the Supreme Court in New Delhi which read as follows:

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558. AIR, 1954, S.C.743.

The public has full and firm faith in the Supreme Court but sources that are in the know say that the Government acts with partiality in the matter of appointment of those Honourable Judges as Ambassadors, Governors, High Commissioners, etc., who give judgments against the Government. But this has so far not made any difference to the firmness and Justice of the Honourable Judges.

At the time he distributed this pamphlet, he was a petitioner in a case pending before the Court. He was promptly charged with contempt!

S.R. Das J. held for the unanimous Supreme Court that far from a flattery of the Court, the pamphlet was an indirect warning that if the Court gave a decision against the petitioner (in the pending cause), and thus in favour of the Government, the implication would be the Judges succumbed to thoughts of higher office. The timing of the pamphlet the Court held, confirmed that view. The condemner and author of the pamphlet was sentenced to a fortnight in gaol. Needless to say he went away a much sober man!

In conclusion, it seems the Indian courts have not departed from the Common Law position in the matter of law of contempt by scandalising the Court. It is submitted that they have not been particularly anxious to charge free comments with contempt as long as the comments used restrained language and were not abusive of the Courts or Judges.

### Sedition

This is an area where Indian courts have tried to break new ground though litigation is relatively rare here since there are very few prosecutions for sedition. Article 19(2) does not refer to 'sedition' as one of the grounds justifying imposition of reasonable restrictions. The draft constitution mentioned it but it was subsequently removed after K.M. Munshi argued that the meaning of 'sedition' was not clear and might create difficulties if included in the Constitution.<sup>559</sup>

In Romesh Thapper<sup>560</sup> and Brij Bhushan<sup>561</sup> this omission of 'sedition' from Article 19(2) was explained differently in the majority and minority judgments. According to Patanjali Sastri J. (who delivered the majority judgment), the framers preferred to use 'security of State' instead of 'sedition' because it was their intention that criticisms of government exciting disaffection towards it were not to be restricted unless they were such as to undermine the security of state or tend to overthrow it. Fazl Ali J., who was the sole dissenting judge, relying on a decision of the Federal Court,<sup>562</sup> held that public order was the basis of

559. B. Shiva Rao, The Framing of India's Constitution, A Study, 221 ff.

560. AIR, 1950, S.C. 124.

561. AIR, 1950, S.C.129.

562. Niharendu Dutt v. Emperor, AIR, 1942, F.C. 22 (1942), F.C.R.38.

the offence of sedition. There was, in his view, no need to specify sedition as a ground in Article 19(2). Public disorder, in his view, and a threat to the security of State could not be easily distinguished. However, in neither of these decisions did interpretation of 'sedition' arise for consideration by itself. It was not even a collateral issue. The majority explanation of 'sedition' became ineffective the moment the First (Constitution Amendment) Act, 1951, inserted 'public order' in Article 19(2). The minority explanation of Fazl Ali J. has less relevance after the Supreme Court in Kedar Nath v. Bihar<sup>563</sup> dealt with the offence of sedition and its constitutionality.

The main provision which makes seditious writings and speeches an offence is Section 124-A of the Indian Penal Code, 1860.<sup>564</sup> This section was introduced by an Amending Act of 1870, Special Act XXVII of 1870. There are other provisions

563. AIR, 1962, S.C.955.

564. 124-A. Sedition. Whoever by words, either spoken or written or by signs, or by visible representation, or other wise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1. - The expression 'disaffection' includes disloyalty and all feelings of enmity.

Explanation 2. - Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3. - Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under the section.

strewn over different enactments, some of which need to be dealt with in this section.

The history <sup>565</sup> of the offence of sedition in India is generally told with Strachey J's decision in Tilak's case as the starting point.<sup>566</sup> In that case, Strachey J. interpreted "feelings of disaffection" as 'absence of affection' towards the government!

What are 'feelings of disaffection'? I agree with Sir Comer Petheram in the Bangabasi case that disaffection means simply the absence of affection. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. 567

Again, the meaning of the words "the Government established by law in British India" was defined by him:

It means, in my opinion, British rule and its representatives as such - the existing political system as distinguished from any particular set of administrators. 568

It was contested by defence counsel that want of affection 569  
in any degree towards British rule could not be 'disaffection'.

565. For a detailed study of sedition in India, see Law of Sedition in India, produced by the Indian Law Institute, 1964.

566. I.L.R. (1897) 22 Bom.112. Leave to appeal refused in I.L.R. (1897) 22 Bom. 528 P.C.

567. I.L.R. (1897) 22 Bom.112, 134. Sir Comer had, in fact, used the expression 'contrary to affection'.

568. IBID., 135.

569. Ibid., 145.

Only active disloyalty could be within the ambit of the offence. Strachey J. appeared~~d~~ to be saying to counsel, after the jury had returned a verdict of guilty, that that was what was meant by him.<sup>570</sup> If he did, one can be sure the jury did not see that and indeed, could not have done so from his summing up. However, when the accused appealed to the Privy Council leave was not granted since the Privy Council did not see any justification for an appeal. Their Lordships thus appeared to confirm the view of Strachey J. In a case reported in the same year and volume of the Indian Law Reports,<sup>571</sup> Farran C.J. held, relying on Murray's Dictionary, that 'disaffection' meant "political alienation or discontent, a spirit of disloyalty to the Government or existing authority". He held that it was an offence under English Law to "attempt to excite feelings of disaffection to the Government" which was equivalent to an attempt to produce hatred of Government established by law, to excite political discontent and alienate the people from their allegiance."

These holdings were followed in India for a number of years. The next milestone was in Niharendu Dutt<sup>572</sup> where the Federal Court of India, the predecessor of the Supreme Court, discussed leading English authorities and demonstrated that with regard to Section 124-A the 'literal' interpretation

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570. Ibid., 148-9.

571. Queen-Empress v. Ramchandra Narayan, I.L.R. (1897) 22 Bom. 152.

572. AIR, 1942, F.C. 22, [1942] F.C.R.38.

adopted by Indian Courts was incorrect. Maurice Gwyer C.J. held that the language of the section was taken from English Law. The acts or words complained of must either incite to disorder, or must be such as to "satisfy reasonable men" that that was the intention or tendency of the words. Mere strong words or abusive words would not constitute sedition. The relevant question according to the Federal Court was whether there was an actual incitement to disorder or a reasonable likelihood or tendency to disorder.

Public disorder, or the reasonable anticipation, or likelihood of public disorder, is thus the gist of the offence. 573

This narrowing down of the ambit of 'sedition' was a clear break from the loyalty test laid down by Strachey J. What is really remarkable is that Sir Maurice Gwyer's view that correct English Law required proof of a tendency to public disorder in order to constitute sedition was opposed to the earlier understanding of the English legal position by Strachey J. and others.

However, the decision of the Federal Court was disapproved by the Privy Council in King-Emperor v. Sadashiv Narayan Bhalerao.<sup>574</sup> It was held that whatever the position in English Law the word 'sedition' does not occur anywhere in Section 124-A of the Indian Penal Code. It occurs in the head-note but that was held not to be an operative part of the Section.

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573. AIR, 1942, F.C.22, 26.

574. AIR, 1947, P.C.82, L.R. 74 I.A., 89.

Their Lordships are unable to find anything in the language of either Section 124-A or the Rule which could suggest that 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.' The first explanation to Section 124-A provides, 'The expression "disaffection" includes "disloyalty and all feelings of enmity", This is quite inconsistent with any suggestion that 'excites' or attempts to 'excite disaffection' involves not only excitation of feelings of disaffection, but also exciting disorder. 575

When the Indian Supreme Court decided Kedernath v. Bihar it had before it two very persuasive views on the interpretation of Section 124-A. Under the changed circumstances represented by an independent republic Constitution, the Court found that unless it adopted the narrow view of the offence under the section, it would have to declare it unconstitutional. Indeed, this had already been done by some High Courts.<sup>577</sup> So it accepted Maurice Gwyer C.J.'s dictum in preference to that of the Privy Council. The Court held that it must choose the interpretation, amongst several, which would render the section constitutional rather than that which would make it unconstitutional and void. Therefore, prosecutions under the Section will succeed only if the narrower understanding

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575. L.R. 74, I.A. 89, 95.

576. AIR, 1962, S.C.955. Misra, 'Freedom of Speech and the Law of Sedition in India', 8 J.I.L.I. (1966) 117-131.

577. Tara Singh v. Punjab, AIR, 1951, Punj. 27, AIR, 1959 All 101 (F.B.). Indramani Singh v. Manipur, AIR, 1955, Mani. 9, holding that if the Privy Council's view were to be adopted, the section would have to be held void in part.

of it is satisfied - a remarkable exercise of judicial ingenuity, balancing the then (as ever) exigent demands of the State with the civil rights of the individual in confrontation with them.

Preservation of public order was the basis of all legislation punishing offences against the State. So, it was held that to incite people to violence or to utter words with the intention of inciting people to take to violent methods to overthrow the Government would most certainly be sedition. 'Absence of affection' would not invite punishment under the section, only a 'reasonable anticipation' of public disturbance.<sup>578</sup>

After Kedarnath, the Supreme Court has not so far, it appears, heard another case on 'sedition' under Section 124-A. But the Court upheld Section 3, Pepsu Police (Incitement to Disaffection) Act (1 of 1953): "... Whoever intentionally causes ... disaffection towards any Government established by law in India amongst the members of a police force or induces ... any member of a police force to withhold his services or to commit a breach of discipline shall be punishable ..."<sup>579</sup>

The Allahabad High Court has held more than once that spreading disaffection against a party government would not by itself amount to disaffection likely to result in disorder.<sup>580</sup>

578. On similar reasoning, Section 505 of the Indian Penal Code was held to be valid constitutionally.

579. AIR, 1962, S.C. 1106.

580. Ahmad Ali v. State, AIR, 1951, All 459; Sarju Pandey v. State, AIR, 1956, All 589, 593. Also see Mohd. Ishaq v. U.P., AIR, 1957 All 782, Abbott, 238. But see (contra) In the Matter of Saptaha, AIR, 1950, Cal. 444. The Allahabad view is the right one in the light of the Supreme Court decision in Kedarnath.

One wonders if this means that if strong speeches are made against the ruling party in the State even if they have a tendency to cause disorder they would not constitute sedition. The High Court has obviously erred on the side of caution but there does appear to be a problem. One knows that in India political parties frequently take out huge processions of their supporters who unfortunately do cause serious disruption to normal life. One can imagine that under certain conditions there may well be a threat to the existence of stable government. By such large-scale campaigns against ruling parties their governments have been brought down in several States of the Indian Union. Had there not been the provision for President's rule (Article 356) to fill the vacuum caused by a lack of any government in many of these States, it is easy to imagine total anarchy prevailing in them.

But the 'liberal' attitude of Indian courts - that is an attitude in favour of the citizen's freedom - continues and in the few cases that come before them the charge of sedition is mostly dismissed. A good example of this trend is the decision of the Gujarat High Court in Manubhai v. Gujarat.<sup>581</sup> The appellant published the 'Thoughts of Mao-tse-tung' in the Gujarati language. The copies were immediately seized by the State acting under Section 99-A of the Criminal Procedure Code. The question was whether the book was seditious. The order served on the petitioner is of some interest and is, therefore, reproduced here.

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581. (1971) 12 Guj.L.R. 968, (1972), Cr.L.J. 373.

Whereas the book captioned ... printed by ... and published by Manubhai ... contains views of Mao-tse-tung which are full of hatred and contempt for all persons who do not subscribe to the communist ideology and also contains Mao's advice on how to overthrow a non-communist Government by violent revolution and how to establish a communist Government by resort to armed revolution:

And whereas the intention of the printer and publisher of the said book, as is clear from the preface to the book, is that the views and advice of Mao-tse-tung contained in the said book should serve as a guide to understand the principles and practice of communism, and thereby the printer and publisher have attempted to bring into hatred or contempt and to excite feelings of disaffection towards the non-communist Government established by law in India ...(!)

The High Court examined the book and verified that there was no specific incitement to violence against the Government of India or any other Government. In the absence of such incitement it held the book was not seditious. In the Court's view, to regard the book as seditious because it contained Mao's thoughts "would be to close the doors of knowledge, to ostracise a philosophy because it challenges values cherished and held dear by our present-day society and (which) holds up for acceptance a new way of life vastly different from what our people are presently accustomed to."<sup>582</sup>

There are other provisions punishing seditious offences. Section 99-A of the Criminal Procedure Code, provides for forfeiture of any newspaper, book or document where it -

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582. Ibid., 979 of the Guj.L.R.

appears to the State Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hate between different classes of the citizens of India or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious belief of that class, that is to say, any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code, the State Government may, by notification in the Official Gazette stating the grounds of its opinion, declare ... every copy of such book ... to be forfeited to government.

The Supreme Court laid down in Harnam Das v. State of U.P. <sup>583</sup> that the Government while making an order under the Section must state the grounds on which it had formed the opinion as to the need to make the order. The duty of the courts under Section 99-D would be to set aside the order on an examination of the grounds stated in the order, and does not extend to an independent scrutiny of the publication to see if, in the courts' opinion, it could be viewed as offending any of the matters referred to in Section 99-A. That would amount to the Courts themselves making an order for forfeiture whereas the Government would be the appropriate authority to do so. The Supreme Court reversed the decision of the Allahabad High Court <sup>584</sup> where the High Court appears to have taken the view that it had to examine 'whether in fact, the document comes within the mischief of the offence charged'. ~~There~~ The order passed by the Government

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583. AIR, 1961, S.C.1662.

584. AIR, 1957, All 538 (S.B.).

was upheld though it did not state on what grounds it had been passed but merely repeated the words of Section 99-A. The majority in the <sup>Supreme</sup> Court in its opinion referred to Arun Ranjan Ghose v. State of W.B.,<sup>585</sup> and expressed agreement with the case.

In that case, decided by the Calcutta High Court, it was held that the order made under Section 99-A, Criminal Procedure Code should have indicated what class of citizens were 'outraged' by the offending publication and what were the classes of citizens between whom feelings of hatred would have been produced by that publication. In the absence of grounds to account for the Government's opinion, the court had nothing to go on in satisfying itself that the book contained matter of the nature referred to under 99-A. The court could not put forth its own grounds for upholding the Government's order. It should see if the grounds stated in the order were justified in relation to the material in the publication. Moreover, in the absence of such grounds it would not be possible for any person aggrieved by the Government's order to exercise his right under 99-B and prove that the impugned book did not contain such seditious or other objectionable material.

The dicta of the Supreme Court in Harnam Das (above, 301) was followed in Md. Khalid v. Chief Commissioner,<sup>586</sup> and an order which merely repeated the language of Section

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585. (1955) 59 C.W.N. 495 (S.B.).

586. AIR, 1968, Delhi, 13.

99-A without giving the reasons or grounds which were responsible for the government's action was held invalid. This position was confirmed recently in Narayan Das v. M.P.<sup>587</sup> where the order of forfeiture was made under The Criminal Law Amendment Act, 1961, which is similar to Section 99-A of the Criminal Procedure Code. After holding in this sense, the Supreme Court observed:

clearly the grounds must be distinguished from the opinion. Grounds of the opinion must mean the conclusion of facts on which the opinion is based. There can be no conclusion of fact which has no reference to or is not ex facie based on any fact. 588

There are a number of cognate offences and provisions in several statutes which have a bearing on the offence of sedition. These are: Section 27-B, The Post Office Act, 1898, Section 3; The Dramatic Performances Act, 1876, Sections 2 and 3; The Criminal Law Amendment Act, 1961, Section 3; The Unlawful Activities (Prevention) Act, 1967, and Sections 4 and 7; The Press (Objectionable Matter) Act, 1951.

Section 27-B of the Post Office Act, 1898, enables the Post-Master General or any officer authorised by him to detain any newspaper or book or document which he suspects of containing any seditious matter the publication of which would be punishable under 124-A of the Indian Penal Code, 1860.

From the standpoint of constitutional reasonableness, the only objection that could be taken would relate to the

587. (1972) 1 S.C.W.R.984.

588. Ibid., 989-90.

expression 'suspects'. Unless the suspicion can be shown to be on reasonable grounds, it may be held unconstitutional. According to Section 27-B(3) the State Government should arrange for the contents of the article to be examined and if the suspicion entertained is confirmed, it shall make further orders considered suitable or else release the article and its contents. According to the second proviso, to Section 27-B(3), an application to the High Court would lie only after the Government had rejected an appeal by the affected individual. Section 27-D further prohibits seeking a remedy in the High Court before the appeal to the Government is rejected. Here there may be one more ground of constitutional challenge. Articles 32 and 226 of the Constitution guarantee the right to invoke the Supreme Court or the High Courts respectively. It has been held by the Supreme Court in K.K. Kochunni v. Madras<sup>589</sup> that the existence of an alternative remedy is no ground for barring a petition under Article 32. If it is possible for a citizen of India to make out a prima facie case that his fundamental right is infringed, he could come to the Supreme Court directly availing himself of his right under Article 32. The scope of Article 226 which is not a fundamental right, is no less potent affording a wide writ jurisdiction to the High Courts. Therefore, it seems the apparently mandatory provisions in Section 27-B and 27-D would clash with the two constitutional provisions in Articles 32 and 226.

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589. AIR, 1959, S.C. 725.

If we consider the following hypothetical case, the constitutional implications of Article 27-B may become clear. Let us say that copies of election manifestos of a political party sent to electors by post were detained while there is an election pending, then certainly a swift remedy ought to lie. A swift remedy is required whether it is the fundamental right of the political party under Article 19(1)(a) or (c) that is violated. In granting an injunction against the Post Office assuming that there is a prima facie case in favour of the petitioners the two stage procedure laid down in Section 27-B would, it seems, be brushed aside.

Turning to Section 3 of the Dramatic Performances Act, 1876, it runs as follows:

Whenever the State Government is of opinion that any play, pantomime or other drama performed or about to be performed in a public place is -

- (a) of a scandalous or defamatory nature, or
- (b) likely to excite feelings of disaffection to the Government established by law in India, or
- (c) likely to deprave and corrupt persons present at the performance,

the State Government ... may by order prohibit the performance.

The constitutionality of this Section was considered in State v. Baboo Lal & Ors.<sup>590</sup> There the respondents were charged as follows:

- (a) that they distorted the script of the play to suit their political ideology.

- (b) that they failed to obtain a proper licence to stage the play.
- (c) that they failed to supply a copy of the play to the Magistrate before the performance, and
- (d) that they disobeyed the prohibitory order issued by the Magistrate (which was, in fact, served in the middle of the performance of the play!)

The first charge was understandably dismissed as unconstitutional. But the Court could have clarified its ratio on the point. It seems that the charge itself was wrongly framed. The grounds mentioned in Section 3(a) and (b) were held reasonable restrictions under Article 19(2).

An interesting argument raised by the accused in the case was that if pre-censorship of newspapers or any other written matter was unconstitutional (Komesh Thapper v. Madras)<sup>591</sup> then by analogy no prior restraint could be imposed on the spoken word whether it was in a play, pantomime or drama. This was rejected by the Court which held that there was a distinction between the written word and the spoken word.

The written word takes a long time to reach its readers, but the spoken word is conveyed to the audience immediately. The written word can be confiscated before it has done much damage, but the spoken word achieves its object as soon as it is uttered. The spoken word is also far more inflammable and can engender heat and excite passions in a far quicker manner and thus can become a much greater danger to the security of the community. 592

The comparative degree to which the two modes of expression could influence the public is a debatable matter but the last

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591. AIR, 1950, S.C.124, above, 249.

592. AIR, 1956, All 571, 573-4.

point made by the learned Judge, it is submitted, is certainly true in India. Unlawful incitement of the public occurs more frequently in platform speeches than in newspaper campaigns.

Examining the procedural provisions of the impugned Act of 1876, the Court found that there was no review or revision of the Magistrate's order by a higher authority, which meant that he exercised absolute discretion in the matter. This was held to be clearly unreasonable.

The Punjab High Court held the Dramatic Performances Act, 1876, unconstitutional in Comrade Chanan Singh v. Union. 593

The Criminal Law Amendment Act, 1961 (Act 23 of 1961) was passed with a view to curb political associations who had made it part of their policy to encourage demands for independent units to be formed by secession from the Union of India.

Section 2: Whoever by words either spoken or written, or by signs, or by visible representation or otherwise, questions 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, shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both.

Section 3: (1) If the Central Government considers that in the interest of the safety or security of India or in the public interest, it is necessary or expedient so to do, it may, by notification in the Official Gazette, declare any area adjoining the frontiers of India to be a notified area; and thereupon, for so long as the notification is in force, such area shall be a notified area for purposes of this section.

- (2) Whoever makes, publishes or circulates in any notified area any statement, rumour or report which is, or is likely to be, prejudicial to the maintenance or public order or essential supplies or services in the said area or to the interests of the safety or security of India, shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

Notifications or orders under this Act have not been challenged so far, but from what we have already seen it will be evident that small scope is available to the petitioners should the impugned documents be skilfully drafted by the Executive.

In conclusion, the only observation that needs to be made is that Indian Courts have clearly construed the statutes punishing sedition strictly. They have made sure that the Executive is fully aware of what it does while charging someone with the offence of sedition.

#### Free Expression and Cinema Films

With the strict social and moral standards prevalent in Indian society, cinema films can expect a certain amount of censorship.<sup>594</sup> The Cinematograph Act, 1952, enables the Government to classify films according to the age of the persons constituting the audience. Section 5-B lays down the circumstances under which films can be totally prohibited from public exhibition:

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594. See Bruce Michael Boyd, 'Film Censorship in India: A "Reasonable Restriction" on Freedom of Speech and Expression' (1972) 14 J.I.L.I., 501-561 for a detailed account of the subject in all its ramifications.

- (1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests or the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of Court or is likely to incite the commission of any offence.

The Central Government framed rules under the Act.

Rule (1)(e) of the Rules prohibits the showing of films that bring into contempt the armed forces or the public authorities entrusted with the maintenance of law and order. Rule (1)(f) prohibited public exhibition of films that portrayed social unrest or discontent to such an extent as to incite the public to crime, disorder, violence, disaffection or resistance to Government.

In K.A. Abbas v. Union of India<sup>595</sup> these two Rules and Section 5-B of the Cinematograph Act, 1952, were challenged as unconstitutional. The petitioner, a well-known artistic personality, made a film contrasting the rich and the poor in the four major cities of India. There were a few shots of 'red-light' areas of these cities, or prostitutes waiting for custom. He was refused a certificate for universal exhibition which was what he wanted. Films are extremely popular with all classes in India, but especially with the poorer classes and young people generally.

He argued that the rules governing the issue of 'U', 'A', and 'X' certificates to films were vague. The discretion permitted to the Government was too wide and therefore,

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595. AIR, 1971, S.C.481.

the petitioner's right under Article 19(1)(a) was unreasonably restricted.

Hidayatullah C.J., for the Supreme Court, held that the cinema film had a special appeal to the Indian public and to the public everywhere and the need for control must be accepted. Such control, however, must be reasonable and in the interests of public morality and decency. When it was pointed out to the Court that Section 5-B did not refer to 'reasonable' control, the Court replied:

The Constitution has to be read first and the Section next. The latter can neither take away nor add to what the Constitution has said on the subject. The word 'reasonable' is not to be found in Section 5-B but it cannot mean that the restriction can be unreasonable. Not only the sense of the matter but the existence of the constitutional provision in pari materia must have due share ... 596

The Court went on to examine the Rules for vagueness and held that they were reasonably clear and did not confer uncontrolled discretion on the State. The directions issued to the Censor Board were also examined and were found to be definite, clear, and thus, unobjectionable.

(b) Reasonable Restrictions on the Freedom of Assembly - 19(1)(b)

If demonstrations and meetings in public are any indication of the freedom enjoyed by a people, Indians do enjoy and assert that freedom so frequently that the forces charged with maintenance of law and order in India are fully

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596. Ibid., 494. This admission of the power of growth of 'reasonableness' - fully consistent with English law - is of greater importance than the actual issues in the cases.

stretched and at times unable to cope with the problems presented. In difficult circumstances, the police can invoke Section 144, Criminal Procedure Code. That section is the most prominent restriction on this right. It has already been referred to.<sup>597</sup> Under the Section a Magistrate may, in his discretion, make an order restricting the formation of assemblies or meetings or make an order prohibiting conduct which, in his opinion, will cause or likely to cause, obstruction, annoyance or injury to the public or to any person or otherwise endanger life, health or safety.

As already noticed, British-Indian Courts construed the executive discretion conferred by the Section strictly, that is to say, with the tacit assumption, always in the background, that the citizens had the liberty of speech and assembly.<sup>598</sup>

One more decision that is in line with this position is to be found in Satyanarayana v. Emperor.<sup>599</sup> There during the civil-disobedience campaign organised by Mahatma Gandhi, a Magistrate at Guntur in Andhra prohibited the wearing of 'Gandhi caps' as a precaution against possible disturbances in his area. There was however, no actual evidence of any disturbances or expectation of them. Under the circumstances, the High Court found that the apprehension of breach of peace was too far removed from the act prohibited by the Magistrate

597. See above, Section on Restriction on the Press, 246 ff. The provision has been reproduced there.

598. In re Ardeshir Phirozshaw, AIR, 1940, Bom. 42; Editor, Tribune v. Emperor, AIR, 1942, Lahore 171 (F.B.). See above, 246 and ff.

599. AIR, 1931, Madras, 236.

under Section 144, Criminal Procedure Code.

It is not enough to say that by stretching several possibilities one after the other, it is possible to establish a connection of cause and effect between the act prohibited and disturbance of public tranquillity. 600

It was held that the likelihood or tendency to disturbances must be reasonable and proximate. The Supreme Court has independently established this to be law in The Superintendent v. Dr. Lohia.<sup>601</sup>

After the Constitution came into force, the Section was challenged in Babulal Parate v. Maharashtra.<sup>602</sup> In an atmosphere of industrial unrest a Magistrate prohibited meetings and processions from certain areas of Bombay in order to stop inter-union feuding in the streets. It was argued before the Supreme Court that the fundamental rights of free speech and assembly were at the mercy of the Magistrate's total discretion, that he made the order without hearing the parties affected. Secondly, it was argued that any application to get his order modified or rescinded was entertained by the same Magistrate and thus he became judge of his own decision. In sum, it was said, the law conferred unconstitutionally wide discretion on the executive. It was strongly urged

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600. In defence of the Magistrate one should comment that headgear has always been associated in India with caste, religion, status, and eventually political association. The wearing of headgear can therefore be provocative. Cf. the affair of the Sikh turbans and the requirement that motor-cycle riders wear crash-helmets in England.

601. AIR, 1960, S.C. 633, See below, 317.

602. AIR, 1961, S.C.884; (1961) 3 S.C.R. 423.

that the judiciary must apply the 'clear and present danger' test or something similar in such situations instead of permitting anticipatory restrictions on fundamental rights. It was stated that the United States Supreme Court had applied the 'clear and present danger' test in Schenck's case.<sup>602a</sup>

For an unanimous Supreme Court Mudholkar J. held that the Magistrate had not been given any wide or arbitrary powers as had been contended, because he was obliged by Section 144(1) to set out the facts and circumstances of each case in his order in writing. This was a safeguard judicially insisted upon for a number of years.<sup>603</sup> It was held that this indicated that he studied the facts before he made the order. Though the Magistrate may have himself heard the application to get the order modified or rescinded he had a duty to act judicially which meant he had to hear the parties and must give reasons for his eventual decision. As for the people affected by his order or orders, there was a further opportunity under Section 435, read with Section 439 of the Code, to appeal to the High Court.

The Court rejected the contention based on the 'clear and present danger' idea which the United States Supreme Court seems to have discussed in a few cases, but never made part of its constitutional doctrine.<sup>603a</sup> The scheme of Funda-

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602a. (1919) 249 U.S.47.

603. The Editor, Tribune v. Emperor, AIR, 1942, Lahore, 171 (F.B.) refers to the following authorities on the point: Chandra Nath v. East Indian Railway, AIR, 1919, Cal.584; Satyanarayana v. Emperor, AIR, 1931, Madras, 236 and R.E. Blong v. Emperor, AIR, 1924, Pat. 767.

603a. See Pierce v. United States, 252 U.S. 239 (1920).

mental Rights in the Indian Constitution, the Court held, afforded no place for such a doctrine. Unlike in the United States document, the rights in India were qualified by 'reasonable restrictions' and Section 144 was one such reasonable restriction on the rights of free speech and assembly.

It should, however, be noted that free speech is not subject in its entirety to Section 144, Criminal Procedure Code. It is only large assemblies of people in certain areas and speeches delivered to turbulent assemblies that are prohibited for a temporary period. It is quite possible to express one's views in other ways such as writing to the newspapers. The calmer and more sober atmosphere of a discussion in the written medium has always been supported by Courts in India.<sup>604</sup> Hence, even in the pre-constitutional period, British-Indian Courts, as has been shown, discouraged any attempt at censoring the Press through orders passed under Section 144, Criminal Procedure Code. It has seldom been invoked for such purposes after the Constitution came into force.

A very important point about Section 144, Criminal Procedure Code is that orders made under it are temporary orders to meet emergencies. Where it was shown that under Section 144(6),<sup>605</sup> Criminal Procedure Code, the State Government could

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604. In re Ardeshir Phirozshaw, AIR, 1940, Bom.42. Romesh Thapper v. Madras, AIR, 1950, S.C. 124, above, 249.

605. "144(6): No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the State Government, by notification in the official gazette, otherwise directs."

extend an order without specifying any time-limit for its eventual expiry that power was held to impose an unreasonable restriction on the rights conferred by Article 19(1)(a) and (b). The Patna High Court in Kamla Kant v. Bihar<sup>606</sup> and the Supreme Court in Bihar v. K.K. Misra<sup>607</sup> held that none of the safeguards that accompanied a Magistrate's order applied when State Governments extended such order - (a) There was no right or opportunity for the parties affected to represent against the order; (b) there was no appeal or revision from the order passed by the State Government and, (c) there was no upper limit fixed by the statute as to the period for which the order in question could be extended.

In the Supreme Court there was a lone dissent by Shah J. who found that the extension order passed by the State government under Section 144(6) had its source in the initial order made by the Magistrate. Hence, the Magistrate himself could hear the parties objecting to the extension, and there could be a further appeal to the High Court. He viewed the Magistrate not as a subordinate functionary of the State Government but independent of it. In his view, the Government as the head of the Executive could exercise no authority over the judicial functions of the Magistrate. This, according to the learned judge, proceeded from the division of powers under the Constitution. It is submitted that the Magistrate does combine both executive and judicial functions while acting under Section 144, Criminal Procedure Code. When he

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606. AIR, 1962, Patna, 292.

607. AIR, 1971, S.C.1669.

makes the prohibitory order he acts as an executive officer but when he entertains applications to modify that order, he acts as a judicial officer. To many this sophisticated notion will seem somewhat unrealistic, however.

The dissent of Shah J. does not give sufficient consideration to the finding of the majority that there was no statutory limitation on the period for which the order could be extended by the State Government.

Two more challenges to Section 144(1) will have to be noticed. In Ram Manohar v. State<sup>608</sup> the petitioner argued before the Allahabad High Court that the restrictions imposed by the Section were in order to maintain 'public tranquillity'<sup>609</sup> while the nearest ground the Constitution referred to was 'public order' in Article 19(2) and (3). It was said that 'public tranquillity' and 'public order' were not the same but referred to different objects. 'public order' predicated that certain serious offences or acts committed or about to be committed were against the very basis of order in the community while 'public tranquillity' covered less serious acts that temporarily threatened peace in a local area. This qualitative difference, it was argued, must be recognized before the question of constitutionality could be gone into. In support of his contention, the petitioner, rightly, relied on the Supreme Court's decision in Ram Manohar v. State,<sup>610</sup> where the Supreme Court distinguished between

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608. AIR, 1968, All 100.

609. 144(1). See above, 247.

610. AIR, 1966, S.C.740. The petitioner there and in the case under discussion were the same.

public order and public tranquillity and illustrated the difference by saying that two drunkards brawling in a public street violated public tranquillity, but the preaching of communal hatred affected public order. Therefore, the argument sought to urge the Court to construe the term 'public order' narrowly as to exclude any power in the State to restrict acts likely to affect 'public tranquillity'.

The Allahabad High Court, in its turn, rightly relied on another decision of the Supreme Court, The Superintendent v. Dr. Lohia,<sup>611</sup> where the Supreme Court clearly equated public order with public tranquillity though it is possible to argue that that dictum was obiter. The High Court dismissed the petition. The conflict between the two Supreme Court decisions remained.

That was eventually solved by the Supreme Court in the recent case of Madhu Limaye v. Sub-Divisional Magistrate<sup>612</sup> where most of the contentions just dealt with were reproduced in attacking Section 144. In addition, one other new argument was also put forward. It was said that deprivation of the freedom of speech even temporarily, as under Section 144, should be resisted because this particular freedom enjoyed a 'preferred position' amongst all others. The United States Supreme Court had accepted, it was said, such a preferred position for free speech guaranteed by the United States First Amendment. The Indian Supreme Court rejecting the contention, <sup>held as</sup> that was shown by Frankfurter's dicta in Kovacs v.

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611. AIR, 1960, S.C.633.

612. AIR, 1971, S.C.1762.

Cooper <sup>613</sup> the notion of preferred position was never fully accepted by the United State Supreme Court. Just as it had pointed out so often before, the Indian Supreme Court stated that the scheme of Article 19 was different from the United States Bill of Rights and there was no room for any such 'preferred-position' doctrine.

As for the argument based on the distinction between the two expressions 'public order' and 'public tranquillity' the Supreme Court held that where the restriction imposed was severe, like preventive detention (as in the second Ram Manohar v. State <sup>614</sup> decided by the Supreme Court) the expression 'public order' in Article 19(2) and (3) would be strictly read and distinguished from 'public tranquillity'. But where the restriction imposed was a relatively milder and temporary restriction like the one imposed under section 144, Criminal Procedure Code, then 'public order' in Article 19(2) and (3) would be read to include 'public tranquillity'. Thus, if a statute provided for preventive detention of individuals likely to disturb public order then that should be understood as a reference to serious acts likely to affect ordre publique. <sup>615</sup> In Section 144, Criminal Procedure Code, the expression 'public order' should be understood to include acts less serious in their consequences and which would be likely to disturb public tranquillity generally.

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613. (1949) 336 U.S.77.

614. AIR, 1966, S.C.740.

615. Hidayatalluh J. who wrote the majority judgment, used the expression but did not fully explain the meaning the term has in French law.

The Court found that the keynote of Section 144 was the urgency of the action taken 'to prevent a rapidly developing danger to public order or peace, or nuisance to public health.'<sup>616</sup>

The outcome of this ingenious, and not unrealistic, decision is that firstly, the grounds justifying reasonable restrictions under Article 19(2) to (6) can bear different shades of meaning depending on the context and circumstances of the case. This adds a new dimension to the law relating to 'reasonable restrictions' under all the sub-clauses of Article 19, fully bringing out the 'contextual' nature of the test of reasonable restrictions. Secondly, the Supreme Court has reiterated its view that executive discretion to impose anticipatory restraint on the liberty or free speech and assembly would be justified by the need to meet sudden disturbances of public order (e.g., pre-election tension between rival political groups or inter-union rivalries in an atmosphere of industrial unrest). This has, in fact, been the view taken by all the High Courts.

The Bombay High Court in Bapurao v. State<sup>617</sup> upheld Section 37(3) of the Bombay Police Act, 1951, which empowered the Commissioner of Police to prohibit processions and assemblies for a period of 15 days if, in his opinion, an emergency warranted it. The Commissioner in passing an order of prohibition had to mention reasons that made the

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616. Section 144(1), see above, 247.

617. AIR, 1956, Bom. 300.

order necessary. It was argued for the petitioner that there was no opportunity for the citizens to show cause against the order being passed. According to this contention, the Commissioner should hear those citizens' representations before he made the order. It was held by the Court that it was a matter for the Commissioner to decide whether an emergency had arisen to justify this prohibition. When a power was conferred to meet an emergency it was futile to argue that principles of Natural Justice should apply. The Commissioner of Police could not be expected to issue such an order after what would amount to a public debate between him and the citizens of Bombay.

While permitting wide discretion to meet public disturbances and other similar emergencies, Indian Courts do expect the discretion to be exercised by responsible officials. The Madras High Court in Re C.N. Annadurai<sup>618</sup> was willing to accept that the Commissioner of Police could exercise a discretion similar to that in the Bombay Act, provided he stuck to the self-imposed convention of restricting the duration of the Prohibitory orders to 15 days - the Madras statute being silent on this point. The Court found that the Commissioner ~~was~~, in addition to being a Police official, had the status of a remanding Magistrate and a Justice of the Peace. Under the circumstances, it held that the impugned section was valid. The restrictions imposed by the section were held to be reasonable restrictions on the rights to free speech and assembly.

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618. AIR, 1958, Madras, 865, I.L.R. [1958] Madras 865.



was within the guarantees of free expression and assembly. But it held that picketing 'en masse' has been forged into a weapon of disruption in India and it has been used in a menacing manner too frequently.<sup>619a</sup> Under those circumstances, it clearly amounted to 'coercion exercised by a group upon another group'. The type of 'loitering' prohibited by the Act was one which was accompanied by an element of menace. While holding the statute constitutional the court observed:

No doubt the Criminal Law Amendment Act was passed to meet a certain situation which was precipitated by our national struggle to achieve independence, but we have still to see the purpose for which this law was placed on the statute book. 620

The Madras and Bombay High Courts have also held the section intra vires the Constitution.<sup>621</sup> In the Madras case, members of a parochial party were convicted under Section 7 of the Criminal Law Amendment Act, 1932, for picketing a shop. They stood in front of the shop owned by a North Indian and dissuaded South Indian customers from patronising the shop. In the High Court it was argued for them that they picketed

619a. "There is no civil right to organise mass disobedience in a free society, ... large scale organised mass disobedience, even if passive, is not the civil liberty or freedom of expression but a negation of it." P.B. Mukharji, Civil Liberties, Bombay, 1968, 4-5. The author is a former Chief Justice of the Calcutta High Court.

620. AIR, 1961, All 531, 533, col.2. The reason behind the impugned provisions, the Court held, was ~~to~~ prohibit conduct likely to interfere with the liberty of another citizen.

621. Re Vengan, AIR, 1952, Madras 95, I.L.R. [1952] Mad. 553. Damodar Ganesh v. State, AIR, 1951, Bom.549.

in twos at a time and were, therefore, not offensive to any one. Mack J. of the High Court held that an exception could not be made in favour of such picketing by twos at a time especially when their picketing interfered with the liberty of another citizen to carry on his trade or business, a fundamental right under Article 19(1)(g). The petitioners' rights under Article 19(1)(a) and (b) could not be construed in such a manner as to deny other citizens their rights. It would not be possible for the Court to interpret 'liberally' the petitioners' rights under the Constitution if what they were trying to propagate were unconstitutional goals such as discrimination against North Indians. A citizen in exercising his liberties could not be permitted to bring about conditions that go against the ideals of the Constitution.<sup>622</sup>

Rights of Government Servants to Demonstrate

Of the several restrictions that apply to government servants, Rule 4A of the Bihar Government Servant Conduct Rules, 1956, was questioned in Kameshwar Prasad v. Bihar,<sup>622a</sup> as in violation of the rights under 19(1)(a) and (b).

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622. See Linghanna v. State of Mysore, AIR, 1954, Mys.12, I.L.R. [1953] Mys.388 where it was held that the petitioner's insistence that a meeting be conducted in a particular language was not supported by his right to free speech. In a country of many languages such as India, this is a right decision. It may also be noted that the Constitution recognises 15 languages without implying that the use of any others would be unlawful.

622a. AIR, 1962, S.C.1166.

No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service.

The State contended that the object of the Rule impugned was to maintain discipline amongst Government employees. Any breach of discipline amongst them would eventually shake public confidence in the administration and might well lead to public disorder.

The Indian Supreme Court found that the right to stage peaceful demonstrations came within Article 19(1)(a) - demonstration being a form of expression of the feelings of an individual or a group of people. Demonstrations, the Court said, took various forms, from merely wearing a badge to violent forms such as stone-throwing. It would be unreasonable to prohibit all forms of it: there were the harmful and disorderly as well as the innocuous and peaceful. The Court held that prohibiting all forms of demonstrations could not be entirely justified on the ground of discipline amongst the employees. If the impugned rule had formed part of a body of rules laying down the procedure for resolution of the grievances of the employees it was possible that the rule might have been considered reasonable. The Court could not find sufficient relation between the rule and the maintenance of discipline.

An initial argument raised by the State was that Government employees should be considered as a special class of people to whom not all the fundamental rights were available. When a citizen voluntarily enters government service, he should not complain later about any reasonable restrictions

necessarily implied in his contract of service with the Government. The Court refused to create any such exception to the operation of guaranteed fundamental rights. It referred to Article 33 as the sole provision which created an exception in regard to the defence forces of the country to whom fundamental rights were not available. There was no question of creating any more exceptions.

It was recognized, however, that there could be certain special restrictions applied to a government servant because of his official position and responsibilities. An example of such a restriction was Section 54(2) of the Income Tax Act, 1922, which provided that a public servant shall not disclose particulars of any document he may come across in course of his duty. So also Section 128(1) of the Representation of the People Act, 1951, enjoins upon every officer concerned with recording and counting votes to maintain the secrecy in regard to voting.

In Ghosh v. Joseph <sup>623</sup> the Supreme Court held as unconstitutional another of the service rules which prohibited a government servant joining an 'unrecognized' service association.

Rule 4B of the Central Civil Services (Conduct) Rules, 1955, laid down that no Government servant should join or continue as a member of any 'Service Association' for government servants if that association had not obtained 'recognition' from the government within six months of its formation or such 'recognition' though originally granted was subse-

quently withdrawn by the Government.

The respondent was sought to be penalised for having contravened Rule 4B. The State raised the contention that the rule was intended to secure discipline amongst public servants. The Court held there was no direct connection between the rule providing for granting or withdrawal of recognition and discipline amongst the employees. The rule imposed unreasonable restrictions on the right of the employees under Article 19(1)(c).

These progressive decisions of the Supreme Court have been criticised <sup>624</sup> by Seervai, who argues that the decisions have the effect of undermining the impartiality of the civil service which has to give its best service whatever the political complexion of the party government in power. While this criticism is correct, the rules impugned in the two cases so far discussed conferred wide controlling powers on the Executive government without adequately defining their objectives. Their rationale belonged to an earlier epoch, in which the structural function of statutory rules need not be disclosed to those subject to them. It is clear from the two cases that there existed a need for proper procedures for ventilating grievances. In the absence of such procedures, the impugned rules when considered in isolation do appear unreasonable. Secondly, both these major decisions of the Supreme Court were decided mainly in relation to the right of the employee to protect himself in his job and to improve his conditions of service. The Supreme Court has not suggested that the government servant had a right to take part

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624. See Seervai, Constitutional Law of India, Bombay, 1967, 345-6.

in a political agitation while holding his job as a government employee. High Courts have held that a restriction, requiring him to refrain from taking a public stand in political matters would be valid. Thus the Madras High Court in P.N. Rangaswamy v. Coimbatore Municipality<sup>625</sup> upheld a regulation under which the petitioner was dismissed for taking an active part in the Communist Party.

It is clear that the right to assemble has created some difficulty to Indian Courts because they have been fully aware on the one hand, of the job that law enforcement authorities faced and on the other, the importance of the right to assemble which is after all inseparable from the freedom of speech and political liberty in its broadest sense.

The Supreme Court has recently applied its scale of reasonableness in favour of the right and against the law impugned in Himat Lal v. Police Commissioner.<sup>626</sup> In the case, Section 33(1)(o) of the Bombay Police Act, 1951, and Rule 7 of the Rules framed under the Section were impugned.

33(1) The Commissioner and the District Magistrate, in areas under their respective charges or any part thereof, may make, alter or rescind rules or orders not inconsistent with this Act for ...

(o) regulating the conduct of and behaviour or action of persons constituting assemblies and processions on or along the streets and prescribing in the case of processions, the routes by which, the order in which and the times at which the same may pass; ...

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625. AIR, 1968, Madras, 387. See also Balakotaiah v. Union, AIR, 1958, S.C.232, below, 342.

626. AIR, 1973, S.C.87.

(7) No public meeting with or without loud-speaker, shall be held on the public street within the jurisdiction of the Commissionerate of the Police, Ahmedabad City unless the necessary permission in writing has been obtained from the officer authorised by the Commissioner of Police.

The following arguments were raised by the petitioner:

- a) The Section and the rule imposed unreasonable restrictions on the rights guaranteed under Articles 19(1)(a) and (b). There ought to be no need to obtain prior permission to exercise one's fundamental rights.
- b) The restrictions imposed were not "narrowly drawn" so as to confine them strictly to meeting the supposed mischief arising out of any possible misuse of the rights. Legislation dealing with basic freedoms ought to be precise. The impugned provisions were vague and too general.
- c) The Commissioner had no statutory guidance in exercising the discretion conferred on him. Therefore, the impugned provisions offended Article 14 insofar as the possibility existed that the discretion could be unequally administered.

The State argued that the question was not merely one of right of assembly but assembly on a highway or a public thoroughfare. In English Common Law, it was argued,<sup>627</sup> there was no

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627. Relying on Halsbury, 3rd Edn., Vol.19, 73, para.107,

the right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it except insofar as their presence is attributed to a reasonable and proper use of the highway as such.

and Blackwell, Law of Meetings, 9th Edn., 5:

There appears to exist a view that the public has a right to hold meetings for political and other purposes on the Highway. This is an erroneous assumption. A public highway exists for the purpose of free passage and free passage only, and for purposes reasonably incidental to this right. There can be no claim on the

right to use public places for holding meetings. The Indian Law on the point, the State urged, was not different. It was denied that Article 14 was violated. The policy of the Act, it was said, could be gathered without difficulty and the Commissioner had sufficient guidance while exercising his discretion.

The majority in the Court held that the need for obtaining prior permission represented reasonable regulation of the right to assemble and to hold processions or meetings. It was held that there had come to be established in India a presumption that the citizens had a right to take out processions especially those connected with religious worship.<sup>628</sup>

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Note 627 - continued from 328:

part of the persons who desire to assemble for the purpose of holding a meeting to do so on the highway. The claim is irreconcilable with the purpose for which a highway exists

628. Relying on Parthasaradi v. Chinnakrishna, I.L.R.(1882) 5, Madras 304, Sundaram Chetti v. The Queen, I.L.R.(1883) 6, Madras 203 (F.B.) and Vijiaraghavachariar v. Emperor, I.L.R.(1903) 26 Madras 554 per Benson J, 587:

The practice of using the public highways for religious processions has existed in India for thousands of years. History, literature and tradition all tell us that religious processions to the village shrines formed a feature of the national life from the very earliest times. That alone is sufficient to raise a presumption that it is lawful and to throw on those who allege it to be unlawful the onus of showing that it is forbidden by law, but this it admittedly is not. The law recognizes the use of the highway by processions as lawful, and gives the Magistrate and superior officers of police power to direct the conduct of assemblies and processions through the public streets and to regulate the use of music ...

Manzur Hassan v. Muhammad Zaman, AIR, 1925, P.C. 36, which was followed by the Supreme Court in Piru Bux v. Kalandi Pati, AIR, 1970, S.C.1885.

A procession, the Supreme Court held was no more than a 'meeting' in motion. The Police Acts in India dealt with assemblies and processions on the same footing.<sup>629</sup>

The majority repudiated any idea that the only right anyone had in regard to a public thoroughfare was confined to 'passing and re-passing'. They pointed out as examples a citizen's right to carry on the business of plying buses on the highways for profit - such a right affirmed in Saghir Ahmad v. U.P.<sup>630</sup> But the right to all these additional uses was subject to regulation by the authorities. One cannot, for instance, insist on holding a meeting at any place one chose to hold it.<sup>631</sup> The regulation, however, has to be 'reasonable'. The impugned Rule 7, the majority found was excessively wide and enabled the Commissioner to refuse permission to hold any meeting at any public place whatsoever.

The two concurring judges agreed that Rule 7 was unconstitutional but had difficulty in accepting the position arrived at by the majority that the right to hold meetings in public places had come to be established in India through long-standing practice.<sup>632</sup> They, however, agreed that the discretion to regulate meetings as conferred by Rule 7 was

629. AIR, 1973, S.C.87, 94, para.29.

630. AIR, 1954, S.C.738, (1955) 1 S.C.R.707.

631. Railway Board v. Niranjan Singh, AIR, 1960, S.C.966, where it was held that there was no fundamental right to hold meetings on premises which were Railway property.

632. Para.74, Beg J.

unconstitutionally wide.

The decision is an affirmation of the right to assembly through Article 19(1)(b) was not the main ground for holding the rule impugned in the case unconstitutional.

(C) Reasonable Restrictions on the Freedom of Association

Article 19(1)(c) and 19(4)

From the point of view of political freedom in its widest sense, perhaps, this freedom as essential as the right to speech or assembly.

The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions ... 633

- so held Patanjali Sastri C.J. while declaring Sections 15 and 16 of the Criminal Law Amendment Act, 1908,<sup>634</sup> unconsti-

633. Madras v. V.G. Row, AIR, 1952, S.C.196, 200. Discussed above, Chapter 1,

634. Section 15. (1) ... ..  
 (2) 'unlawful association' means an association -  
 (a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or  
 (b) which has been declared to be unlawful by the State Government under the powers hereby conferred.

Section 16. If the State Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance

tutional as violating Article 19(1)(c). An association called, 'The People's Education Society' (of which the respondent was the secretary) was declared by an executive fiat to be an unlawful association. No copy of the order was supplied to any of the officers of the society but it was published in the official gazette as required by the Act. However, nowhere were any reasons provided for declaring the society unlawful. But the State contended at the hearing that the society was a front for the Communist Party declared unlawful in August 1949. It was also contended that there was an Advisory Board to help the Government with its decision.

The Madras High Court and the Supreme Court in turn struck down the Government's order. It was held by the Supreme Court that there was no question of subjecting any of the freedoms guaranteed by Article 19 to executive or administrative discretion of the type the Court was considering. In any case, full reasons were to be produced so as to enable judicial review of the order made<sup>635</sup>. The machinery of an Advisory Board could never be a substitute for judicial review. That arrangement would have to be confined to preventive detention and could not be extended to other provisions of the Fundamental Rights part. The Court distinguished the decision in Dr. N.B. Khare,<sup>636</sup> by saying that extenuation of the

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Note 634 - Continued from 331:

of law and order, or that it constitutes a danger to the public peace, the State Government may by notification in the official Gazette, declare such association to be unlawful.

635. AIR, 1952, S.C.196, 200.

636. AIR, 1950, S.C.211, (1950) S.C.R.519.

petitioner there was , like preventive detention, a precautionary measure. The basis there was suspicion, but in the case before them it was factual and capable of assessment by the Court. It was held that it would be necessary for the State to establish that the association 'encouraged' or 'aided' persons to commit acts of violence within Section 15(2)(a).

Finally, the Supreme Court disapproved of the mode of bringing the order made to the notice of associations in question. Publication in the official gazette was held to be inadequate and that some other more prominent mode of publication, such as sticking up a copy of the order at the premises of the society concerned was held to be essential to satisfy procedural reasonableness.

This decision in Madras v. V.G. Row is considered in India as a strong decision laying down firmly not merely the ambit of the right to association but also the Supreme Court's approach to all the Fundamental Rights. Recently, the Supreme Court followed Madras v. V.G. Row in Damayanti Narang v. Union of India.<sup>637</sup> In the case, a registered society which ceased to function as a result of disagreements between its members was reconstituted by a union statute. It provided for the dissolution of the society and the formation of a new one in its place. All the members of the old society were to be admitted to the new society but there were to be other new members, some of whom were to be 'sponsored' by the Government.

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637. AIR, 1971, S.C.966.

The Supreme Court held the statute unconstitutional as infringing Article 19(1)(c). It was held that while the old members had not been deprived of membership, they were given no choice in the admission of the new members, some of whom were sponsored by the Government. The Government had also reserved a discretion for itself to decide on the total number of members of the society. This it could not lawfully do.

The Court held that the right under Article 19(1)(c) was not merely to form an association but was also for a continued voluntary association between those who formed it. Their choice in the matter could not be interfered with.

But this would not mean that ideal conditions are to be provided by the State for the 'effective functioning' of an association. In All Indian Bank Employees Association v. National Industrial Tribunal,<sup>638</sup> the appellants impugned Section 34-A of the Banking Companies Act, 1949, as infringing their right to 'function effectively' as a union. The section enabled banking companies to keep certain sums of money in reserve to provide for bad and doubtful debts. This reserve fund need not appear in the balance sheets produced by the companies. The appellants were negotiating for higher wages, the National Industrial Tribunal acting as the arbitrator between them, and their employers, the banking companies. The Union wanted their employers to disclose all their assets, including the reserve fund, to the Industrial

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638. AIR, 1962, S.C.171.

Tribunal so that the eventual wage determination would be favourable to the employees.

Their contention was that Section 34-A prevented the achievement of the object of their association, viz., getting higher wages for their members. The right to form an association, it was argued, would also include the concomitant right of the association 'functioning effectively' without statutory interference. Unions existed, the Court was told, to get higher wages.

The Supreme Court held that there could be no such additional rights concomitant to the right under Article 19(1)(c). An opposite construction would "by a series of ever-expanding concentric circles in the shape of rights concomitant to concomitant rights and so on lead to an almost grotesque result."<sup>639</sup> A congregation of citizens, it was held, could not claim privileges that as individual citizens the members of the congregation could not claim.

As the stream can rise no higher than the source, associations of citizens cannot lay claim to rights not open to citizens ...<sup>640</sup>

Thus the right of the association to express its views would be governed by Article 19(1)(a) and 19(2), its right to hold property by Article 19(1)(f) and 19(5) and so forth. Therefore, it could not be contended that the only restrictions that could be imposed on the activities of the association were those under Article 19(4).

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639. Ibid., 180, col.2.

640. Ibid., 180, col.1.

It was held that the arrangement by which the Reserve Bank of India issues a certificate as to the secret reserves was a compromise in meeting the need to maintain the credit structure of the economy on the one hand, and the interests of the employees in securing a good wage on the other hand.

Whether or not a right to form and belong to an association of one's choice would include the right not to belong to any association was raised in Tika Ramji v. Uttar Pradesh.<sup>641</sup> The U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, aimed at protecting the interests of cane-growers by fixing minimum prices for sugar-cane purchased by sugar mills in the State. The Act divided the cane-growing areas into zones and each zone was earmarked for a particular mill. All this meant that the mills had to pay the minimum price fixed or else they got no cane. The Act favoured growers' Co-operative Societies and where 75% of the total number of growers in any area belonged to the local Co-operative Society, the Act ignored the individual grower altogether. The petitioner, one such individual, complained that the Act compelled him to join the Co-operative Society and that was in violation of his fundamental right under Article 19(1)(c). His contention was that there was a negative right not to belong to an association.<sup>642</sup> The Supreme Court refused to recognize

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641. AIR, 1956, S.C.676.

642. (Vide Article 20(2), U.N. Declaration of Human Rights, 10th Dec. 1948, "No one may be compelled to belong to an association".) The petitioner relied on the decision of the Madras High Court, in Indian Metal and Metallurgical Corporation v. Industrial Tribunal, AIR, 1953, Madras, 98, where it was held that a business corporation could not be compelled to carry on a business. "A person can no more be compelled to carry on a business than a person can be compelled to

any such general proposition that the negative right was to be regarded as included in the fundamental rights. It was held that in any case there was no compulsion on the petitioner to join the Co-operative Society. He could sell his sugar-cane to a buyer other than a sugar-mill.

Commenting on this case, H.M. Seervai thinks that the negative right not to belong to an association is certainly part of the guarantee in Article 19(1)(c).<sup>643</sup> But he agrees with the outcome of the decision and thinks there was no compulsion on the petitioner. With respect, it seems to this writer that there was sufficient pressure on the petitioner to amount to compulsion to join the Co-operative society. It was obvious that for bulk producers of sugar-cane like he was, sugar-mills were probably the only bulk-buyers. Therefore, to tell him, as the court did, that he could have sold his tons of sugar-cane to some buyer other than the mill seems unrealistic. However, the real reason for the Supreme Court holding the law constitutional may well be the total dependency, at that time, of sugar growers all over India on the mills. The latter quite often dictated the price and the growers were paid very low prices.

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**Note 642 - Continued from 336:**

to acquire or hold property." Also see Suryapal v. U.P., AIR, 1951, All 674, 698, where reliance was placed on the Declaration of Human Rights conferring the right to belong to or not belong to an association as distinct rights. The Allahabad High Court held that Article 19(1)(c) contained both rights (seemingly wrongly).

643. H.M. Seervai, Constitutional Law of India, Bombay, 1967, 340.

The Andhra Pradesh High Court in Sitaramachary v. Senior Dy. Inspector of Schools<sup>644</sup> held that the negative right of not belonging to an association would be part of the right guaranteed under Article 19(1)(c). The circumstances of the case appear to justify the Court's decision. The following order was issued by the Education Department of the State Government:

All teachers (men and women teachers) in recognized elementary schools, ... in the area shall be members of the Association. None other than these shall be admitted as members.

The Association referred to was sponsored by the Education Department and recognized by the Government as the official teachers' union. A teacher who did not attend the meetings of the association was subject to disciplinary action. The State argued that the compulsion was justified because it was necessary in order to ensure the 'efficiency' of the teachers.

The order impugned was held to be unconstitutional as infringing the petitioner's fundamental rights under Article 19(1)(c). The English case of R. v. Dr. Askew<sup>645</sup> was referred to in support of the Court's decision. The effect of Tika Ramji (above, 336) in these contexts cannot be said to

644. AIR, 1958, A.P.78. Apparently Tika Ramji (above, 336) was not brought to the Court's attention.

645. (1768) 4 Burr. 2186, 2200:

If the inhabitants of a town are incorporated, yet every one must be admitted before he becomes a corporator. The Crown can't oblige a man to be a corporator, without his consent: he shall not be subjected to the inconveniences of it, without accepting it and assenting to it.

be self-evident. It is clear that there is a need to protect the individual from any pressure to belong to an association which he does not support. The guarantee in Article 19(1)(c) cannot mean that the individual could be pressurised into doing an act against his will. In view of this, Tika Ramji should be construed as having left the matter open. The case did not make a definitive pronouncement on the point. The Supreme Court's contribution on this subject remains uncertain.

The right guaranteed by Article 19(1)(c) enables workers and employees to form unions. But it is open to a statute to prescribe conditions subject to which the employer may 'recognize' a Union as the official negotiating body on behalf of the majority of workers employed in the industry. Thus, Section 27 of the Industrial Disputes (Appellate Tribunal) Act, 1950, laid down that a Worker's Union could not be recognized by an employer unless it represented more than 15% of the workers in a given industry. This was held to be a reasonable restriction by the Indian Supreme Court.<sup>646</sup>

Yet the guarantee under Article 19(1)(c) will not help an Union in its grievances that a rival Union is taking members away from it. There is no question of an existing Union's interests being shielded by the constitutional guarantee when it is threatened by the emergence of a rival Union.

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646. Raja Kulkarni v. Bombay, AIR, 1954, S.C.73.

In K.R.W. Union v. Registrar,<sup>647</sup> the appellant Union objected to the Registrar of Unions registering a rival Union without giving the appellants notice and a personal hearing. It was said principles of Natural Justice were not observed.

Durga Das Basu J. held that the constitutional guarantee of forming associations belonged to all workmen. No Union could claim a monopoly right to exclude others from competing with it for membership of the same workmen. A point to be noted is that it was held that the workmen had a right not to join a particular Union or any Union at all. This again fortifies the conclusion that the right to form an association cannot mean everyone can be coerced into becoming members.

Moreover, it looks as though the Indian Supreme Court's dictum in Tika Ramji<sup>648</sup> is rightly not construed by the High Courts as denying the right not to belong to any association.

Where a Union satisfied the statutory conditions and recognition is extended to it, that cannot be withdrawn without proper opportunity afforded the Union to explain its case. There the principles of Natural Justice would apply. The act of recognition and the withdrawal of it would be scrutinised by the courts.<sup>649</sup>

647. AIR, 1967, Cal.507.

648. AIR, 1956, S.C.676.

649. E.R. Employees v. General Manager, AIR, 1965, Cal.389.

The conditions for recognition must relate to well-understood and predictable objectives such as adequate representation, proper functioning of the association, e.g. averting 'wild-cat' strikes by members of the association.

In Ghosh v. Joseph<sup>650</sup> the Supreme Court held that the need to maintain discipline amongst government employees<sup>650a</sup> or to ensure efficiency amongst them would be legitimate aims and therefore, might form the basis for giving or withdrawing recognition. In the case before them, however, the impugned provision was held not to be related to these aims. Rule 4-B of the Central Civil Services (Conduct) Rules, 1955, penalised any employee who continued his membership of an association of employees after the Government had withdrawn recognition from it.

Prior restraints are not as a general rule regarded as reasonable restrictions on the right under Article 19(1)(c). In S. Ramakrishnaiah v. The President, Dt. Board,<sup>651</sup> the petitioner, a school teacher, was informed by the respondent that he could not become a member of any Union unless he

650. AIR, 1963, S.C.812. Also see A.C. Mukherjee v. Union (1972) II, Labour Law Journal, 297, where the Calcutta High Court held that non-recognition of, or withdrawal of recognition from, a labour union did not violate Article 19(1)(c) when such recognition was granted instead to a rival union that represented a majority of the workers.

650a. See above, 323 ; for a collection of cases and comments on the subject, see A.P. Aggarwal, 'Freedom of Association in Public Employment' (1972) 14 J.I.L.I., 1-20.

651. I.L.R.[1953] Madras 57.

obtained the prior permission of his employers. This order was sought to be justified on the ground that it was to prevent school teachers from getting involved in political movements. The Madras High Court held the order unconstitutional:

It is well-established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion, or the right of freedom of association cannot be made subject to the discretionary control of an administrative or executive authority, which can grant or withhold the permission to exercise such right, at its discretion. 652

It is not incompatible with the freedom of association to declare strikes illegal or penalise resort to strikes.<sup>653</sup>

IN P. Balakotaiah v. Union of India<sup>654</sup> the appellants were dismissed because, according to them, they were Communists and trade unionists likely to organise strikes. This, it was contended violated their right under Article 19(1)(c). The

652. Ibid., 63. The Court distinguished United Public Workers v. Mitchell, (1947) 330 U.S. 75; 91 Law Ed. 754 and New York Ex Rel. Bryant v. Zimmerman, (1928) 278 U.S.63; 73 Law Ed. 184. It approved of other United States decisions in Lovell v. Griffin (1938) 303 U.S. 444; 82 Law Ed. 949, and Hague v. Committee for Industrial Organisation, (1939) 307 U.S.496; 83 Law Ed. 1423, both of which dealt with prior restrictions on the freedom of the Press and assembly which were held unconstitutional.

653. In All India Bank Employees Association v. National Industrial Tribunal, AIR, 1962, S.C.171, see above, 334, a provision of the Industrial Disputes Act, 1947, suspending strikes during the period of compulsory arbitration was held constitutional and reasonable. Also see Radhey Shyam v. Postmaster-General, AIR, 1965, S.C. 311, which confirmed that there was no fundamental right to strike under Article 19(1)(c).

654. AIR, 1958, S.C.232, (1968) S.C.J.451.

Supreme Court held that if it was a question of unfair dismissal, they should have pleaded Article 311 of the Constitution. The Court held that they had the fundamental right to be Communists but had no such fundamental right to Government employment!

While resort to strikes can be controlled in the interest of a negotiated settlement, the Government could not penalise a mere resolution advocating a strike.<sup>655</sup> Every association has the right to pass any resolution it wishes or consider every type of resolution.

Though they thus affirmed the independence of associations wherever economic matters are involved, Indian Courts, like Courts in other countries, have exercised restraint in interfering with the Government discretion. In Madhubai Amathlal v. India,<sup>656</sup> the Securities Contracts (Regulations) Act, 1956, empowered the Government to regulate stock dealings. By virtue of its powers, the Government recognized one of two stock-exchanges as the one entitled to carry on transactions in stocks and shares. The members of the other exchange were permitted to become members of the new stock-exchange. The constitutionality of the measure was not challenged in the case but it was assumed to be valid. What was challenged was a provision in the Government's order that those members of the other association who wished to be admitted to the new stock-exchange should have been members for at least one year previous to the making of the order. This was held by the Court to be a relevant condition subject to which recognition was extended to the new body and the condition was intended to keep out inactive

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655. Benchey Lal v. U.P., AIR, 1959, All 614.

656. AIR, 1961, S.C.21.

members who would only act as dead weights if admitted.

Likewise in Raghubar Dayal v. Union.<sup>657</sup> it was held that speculative and future contracts in an essential commodity could be reasonably confined to one body or association recognized by the Government for the purpose of ensuring certain economic results.

This deference shown by the Courts to legislative and executive freedom of action in economic matters could be seen applied to most regulations of business and trade.<sup>658</sup>

We have seen that Sections 15 and 16 of the Criminal Law Amendment Act, 1908, were declared unconstitutional in State of Madras v. V.G. Row.<sup>659</sup> Similar powers of declaring an association unlawful were bestowed on the Executive by Section 3(1) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967). But unlike the Act of 1908 this is a more closely drawn statute giving the Executive the power to so declare an association unlawful only where the association attempts to bring about the cession or secession of a part of Indian territory. It was the intention of Parliament in 1967 to stop political campaigns for securing separate home-lands. Thus Section 2(f) says:

(f) 'unlawful activity', in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or

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657. AIR, 1962, S.C.262.

658. See below, *Section 2 (a)*, 357.

659. AIR, 1952, S.C.196.

otherwise),

- (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession;
- (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India;

Also, unlike the Act of 1908, this Act provides that every order or notification made under the Act shall specify the grounds upon which the order was issued. There is also a more realistic and effective manner of serving the order on the association in question. The orders under the Act would have a life of two years. The Act can be supported, if challenged, on the ground of 'sovereignty and integrity of India' introduced in 1963<sup>660</sup> into Articles 19(2), 19(3) and 19(4) governing the freedoms of speech, assembly and association respectively.<sup>661</sup> It is very likely that the Act would be held to impose only reasonable restrictions in the interests of the sovereignty and integrity of India.

In conclusion, it may be pointed out that the freedom of association and its adjudication by the Courts has, so far, not given rise to any serious controversies or debates. This may well be because there has been no attempt by the State in India to interfere with any of the existing political or religious associations, notwithstanding demands that sectarian

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660. See above.

661. Introduced by the Constitution (Sixteenth Amendment) Act, 1963, (w.e.f. 5.10.63.).

parties like the Muslim League or Hindu Mahasbha be banned. The Unlawful Activities (Prevention) Act, 1967, has not been used to ban any of the regional parties.

(d) Reasonable Restrictions on the Freedom of Movement - 19(1)(d) and 19(5).

Probably the least developed among the personal freedoms of the individual in India is the right to movement. This is primarily because preventive detention is 'recognized' by the Constitution. It may be recalled, that Article 19(1)(d) was invoked in A.K. Gopalan<sup>662</sup> by the petitioner who was preventively detained. The Supreme Court held then that in cases of preventive detention or of punitive detention in general, the right conferred by Article 19(1)(d) did not come into operation. In order to arrive at this conclusion the majority in the court had to distinguish Article 19(1)(d) from "personal liberty" in Article 21. In other words, the majority wished to say that freedom of movement in Article 19(1)(d) and 'personal liberty' in Article 21 were not identical concepts. While the former was restricted to movement within the territory of India, the latter was meant to guarantee freedom from physical restraints. Article 19(1)(d), in the view of the majority in the Supreme Court, emphasised 'the factual unity of India'. It was included as a fundamental right to forestall any possible parochial barriers.

But the lone dissenter, Fazl Ali J., pointed out, with some justification it seems, that Article 19(1)(d) and Article 21 overlapped and both meant 'Liberty' in its general sense

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662. See above, 223, 259 and 263.

of freedom from restraints. In his view, this overlapping need not be explained or rationalised by cutting down the scope of Article 19(1)(d). There was no need to differentiate between the two provisions at all.

One must, however, note that Article 19 is an unique provision amongst all the Fundamental Rights, with its own scheme of 'reasonable restrictions' while Article 21 is a general - perhaps, a too general - provision and is probably the weakest right in Part III of the Indian Constitution. One of the majority Judges, Mukherjea J. realised this and held that Article 19 provided for a proper balancing of freedoms and the necessary social control, whereas Article 21, along with Articles 20 (guarantee against ex post facto criminal laws) and 22 (safeguards to be observed by the State in cases of preventive detention) contemplated penal statutes exclusively.

Yet another view is possible on this matter. As against the majority view that Article 19(1)(d) was in substance a right to travel up and down India, it may be pointed out that Article 19(1)(e) fully provided for free access to citizens to any part of India. This right assumes the right of movement because it says citizens can 'reside and settle in any part of the territory of India'. This, more than Article 19(1)(d), would enable one to say that 'the factual unity of India' was being emphasised. No doubt, Article 19(1)(d) also uses the expression 'throughout the territory of India'. Quite obviously, the Indian Government could not have extra-territorial powers to guarantee free movement

outside the territory of India. Thus there is an internal and external aspect to free movement and internal free movement was sought to be guaranteed in 19(1)(d). It would have been wholly compatible with this meaning to read into Article 19(1)(d) liberty of movement to its wider sense as the minority judge, Fazl. Ali J. did. The actual decision in A.K. Gopalan denied this. It was unfortunate because the outcome of the decision meant that of the two provisions which had to do with liberty of movement only the weaker provision (Article 21) that yielded little judicial review could be invoked if physical liberty ('personal liberty') is violated either by confinement in a cell or through any other means. It will be plain to see why Article 21 is the weaker provision:

21. Protection of life and personal liberty -  
 No person shall be deprived of his life or personal liberty except according to procedure established by law.

This was construed in A.K. Gopalan to mean that as long as there was a relevant law, which meant lex and not jus, Article 21 would be satisfied. Where a law enacted by the Legislature could be shown in support of the executive action no further judicial review would be possible under Article 21.

In the light of the 'poor start' by Article 19(1)(d) it is not surprising that the number of cases covered by it are limited and are of one kind - cases of externment of individuals from specified areas of the country.

The first of these cases is Dr. N.B. Khare v. Delhi <sup>663</sup>

already once dealt with. It may be recalled that the East Punjab Public Safety Act, 1949, under which the petitioner was externed out of Delhi was upheld by a majority of three to two in the Supreme Court. The Act impugned, empowered a District Magistrate to pass orders of externment on his subjective satisfaction. A plain reading of the relevant provisions of the Act showed that there was no compulsion on the authority to supply the reasons or grounds of the order to the externee. There was no time-limit fixed by the Act for the operation of the orders made under it. However, the Act was itself a temporary one and was to expire within a year's time. The majority emphasised the temporary nature of the statute, construed the provision that grounds 'may' be supplied as grounds 'must' be supplied and upheld the Act and the order impugned as constitutional. It has already been shown how the test of reasonableness applied by the majority was narrower than that accepted by the Supreme Court in V.G. Row.<sup>664</sup>

The absence of provisions to ensure that power under the Act would be exercised only to secure the objects of the Act was held by the majority to be of no consequence in determining its reasonableness.

The two minority Judges pointed out that the statute (admittedly a temporary one) had been extended by a further period once before and there was nothing to prevent a similar, further extension. Moreover in their view, the circumstances surrounding a case should be looked at as a whole

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664. Above, 131, 132.

while determining the reasonableness of the law as well as the order made under it.

An earlier decision of the Bombay High Court had in fact taken this minority view in the Supreme Court.<sup>665</sup> It was held that the Bombay Public Security Measures Act, 1947, which did not provide for a time-limit for the operation of the order nor for the supply of the grounds of the order, imposed unreasonable restrictions on the rights conferred by Article 19(1)(d) and (e). The High Court also took a broader view of the test of reasonableness.<sup>666</sup>

The freedom of movement comes out severely circumscribed after the interpretation given it in the two decisions of A.K. Gopalan and Dr. N.B. Khare.<sup>667</sup>

Following Dr. N.B. Khare's case, the Assam High Court held<sup>668</sup> that only two considerations entered into the determination of the reasonableness of an externment law. They were (a) the extent of the territory from which the individual is externed, and (b) the duration of the externment. The Assam Maintenance of Public Order Act, 1947, provided ~~provided~~ that a District Magistrate could pass an order of externment for up to a year's duration on grounds of public

665. Jeshingbhai v. Emperor, AIR, 1950, Bom. 363 (F.B.). Above, 128

666. See above, 128-9.

667. AIR, 1950, S.C.211, (1950) S.C.R.519.

668. Amrit Bhattacharya v. State, AIR, 1953, Assam, 77. P. Arumugham v. Madras, I.L.R. (1953) Madras, 937, is a similar case where the Madras Restriction of Habitual Offenders Act, (VI of 1948) that prescribed no time-limit for confining a 'habitual offender' to a specified area was upheld following Dr. N.B. Khare's decision.

order and public safety. The petitioner was ordered not to leave his home-town. His argument was that the Act did not provide for such safeguards as an independent Advisory Board, which even laws of preventive detention included. His contentions were rejected and the Act was held constitutional. The Supreme Court had laid down in Hari Khemu Gawali v. Bombay<sup>669</sup> that there was no universal rule that an Advisory Board should be provided in such statutes for them to be constitutional.

Cases of externment of violent characters, known in India as 'Goondas', come up before Indian courts from time to time.<sup>669a</sup> In Gurbachan Singh v. Bombay,<sup>670</sup> Section 27(1) of the City of Bombay Police Act, 1902, which authorised externment of persons whose presence might 'cause alarm, danger or harm to person or property' was held to be reasonable and constitutional. It was held that two aspects of the impugned provisions were in favour of their constitutionality: (a) only a high-ranking official - the Commissioner of Police - could pass the order of externment, and (b) a maximum duration of two years for the operation of the order was fixed by the statute but at any time in the meanwhile, the Commissioner could, in his discretion, revoke the order.

An attack on the section that the externee could not cross-examine those who complained and/or bore witness against

669. AIR, 1956, S.C.559, [1956] 1 S.C.R.506.

669a. See Deb, Puri and others, 'Operation of Special Laws relating to externment of Bad Characters' (1969) 11 J.I.L.I., 1-28. The authors urge that there is a need to strengthen police powers to extern criminal characters.

670. AIR, 1952, S.C.221.

him was rejected. It was held that externment was resorted to because of the difficulty in getting those terrorised by him to come forward and depose in a regular trial. That being the case, the right to cross-examination would be counter-productive. The externee, however, could make representations to the Commissioner in other ways. It is submitted that this is a correct decision bearing in mind the operations of such gangsters in India.

But where such a law aimed against a 'Goonda' had not indicated, however generally, who was a goonda for the purposes of the law, it would be unconstitutional under Article 19(5) and perhaps also under Article 14.<sup>671</sup>

In the first of the cases concerned, Madhya Pradesh v. Baldeo Prasad, the Supreme Court did something towards restoring <sup>671a</sup> the right under Article 19(1)(d) to the level of the rights to free speech and association.

Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Art.19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. <sup>672</sup>

671. Madhya Pradesh v. Baldeo Prasad, AIR, 1961, S.C.293.  
Jagannath Prasad v. Madhya Pradesh, AIR, 1968, M.P.155.

671a.MC. Setalvad, The Indian Constitution, 1960-65, Bombay, 1967, 79.

672. AIR, 1961, S.C.293, 298.

Thus the Supreme Court applied here standards similar to those in V.G. Row and Romesh Thapper to the right of free movement.

Another welcome decision of the Supreme Court is to be found in Madhya Pradesh v. Bharat Singh.<sup>673</sup> There it was held that if the Madhya Pradesh Public Security Act, 1959, is to be regarded as constitutional, it must enable the externee to make representations against the order. The decision covered other constitutional points which are not relevant here.

In the line of welcome decisions must be included also the decision of the Bombay High Court in Balu Shivling Dombe<sup>674</sup> where it was held that a valid order of externment should satisfy two conditions, (a) the alarm, danger or harm caused by the presence of the person inclined to violence should be with reference to more than two or three individuals. There must be a general apprehension of fear on the part of the public in the area concerned, (b) the area from which he is to be externed must be strictly relevant to the purpose of externment. The Magistrate passing the order could not include additional areas (in good measure) merely on grounds of contiguity!

The Bombay High Court has also held that ordering prostitutes to remove themselves from a given area would be a reasonable restriction on the guarantee in Article 19(1)(d).<sup>675</sup>

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673. AIR, 1967, S.C.1170.

674. AIR, 1969, Bombay, 351.

675. Smt. Begum v. State, AIR, 1963, Bom.17.

The Suppression of Immoral Traffic in Women and Girls Act, 1956,<sup>676</sup> enables a Magistrate to order a woman or a girl prostitute to move out of any place to any other within or outside his area of jurisdiction. The woman or girl prostitute concerned could appear before the magistrate and deny that she is a prostitute. While upholding the Act and the powers conferred therein the Court (Patel J.) observed:

While dealing with the argument about reasonableness or otherwise ..., one must remember that women do not choose this vocation because they like it. It has been recognized ... they are forced into this ... by social conditions. ... one may not therefore judge these cases with any harshness. 677

It was held that the power of the Magistrate to ask a prostitute to move out of the area of his jurisdiction was, however, excessive and unreasonable. Though the Court did not say it, one presumes that an unlucky prostitute might be continuously asked to be on the move by several magisterial orders! The psychological, sociological and economic factors referred to by the learned judge in passing were not the subject matter of testimony and argument before him, and expertise in this area of value judgments has evidently still to be developed.

In Uttar Pradesh v. Kaushaliya<sup>678</sup> the Supreme Court approved of the constitutionality of the same Act of 1956 but

676. See R.K. Raizada, 'The Suppression of Immoral Traffic in Women and Girls Act, 1956: Some Socio-legal Problems' 8, J.I.L.I. (1966) 96.

677. Ibid., 18, col.2 (para.5).

678. AIR, 1964, S.C.416, overruling Shama Bai v. U.P., AIR, 1959, All 57.

disagreed with the Bombay High Court, holding that the Magistrate's power to order the prostitute to go out of his area of jurisdiction was not unreasonable. The clear possibility of her being moved from district to district by such orders was dismissed by the Supreme Court as a 'fantasy'! No testimony or arguments on this subject were available to the Court. Surely it is not 'fantasy' and, with respect, the Court may have underestimated the harassment of such 'common women' by the Police and the authorities alike in India. The high moral tone adopted by everyone concerned reserves little sympathy for the prostitute who (if she is selected for harassment) is generally a poor and wretched character commonly living in a slum.

Extraditing an Indian citizen to Ceylon according to the terms of the Indian Extradition Act, 1903, would amount to a reasonable restriction in the interests of the public under Article 19(5).<sup>679</sup>

But deporting an Indian citizen because he had violated passport rules would be plainly unreasonable however serious the violation might have been.<sup>680</sup> It would be an excessive punishment for any of the offences that one may commit under the Passport Rules.

A decision of the Supreme Court that was not given under Article 19(1)(d) but which is of significance to free movement is to be found in Satwant Singh Sawhney v. Assistant Passport Officer, New Delhi.<sup>681</sup> The passports of the several

679. ReSockalingam, AIR, 1960, Madras, 548.

680. Ebrahim Vazier v. Bombay, AIR, 1954, S.C.229.

681. AIR, 1967, S.C.1836.

petitioners jointly represented in the case, were withdrawn by the Government on grounds which varied from petitioner to petitioner. They included such complaints against some of them as contravening the immigration laws of a friendly foreign power and contravening the Exchange Control Rules, etc.

The petitioners prayed for a writ directed at the Government to issue them their passports. They argued that "personal liberty" under Article 21 included the right to go abroad. They did not invoke Article 19(1)(d) since that was confined to movement "throughout the territory of India".

The Supreme Court which had already shown an anxiety<sup>681a</sup> to restore the content of 'personal liberty' in Article 21 accepted the petitioners' arguments and held that there was a fundamental right to travel abroad<sup>682</sup> (under Article 21) and this meant there was a right to a passport.

By way of conclusion it remains to be said that Article 19(1)(d) has suffered more because of the existence of Article 21 which has shown signs of a potential which Article 19(1)(d) does not seem to possess. But its importance in cases of externment cannot be ignored. We have seen that it has also played its part in questions concerning the deportation of citizens and their right to re-enter India after a sojourn or stay abroad.

681a. Khark Singh v. V.P. (1964) 1 S.C.R.332.

682. United Nations Declaration of Human Rights, 1948,  
 Article 13(1) Everyone has the right to freedom of movement and residence within the borders of each State.  
 (2) Everyone has the right to leave any country, including his own, and to return to his country.

CHAPTER 3

SECTION 2(a): REASONABLE RESTRICTIONS ON THE FREEDOM OF FREE  
PURSUIT OF TRADE, BUSINESS OR PROFESSION

The naturally complex factors that characterise matters of trade and business have made it difficult to arrive at any clearly spelt-out limits of reasonableness, whether one is considering an individual case or a particular class of restrictions. An ideological element is strongly present in commercial practices and legislative restrictions on those practices. Therefore, unlike the case of restrictions on the freedom of speech or assembly, the element of 'public interest' in restricting a trade or business becomes a matter of debate and its applicability a matter of opinion. Ideally these differences should not or, perhaps, need not be reflected to the same extent in a decision of the court as to the reasonableness of a legislative restriction. But a consideration of the decisions not only in India but also in other federations such as the U.S.A.<sup>682a</sup> and Australia<sup>682b</sup> leaves one with the impression that the diverging points of view do (and are thus perhaps bound to) affect the question of reasonableness. Thus, while the majority and minority judgments in a case may express their rationes in terms of well-recognised formulae, the distinction between them may be solely in the appreciation of such broad but essential features as 'public interest'.

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682a. Alpheus T. Mason, The Supreme Court: Palladium of Freedom, University of Michigan Press, 1962, Chapter 5.

682b. W. Anstey Wynes, Legislative, Executive and Judicial Powers in Australia, 3rd Edn., The Law Book Company of Australasia, 1962.

Indian courts have pronounced upon the reasonableness of import-export restrictions, licensing measures, controls on the trading of commodities essential to the community (like food, fuel and textile articles), nationalisation and State enterprise in trades that could ordinarily be carried on by citizens - all of which prima facie violate the freedom guaranteed to the individual under Article 19(1)(g).<sup>683</sup> Restrictions imposed by industrial legislation such as the Industrial Disputes Act, 1947, and the Minimum Wages Act, 1948, have been challenged.<sup>684</sup> Anti-smuggling measures and other steps taken to counter tax-evasion have presented questions of the constitutionality of search and seizure of documents, such as account-books.<sup>685</sup>

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683. Daya v. Joint Chief Controller of Imports & Exports, AIR, 1962, S.C.1798, (1963) 2 S.C.R.673; M/S Dwarka Prasad v. Uttar Pradesh, AIR, 1954, S.C.224; Kishanchand Arora v. Commissioner of Police, AIR, 1961, S.C.705; For the administrative law of licensing, see the excellent judgment in Sukhlal v. Collector, AIR, 1969, M.P.176; S.M. Mohd. Anzar Husnain v. Bihar, I.L.R. (1952) 31 Patna 203 (F.B.); Manjashetty v. Mysore, AIR, 1972, Mys. 138; Saghir Ahmad v. Uttar Pradesh, AIR, 1954, S.C.728; Akadasi Pradhan v. Orissa, AIR, 1963, S.C.1047. For a general conspectus, see Government Regulation of Private Enterprise, Indian Law Institute (ed.) Dinesh C. Paude, Tripathi, Bombay, 1971. In particular, see the same, R.B. Tewari at 45, and T.S. Rama Rao at 51.
684. Hathi Singh Manufacturing Co. v. Union, AIR, 1960, S.C.923; B.C. Mills v. Ajmer, (1955) 1 S.C.R.752.
685. Collector of Customs v. Sampathu Chetty, AIR, 1962, S.C.316; Madras v. R.S. Jhaver, AIR, 1968, S.C.59; Balwant Singh v. Director of Inspection, AIR, 1969, Delhi, 91.

In the determination of the reasonableness of restrictions on this right, a principle that clearly emerges is that in economic matters the State has been left with almost total discretion to do what it liked. This factor together with the constitutional approval of nationalisation<sup>866</sup> has meant that the right to trade is a relatively weak right. The enactment of the Constitution (Twenty-fifth) Amendment Act, 1971, leaves it even weaker. None of this, however, means that judicial review has become so minimal that it could be ignored. The material in this section would support this.

In Glass Chatons Importers & Users Association v. Union,<sup>867</sup> the Central Government acting under clause (h), para 6, Imports Control Order, 1955 (made under Section 3 of the Imports and Exports Control Act, 1947) prohibited the petitioners from directly importing glass chatons that they had freely imported in the past. The said para.(6), clause (h) ran as follows:

Refusal of Licence - The Central Government or the Chief Controller of Imports and Exports may refuse to grant a licence or direct any other licensing authority not to grant a licence:-

... ..

(h) if the licensing authority decides to canalize imports through special or specialized agencies or channels;

... ..

The Government had exclusively authorised the State Trading Corporation, a publicly-owned commercial enterprise, to import the material. With these facts before it, the Supreme

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866. See below, 382.

867. AIR, 1961, S.C.1514, (1962) 1 S.C.R.862.

Court observed:

It may be difficult for any Court to have adequate materials to come to a proper decision as to whether a particular policy as regards imports is, on a consideration of all the various factors involved, in the general interests of the public. Even if the necessary materials were available it is possible that in many cases more than one view can be taken as to whether a particular policy as regards imports - whether one of heavy customs barrier or of total prohibition or of entrustment of imports to selected agencies or channels - is in the general interests of the public.

... ..

Consequently, we are unable to accept the argument that a decision that imports shall be cancelled is per se not a reasonable restriction in the interests of the general public. We wish to make it clear that while the decision that import of a commodity will be canalised may be difficult to challenge, the selection of the particular channel or agency decided upon in implementing the decision of canalisation may well be challenged on the ground that it infringes Article 14 of the Constitution or some other fundamental rights. 868

The Court held that if the creation of special agencies to carry on the import trade is found by the legislature to be in the public interest, then that was conclusive and the restrictions would be regarded as constitutionally valid.

But this ratio and the passage quoted above were confirmed in Daya v. Joint Chief Controller<sup>869</sup> where the question was similar except that it was export rather than import that was prohibited. Acting under para.6, clause (h) of the Export Control Order, 1958, (which is in the same terms as para. 6, clause (h) quoted above) the Central Government

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868. AIR, 1961, S.C.1514, 1516, col.2 (para.6).

869. AIR, 1962, S.C.1796, (1963) 2 S.C.R.73.

restricted the export of manganese ore to the following three categories of exporters: (a) established shippers of the ore, (b) mine-owners who were already in the trade, and (c) the State Trading Corporation, a public company established and controlled by the Government. The petitioner, a 'new-comer' with no previous experience of the trade, found that there was no provision made for people in his situation who, in view of the Government's order, were forced to sell their ore at reduced prices to one or the other of the three who had quotas for export.

The Supreme Court was asked to hold that the withholding of the right to engage in export trade from the class of 'new-comers' was an unreasonable restriction under Article 19(6). Section 3 of the Act of 1947 was the source of the impugned order of 1958. That section enabled the Government, (a) to specify the goods in respect of which the control or restriction was to be exercised, (b) to specify the quantities that may be exported, (c) to specify the quality of the goods that may pass out of the country, and (d) to specify the destination to which they may be exported.

It was argued that the section did not enable the Government to restrict the number or class of persons wishing to export. The Court rejected the argument and held that if the quantity to be exported could be controlled, that must necessarily mean control of the persons who would be able to export the specified quantity. This appears to be an incompletely evolved or dubious reasoning.

The following reasons were presented before the Court by the State as the basis for controlling the trade -

- a) The previous trading mechanisms were found to be inadequate for properly catering to the export market.
- b) Frequently Indian exporters had failed to honour their commitments arising out of contracts they had entered into with foreign buyers. That was detrimental to the trade as a whole.
- c) And therefore, the Government had to canalise the export by fixing target quantities to be exported. The quantities were to be progressively increased in such a manner as to accommodate every mining interest in the country.

The majority in the Court considered that these were reasonable justifications for the restrictions. However, the majority judgment ended with the following remarks:

Though we consider that the appellant has no legal right to the relief that he sought, his grievance is genuine and it would be for the Government to consider how best the interest of this class should be protected and it is made worth their while to win the ore so as to expand, foster and augment the export trade in this valuable commodity. 870.

In a separate concurring judgment Subba Rao J. found that the Government had tried to confer an exclusive right in the trade on the State Trading Corporation by progressively eliminating the other two categories of people who had originally been given quotas. In those circumstances, he found that the exclusion of the petitioner and others in a similar situation was an unreasonable restriction. The learned judge stated, rightly:

The scheme of channelling of exports through an agency or agencies could certainly be dovetailed with that of equitable apportionment of quotas amongst persons producing or doing business in manganese ore without any detriment to the object of promoting export trade. Any scheme of channelisation of exports through specialised agencies must be governed by definite rules whereunder provision is made giving stability and guarantee of fair treatment in ordinary times as well as in times of emergency. 871

On other grounds, he concurred with the order made by the majority of the Court.

In re Venkatakrishnan,<sup>872</sup> the Central Government specially authorised certain co-operative societies to export chillies to Ceylon at a time when there was a general ban on export of chillies. This was held to be a reasonable and valid action since those co-operative societies were considered non-profit making organisations. This may be viewed as another example of tacit recognition by the Court of India's 'mixed-economy' philosophy.

The discretion vested in the Government would cover other matters incidental to imports and exports. It is reasonable for the authorities to demand an income-tax verification certificate before granting any one an import licence.<sup>873</sup> The following reasons advanced by the State for insisting on the certificate were held good and sufficient: the financial

871. Ibid., 1809 (para.30).

872. AIR, 1958, Madras, 218.

873. Dasai Gounder & Co. v. Deputy Chief Controller, AIR, 1955, Madras 699, inadequately distinguishing Raman & Co. v. Madras, [1952] 2 M.L.J. 544, where it was held that production of income-tax certificate had nothing to do with the grant of a yarn licence.

status and reliability of an applicant could be seen from the certificate, it was essential that the quota likely to be granted is put to full use by the allottee. The production of an income-tax certificate is now a standard pre-condition to most transactions between individuals and Governments in India.

However, matters incidental to imports and exports in relation to which the Government has freedom of operation cannot extend beyond statutory rules and executive regulations made under the rule. This sounds simple enough but does not appear so in the course of the administration's work. Ram Krishna v. Union,<sup>874</sup> is a good example of a casual action taken by a government department but which was shown to be an unauthorised infringement of the petitioner's right under Article 19(1)(g). The petitioner was granted an import licence on certain conditions. After importing the material he wanted, he broke some of the conditions which he had earlier agreed to. The Government immediately put him on a 'banned list'. A circular was sent round to all government departments as well as to public sector commercial corporations, which were legally independent entities, warning them not to have any dealings with the petitioner. He went to the High Court complaining that the circular materially affected his right to trade.

The High Court held that the administration was entitled to take such action as was authorised by the regulations under which the import licence was originally issued

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874. AIR, 1969, Calcutta, 18.

to the petitioner. There, however, was no authority given by any of the import regulations examined to let the administration 'induce' other independent entities not to do business with the petitioner. So it was held that the circular sent to those outside government departments was a violation of the petitioner's right under Article 19(1)(g).

Nor would all the freedom the Government has to control imports and exports mean that it can be released from promises made in the course of administration of its import/export policies. The guaranteed right in Article 19(1)(g) would (remarkable as this seems) give the citizen an 'equity' to enforce a promise, even if that promise was made by the government as part of an administrative act and not in any statutory regulation or specific contract with any particular citizen.

In Union v. Anglo-Afghan Agencies,<sup>875</sup> the Government of India in one of their bi-annual statements of import-export policies (contained in a red book) announced an export promotion scheme covering certain specified commodities. Under the scheme they stated that import licences would be issued to the full export value of certain goods exported, provided the export value was not over-invoiced and no other fraudulent practices were adopted.

The petitioners were given import licences which were of a value less than the value of goods they had exported. But in all respects, they qualified for licences of full value within the meaning of the scheme. When the Government's

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875. AIR, 1968, S.C.718. See S.N. Jain, 'Administrative Discretion in the Issue of Import Licences' 10 J.I.L.I. (1968) 121.

refusal to comply with their scheme was challenged, the government took the position that the policy statements in the 'Red book' were administrative matters and could not bind them in the same way as statutory provisions.

This contention was rejected by the Supreme Court on the ground that it was not the form of State action that mattered, whether it be legislative, executive, or administrative, but the damage suffered by the citizen in the proper exercise of his fundamental rights. The representations held out in the handbook, on the basis of which the petitioner company acted, were binding on the government.

It was also held that there was no question of 'executive necessity' being invoked under such circumstances to enable the Government to vacate their obligations.

But where the representations made in the 'Red book' clearly stated that import licences up to a maximum of 50% value of goods exported would be considered by the Government, it was held that the Government had a discretion in the matter. No commitment was entered into or promises held out by the Government that under all circumstances the maximum would, in fact, be given. In exercising their discretion they were entitled to take into account such factors as the foreign exchange reserves, balance of payments, etc.<sup>876</sup>

Whatever the representations made by the Government in the 'Red book' if a citizen has fraudulently over-invoiced the export bills (in collusion with the buyer abroad) in order to

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876. Prabhu Das v. Union, AIR, 1966, S.C.1044.

inflate the value of import licences to be obtained, he would have no 'equity' in his favour and under those circumstances, a court would not interfere with a decision not to grant him any import licence.<sup>877</sup>

A further consideration that may show the right under Article 19(1)(g) to be weaker than, particularly, the right of free speech, free assembly and free association emerges from two decisions of the Madras High Court. In the first of these decisions, Anantakrishnan v. Madras,<sup>878</sup> the petitioner, a law graduate, objected to the Advocate's enrolment fee of Rs.625/- (approximately £34) as excessive. Without enrolling as an advocate he would not be allowed to practice before the courts in Madras. The sum of Rs.625/- was fixed under the Indian Stamp Act, 1899.

One of the arguments raised by him was that such an unreasonably excessive sum demanded of him as enrolment fee amounted to a prior restraint on his fundamental right to practice his profession. By the standards obtaining in 1951-52, many would have agreed with him that the figure was substantial as a fee. The petitioner relied on a number of decisions of the Supreme Court of the United States, in support

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877. See also Fedco (P) Ltd. v. S.N. Bilgrami, AIR, 1960, S.C. 415, where section 9(a) of the Imports Control Order, 1955, which provided for cancellation of the licence obtained through fraud or misrepresentation was held to be a reasonable restriction under 19(6).

878. I.L.R. [1952] Madras 933.

879. Near v. Minnesota (1931) 283 U.S.6961; Lovell v. Griffin (1938) 303 U.S. 444 ; Schneider v. Invington (1939) 308 U.S.147, and Cantwell v. Connecticut (1940) 310 U.S.296.

of his contention that no prior restraints could be imposed on the exercise of fundamental rights.

All the American cases relied upon were, as pointed out by the Court, on pre-censorship of the press or speech in the form of religious propaganda. It was held by the Court:

But these freedoms differ by their very nature considerably from freedoms relating to property or trade. While a censorship in the case of the former is tantamount to a prohibition, it is otherwise when it relates to property or trade. To apply the theory of previous restraint to the freedom of trade or profession is to ignore the reason behind the rule, cessante ratione legis, cessat ipsa lex. 880

The Madras High Court, therefore, rejected the petitioner's argument. One of the judges, Venkatarama Ayyar J. held:

A... Article 19 does not enunciate a general rule that previous restraint is unconstitutional; that rule was evolved in the Courts with reference only to freedom of speech and freedom of the press, [881] having regard to the nature of those rights, and it cannot be applied as an absolute rule of law with respect to freedom of trade or right to hold property or indeed, to any of the freedoms mentioned in Article 19. 882

The petitioners' case was dismissed and the sum of Rs.625/- held a proper non-recurring tax. This ratio was reiterated in another case that came before the same High Court,<sup>883</sup>

880. Ibid., 954.

881. Reference is to Romesh Thapper and Brij Bhushan, above, 249, 251.

882. I.L.R. [1952] Madras 933, 955.

883. C.S.S. Motor Service v. Madras, I.L.R. [1953] Madras, 304.

in which it was held that the grant or refusal of permits by transport authorities to selected applicants must be according to rules laying down principles of selection, rules reasonable to interests of the public as required by Article 19(6), to be followed by all transport authorities including the Government itself. The same learned judge, Venkatarama Ayyar J. stated:

As observed in the decision in Anantakrishnan v. Madras the theory of previous restraint which was evolved with reference to the freedom of person and freedom of speech cannot operate with the same force with reference to the freedom of trade or profession and reasonable conditions forming part of licensing regulations cannot be held to be repugnant to Art.19(1)(g). 884

Again, it was in a case concerning the right to profession that the Supreme Court held that under certain circumstances a total prohibition of the exercise of the right could well amount to a 'reasonable restriction'.

In Narendra Kumar v. Union<sup>885</sup> the Supreme Court was examining the validity of the Non-Ferrous Metal Control Order, 1958, issued by the Central Government under section 3 of the Essential Commodities Act, 1955.

Clause 4 of the Order impugned was as follows:

... no person shall acquire or agree to acquire any non-ferrous metal [886] except under and in accordance with a permit issued in this behalf by the controller

884. Ibid., 334.

885. AIR, 1960, S.C.430.

886. The non-ferrous metal being copper, zinc or lead.

in accordance with such principles as the Central Government may from time to time specify.

It was further laid down that no one could buy or sell the metals except at prices fixed by the Order. The controller referred to was informed by the Government that permits should be issued only to direct importers and actual customers. This meant that several middlemen dealers were deprived of their businesses. The petitioner, one such dealer, argued that such elimination of a class of traders amounted to a total prohibition of their fundamental right to pursue their trade. The Constitution in Article 19(6) authorised the imposition of reasonable restrictions which meant that the rights could be reasonably regulated but not prohibited. Restriction, it was said, could never amount to prohibition.

The Supreme Court decided against the petitioner on this point:

It is reasonable to think that the makers of the Constitution considered the word 'restriction' to be sufficiently wide to save laws 'inconsistent' with Art.19(1), or 'taking away the rights' conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word 'restriction' to include cases of 'prohibition' also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court. 887

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887. AIR, 1960, S.C.430, 436, col.1. In thus holding, the Supreme Court distinguished Kania C.J.'s dictum in A.K. Gopalan, which regarded 'deprivation' and 'restriction' as separate. AIR, 1950, S.C.27, 37. The dictum was confined to Article 19(1)(d) in its relation to Article 21.

The following reasons supplied by the State for enacting the impugned order was found to be justifiable and therefore, reasonable:

- a) That the market prices of these metals were high as a result of the large profit margins fixed by middlemen dealers.
- b) In order to bring down the prices of a number of articles made out of copper, zinc and lead it was essential that control be exercised in the trade of these metals.

There was one point where the Supreme Court held that the law was not properly complied with. The Act of 1955 under which the Order was made required the publication of the principles meant to guide the controller in the administration of the Order. Such publication was to be in the Official Gazette or as part of the Order made. Neither was done in the case before them. So the administrative communication with the Controller was held invalid.

The High Court of Orissa had earlier discussed the question <sup>whether</sup> ~~where~~ 'restriction' could amount to prohibition in Loknath Misra v. Orissa.<sup>888</sup> The petitioner attacked the constitutionality of the Orissa Motor Vehicles (Regulation of Stage Carriage & Public Carrier's Services) Act, 1947, which provided for nationalisation of the passenger bus services by conferring a monopoly on a joint stock company owned by the State and union governments.

The petitioner argued that thus putting him out of his business was more than restricting his fundamental right

to trade and was unconstitutional. Relying on Municipal Corporation, City of Toronto v. Virgo,<sup>889</sup> he argued that 'restriction' in Article 19(6) implied mere 'regulation' and not total prohibition of the fundamental right.

The High Court distinguished the Canadian appeal by stating that 'regulation' might well carry that sense but 'restriction', which was not synonymous with 'regulation', could be complete or partial. Where it was complete it would amount to absolute prohibition. The dictionary meaning of the term 'restriction', the Court pointed out, included 'prohibition' too. Though the Court did not say it, then the extent of the restriction would after all, be one of the main factors in the determination of its reasonableness. A total prohibition would be serious and the Court would normally seek good justification for holding it reasonable.

On the facts, the Court held that passenger bus service was a 'public utility service' and as such, admitted State monopoly.<sup>890</sup> The role of the State too, the Court, observed had changed from a 'police state' (what the Court meant was a State that "contented itself with mere maintenance of law and order") to a 'welfare State' that actively participated in matters of vital concern to the community.

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889. L.R. (1896) A.C.88, 93 "a power to regulate and govern <sup>seems</sup> ~~seems~~ to imply the continued existence of that which is to be regulated or governed."

890. "From the earliest days of English Common Law it was always recognised that common carriers and other public utility undertakings require drastic State control and that they cannot be left to free competition". AIR, 1952, Orissa, 42, 46, col.1.

Thus while holding the impugned Act constitutional the Court, however, held that existing permit holders were to be suitably compensated by the State for having cancelled them prematurely.

Such 'prohibitions' as in the two cases discussed above, and in the cases to follow have occurred more often in relation to the right under Article 19(1)(g). This is attributable to the notion of 'mixed economy' pursued by the Indian Government at the centre and the governments of the States.<sup>891</sup> There are no other areas of economic and business regulation where the right of some to pursue their particular trade has been prohibited.

In M.B. Cotton Association v. Union,<sup>892</sup> Cotton Control Order, 1950 (made under Section 2(a) of Essential Supplies Temporary Powers Act, 1947) was challenged as violating Article 19(1)(g). The Textile Commissioner exercising the powers conferred on him by the Order named the petitioner's rival in trade as the sole authorised association to enter into 'hedge contracts' - a form of speculative contracts in forward dealing.

This form of speculative, future transactions if not regulated carefully, held the Supreme Court, could ruin a number of cotton dealers not 'involved in hedging'. 'Hedging' like insurance and banking required experience and stability. It was found by the Court that the Association named by the Textile Commissioner did have more experience behind it than the petitioners.

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891. See below, Conclusion.

892. AIR, 1954, S.C.634.

In Arunachala v. Madras,<sup>893</sup> The Madras Commercial Crops Markets Act, 1933, sought to eliminate commission agents in order that the actual grower of the crops and the purchaser could get in direct contact and arrive at a realistic price which would be for the grower's benefit. The Act established wholesale markets in specified areas of the State and prohibited any other privately organised wholesale markets in such areas.

The Supreme Court went into the historical background of the law and discussed the Report of the Royal Commission on Agriculture, 1928. This report appears to have concluded that the Commission Agents in the trade made excessive profits at the expense of the grower. Their role was on balance more damaging than beneficial. Having regard to the scheme of the Act<sup>894</sup> the restrictions were held reasonable.

#### Res extra commercium in India

In Bombay v. R.M.D. Chamarbaugwala,<sup>895</sup> the constitutional validity of the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948, was tested. The Act passed by the State under entry 34 of List II,<sup>896</sup> the State list, imposed,

893. AIR, 1959, S.C.300.

894. A similar Act in Gujarat which applied to wholesale as well as retail markets was upheld in Jan Mohammad v. Gujarat, [1966] 1 S.C.R.505. The Bombay Agricultural Produce Markets Act, 1939, upheld in Ramakrishna Hegde v. Market Committee, AIR, 1971, S.C.1017.

895. AIR, 1957, S.C.699.

896. "Betting and gambling".

according to the respondents, such a heavy tax on prize-competitions conducted by them that they could not carry on the activity without incurring a loss. They invoked their fundamental right under Article 19(1)(g).

The question of the State's competence to impose the tax settled, the only other question was whether the heavy taxation amounted to an unreasonable restriction under Article 19(1)(g)? The State argued that no such question arose since Article 19(1)(g) did not intend to protect trades or occupations opposed to public policy. Gambling was always, it was said, considered an evil in India and therefore, the Court could not regard that as a trade included under Article 19(1)(g). Here was evaluation with a vengeance!

The Supreme Court in its attempt to discover the constitutional norm appropriate to the case examined ancient Hindu literature and traditional moral teaching and arrived at the conclusion canvassed by the State that gambling was opposed to public policy and there could not be any trade in it.

Gambling activities from their very nature and in essence are extra commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art.19(1)(g) or Art. 301 of our Constitution. 897

The respondent's contention that 'trade' or 'business' or 'Commerce' should be construed to mean any activity undertaken to earn profit was rejected.

In another case, the Supreme Court held that there was no 'general right' in citizens to carry on trade in liquor. The Excise Regulation 1 of 1950 was challenged in Cooverjee v. Excise Commissioner <sup>898</sup> as creating a monopoly by conferring the right to sell liquor to the highest bidder in an auction specially arranged by the State. The argument was that, by creating a monopoly in favour of one, the rest of the traders were precluded from exercising their right to trade. It might have succeeded had not the Court come to the conclusion that the protection of Article 19(1)(g) was not available to such a trade.<sup>899</sup> It was held that the State could prohibit, and not merely regulate, trades such as dealing in liquor or in other dangerous, noxious goods.

It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It cannot also be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. 900

One other aspect of the case that the Court, perhaps, should have investigated, but did not was the petitioner's complaint that there were some irregularities in the actual conduct of

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898. AIR, 1954, S.C. 220.

899. The Supreme Court relied on the United States decision of Crowley v. Christensen (1890) 34 Law Ed. 620, in support of its finding, AIR, 1954, S.C.220, 223, col.1.

900. Ibid., 223, col.1 (para.7).

the auction.

Serious doubts were thrown on the theory of res extra commercium when the Supreme Court held in Khrishna Kumar v. Jammu & Kashmir<sup>901</sup> that dealing in liquor would be trade within Article 19(1)(g). Subba Rao J. held (most understandably) for the unanimous court that,

The morality or otherwise of a deal does not affect the quality of the activity though it may be a ground for imposing a restriction on the said activity. 902

The petitioner in the case, the proprietor of a restaurant, was refused renewal of his liquor licence by the excise authorities acting under the Excise Act, 1958. When the refusal was challenged, the State took up the position, relying on the decision in Cooverjee<sup>903</sup> that there was no trade in liquor and the petitioner had no case. But the Supreme Court did not accept that the judgment in Cooverjee laid down that liquor deals were outside the purview of Article 19(1)(g). In answer to the State's contention that there could not be trade in commodities like liquor which were subversive of community morals, it was held,

The acceptance of this broad argument involves the position that the meaning of the expression 'trade or business' depends upon and varies with the general acceptance of standards of morality obtaining at a particular point of time in our country. Such

901. AIR, 1967, S.C.1368.

902. Ibid., 1371, col.1. (My emphasis).

903. AIR, 1954, S.C.220.

an approach leads to incoherence in thought and expression. Standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right. So too, a Legislature can impose restrictions on, or even prohibit the carrying on of a particular trade or business and the Court, having regard to the circumstances obtaining at a particular time or place may hold the<sup>904</sup> restrictions or prohibition reasonable.

The reasonableness and appropriateness of this view will appeal to most academic lawyers.<sup>905</sup> However, the Court accepted the finding of fact by the lower court that the ground on which the refusal was made was taken bona fide and was arrived at after a proper inquiry!

It seems incorrect for the Cooverjee and RMDC<sup>906</sup> cases to treat morality as a ground in addition to the only ground of restriction in Article 19(6)(i) - viz. 'in the interests of the general public'. Considerations based on morality could come within the ground of 'in the interests of the general public' but could not be treated as forming a separate ground for justifying legislative restrictions. This is what is indicated by the judgment in Khrishna Kumar.

There is one other important objection against the reasoning in the Cooverjee and RMDC cases. By declaring

904. AIR, 1967, S.C.1368, 1371, col.1.

905. Liquor trade held protected by Article 19(1)(g) in Damodaran v. Kerala (1969) K.L.T. 587.

906. Also a similar case in U.P. v. Kartar Singh, AIR, 1964, S.C. 1134 - where the Supreme Court equated trade in adulterated commodities with trade in prohibited articles like liquor, and held that there was no protection for such trades under Article 19(1)(g). But see A.P.G. & S.H. v. Union, AIR, 1971, S.C.2346, which negatives that stand by implication.

that there was no trade in liquor or that a business in gambling was res extra commercium, the Supreme Court precluded itself from enquiring into the substantive as well as the procedural reasonableness of the impugned laws. For instance, in Cooverjee, the petitioner had complained of what appears to be a clear irregularity in applying the auction procedure laid down by the Excise Regulation, 1950. This aspect of his contention deserved a proper answer, but one was not given because the Supreme Court had precluded itself by maintaining that trade in liquor did not fall within Article 19(1)(g). On the other hand, by recognizing that there was a trade in liquor but that could rationally be subject to greater restrictions, the Supreme Court in Krishna Kumar was able to examine whether the petitioner was denied his licence on proper grounds. Lastly, the Krishna Kumar view of the matter enables the Court to maintain its review of restrictions on a 'sliding scale' instead of tying itself to one end of the scale.

In Amarchandra Chakraborty v. Excise Collector <sup>907</sup> a unanimous Court recognized that there was trade in liquor. But the Court held the strict regulation contained in Section 45 of the Bengal Excise Act, 1909, reasonable because trade in a commodity like liquor had to be strictly controlled. The petitioner's licence to trade in liquor was revoked before it had run its course for reasons not supported by the Act of 1909. It was held that there was a 'reasonable nexus' between the actual ground for terminating the licence and the object of the Act. Under the circumstances the revocation

was held valid. This appears to be an interesting exception to the general rule that revocation of a licence could not be otherwise than on the basis of grounds laid down by the statute. But that rule is so well established that the decision heremust be regarded as erroneous.

### Monopoly Rights

Prohibition of a trading activity as we have seen, could very often be the result of a State monopoly in the activity. Article 19(6)(ii) which enables the creation of a State monopoly refers to the exclusion, complete or partial, of citizens from such trades over which a State monopoly exists.<sup>908</sup>

It is clear that no monopoly of any kind could be created through mere executive or administrative acts. The leading case on this point is Mannalal v. Assam<sup>909</sup> where the Assam Foodgrains (Licensing and Control) Order, 1961 (made under Section 3 of the Essential Commodities Act, 1955) provided a licensing system for regulating the trade in foodgrains. One of the considerations in granting licences under the Order was to be whether or not the applicant was a co-operative society.

The petitioner, a private dealer, challenged the refusal of a licence to him and the reason supplied to him for the refusal, viz. that the Government wished to encourage

908. For a short account of the rise of public corporations in India and some of the basic problems in nationalisation, see R.S. Arora, 'Rise of the Public Corporation in India: Some Constitutional Aspects' (1961) Public Law, 362.

909. AIR, 1962, S.C.386.

co-operatives, and therefore, licences would be issued only to them and no one else.

The majority of the Supreme Court held that neither the Order of 1961 nor the parent Act of 1955 under which it was made authorised the creation of such a monopoly in favour of co-operative societies. Creation of one through a biased administration of a licensing system offended Article 14 and also Article 19(1)(g) since it amounted to an unreasonable restriction on the right of the petitioner and those like him.

The two minority judges, Sarkar and Mudholkar JJ., held that there being a directive principle of state policy providing for encouragement of co-operatives,<sup>910</sup> the preference shown to them would be a reasonable restriction even if private dealers were totally excluded from the trade.

There is a passing reference to co-operatives in Article 43: "... the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas." This does not seem to be a sufficiently strong or clear reference in favour of giving monopolies to co-operatives.

In District Collector v. M/s Ibrahim & Co.<sup>911</sup> the facts were similar to Mannalal. A monopoly was sought to be conferred on co-operative societies in the sugar trade. The Andhra High Court while holding the monopoly unconstitutional, pointed out that ordinarily the creation of a monopoly was to be in favour of the State and not in favour of any individual or

910. Article 43.

911. AIR, 1966, A.P.310.

group of citizens like co-operative societies. This clearly emerges from Article 19(6)(ii).<sup>912</sup>

The Punjab High Court<sup>913</sup> disapproved of the action of a municipal authority which used a licensing power intended to further the interests of health and safety in markets to confer a monopoly in the wholesale vegetable trade on an exclusive group of traders.

### State Monopoly

On the basis of the law before the introduction of Article 19(6)(ii)<sup>914</sup> the Supreme Court held in Saghir Ahmad v. Uttar Pradesh<sup>915</sup> that a monopoly in favour of the State in a trade that could normally be carried on by the citizens would amount to an unreasonable restriction.

The effect of Article 19(6)(ii) came up to be examined by the Supreme Court in Akadasi Pradhan v. Orissa.<sup>916</sup> The Orissa Kendu Leaves created a State monopoly in the trade of Kendu leaves used in the manufacture of cigars.

The first question to be decided by the Supreme Court was whether the test of reasonableness applied to such a law.

912. See Appendix II.

913. Municipal Committee v. Haji Ismail, AIR, 1967, Punj.32.

914. By the Constitution (First Amendment) Act, 1951.

915. AIR, 1954, S.C.728.

916. AIR, 1964, S.C.1047.

While deciding Saghir Ahmad v. Uttar Pradesh <sup>917</sup> referred to above, Mukherjea J. stated obiter that after the First Amendment Act, 1951, the State need not justify a monopoly in its favour as a reasonable restriction on the rights of citizens under Article 19(6).

Here in Akadasi, the Supreme Court held unanimously that the concept of State monopoly itself was not justiciable because it was based on a doctrinaire view of the matter. The addition of sub-clause (ii) to Article 19(6) showed that nationalisation schemes introduced by legislation should be regarded as reasonable restrictions in the interests of the general public.

But it was laid down that this did not mean that the entire law creating a State monopoly would be exempt from the test of reasonableness. Firstly, only provisions "relating to" the creation of the monopoly were thus exempt. The other provisions of the law not directly concerned with, or intimately connected with, the monopoly would be examined by the Court. Secondly, if any of the provisions of the impugned law directly and not merely incidentally violate any of the other rights guaranteed by Article 19(1) then also it would be examined from the standpoint of the sub-clause corresponding to the right or rights affected.

Which provisions were to be regarded as incidental and which essential for the monopoly would be a question of fact.

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917. AIR, 1954, S.C.728, (1955) 1 S.C.R.707.

The essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created; they will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. 918

In the case before them, the Court held that fixing the purchase price of the leaves was not an integral part of the creation of the monopoly and, therefore, could be examined. In the event they held that the price fixed was not shown to be low or unreasonable. The object of the law itself in fixing the price was to benefit the growers of the leaves.

On the second point, the Supreme Court employed the ratio in A.K. Gopalan to say that if any of the other rights guaranteed by Article 19(1) were directly infringed, then each such infringement would be separately examined.

The construction put on Article 19(6)(ii) was regarded by the Supreme Court as strict, since it was in its view an exception to the right guaranteed by Article 19(1)(g).<sup>919</sup> This is also illustrated by the Court's finding that appointment of private individuals as Commission Agents for the State to run the trade was inconsistent with the idea that in a monopoly the only beneficiary was the public exchequer. What is remarkable is that the Court insisted that all the benefit to flow out of the monopoly should be derived by the State. It

918. Ibid., 1056 (para.23).

919. See J. Narain, 'Nationalisation and the Right to hold Property under the Indian Constitution: Lessons from Comparable Australian and U.S. Experiences', (1965), Public Law, 256.

was held that the monopoly trade should be generally run by officers of the State and not by private individuals. But where the nature of the trade meant that outsiders would have to be appointed they were to work as agents - agency being narrowly defined. Those appointed must be essentially concerned with working for the State and not for themselves. This might mean that if they worked for a salesman's commission, it might be unconstitutional but if the same agents worked for a salary it might be within the Court's view of a proper monopoly in favour of the State.

If the agent acquires a personal interest in the working of the monopoly, he ceases to be accountable to the principal at every stage, he is not able to bind the principal by his acts, or if there are any other terms of the agency which indicate that the trade or business is not carried on solely on behalf of the State but at least partially on behalf of the individual concerned, that would fall outside Art.19(6)(ii).

... ..  
 In other words, the limitations imposed by the requirement that the trade must be carried on by the State or by a Corporation owned or controlled by the State cannot be widened and must be strictly construed and agency can be permitted only in respect of trades or businesses where it appears to be inevitable and where it works within the well-recognised limits of agency. 920

The Supreme Court did not consider the possibility that there might be circumstances where those agents working for themselves might also increase the profits for the State. The decision appears to force reliance on the State bureaucracy under all circumstances and implies the Court's committing<sup>t</sup>

itself to a doctrinaire position of an economic-political character. Bureaucracy, not only in India but in several countries of the world, whatever their ideology, has proved cumbersome and inefficient in managing enterprises of a commercial nature. The ideals of mixed-economy followed by India would, in principle, permit State enterprises exploiting private talents for ultimate State benefit. The basis of a monopoly could be viewed as an exclusive right in the State to trade or business. This right would be intact even if private entrepreneurs are to be brought in at the 'ground level' in accordance with a clearly-understood pattern of management of the trade concerned.

It is therefore unfortunate that on this point the Supreme Court's view has proved inflexible. But on the other hand, the Court might have felt that such flexibility might prove to be the thin end of the wedge which might eventually destroy or complicate the notion of a State monopoly. A possible answer to this would be, in every instance of State monopoly brought to the attention of the Court, the crucial question would be: 'Is there a substantial profit to the public exchequer out of the monopoly, in view of the attending circumstances of the case?' That these conjectures are still open, reveals the methodologically immature state of this power of review.

Any excessive use of private enterprise or private individuals would be held unconstitutional. State monopoly is but a way of benefitting the community as a whole. Any and every legal means, including exploitation of private talents could well be employed in that process. A further

reason for the Court's view of monopoly in Akadasi Pradhan (above, 382) might have been the fear that a system of patronage might develop in the matter of connections between nationalised and private commercial sectors. Here the answer would be, the Court could rely upon Article 14, the equality guarantee, to see that no unfair patronage is given to any one class or community of traders.<sup>921</sup> One hopes that at some time in the future, the Supreme Court would modify this inflexible condition laid down in Akadasi Pradhan. The case itself represents an area of judicial policy-making, which is more overt than any other we have come across.

On the facts of that case, the Supreme Court found that such agents as there were could keep any sum of money beyond what was specified in the contract between them and the State. This arrangement was held to be beyond the scope of 'monopoly' as understood by the Court.

This part of the ratio was confirmed and followed in Rashbihari Panda v. Orissa<sup>922</sup> where under the Orissa Kendu (Control of Trade) Act, 1961, the State had picked as agents the contractors under the old system before State monopoly was introduced, to work the monopoly. The Court held that confining the selection of such agents to the class of contractors under the old system was an unreasonable restriction,

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921. For an example, see Rashbihari Panda v. Orissa, AIR, 1969, S.C.1081, below.

922. AIR, 1969, S.C.1081.

both in terms of Article 14 and 19(6). A State monopoly had to bring the entire benefit to the State and could not be used as a cloak to reward a limited class of people with profit. The process of selection of such agents should be so administered that any one interested in the trade may have a chance to offer his services. With this decision few could disagree.

In Vrajlal Manilal & Co. v. M.P.,<sup>923</sup> the Supreme Court found that the M.P. Kendu Patta (Vyapar Viniyam) Adhiniyam (Act 29 of 1964) created a State monopoly in the trade of leaves used in the manufacture of bidis (small cigars). The Act had established that no one except the Government could buy and sell the leaves. All trading would be channelised through the government. The Act further imposed restrictions on the movement of the leaves to and from the territorial units created by the Act. A permit was required to move the leaves from place to place. The purpose was to stop anyone else from buying and selling the leaves. The petitioners, bidi-manufacturers, complained that once they had bought the leaves from the government they should not be put to the inconvenience of obtaining permits every time they moved the leaves from their warehouses to their sub-contractors who, in turn, moved them to the dwellings of rollers of bidi.

The Supreme Court held that the elaborate provisions restricting the movement of the leaves by obliging traders to obtain permits were not basically and essentially part of

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923. AIR, 1970, S.C.129.

the monopoly. They were incidental provisions and hence were liable to be tested for their reasonableness. Since these provisions also affected the petitioners' property right under Article 19(1)(f) and the constitutional mandate of free interstate commerce (Article 304(b)), they were to be examined in the light of each of these provisions. But the Court held that the requirements of reasonableness under these three provisions were the same and therefore, could be examined together.

The petitioner was compelled to obtain permits even after he had bought the leaves from the State, even after he had acquired ownership over them. The Court held that the object of the Act and the nature of the trade in the State justified the need for permits till the leaves were taken to the sub-contractors to be distributed to rollers of bidis. Insistence on permits after that stage was held to be unreasonable. The impugned law was clearly an example of a badly thought-out nationalisation measure.

The Supreme Court was faced with yet another challenge to a nationalisation measure in R.C. Cooper v. Union.<sup>924</sup> The Banking Companies (Acquisition and Transfer of Undertakings) Ordinance (8 of 1969, dated July 19th, 1969), and the Act (22 of 1969) which replaced it, nationalised fourteen named Indian banks, all of which had deposits exceeding Rs.50 crores. The Act replaced these named banks with new statutory banks which succeeded to the rights and liabilities of the named banks. Provision was made for the payment of compensation. Section 4

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924. AIR, 1970, S.C.564.

of the Act vested in the Union government the entire undertaking in the named banks and further prohibited them from engaging in the business of banking as defined in Section 5(b) of the Banking Regulation Act, 1949. They were, however, expressly enabled by Section 15(2)(e) to carry on any business other than banking.

The question that the Supreme Court posed was, were there any means by which the named banks could engage in any other business? The Court was thinking of the compensation that might be paid them and which they might use to set themselves up in any new venture.

The provisions of the Act dealing with compensation envisaged that a major part of the payment would be in the form of Government securities which matured after a period of ten years but which were marketable at any time.

The majority in the Supreme Court came to the conclusion that the petitioners and their banks were rendered incapable of engaging in any business whatsoever because no immediate compensation money was made available to them.

If compensation paid is in such a form that it is not immediately available for re-starting any business, declaration of the right to carry on business other than banking becomes an empty formality, when the entire undertaking of the named banks is transferred to and rests in the new banks together with the premises and the names of the banks, and the named banks are deprived of the services of its administrative and other staff. 925

This finding added a new dimension to the law relating

to nationalisation vis-a-vis the right guaranteed by Article 19(1)(g). The majority view appears to be that the State not only deprived the petitioners of their regular business but also deferred payment of compensation, as a result of which the petitioners were left with nothing to do, financially unable as they were to start any other venture - an arguable conclusion under the circumstances.<sup>926</sup>

This could also be described as the Court's view of how compensation is to be paid when an industry or trade is nationalised. The adequacy of compensation is the other question.

The sole dissenting judge, A.N. Ray J. (as he then was) took the view that lack of immediate resources to fund the petitioners' new trade was no ground of attack on the constitutionality of the Act. Once the payment of compensation was clearly provided for there was nothing more the Constitution required. The question whether there were enough funds available to the petitioner to carry on some other trade was (in his view) not relevant in the case.

Besides Article 19(1)(g), 19(1)(f) was also invoked by the petitioners. This would be dealt with in the next section on property rights.

The decision in R.C. Cooper<sup>927</sup> is considered the

926. But now The Constitution (Twenty-fifth Amendment) Act, 1971, provides in Article 31(2) that the payment of compensation by the State could not be challenged on the ground that "the whole or any part of such amount is to be given otherwise than in cash".

927. Above, 389 .

direct cause for the enactment of Constitution (Twenty-Fifth Amendment) Act, 1971,<sup>928</sup> Section 3 of the Act is by far the most novel provision affecting the rights in Articles 14, 19, and 31. In practice, it would be Article 19(1)(g) and (f) that are likely to be seriously curbed.

### 3. Insertion of new article 31C.

After article 31B of the Constitution, the following article shall be inserted, namely:-

Saving of laws giving effect to certain directive principles.

31C. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31;

The rest of Section 3 held invalid by the Supreme Court re- recently in Kesavananda Bharathi v. Kerala<sup>929</sup> was as follows:

...; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy.

Provided that where such law is made by the Legislature of a State the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

One final point on the subject of State commercial ventures is that Article 298 of the Constitution provides:

928. Received Presidential assent and published in the Gazette of India on 20/4/72, pt.II-S. 1, Ext. p.79. For the Statement of Objects and Reasons, Gazette of India, Pt.II-S, 2, Ext. p.492.

929. AIR, 1973, S.C.1461.

Power to carry on trade, etc. - The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose;

... ..

The article was given this form by the Constitution (Seventh Amendment) Act, 1956, by way of confirmation of the decision of the Supreme Court in Ram Jawaya v. Punjab.<sup>930</sup> There it was held that the executive power of the union extended to carrying on the business of publishing school text-books. In doing so, the State executive need not show a legislative enactment in support provided the action of the executive did not infringe upon any of the fundamental rights guaranteed.

To sum up, it is clear that India's policy of 'mixed economy' is fully reflected in the provisions of the Constitution considered in this section. But nationalisation - the primary means by which the 'public sector' is created - enjoys no immunity from the requirements of 'Rule of Law' or judicial review. The provision enabling the State to create monopolies in its own favour has been construed strictly (Akadasi, above, 382). In spite of the Twenty-fifth Amendment, the scope of review in this area is still substantial. There is more potential here than the Indian Supreme Court has admitted hitherto. The policy of non-interference pursued by the Courts is commendable insofar as the State must have considerable discretion in economic matters. But non-interference should be informed restraint rather than total judicial

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930. AIR, 1955, S.C. ; (1955) 2 S.C.R.225.

abstinence.

Before concluding this section, it is necessary to briefly examine an aspect of reasonableness that has presented the Indian Supreme Court with some problems. In a batch of three or so cases, the Court was asked to review laws passed by the States of Bihar and Uttar Pradesh banning the slaughter of cows and calves. The laws were enacted to respect deep Hindu sentiments on the question. The cow - 'provider of milk equal to one's own mother's milk', as many Hindus gratefully describe it - is venerated as much in Indian folk lore (which is largely secular) as in religious literature. The fact that cattle is the basis of livelihood in rural India and the undeniable need for the progeny of the cow in agriculture still do not provide an entirely 'rational' explanation for the powerful sentiments Hindus entertain in protecting the Cow. The generally meek, and at times stoic, Hindu becomes violent when he sees, or is told that a cow is being slaughtered. Those Hindus who say that they are prepared to agree to some 'humane' method of slaughtering decrepit cows are a modern minority who see the issue differently. Whatever the Hindu sentiments, the Muslim butchers who challenged these cow-protection laws did not share them. In Mohd. Hanif Quareshi v. Bihar<sup>930a</sup> they claimed that their fundamental right to trade as butchers was unreasonably restricted by the U.P. Prevention of Cow-Slaughter Act, 1955, and C.P. and Berar Animal Preservation Act, 1949. These two impugned laws prohibited not only slaughter of cows and calves

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930a. AIR, 1958, S.C.731, (1959) S.C.R.629.

(of all ages) but also bulls, bullocks and heifer. So at first glance, it would appear that the laws went beyond what was strictly required in terms of Hindu sentiments. The Supreme Court, rightly, did not regard such sentiments as the basis of discussion in the case. It affirmed that the Muslim petitioners' fundamental right was violated by the ban imposed and on that finding, proceeded to examine the reasonableness of the provisions of the impugned laws. But as we shall see, the Court's view of reasonableness in the case did take into account the sentiments of the Hindu majority.

After a detailed examination of the position of cattle in India, the milk production and other related matter, the Court agreed with Lord Lithgow who had earlier commented, "The cow and the working bullock have on their patient back the whole structure of Indian agriculture."<sup>930b</sup> From this, the Court concluded that there was some justification for the protection extended to milking cows, she-buffaloes and working bullocks. In the next stage of its reasoning, the Court seemed to urge the futility of preserving useless cows. The work done by charitable trusts which ran homes and sanctuaries for useless and old cows, the Court pointed out, was economically impossible to justify. Having said this much the Court went on to hold constitutional the total ban on the slaughter of cows and calves, thus clearly showing a concession to Hindu sentiments. Admittedly, Article 48, a directive of the Constitution, was framed with the intention of protect-

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<sup>930b</sup> Quoted in the Report on the Marketing of Cattle in India, Ministry of Agriculture, 1956, 20.

ing the cow fully.<sup>930c</sup> This was taken into account by the Court.<sup>930d</sup> The Court did hold unreasonable the ban on buffaloes and bulls that had become useless.

In subsequent cases, the Supreme Court made no more concessions to Hindu sentiments which tried to extend protection to such useless buffaloes and bulls. In Abdul Hakim v. Bihar,<sup>930e</sup> the impugned law banned their slaughter until they were above the age of twenty years. The Supreme Court accepted expert opinion to the effect that on an average such cattle in India did not survive to that age. So the rule based on twenty years was practically a total ban on the slaughter of the animals. The Court struck down the statute as imposing unreasonable restrictions.

On the whole, these decisions dealing with such delicate issues as the cases did, are satisfactory. They have firmly drawn a line which represents a reasonable compromise between the requirements of the two communities, Hindus and Muslims.

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930c. A plain reading of Article 48 does show this:  
48. Organisation of agriculture and animal husbandry.- The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

930d. For a comment on this and other aspects of the case, see J.D.M. Derrett at (1958) 8 I.C.L.Q., 221-4, and also at (1961) 10 I.C.L.Q., 914-6, where he comments generally, "The India which expresses herself in terms of concepts that were originally Western has won these rounds of a contest which is waged relentlessly by 'Indian' India."

930e. AIR, 1961, S.C.448.

SECTION 2(b): LICENSING MEASURES AS RESTRICTIONS ON THE RIGHT UNDER ARTICLE 19(1)(g)

Licensing measures have been scrutinized by Indian Courts not merely with reference to Article 19(1)(g) but also in respect of the right guaranteed in Article 14. Conferring wide or excessive discretion on executive officers has been construed as offending against either Article 14 or any one of the rights in Article 19(1), depending on the case.<sup>931</sup> Excessive delegation (Delegatus non potest delegare) is a separate principle which may also be a ground for declaring statutes invalid.<sup>932</sup>

A discretion would be held <sup>too</sup> wide if no recognizable standards governing its exercise are laid down either by the law itself or the rules made under it,<sup>933</sup> the objection being that fairness in the administration could not be ensured if no standards or criteria are previously determined and known. Licensing statutes are particularly vulnerable to a charge of lack of definite standards. A full review of the law relating to licensing is beyond the scope of this work. Since the main concern here is Article 19(1)(g), the following summary of the law is produced.

(1) Flowing from the fundamental right in Article 19(1)(g) there is a right to compete for a licence. The

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931. Dwarka Prasad v. Uttar Pradesh, AIR (1954), S.C.R.982.  
R.M. Seshadri v. District Magistrate, AIR, 1954, S.C.747.

932. In re Delhi Laws Act, 1912, (1951) S.C.R.747.

933. Asit Ranjan v. Calcutta Dock Board, AIR, 1961, Cal. 365.

Indian Supreme Court has disagreed with the view expressed in Nakkuda Ali v. Jayaratne<sup>934</sup> that a licence amounted to a privilege and that there was no general right to it.<sup>935</sup> Moreover, in view of Article 14, not only is there a right to compete for a licence but there is also a right to expect that all the applicants to the licence will be treated equally (provided they qualify for the licence in terms of the conditions laid down in the statute). Any real, and not imagined, discriminatory practice, could fruitfully be brought to the Court's notice.<sup>936</sup> These rights are subject to such factors as municipal planning and other decisions of local authorities relating to factual details or decisions of any 'domestic tribunal'. Thus in T.B. Ibrahim v. The Regional Transport Authority,<sup>937</sup> the Supreme Court held that it was for the transport authorities to decide where the central bus station of a town should be located. Therefore, the petitioner who had owned the site where the Bus Station was until it was shifted to a municipally-owned site, could not complain. The loss of income he suffered as a result of the

934. L.R. (1951) A.C.66.

935. Shri Bhagwan v. Ramchand; AIR, 1965, S.C.1767. Rameshwar v. District Magistrate, AIR, 1954, All, 144.

936. C.S.S. Motor Service v. Madras, I.L.R. (1953) Madras, 304.  
But what ever principles be adopted as criteria for making the selection among the applicants, it is necessary that they should be applied uniformly and without differentiation, as if they had been enacted as part of the statute.

Per Justice T.L.V. Venkatarama Ayyar, Ibid., 344.

937. AIR, 1953, S.C.79.

move was held not relevant to the case. He did not have a fundamental right to be licensed to carry on his business in any place he might choose. The right was subject to the 'interests of the general public' which in the case, took the form of public convenience and comfort.

(2) Courts could be persuaded to declare a restriction reasonable if the discretion to impose the restriction vests in an officer of senior rank whose accountability is greater in comparison with minor officials.<sup>938</sup> However, that is not necessarily conclusive.

(3) If the discretion is vested in a minor official, the Courts would wish to see that his decisions to grant or refuse licenses are properly supervised to ensure fairness.

(4) A good and convincing indication of such supervision is the availability of appeal to a higher authority.<sup>939</sup> But the absence of appeal need not be always fatal to the question of constitutionality.<sup>940</sup> In any event, barring resort to a court would be unreasonable in matters of licensing.<sup>941</sup>

(5) The administration of licensing statutes should be in accordance with their objects, i.e. to achieve the objects set out therein. Extraneous or irrelevant consider-

938. Chinta Lingam v. Government of India, AIR, 1971, S.C.474.

939. Harichand Sardar v. Mizo District Council, AIR, 1967, S.C. 829. Dwarka Prasad v. Uttar Pradesh, AIR, 1954, S.C.224.

940. Chinta Lingam v. Government of India, AIR, 1971, S.C.474.

941. Corporation of Calcutta v. Calcutta Tramways Co., AIR, 1964, S.C.1279.

ations should not figure in granting or refusing licenses.

Where a Muslim butcher's licence was cancelled because the Hindu residents of the locality objected to his selling beef, it would amount to an unreasonable restriction on his right. Only the breach of conditions imposed by the licensing statute would justify cancellation of his licence. What the residents of the locality felt would be irrelevant to the case.<sup>942</sup>

(6) A licensing statute should be clear and workable. If vagueness and inconsistencies prevail the statute may be declared unconstitutional under Article 19(1)(g).<sup>943</sup>

Thus the actual administration of licensing statutes comes under greater scrutiny than the substantive area consisting of limitations imposed on the right to trade. There is no doubt at all that Indian courts have kept a 'low profile' in regard to Article 19(1)(g). A pronounced judicial presence which appears to interfere with economic and business regulations is likely to be strongly criticised by economists, policy-makers, administrators, but perhaps also by lawyers themselves. Though it appears that the Indian Supreme Court did lay down rather sweeping rationes in regard to matters like trade in liquor or business of conducting cross-word competitions, the Court's reticence or restraint, it is submitted, is to be approved.

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942. Abdul Hameed Md. Hayat v. Town Municipality, AIR, 1965, Mys. 281.

943. Kandaswamy v. Textile Commissioner, I.L.R. [1953] Madras 51. Asit Ranjan v. Calcutta Dock Labour Board, AIR, 1961, Cal. 365. Harakchand v. Union, AIR, 1970, S.C.1453.

Therefore, if Article 19(1)(g), in practice, happens to be one of the weaker rights guaranteed by Article 19 the reason for it lies not with the judiciary but with Parliament, which interferes with the exercise of the right on account of what it sees to be public interest and the Constitution itself which permits nationalisation and State enterprise in other forms. In spite of the central role of the State as an entrepreneur, it is not true to say that judicial review does not cover this field. As we have seen, many aspects of a nationalisation law can be examined for their reasonableness.

SECTION 2(c): REASONABLE RESTRICTIONS ON THE FREEDOM TO ACQUIRE, HOLD AND DISPOSE OF PROPERTY

The nature and extent of the restrictions that could be imposed on this right and the scope of judicial review of the measures imposing the restrictions are questions that have infested Indian Constitutional Law from early days. While framing the provisions relating to property rights, the Indian Constituent Assembly was aware that different views were held on the subject by the members. There was some anxiety not to succumb to the well-known propensity of issues relating to property to take an ideological, dogmatic, course leading to irreconcilable disputes.

This anxiety to get a general agreement seems, in retrospect, not to have been such a wise move, and one would have liked to see a fuller and franker discussion which would have reduced the extent of the controversies produced in subsequent years. The views prevailing in the Assembly could be roughly divided into three categories:<sup>944</sup> (a) The views held by the 'progressives' who wanted equal distribution of wealth achieved through such measures as nationalisation, land reforms, free universal education and employment opportunities, etc.<sup>945</sup> This

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944. See also H.C.L. Merillat, 'A Historical Footnote to Bela Banerjee's Case', 1 J.I.L.I. (1958), 375-401. The three groups mentioned here are substantially the same as those mentioned by H.C.L. Merillat, but has a rather more general reference.

945. Professor K.T. Shah provided the intellectual power in support of these views. There were others who independently, in their own way, expressed such views. See, CAD, 9, 1271.

view opposed the very idea of guaranteeing the right to property. It recognized no right to private property. However, in comparison with the other two schools of thought this did not exert much of an influence in the Assembly.

(b) The second set of views, though inclined to sympathise with 'progressive' ideals, yet wished to see some form of guarantee which might be suitably phrased to allow the legislature to enact extensive measures of nationalisation and land reform. In later years, this group would prevail over the others. They admitted the principle that compensation should be paid for private property compulsorily acquired by the State for public purposes, but made exceptions in such cases as the abolition of the Zamindari estates. This school of thought <sup>946</sup> which now prevails in India has gradually enlarged such exceptions, from Zamindari abolition, to land ceiling - and now to nationalisation.<sup>947</sup> A great deal of controversy centres upon this development.

(c) Thirdly, there was the traditional view in favour of proper guarantees.<sup>948</sup> The 'traditionalists' could have been persuaded to agree to limited nationalisation measures but they would

946. Jawaharlal Nehru belonged to this group. He made a distinction between acquisition for regular public purposes and acquisition with social and economic reform in view. In the former type of cases, he was willing to see full compensation but in the latter type of case, he doubted the principle of full compensation. See C.A.D., 9, 1192.

947. See the Constitution (Twenty-fifth Amendment) Act, 1971, See Appendix I.

948. Certainly K.M. Munshi and Sardar Patel would have to be put under this category.

have insisted on full compensation being paid for whatever loss is caused to the individual citizen. All three groups, however, made an exception in favour of Zamindari abolition.

But one gets the impression that unfortunately these three groups never adequately articulated their views in the Assembly itself. One certainly misses a desirable and essential discussion of the kind of measures the future Governments of India (Union and State Governments) were to undertake. Details of that nature were lacking. The excuse may well be that the Assembly was anxious to finish its work in a reasonably short time in order that the independent Government of India might attend to its tasks or that information of that nature were not available then.

However, the following extract from the speech of a member of the Assembly, Sri T.T. Krishnamachari, shows the somewhat unsatisfactory view of property rights <sup>949</sup> arrived at by the Assembly at the end of the day:

We in this House, though the bulk of us belong to one party, have different ideas on economic matters. We were all together in one particular fact that the British should go; we are all united in the desire that we should have a stable Constitution which will ensure to the common man what he needs most, what he did not obtain in the former regime. But in the achievement of that goal, our ideas vary considerably, and vary from one end to the other. I am happy to see that the Drafting Committee has chosen to avoid importing into

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949. To further confound matters, the constitutional lawyers in the Assembly gave conflicting (though it was not noticed at that time) views on the extent of judicial review on account of 'compensation' payable for acquired property. See C.A.D., 9, 1271-72, for Alladi Krishnaswamy Ayyar and C.A.D., 9, 1299, for K.M. Munshi.

this particular article the economic implications in the enumeration of fundamental rights that obtain in other constitutions.

... ..  
 I know a friend of mine in this House has objected to one particular sub-clause (f) of Article 13, namely, to acquire, hold and dispose of property. I would like to assure him and those who hold the opinion that he holds that this does not really mean ... more than what any person even in an absolutely socialistic regime will desire, that what he possesses, what are absolutely necessary for his life, the house in which he lives, the movables that he has to possess, the things which he has to buy, should be secured to him, what I think any socialistic regime, unless it be communistic, will concede, is a right that is due to an individual. 950

This is the closest to any summing up that was attempted during the debates of the Assembly and perhaps, the only attempted explanation of the 'philosophy' behind the property guarantee. The explanation has been largely justified by the policies pursued in the last twenty-four years. These have meant nationalisation of many sectors of Indian economy and strict control of private enterprise through an extensive bureaucracy which purveys the licences and permits referred to above.

The explanation given by the member, however, was not compatible with the text of the article, Article 13(1)(f) in the draft, and Article 19(1)(f) now. There seems no reason for a court to give the interpretation <sup>951</sup> canvassed by Sir T.T. Krishnamachari. But his explanation is retrospectively

950. C.A.D., Vol.7, 771-2, December 2, 1948.

951. As for the actual interpretation given by the Courts it "would seem to indicate that the framers of the Constitution failed to realise that these large rights to property and trade were incompatible with the objectives of the Constitution and the directives of State policy which they were enunciating in Part IV of the Constitution." MC. Setalvad, The Indian Constitution, 1950-65, Bombay, 1967, 123.

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justified by the long course of amendments to Article 31. To simplify and sum up a lengthy account, this view of property rights <sup>952</sup> has resulted in the Indian Parliament amending the original text of these provisions on several occasions. Through those means decisions of the Supreme Court reviewing the reasonableness of measures affecting private property have been progressively nullified. The attitude of the Supreme Court has been to show the kind of regard for private property that is likely to be shown in a property-conscious but middle-of-the-road democracy. The Court has upheld any number of restrictions on property as being in the interests of the public.<sup>953</sup>

The real and perhaps only difficulty has been that the Court has always insisted on full compensation <sup>954</sup> being paid for private property acquired by the State while the

951a. Notably the First, Fourth and Twenty-Fifth Amendment Acts. For a discussion of these amendments, see R.S. Gae, 'Land Law in India: With Special Reference to the Constitution', 22 I.C.L.Q. (1973) 312-328.

952. For a detailed account, see H.C.L. Merillat, Land and the Constitution of India, Columbia University Press, 1970, and H.M. Jain, Right to Property under the Indian Constitution, Property right in the context of nationalisation is dealt with in R.S. Gae, The Bank Nationalisation Case and the Constitution, Bombay, N.H. Tripathi, 1971. A compilation of essays looking at property right from different angles is found in Property Relations in Independent India, The Indian Law Institute, New Delhi, 1967.

953. Below,

954. See T.S. Rama Rao, 'The Problem of Compensation and its Justiciability in Indian Law', 4 J.I.L.I. (1962) 481-509. V.S. Rekhi, 'Courts and Compensation' 4 Aligarh Law Journal, (1969) 1-55.

Court has maintained ( understandably) that they could not possibly afford to fulfil that condition and at the same time hope to benefit the public at large. The contest has been between full compensation as a basic ingredient of constitutional reasonableness and a 'socialistic' view that, in a largely poor and under-privileged country, if full compensation were to be paid the rich would get richer and the poor poorer. Neither of these views has met the other in a compromise.

If that is the case what would be a third view - the view of a neutral but sympathetic observer? First, he is likely to notice that the basis on which the Legislature claims to avoid paying full compensation is too general ("to aid social progress" or "for sweeping land reforms"). In the absence of adequately understood stages in socio-economic reforms - understood by the Government and by the majority of (at least the educated) people - a neutral observer is likely to say that it need not only be a love of property which prompts one to insist that as a general rule reasonable compensation should be paid for a private property acquired by the State. There is always a danger that an unfair administration may possibly victimise a class or community or even an individual by holding out the threat of compulsory acquisition of their or his or her properties. Much as one would like to sympathise with the point of view of the Government of India, these dangers could not be ignored. This matter, it should be recognized, involves questions of equal treatment.

It is gratifying to note that so far as is known, no such threats of victimisation have been held out against any community or individual in India. But if conditions permit unreasonable acts may be committed. That is so anywhere in the world.

One other point a neutral observer may make is that it is not advisable to insist on barring judicial review<sup>955</sup> without first clarifying the extent to which and the precise circumstances under which the less-than-full compensation is to be paid. Clearly, this has not been done in India and as a result, a neutral observer is likely to be left with too many unanswered doubts and questions. These considerations do tell upon the question of reasonableness. Hence, a brief mention has been made of them.

The issue of compensation was undoubtedly the main issue. But clouding every issue in regard to property rights was, and still is, the chaos created by the multiplication of provisions all put together in a misleading manner. The inter-relationship between Article 19(1)(f) on the one hand, and Article 31(1) and (2)<sup>956</sup> each considered separately,

955. By creating a ninth schedule to the Constitution and including in it a number of statutes connected with land tenure, the Indian Parliament has made the entire schedule non-justiciable on account of fundamental rights to equality (Article 14), property (Article 31) and the rights in Article 19.

956. 31. Compulsory acquisition of property -

- (1) No person shall be deprived of his property save by authority of law.
- (2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such

on the other, forms one of the two main questions in the law relating to property rights. Thus complimentary to the career of the law of compensation (which is the other question) is the extension of the Courts' power to pronounce upon the reasonableness of a restriction under Article 19(1)(f) to

Note 956 - continued from 407:

law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

- (2a) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.
- (3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.
- (4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).
- (5) Nothing in clause (2) shall affect -
  - (a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or
  - (b) the provisions of any law which the State may hereafter make -
    - (i) for the purpose of imposing or levying any tax or penalty, or
    - (ii) for the promotion of public health, or the prevention of danger to life or property, or
    - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise with respect to property declared by law to be evacuee property.

compulsory acquisition under Article 31(1) and (2).<sup>957</sup> One may begin to discuss this development by asking the question: Is the requirement of constitutional reasonableness in Article 19(1)(f) and 19(5) extendable to Article 31(1) and (2) (which deal particularly with what conditions are to be fulfilled before private property could be compulsorily acquired)?

It may be noticed that a similar question was asked in A.K. Gopalan in relation to Article 19(1)(d). The precise question there was: Could the requirement of reasonableness in Article 19(1)(d) and 19(4) be extended to Articles 21 and 22, which deal particularly with what conditions are to be fulfilled before a person could be preventively detained? The answer given was that given the nature of preventive detention there was no question of meaningfully examining its reasonableness. The Constitution itself has provided for it and there was nothing the Court could do. While expressing this point it was also held Article 19 could not be extended to other provisions of the chapter on fundamental rights.

Coming to the question of property rights two decisions of the Supreme Court gave answers similar to what was done in A.K. Gopalan. It was held in West Bengal v. Subodh

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957. The two outstanding decisions in the entire law of property rights are perhaps, K.K. Kochuni v. Kerala, AIR, 1960, S.C. 1080, and R.C. Cooper v. Union, AIR, 1970, S.C.584. Though they may seem hard on the Government they have laid down the law more clearly than any of the other decisions.

Gopal <sup>958</sup> and Dwarkadas v. Sholapur Spinning & Weaving Co., <sup>959</sup> that Article 19(1)(f) and Article 31 dealt with different areas of the subject of property and were mutually exclusive. Article 19(1)(f) guaranteed the right to citizens only while Article 31(1) and (2) applied to every person in the Union of India. The latter came into operation whenever there was a 'substantial' deprivation of the rights of ownership over property.

Patanjali Sastri, the then Chief Justice of India, described Article 19(1)(f) as dealing with the general right of the citizen to own property while Article 31(2) dealt with the incidents of ownership over specific items of property. He equated the former with Article 17(1) of the United Nations Declaration of Human Rights:

Everyone has the right to own property alone as well as in association with others.

So according to the Chief Justice every citizen irrespective of his community or sect or race was entitled to own property. <sup>960</sup>

Non-discrimination between classes of citizens is guaranteed separately in Articles 14, 15 and 16. Articles 25, 29 and 30 enable minority institutions to own property and administer them themselves. In view of that the Chief

958. AIR 1954 S.C. 92.

959. AIR 1954 S.C. 119, (1954) S.C.R. 674.

960. Vide Sections 111 and 298 of the Government of India Act, 1935, referred to by the Chief Justice.

Justice's opinion loses much of its force.<sup>961</sup> It was specifically overruled by the Supreme Court in S.M. Transports Ltd. v. Sankaraswamigal.<sup>962</sup>

In Bombay v. Bhanji Munji,<sup>963</sup> the analogy between property rights in Article 31(1) and (2) and the ratio in A.K. Gopalan with respect to preventive detention was admitted by Supreme Court itself.

Wherever there was a compulsory acquisition, the owner had lost his title to the property and therefore, could not invoke Article 19(1)(f) or 19(5) since both of them presupposed a title to hold and dispose of property. This was exactly a parallel to the ratio that since a person has lost his freedom by being preventively detained he could not invoke Article 19(1)(d) since that presupposed a free individual!

Thus the reasonableness test was strictly confined to Article 19 which was distinguished from the rest through the notion that the different articles in the fundamental rights part formed 'self-contained codes' concerned with particular matters.

A break came in this line of thinking when in K.K. Kochuni v. States of Madras and Kerala<sup>964</sup> the majority in

961. However, see Jagat Narain, 'Equal Protection Guarantee and the Right of Property under the Indian Constitution', (1966), Vol.15/I.C.L.Q., 199-230, who argues that in property matters the Legislature should have greater discretion to classify and distinguish in view of the greater disparities of wealth between sections of the Indian society.

962. AIR 1963 S.C. 864.

963. AIR, 1955, S.C.41.

964. AIR, 1960, S.C.1080.

the Supreme Court held that any law depriving an individual of his property should be justified as a reasonable restriction under Article 19(5). When the property is 'acquired or requisitioned' by the State, Article 31(2) would apply and not Article 19(5). But in all the other cases, Article 19(5) would govern. The Supreme Court justified this departure on two grounds:

- (a) After the Constitution (Fourth Amendment) Act, 1955, introduced Clause 2A<sup>965</sup> to Article 31(2) that provision and Article 31(1) became distinct - the former should be confined to direct State acquisition or requisition of private property and the latter read with Article 19(5) to govern all other forms of deprivation. What the Court did was to afford the protection of judicial review to such cases of 'non-acquisition' which nevertheless resulted in a loss to the owner.<sup>966</sup> It seems right that the reasonableness of such measures should be tested by the Court.
- (b) The Court distinguished the ratio in A.K. Gopalan on the basis that while Article 19(1)(d) guaranteed freedom of movement Article 21 dealt with the wider concept of

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965. (2A) Where a law does not provide for the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisition of property, notwithstanding that it deprives any person of his property.

966. Chiranjit Lal v. Union, AIR, 1951, S.C.41, and Dwarkadas Sreenivas v. Sholapur Spinning & Weaving Co., AIR, 1954, S.C.119, (1954), S.C.R.674.

'personal liberty' and hence the two provisions could not be read together. But in the case of Article 19(1)(f) and Article 31(1), it was held, that both were about the same matter of deprivation<sup>967</sup> of property otherwise than through compulsory acquisition.

A second decisive step was taken by the Supreme Court in this development in R.C. Cooper v. Union, where the Court extended the reasonableness test to cases of 'acquisition and requisition' under Article 31(2) as well.<sup>968</sup> There the Court rejected the A.K. Gopalan ratio in these words:

To argue that state action which deprives a person permanently or temporarily of his right to property or personal freedom, operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. 969

It was held that Articles 19(5) and Clauses (1) and (2) of 31 were parts of a single scheme and therefore, had to be considered together. This meant that the test of reasonable restrictions under Article 19(1)(f) had been fully extended to all possible cases<sup>970</sup> affecting property. The Court,

967. In an earlier decision, Narendra Kumar v. Union, AIR, 1960, S.C. 430, (1960) 2 S.C.R. 375, (above 369) the Court had held that restriction under Article 19 could, under certain circumstances amount to total prohibition of the exercise of the right guaranteed. The Supreme Court in Kochuni relied on that decision in extending Article 19(1)(f) to areas which it should legitimately cover.

968. AIR, 1970, S.C. 564; The case is also known as the Bank Nationalisation case.

969. AIR, 1970, S.C. 564, 593, col.1 (para.46-A). See above, 389.

970. Except the limited number arising under Article 31(5)(b):  
 31(5) Nothing in clause 2 shall affect -  
 (b) The provisions of any law which the State may hereafter make -  
 (i) for the purpose of imposing or levying any tax or penalty, or

however, laid down that where a law of compulsory acquisition was clearly in the public interest, i.e. for a public purpose, it might be assumed to be reasonable in the substantive sense. The law could still be scrutinized to see if it satisfied the requirements of procedural reasonableness. An example given by the Court was where the law sets up a tribunal to determine the amount of compensation but does not afford the owner a hearing before the tribunal, then it would be unreasonable on procedural grounds.

In a case decided two years earlier, Madhya Pradesh v. Ranojirao Shinde <sup>971</sup> the Supreme Court had laid down yet another new proposition which was that where a deprivation of property was not for any ostensible public purpose but merely to benefit the State exchequer then the law would come under Article 19(5) and can be declared an unreasonable restriction. The M.P. Abolition of Cash Grants Act, 1963, laid down that certain cash grants executed by the erstwhile Rajas of the princely states included in the State of Madhya Pradesh need not be continued. These grants, in favour of certain individuals, were more in the style of feudal pensions for services rendered or in some cases simply gratuitous.

The result was that the State was saved the expenses

Note 970 - continued from 413:

- (ii) for the promotion of public health or the prevention of danger to life or property, or
- (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuated property.

it had incurred in meeting the payments. Its obligation arising out of its succession to the princely states was thus at an end.

It is true that the abolition of the cash grants would augment the resources of the State but that cannot be considered as a public purpose under Art.31(2). If it is otherwise it would be permissible for the legislatures to enact laws acquiring the public debts due from the State, the annuity deposits returnable by it and provident fund payable by it by providing for the payment of some nominal compensation to the persons whose rights are acquired ... 972

Thus it seems the Court's apprehension was in regard to setting up an undesirable precedent. Such caution is understandable in a constitutional bench.

The ratio in R.C. Cooper<sup>973</sup> has now been nullified by yet another amendment. The Constitution (Twenty-Fifth Amendment) Act, 1971, provides in Section 2(b) that Article 19(1)(f) will not apply to cases arising under Article 31(2). This directly nullifies R.C. Cooper v. Union. The decision in K.K. Kochuni establishes that there are cases of deprivation of an individual's property otherwise than by acquisition under Article 31(2). The applicability of Article 19(1)(f) to such cases, it seems, is still the current law and The Constitution (Twenty-Fifth Amendment) Act, 1971, has not overruled that position. If that is the case there may yet be some protection left to cases covered by the ratio in K.K. Kochuni. But all this is subject to the overriding effect of the new Article 31-C introduced by the Twenty-

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972. Ibid., 1057.

973. AIR, 1970, S.C.564.

Fifth Amendment Act.

There are a number of decisions in Indian courts given squarely on Article 19(1)(f) itself, thus rendering that provision meaningful enough for us to take it seriously. But before those cases are dealt with, a useful preliminary point may be mentioned. What is the 'property' protected by Article 19(1)(f)? Reading the text it may appear that it is only property that one may 'acquire, hold and dispose of' that is protected by the article. 'Property' is not defined in the Constitution itself. There are other enactments which define 'immovable' and 'movable' properties. Section 3(26) of the General Clauses Act, 1897, defines immovable property as "land, benefits to arise out of land and things attached to the earth or permanently featured to anything attached to the earth". It is, however, an inclusive definition.

Other enactments like the Indian Companies Act, 1956, classify shares and stocks as movable property. There are, of course, judicial decisions arising under the Transfer of Property Act, 1872, which have defined the extent of properties of different kinds.<sup>974</sup>

As we have already seen in an early Supreme Court decision, Chiranjitlal v. Union,<sup>975</sup> the question arose whether the right of a share-holder in a joint-stock company to vote in the election of directors and to vote to pass resolutions

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974. D.F. Mulla, Transfer of Property,

975. AIR, 1951, S.C.41, (1950) SCR. 869.

in the meeting of share-holders would amount to 'property' one could 'acquire, hold and dispose of'.

It may be recalled that the management of a company was taken over by Government-nominated directors after a shut-down of the company's mills, it was alleged, through mismanagement.

Mukherjea J. (with whom Kania C.J. agreed) giving the main majority judgment held that:

The petitioner undoubtedly has been precluded from exercising his right of voting at the election of directors so long as the statutory directors continue to manage the affairs of the company.

... ..

In my opinion, these are rights or privileges which are appurtenant to or flow from the ownership of property, but by themselves and taken independently, they cannot be reckoned as property capable of being acquired, held or disposed of as is contemplated by Article 19(1)(f) of the Constitution. 976

It was held that the petitioner's share was not taken away and he continued to receive his dividends. He had not lost the main incidents of his property over the share. The definition of property adopted by Mukherjea J., which has not been questioned, is that it consists of a bundle of rights of ownership exercisable in relation to the object of property. 976a

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976. Ibid., 909, S.C.R.

976a. See Jagat Narain, n. 961 above, 411. He is critical of this view of property. He would prefer a more sociological view that takes into account the widespread poverty in India. Many Indian writers are looking for a notion of property that will fit Indian needs as reflected in the policies pursued at present. For example, see A.R. Biswas, 'Property in a Changing Society' (1973) 15 J.I.L.I., 1-73. So far no definite propositions have emerged.

This notion was also convenient when it came to the distinction made by the Supreme Court between 'restrictions' under Article 19(1)(f) and 'substantial deprivation' under Article 31(1) and (2). Restrictions that affected only a limited number of incidents of property were to be adjudged under Article 19(1)(f) while any substantial curb on most of the incidents of ownership attracted compensation under Article 31(2).<sup>977</sup>

Generally, the Indian Courts have regarded as property any beneficial, pecuniary interest. Thus the office of trusteeship of a religious institution with power of disposal over its properties has been declared to be property in itself.<sup>978</sup> But a mere power of management where no such beneficial interest is derivable in favour of the office would not be property even if it is a hereditary position.<sup>979</sup>

The type of office to which a beneficial interest is attached and which, therefore, is property <sup>is</sup> ~~are~~ generally found in Hindu religious institutions where the head of the institution, e.g., Mahant has a personal interest in the properties endowed.<sup>980</sup> Special to Indian law are two particular matters.

977. West Bengal v. Subodh Gopal, AIR, 1954, S.C.92. Dwarkadas v. Sholapur Spinning & Weaving Co., AIR, 1954, S.C.119.

978. Commissioner, Hindu R.E. v. Lakshmindra, AIR, 1954, S.C.282, (1954) S.C.R.1005.

979. Bira Kishore Deb v. Orissa, AIR, 1964, S.C.1501.

980. For details, see J.D.M. Derrett, Religion, Law and the State in India, Faber, London, 1968, 482 ff.

One is 'evacuee property' and the other is a right of pre-emption.<sup>981</sup>

With the partition of India (1947) into India and Pakistan, religious minorities in the two countries migrated across the borders leaving behind their properties which became 'evacuee properties'. A pool of such properties were created and distributed amongst such evacuees after they reached their new country on the basis of what they had left behind in the other country. In the administration of the allotment of such properties, the law recognized a quasi-permanent stage which meant that there was a provisional allotment in favour of a 'displaced person' while the title still inhered in the 'evacuee' to whom it belonged before the partition of India. If such a quasi-permanent allotment were to be held, property and protection extended to it under Article 19(1)(f) the administration of the evacuee property laws would have become difficult. So rightly, it was held not to be property.<sup>982</sup> But ease of administration is no basis for dispensing with uniform standards in the computation of values of properties exchanged or allotted.<sup>983</sup> Nor is there any room for 'expediency' with no other excuse or reason to support it.<sup>984</sup>

The second matter of special interest to Indian law,

981. The role of pre-emption in Islamic laws is ignored here.

982. Amar Singh v. Custodian, Evacuee Property, AIR, 1957, S.C. 599, (1957) S.C.R.801.

983. Lachman Das v. Municipal Committee, Jalalabad, AIR, 1969, S.C.1126.

984. Ibid.

'pre-emption', is a customary right especially strong in the provinces of Punjab and Haryana. In its simplest form it means that 'A' has the right of first refusal to the property situated next to his in case it is put on sale. In village communities it is unlikely that the owner of that neighbouring property would be any stranger. The two owners concerned would in all probability be relations, however distant. The strength of the claim to exercise this customary right made it necessary to pass legislation in some States of Northern India. The validity of these have been attacked on the ground that the right of pre-emption was an unreasonable restriction on the right of the owner to dispose of his property to his liking.

After considerable disagreement between the High Courts, the Indian Supreme Court held by a majority that the right of pre-emption was unconstitutional in the light of the fundamental right guaranteed in Article 19(1)(f).<sup>985</sup> However, where such a right rested in a co-sharer or in any agnatic relation of the owner, it would not be regarded as unconstitutional since in these cases the existence of the right promoted family integrity.<sup>986</sup>

A trade or a business would be property in most of its manifestations. A trading licence is property and hence, if it is cancelled arbitrarily both Article 19(1)(f) and 19(1)(g)

985. Bhau Ram v. Brij Nath, AIR, 1962, S.C.1476.

986. Ram Sarup v. Munshi, AIR, 1963, S.C.553, [1963] 3 S.C.R.858.

would be violated.<sup>987</sup>

Thus, one aspect of judicial review in the area of property is the declaration that a certain right is also a constitutionally protected right to property. Two illustrations of this kind of declaration may be given here. In the first decision, Madhav Rao Scindia v. Union,<sup>988</sup> the main issue before the Supreme Court was whether the action of the Indian Government in discontinuing the payment of 'privy purses' to those ex-Rajas and ex-princes of Indian States was constitutionally valid. Their right to receive the sums arose out of agreements entered into with the independent Government of India just before the Princely States were merged with the rest of India. The Constitution provided that the agreements were not to be adjudicated upon by ordinary Courts of law.<sup>989</sup> But it also made provisions for the payment of the privy purses from out of the Consolidated Fund of India and laid down that Parliament and the State Legislatures were to pay 'due regard' to the privileges given the ex-rulers.<sup>990</sup>

In the face of protests by the Union and the States that the whole question was a 'political' matter, the Supreme Court declared that the ex-rulers' right to receive the privy purses was a fundamental right to property which could not be

987. Mineral Development Ltd. v. Bihar, AIR, 1960, S.C.468.

988. AIR, 1971, S.C.530.

989. Article 363.

990. Articles 291 and 362, since repealed by the Constitution (Twenty-Sixth) Amendment Act, 1971.

taken away without adequate compensation.

The decision of the Court, which has been criticised by many both on purely legal <sup>991</sup> and wider general grounds, is perhaps the least defensible of all the decisions on property matters.

The second illustration of a right being declared for the first time as a right to property is to be found in Deokinandan Prasad v. Bihar.<sup>992</sup> The appellant was denied his pension after he was discharged from Government service for misconduct. That was in accordance with an executive order.

The Supreme Court held that a right to receive whatever pension was due was a right to property. It was not a bounty payable at the 'sweet will' of the government.

While these decisions considered on their own may give the impression that the Indian Supreme Court has been too meticulous about the right to property, a look at other cases may make one qualify that impression.

The following examples from cases that frequently arise before the Courts may be given.

Tenancy legislation reducing the amount of rent chargeable by a landlord whether it be agricultural land,<sup>993</sup>

991. See H.H. Seervai, 'The Privy Purse Case: A Criticism', LXXIV, Bombay Law Reporter (Journal), 37-49.

992. AIR, 1971, S.C.1409.

993. Madras v. Kannepalli, AIR, 1962, S.C.1687.

or urban accommodation <sup>994</sup> has been held to be reasonable. In Vajrapani Naidu v. N.T.C. Talkies the Madras City <sup>995</sup> Tenants Protection Act, 1922, was challenged with reference to Article 19(1)(f). The Act was enacted with the object of preventing eviction of tenants who leased lands and built buildings on them with the expectation that as long as they paid their rents regularly they would not be evicted. In most cases, the lease agreements permitted the raising of such structures on the lands. But evictions became frequent after the inflationary trend following the European War, 1914-18, sent land values soaring. Section 9 of the Act provided that notwithstanding any contract to the contrary (with some specified exceptions mentioned in the Act) where a landowner sought to evict such a leasehold tenant, the latter could apply to the Court to get an order that the landlord should sell the land at a price to be fixed under the Court's supervisions.

The majority in the Supreme Court held:

The protection becomes effective only when the landlord seeks to obtain, in breach of the mutual understanding, benefit of the unearned increment in the land values, by instituting a suit in ejectment. It was manifestly in the interest of the general public to effectuate the mutual understanding between landlords and tenants as to the duration of tenancies, and to conserve buildings for purposes for which the leases were granted. 995A

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994. Bombay v. Bhanji Munji, AIR, 1955, S.C.41.

995. AIR, 1964, S.C.1440. On questions of land use and urbanisation; see Law and Urbanisation in India, Indian Law Institute, Tripathi, Bombay, 1969.

995a. Ibid., 1444, col.2.

An interesting argument was produced in a case decided by the Madras High Court that a 'restriction' under Article 19(5) could not be a bestowing of rights on some at the expense of others. The argument was raised in a tenancy case which affected the rights of landlords adversely but increased the security of farm labourers attached to lands by custom.<sup>996</sup>

The Tanjore Tenants and Pannaiyal Protection Act, 1952, was passed under circumstances of violence and unrest amongst the cultivating tenants and farm labourers of Tanjore. The root-cause of the unrest appeared to be frequent dismissal of tenants and labourers by landowners who were unwilling to pay increased wages demanded by the former. The Act sought to remedy the situation by providing for the reinstatement of those dismissed within a certain date and provided for their undisturbed tenure for a period of five years.

The landowners pleaded Article 19(1)(f) and argued that none of them would be able to resume personal cultivation for the five-year period and all of them had to accept tenants thrust upon them by the Act.

The High Court upheld the Act as imposing only reasonable restrictions. Firstly, it was held that the Act was to meet an emergency and secondly, that it was a matter of general public interest to see that friction between agricultural labourers and landowners are resolved through State intervention where necessary.

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996. Santhanakrishna v. Vaithialingam, I.L.R. [1953] Mad.1114.

The High Court rejected the contention that a restriction could only be negative in character and could not confer benefits on some at the expense of others. It was held that such a 'scholastic' view of the meaning of 'restriction' could not be read into Article 19.

Tax laws are subject to fundamental rights though it has been held that the legislature should be regarded as having a wide discretion in matters of taxation. It can choose the subject matter of taxation and the means of realising tax levied.<sup>997</sup> An unauthorised tax levy would offend Article 19(1)(f). In other words, a tax levied by an unconstitutional law could also be hit by Article 19(1)(f).<sup>998</sup>

In Kantilal Babulal & Bros. v. H.C. Patel<sup>999</sup> Section 12(a)(4) of the Bombay Sales Tax Act, 1946, provided for forfeiture of any sum collected by a dealer by way of sales tax in contravention of the provisions of the Act. The section was meant to be a penalty provision.

But the Act was silent as to how the provision was to work. By reading the Act one obtained no idea as to how the fact of unauthorised collection was to be established and

997. Khadinge Bhat v. Agricultural I.T. Officer, AIR, 1963, S.C. 591-594; Purushottam v. B.M. Desai, AIR, 1956, S.C.20; Twyford Tea Co. v. Kerala, AIR, 1970, S.C.1133.

998. The decision in K.T. Moopil Nair v. Kerala, AIR, 1961, S.C. 552, [1961] 3 S.C.R.77, has already been referred to above, 192. There a law which violated Article 14 was also held to violate Article 19(1)(f).

999. AIR, 1968, S.C.445.

whether the dealer would be given an opportunity to present his case. From this the Court concluded that total discretion existed in the tax authorities to impose the penalty under the impugned section in any way they wished. In the absence of any guiding principles whatsoever, it was held that it operated as an unreasonable restriction on Article 19(1)(f). A second ground for holding the section unreasonable was that it provided no opportunity for a dealer accused of collecting unauthorised tax to rebut the charge.

In the Central India Spinning & Weaving Co. v. Municipal Committee<sup>1000</sup> the Supreme Court held that in construing a taxing statute, of two possible interpretations the one favourable to the citizen should be preferred and the one that imposed a greater burden on him should be rejected. This seems to be another consequence of the right under Article 19(1)(f).

As has been briefly mentioned above, one of the two important decisions<sup>1001</sup> that enhanced the importance of Article 19(1)(f) was K.K. Kochuni v. States of Madras and Kerala.<sup>1002</sup> The petitioner was the holder of a feudal impartible estate,<sup>1003</sup> given to his ancestors for military

1000. AIR, 1958, S.C.341. Also see J.K. Steel Ltd. v. Union, AIR, 1970, S.C.117.

1001. The other being R.C. Cooper v. Union, AIR, 1970, S.C.564, above.

1002. AIR, 1960, S.C.1080.

1003. See J.D.M. Derrett, Introduction to Modern Hindu Law, Bombay, O.U.P., 1963, 528.

services rendered to the Rajas of Conhin. The estate was described in Malabar Joint Family Law as 'Sthanam' and the holder the 'Sthaneer'.<sup>1004</sup> Ordinarily, the estate was inherited by the senior male member of the joint family, the other members having no more than a right of maintenance. These junior members of the family (tarwad) claimed partition of the estate and unsuccessfully litigated the matter up to the Privy Council. The impartibility of the estate having thus been confirmed, the legislature at Madras stepped in to pass the impugned measure which was declaratory of the rights of the members of the tarwad to partition the estate.

In other words, the enactment sought to convert, at a stroke, an impartible estate into a partible one. Thus the customary law, however unfair it might have been, was sought to be altered to the detriment of the petitioner who held the entire estate. He raised the following contentions:

- (a) The Madras Marumakkathayam (Removal of Doubts) Act, 1955, the impugned measure, infringed the equality guarantee in Article 14.
- (b) The Act amounted to an infringement of the petitioner's right under Article 19(1)(f) to 'hold and dispose of property'.

The States of Madras and Kerala argued:

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1004. J.D.M. Derrett, op.cit., 354.

- (a) The petitioner's 'Sthanam' was an 'estate' within the meaning of Article 31-A<sup>1005</sup> which authorised the State to extinguish or modify rights in such an 'estate' without having to face the challenges under Articles 14, 19, and 31.
- (b) In any case, the petitioner could not rely on Article 19(1)(f) since he had been legally deprived of his title to the properties in the estate. This meant that the requirement of Article 31(1) had been satisfied. There was nothing more to answer. [Cf. A.K. Gopalar ].<sup>1006</sup>

Taking the first argument of the States, the majority in the Supreme Court examined the nature of the 'estate' referred to in Article 31-A. The Article was inserted by the Constitution (First Amendment) Act, 1951, and subsequently amended by the Constitution (Fourth Amendment) Act, 1955, to provide for a wider definition of the term 'estate'.

Looking at the Objects and Reasons of the Fourth Amendment, the majority concluded that the sole concern of the Amendment was 'agrarian reform'. The purpose was to regulate the rights inter se of landlords and tenants of

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1005. Article 31-A(2) defined an 'estate' entirely in terms of land tenure. It had no reference to any matters of Hindu Joint Family Law. So clearly the first argument of the States was inapplicable.

1006. AIR, 1950, S.C. 27 (1950) S.C.R.88.

agricultural lands. The impugned Act was not one which had that as its aim. Therefore, the protection of Article 31-A was not available to the impugned Act - a protection which in view of its effect on fundamental rights could not be widened to include subjects other than 'agrarian reform'.

The second argument of the States was that in Article 31(1) ("No person shall be deprived of his property save by authority of law"), the term 'law' should be given a meaning analogous to what was given in A.K. Gopalan, viz., any properly enacted law.

The majority in the Supreme Court found that there was no parallel between the provisions that formed the basis of the discussion in A.K. Gopalan<sup>1007</sup> and the provisions the Court was concerned with in the case. Deprivation of property for other than public purposes affected not merely Article 31(1) but also Article 19(1)(f). A law which did not acquire or requisition property for a public purpose must satisfy the test of reasonable restrictions under Article 19(5) and ought to be in the interests of the general public. When the test under Article 19(5) was applied to the impugned enactment, it was found by the majority to be unreasonable and not in the interests of the general public.

We cannot say on the materials placed before us that any public interest will be served by depriving a sthaneer of his properties and conferring title in his properties ... on others. Nor is there any

evidence that there was a real and genuine grievance in this particular section of the public belonging to tarwads justifying the interference by the State. We cannot on the materials placed before us hold that this reform is in the public interest. 1008

In the view of the majority:

The Act is only a legislative device to take the property of one and vest it in another without compensation, and therefore, on its face stamped with unreasonableness. 1009

It may be pointed out that the questions whether the measure was necessary, whether the need to reform the customary position was desirable, whether there was discontent amongst the junior members of the tarwad, were not matters on which the judiciary could express an opinion - they were political matters. The answer to such a criticism may be that the Court, though it expressed an opinion, was willing to hear evidence or look at any other material placed before it.

Admittedly, it is extremely difficult to delimit the extent of the Court's power to say that a measure is or is not in the interests of the general public. The safest course would be for a Court to assume that an enactment is in the interest of the public<sup>1010</sup> and concentrate on the nature of the restriction imposed. But then that may be viewed as going against the express words of Article 19(5)

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1008. K.K. Kochuni, AIR, 1960, S.C.1080, 1104-5.

1009. Ibid., 1104.

1010. See above, Chapter 2, Section 1(b).

which speaks of the restrictions being in the interests of the general public. In any case, there is no harm, it seems, in asking the Legislature to disclose the precise need for, or simply the background to, the restriction imposed. This question may not be asked if the restriction did not amount to much and could be considered reasonable whatever the degree to which it served a public interest.

However, it seems quite possible for the Kochuni Court to have left out of consideration the question whether the impugned Act served any public interest. The Court had already held the Act an unreasonable restriction under Article 19(5). Presumably that will hold whether or not the Act served any public interest.

The effect of the decision was to give some life back to Article 19(1)(f); no other decision before had done such service to that article. Nor did any other decision subsequently do so except R.C. Cooper v. Union which now stands reversed by the Constitution (Twenty-Fifth Amendment) Act, 1971. The central problem with regard to property rights is the question of compensation. This is the sole basis on which much of the present criticisms against the Indian Supreme Court are directed. It seems inappropriate to let this question influence an overall assessment of the notion of reasonableness in relation to Article 19(1)(f).

### CONCLUSION

P.B. Mukharji, the former Chief Justice of the Calcutta High Court observed while delivering his Ramanad Lectures that the Indian Fundamental Rights "were conceived in a 'liberal spirit' but phrased in a 'suspicious spirit'".<sup>1011</sup> He was contrasting the freedoms in Article 19(1) with the wide exceptions in the rest of the sub-clauses of that Article that appear to overwhelm the freedoms guaranteed. Undoubtedly, the one redeeming feature in Article 19 is the requirement of reasonableness.

It is thus evident that the only thing fundamental about Article 19 is the word 'reasonable' which empowers the courts to review to a limited extent legislation restricting the freedoms. It is rather sad to reflect that in the original draft, this word did not find a place - 1012

so observed recently one of the few surviving members of the Indian Constituent Assembly, which finished its work nearly twenty-five years ago. Thus, the credit goes to the member from Punjab, Thakurdas Bhargava who insisted on the inclusion of the term 'reasonable' in the sub-clauses of Article 19. The leaders in the Constituent Assembly, most of whom became members of the first independent government of India, were, perhaps, apprehensive of judicial review preoccupied as they were with nervous expectations of their new responsibilities. Though they had some experience with judicial review for a

1011. Civil Liberties, Bombay, 1968, 31.

1012. K. Santhanam, Fundamental Rights, Bharatiya Vidya Bhavan, Bombay, 1970, 24.

short period under the Government of India Act, 1935, they only contemplated the 'inconvenient' aspects of judicial review.

From the account of the proceedings in the Assembly, the following points emerge: (a) The framers started with an inadequate notion of the role of judicial review in written constitutions; (b) Their prejudices <sup>1013</sup> against judicial review were based on a static view of the 'due process' clause and how the United States Supreme Court interpreted 'due process' at a particular point of time in the long United States Constitutional history. It is rather sad to see Indian Courts and lawyers still talking about ~~the~~ 'due process' in terms that would not be recognized by an American lawyer today. Given the slightest opportunity, Indian lawyers dart back to the 'New Deal' controversy and Roosevelt's 'court-packing plans' as if that is the only lesson to be learnt from United States Constitutional experience. No doubt it is to be borne in mind, but judicial review cannot be viewed from the standpoint of how it might be 'abused'. No power of whatever kind could be viewed solely from the angle of its possible abuse; (c) Entertaining such views as the experts and the leaders in the Assembly did, they failed to adequately provide for the protection of 'social welfare' legislation they were so anxious to see enacted.

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1013. Pandit Nehru's remarks on the role of the Courts sound as though he regarded judicial review as an interfering old aunt. See above, 33, note 66, for more details of Nehru's views. See M. Markandan, 'Are Amendments to Part III of the Constitution necessary to achieve Socialism?' (1969) IX/3, The Indian Advocate, 22-45.

These attitudes of the experts and leaders of the Constituent Assembly produced, predictably, a nervous response from the judiciary in the early days of the Constitution. Thus whatever the merits of A.K. Gopalan may not have been, the fact remains that the Indian Supreme Court assigned itself very limited judicial review in relation to Article 19. In Madras v. V.G. Row, Patanjali Sastri C.J. almost 'apologised' for the exercise of judicial review in relation to Article 19.<sup>1014</sup>

By a comparison with American 'due process' and by reference to the legislative history of Articles 19 and 21, courts and lawyers in India convinced themselves that there was not 'full' judicial review in India but only a 'limited' one. The Courts came under immediate criticism if ever they attempted anything novel, i.e. if they departed from the English legal tradition of aloofness and apparent unconcern with the basic issues in a case. Thus Subba Rao C.J.'s enunciation of the principle of 'prospective overruling' was criticised as a dangerous American idea. But the recent trend has been to criticise the Courts for still adhering to the English style of review with the premium put on

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1014. "If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit but in discharge of a duty plainly laid upon them by the Constitution.

... ..  
 We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the Courts in the new set-up are out to seek clashes with the legislatures in the country."

Madras v. V.G. Row, AIR, S.C.196, 199, col.2.

textual analytical 'legalism'.<sup>1014a</sup>

This shift in the emphasis by the critics of the Courts in India does not mean they would tolerate judicial innovation in the future. It is clear that none of these notions that have infested the birth of judicial review in India has helped its natural growth. The whole idea of less-than-full judicial review is meaningless. Either there is or there is not judicial review. There could not be any in-between positions. The following comments by a perceptive Indian scholar and judge is very appropriate:

The springs of interpretative law themselves lie deep, and as the development of Constitution Law has shown, the rigorous exclusion of 'ultimate referents' by Courts, circumscribed in their task of interpretation by the Constitution and the specific import of words, is not permanently successful. Either the interpretation broadens, or changes in the law invest the Courts again with the flexible power of declaring and protecting substantive rights. 1015

The entire area of preventive detention illustrates the inhibitions felt by the Indian Courts in relation to judicial review. Indeed, the section of this thesis on preventive detention and free speech shows that the Courts did

1014a. A.R. Blackshield, "'Fundamental Rights" and the Institutional Viability of the Indian Supreme Court', (1966) 8 J.L.L.I., 139-217. "The Indian Supreme Court, like Courts in other common law countries at other periods, went through a phase early in its career when it might have been accused of the self-deception of legalism." Ibid., 163.

1015. M. Anantanarayanan, 'Some Reflections on the 'Due Process' Clause and our Constitution', (1956) 1/2 Lawyer, 24, 27,

render justice in most cases where the element of free speech showed itself but they did so without altering the doctrinal basis of exclusion of Article 19 in cases of preventive detention.<sup>1016</sup> Another illustration of <sup>the</sup> Indian Courts' inadequate use and development of the notion of reasonableness is the area of freedom of profession and trade. It has been too easily assumed, and that assumption too frequently employed, that economic issues were not for the Courts to consider. It is indeed a salutary principle (fortified by the United States experience) that Courts should be slow to interfere in economic matters which are often indistinguishable from policy. But one should also bear in mind that judicial review on the basis of a fundamental freedom is entitled to take a stand in the middle and expect other factors to adjust themselves to the constitutional requirements. Clearly too dogmatic a stand without a comprehension of the responsibilities of the Legislature and Executive will be unwise.

This takes us to the point about judicial deference to legislative wishes and policies. The need for such judicial deference is clear and it is often expressed through such ideas as the doctrine of 'margin of appreciation' and 'presumption of constitutionality' of enactments. The best means of ensuring judicial deference, or better still, judicial understanding in relation/<sup>to</sup> an impugned statute is to give the Court as much information as possible about the nature and scope of that statute. We noticed that this was lacking in many cases, especially those arriving under Article 14.<sup>1017</sup>

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1016. See above, 219 ff.

1017. Above, 171 ff.

in order that a discriminatory classification may be reasonable, a good justification in terms of public interest must be shown. Indian Courts have too often accepted slender proof of the existence of public interest. Many judgments<sup>1018</sup> of the Supreme Court seem rather barren because the reader is unable to gather the element of public interest justifying the law. It is clear that Courts must be prepared to ask for details and the State must be willing to offer such details in support of a statute's reasonableness. Many reasons for imposing restrictions on freedoms may sound adequate in paper, but the whole point is the State should be able to substantiate these with facts and information. More on this a little further below. But relevant here to the need to get the Courts to appreciate legislative wishes is the actual drafting of the statutes.<sup>1018a</sup> The importance of drafting for the issue of reasonableness cannot be exaggerated. The process of interpretation and the determination of reasonableness can be largely determined by realistic framing of laws. Judicial review, after all, is only one stage in a chain of events. It may be a decisive one but is not totally unpredictable.

It often strikes an observer that the Executive in India is inept in framing subordinate rules and regulations, even though they have many detailed and sympathetic judgments to guide them.

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1018. Such as in Board of Trustees v. Delhi, AIR, 1962, S.C. 458, (1962) Supp. 1, S.C.R.156.

1018a. "I strongly believe that if laws and statutory rules and orders are carefully drafted, litigation will lessen." Chief Justice S.M. Sikri (Supreme Court) (1971), 3/4 Lawyer 66, 67.

A recent instance will show how the problem looks from the angle of the High Court. In Jolly v. State of Kerala,<sup>1019</sup> Subramonian Poti J., comments on a rule framed by Government which restricted admission to part-time LL.B. classes in all Government Law Colleges of the State to 'employed persons on a regular full-time basis in the central and state government departments, quasi-governmental bodies including public corporations and government-owned companies.' The learned judge found this violated the fundamental right of otherwise qualified applicants at large to equality guaranteed under Article 14 and quashed it. In so doing he observed:

It is very difficult to conceive of a rational policy behind the impugned Government order. It is highly doubtful whether the Government seriously took note of the consequences of exclusion resulting from the implementation of its order. It suggests to me from a perusal of the file that in an attempt to lay down some rule or criteria, suggestions made by the then Principal of the Law College ..., the second respondent, to the Government were accepted as such without seriously considering the consequences that would result from the course adopted. There has not been a serious attempt to justify the classification ... 1020

Now in framing statutes and statutory rules and orders the State must have guidance from expert counsel. These, in turn, must have available to them doctrinal material based upon the Supreme Court's judgments. It is in the light of these observations that the following criticism must be looked at. Since the primary responsibility of implementing the Directive Principles lies with the Legislature and

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1019. 1974, K.L.T.95.

1020. Ibid., 101, para.15.

Executive it is for them to frame appropriate laws giving effect to those principles.

The criticism that the notion of reasonableness has not adequately taken into consideration the Directive Principles of State Policy <sup>1021</sup> in such decisions as the Privy Purses case <sup>1022</sup> or Bank Nationalisation case <sup>1023</sup> may be supported by rather general arguments. One may point out that the Directives have not been used in a creative manner by Indian Courts. That the Supreme Court assigned a secondary position to the Directives and gave primacy to the fundamental rights is in accordance with the Constitution. Too often the very general nature of the Directives is the impediment which prevents their inclusion in the list of factors relevant to the determination of reasonableness.

It is not the intention of the writer to deny that directive principles are part of the rules of the Constitution. Their non-enforceability does indeed pose a problem and only recently has a simple workable suggestion emerged to overcome the difficulty. The suggestion in the words of the author is:

The plain, ordinary meaning of the words 'shall not be enforceable by any court', does not preclude recourse to a court for a declaratory judgment. All that a court of law is restrained from doing is the enforcement of Directive Principles. In a declaratory judgment there is no enforcement contemplated. 1023a

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1021 Above, 139 ff.

1022. AIR, 1971, S.C.530 above, 421 Sub-nom Madhav Rao Scindia

1023. AIR, 1970, S.C.534 above, 389.

1023a. Joseph Minattur, "The Unenforceable Directives", K.L.T., 1973, Journal Section, 104-109, 106.

He suggests that the executive authorities in India will respect declaratory judgments and he points out that such judgments are not unknown to law. The merit of the suggestion lies in the fact that,

- a) The Constitution speaks of non-enforceability and not non-justiciability;
- b) It is always open to a Court to resort to declaratory judgments.<sup>1023b</sup>

The one possible objection to the Suggestion may well be that it still does not solve the question of judiciary taking the Directive Principles into consideration while interpreting the fundamental rights and in determining reasonableness of restrictions. We may look at some more propositions put forward by other writers.

One of the arguments put forward by protagonists of Directive Principles in judicial interpretation is that the determination of reasonableness is not ideologically 'neutral' but should follow the values determined by the Directives.

The fundamental assumption of the Constitution undoubtedly is that the organisation of society as it obtained in India at the time of Constitution-making was productive of injustice of many kinds to many people and accordingly the State is required to strive to promote a new social order in which justice, social-economic and political shall inform all the institutions of national life.<sup>1024</sup>

Many writers have emphasised the increased State interference

1023b. The author refers to Lord Atkin\$ in Simmonds v. Newport Abercorn Black Vein Co., "The Court has power to make a declaration whenever it is just and convenient." (1921) 1 K.B. 616, 630.

1024. Narayana Netta, 'Fundamental Rights and Directive Principles', (1969) 9/4, The Indian Advocate, 24-31, 24.

in almost all areas of national life. Determination of reasonableness in their view should acknowledge this fact. From this it is argued that 'reasonable restriction' of trade, for example, is more than 'reasonable regulation' of it. The State can do more than that in the interests of the general public. Public interest, and that alone, is conclusive of the question of reasonableness.<sup>1025</sup> Another writer has stated that 'reasonable' restriction is not necessarily what 'common-sense' dictates. Reasonableness and 'common-sense' are not identical according to this view. "Common-sense' in such cases often becomes another name for unconscious prejudices." <sup>1026</sup>

This takes us to the question what meaning or meanings the term 'reasonable' appears to bear in the Indian Constitution, especially under Article 19.

In the early case of Chintamanrao v. Madhya Pradesh<sup>1027</sup> reasonable was identified with the 'course reason dictates'. Restrictions that are excessive or arbitrary in relation to what was aimed at by the law, it was held, would be unreasonable. In a number of decisions the arbitrary nature of the restriction imposed was characterised as the element of unreasonableness.<sup>1028</sup>

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1025. V.B. Awasthi, "'Restriction' on right to freedom of trade in 'public interest'" (1971) 3/1, Lawyer, 17-21.

1026. V.R. Bhat, 'A plea for an Integrated Study of Social Sciences and Law, a Scheme' (1962) VIII/3 & 4, Lawyer, 139-144, 141, col.1.

1027. AIR, 1951, S.C.118, above, 123.

1028. The classic case being Madras v. V.G. Row, AIR, 1952, S.C. 196. Many subsequent decisions have followed it. A recent example is Himat Lal v. Commissioner, AIR, 1973, S.C. 87.

Both in Saghir Ahmed v. Uttar Pradesh<sup>1029</sup> and Mohd. Hanif Quaraishi v. Bihar<sup>1030</sup> inconvenience caused to a large number of citizens was referred to as the element of unreasonableness. It seems by and large, Indian judges have followed the English Law notion of a 'reasonable man' in respect of Article 19.<sup>1031</sup> They have looked for a balance between 'freedom' and 'social control'. They have thus accepted that there is no absoluteness about any of the guarantees but that they are subject to restrictions in the interests of the public. They see 'reasonableness' as representing a balancing act of which they are in charge. It is a yardstick with which they measure both the extent of the individual's freedom of action and the public interest or public policy served by legislative restriction.

A most interesting point here is, of course, the 'conviction' with which the judges perceive these two factors. Judicial value judgment can vary according to the degree to which they either lack conviction (in the light of material presented to them) or have conviction in regard to the type of legislative restrictions challenged before them. What is reasonable and what is not is greatly influenced by judicial credibility and imagination. The judiciary cannot be hurried along this path. They have to be presented with

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1029. AIR, 1954, S.C.728, above,

1030. AIR, 1958, S.C.731, above,

1031. Surendra Kumar Agarwala, 'Standard of "Reasonableness" in Article 19 of the Indian Constitution', (1955) XVII, The Supreme Court Journal (J), 151-162.

persuasive arguments and relevant material in support before they can be convinced. Here one is entitled to assume that the judges themselves are reasonable and responsible men. In India, it is submitted, there are more reasonable judges than reasonable administrators or even politicians - such is the view of this writer.<sup>1032</sup>

Admittedly, the whole question of how successfully the judiciary can act as supplementary to, or co-adjutive of, the legislature in political decision-making and decision-enforcement cannot possibly be solved until the judicial role is better worked out.

This thesis has shown that many judgments of the Supreme Court and of High Courts in India appear to be ad hoc decisions on matters of importance to India's policy. The question of what amounts to a reasonable restriction need not be that subjective.

The present view that Courts while deciding the question of reasonableness, seek to strike a balance between the freedoms guaranteed and social control is adequate and funda-

1032. The following observations, albeit indirectly, support this view:

[Youth] also sees the unedifying manner in which these very persons - legislators and political executives, politicians in brief, periodically attempt to ride roughshod over the restraints imposed on them by the Constitution and the judgments of the Supreme Court. It has instilled in Youth a growing belief that nothing is sacrosanct in this country; no pledge, undertaking or promise - written or unwritten - is binding, if it comes in the way of one's own desires, or stands in the way of one's exercise of power in the way one wants it at a particular time for obtaining something for oneself. Badr-ud-din Tyabji, The Self in Secularism, New Delhi, 1971, 179-180.

mentally sound. There does not appear to be a compelling need to urge the Courts to alter this view of their interpretative role.

This writer has two other serious matters in mind. A more thorough approach to the determination of reasonableness will entail a deeper inquiry by the Courts into the social and economic background to the statutes challenged before them and an equally sustained inquiry into the consequences the statutes operate. This clearly means more time spent on cases and a greater need for assistance from the bar. On both these counts, Indian Courts at present are so badly off that one cannot help admiring them for producing such judgments as they do manage.

The last Chief Justice of India, Sri S.M. Sikri, practically carried on a crusade in publicising the extent of pressure of work in the Supreme Court. If there is proof needed that in India there has been an increase in State activity, one only has to look at the number of suits in which the Governments are involved. Both the High Courts and Supreme Court are extremely busy with litigation pertaining to fundamental rights. Appeals lie to the Supreme Court in civil, criminal and constitutional matters. The Supreme Court also adjudicates election disputes, taxation suits and suits by Government employees alleging discriminatory treatment or some other irregularity. There are other problems the Courts have to cope with. In the words of Chief Justice Sikri:

The legislatures in India, apart from enacting fresh legislation, are for ever amending existing legislation, especially tax legislation. One reason for the necessity to amend laws is that a Minister responsible for a legislative measure sometimes accepts amendments on the floor of the legislature without, *realising* all its implications. 1033

The consequence of all this in the words of the Chief Justice himself:

I have not been a Judge of a High Court but I can say that Judges of the Supreme Court work extremely hard. We do not dictate judgments in Court. Almost every judgment is reserved and dictated at home. Most judgments are dictated on Saturdays and Sundays.

... ..  
On an average, I should say, a Supreme Court Judge works 60 to 70 hours a week, some work even harder than that. 1034

The other handicap the Supreme Court, and indeed, the High Courts suffer is lack of adequate assistance of the kind that will enable them to undertake a more thorough inquiry into such questions as the reasonableness of restrictions.

In the same context, the Chief Justice of India referred to this second factor also. Referring to senior lawyers who undertake too many briefs at a given time, the Chief Justice says:

Again, with respect, I say this is not fair to the client. He has a right to expect, not only the benefit of pure advocacy based on a solid foundation of research. I remember when I used

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1033. Sri S.M. Sikri, 'Inaugural Address: Punjab & Haryana Bar Conference, 1971' (1971) 3/4, Lawyer, 66, 67.

1034. Ibid., 67.

to work in the chambers of the late Mr. Jagan Nath Aggarwal, ... we used to receive from solicitors in London detailed inquiries about points arising in the appeals pending before the Privy Council. These showed that preparation was going on well in advance of the hearing. Unfortunately, in most cases nothing like this happens in the Supreme Court. The result is sometimes even relevant Supreme Court judgments are not brought to our attention. This tends to waste time both of the Counsel and the Court. 1035

It will be extremely sad to let the Supreme Court smother under weight of work in this fashion. It is even more sad when one realises that judicial review in any meaningful form exists only in India amongst the countries of Asia, the others either deliberately not choosing judicial review or experiencing military governments.<sup>1036</sup>

It is hoped that this thesis has highlighted at least some of the problems arising under the provisions of the Indian Constitution without aiming to achieve more than the wholly transitional state of the subject permits.

1035. Ibid., 68.

1036. T.K.K. Iyer, 'A Comparative Note on the Scope of Judicial Review in India, Pakistan, Malaysia and Ceylon', (1973), 5/2, Lawyer, 21-28. Also,

'Constitutional Law in Pakistan: Kelsen in the Courts', (1973), 21/4, The American Journal of Comparative Law, 759-771.

APPENDIX I

THE CONSTITUTION (TWENTY-FIFTH AMENDMENT) ACT, 1971

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:-

1. Short title.

This Act may be called THE CONSTITUTION (TWENTY-FIFTH AMENDMENT ACT), 1971.

2. Amendment of article 31.

In article 31 of the Constitution -

(a) for clause (2), the following clause shall be substituted, namely:-

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such

law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause";

(b) after clause (2A), the following clause shall be inserted, namely:-

"(2B) Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)".

### 3. Insertion of new article 31C.

After article 31B of the Constitution, the following article shall be inserted, namely:-

Saving of laws giving effect to certain directive principles

"31C. Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

APPENDIX II

CONSTITUTION OF INDIA

PART III

FUNDAMENTAL RIGHTS

General

12. Definition. - In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

13. Laws inconsistent with or in derogation of the fundamental rights. - (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires, -

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas:

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

#### Right to Equality

14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

- (a) access to shops, public restaurants, hotels and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this Article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. Equality of Opportunity in matters of public employment. - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any officer under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the opera-

tion of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

17. Abolition of Untouchability. - "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. Abolition of titles. - (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

#### Right to Freedom

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

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;

- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practise any profession, or to carry on any occupation, trade or business

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

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

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

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

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

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.

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

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

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

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

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

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

(a) An Advisory Board consisting of persons who are, or have been or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months

that there is in its opinion sufficient cause for such detention;

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

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

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

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

(7) Parliament may by law prescribe -

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

- (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
- (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

### PART XIII

## TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

### 301. Freedom of trade, commerce and intercourse. -

Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

302. Power of Parliament to impose restrictions on trade, commerce and intercourse. - Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce. -

(1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of

the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Restrictions on trade, commerce and intercourse among States. - Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law -

- (a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
- (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

305. Saving of existing laws and laws providing for State monopolies. - Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing

in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19.

306. [Power of certain States in Part B of the First schedule to impose restrictions on trade and commerce.] Rep. by the Constitution (Seventh Amendment) Act, 1956, s.29 and Sch.

307. Appointment of authority for carrying out the purposes of articles 301 to 304. - Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

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