CHAPTER VII

CONSTITUTIONAL EXCEPTIONS TO FREEDOM OF PRESS

1. TEXT OF EXCEPTIONS UNDER INDIAN CONSTITUTION:

Freedom of press, like any other individual freedom, cannot be absolute. Freedom of Press is essential to keep the people informed on matters of public interest, but there is every possibility of its abuse. Under the Indian Constitution a balance between the two competing interests i.e. freedom of press and social interest is sought to be achieved by providing limitations on individual freedom amounting to constitutional exceptions in the form of reasonable restrictions. Indian Constitution guarantees freedom of speech and expression and freedom of press is inclusive in Art.19 (1)(a). The Constitution provides for constitutional exceptions to freedom of the press namely reasonable restrictions under Art.19(2). Provisions under Art.19(2) are as follows:

19(2) Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes
reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of 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.¹

1.1 ART.19(2) WHAT IT COVERS?

By Art.19(2) all forms of expressions i.e. speaking, writing, printing, and publishing, singing, gesturing, dramating and art performing etc. can be restricted by reasonable restrictions. Amongst two words 'reasonable restrictions', what is restriction and when it is reasonable or otherwise, are the important issues. Restriction means to prohibit, to save, to limit the scope of provisions, under Art.19(1)(a). These restrictions might be either direct or indirect ones. If one is allowed to speak but the use of loudspeaker is not allowed, then the extent of spoken word is limited. Similarly if one is allowed to write but is not allowed to print it, then also extent of written words is limited. Thus, restrictions not to use mechanical devices, limit
the scope of freedom of expression. For example of indirect restriction it may be said that, if a singer expresses views against the Government for which his name is black listed and he is not allowed to appear on T.V. or Radio even in programmes not connected with the Government, it may well be said that indirect restriction has been imposed upon his freedom of expression.

Art.19(2) specifically enumerates the list of matters for which such restrictions can be imposed. These matters are danger to sovereignty and integrity of India, security of the state, friendly relations with foreign States, public order, decency and morality and in respect of contempt of court, incitement to an offence. No restrictions on the basis of any other ground than above matters or subjects is permissible by and justifiable under the constitution of India. Any piece of legislation imposing restriction on the ground of any matter specifically enumerated as above is permissible. Moreover, it shall be presumed to be constitutional, since it must be assumed that the legislature rightly understands and correctly appreciates the needs of the people. But this presumption is rebuttable; and in the event of challenge State will have to satisfy the court about its reasonableness. In the words of
Ramaswami J. in Re Bharati Press

"The presumption supporting legislation is balanced by the priority given in the scheme of the constitution to fundamental liberties."

He further hold that,

"When a Statute appears on its face to invoke the basic guarantee in the constitution the presumption is against the validity of the law and the burden of proof will rest upon those who defend it to show that the invasion of civil liberty is justified by the exceptions enacted."

In case, any part of legislation imposing restriction which may not be covered or saved by grounds specifically mentioned under Art.19(2), no question of permissibility, presumption, justification and validity arises as it is unconstitutional and void ab-initio. However, restriction is permissible or not is a question to be decided by the courts.

Another issue is of the 'reasonableness of restrictions'. Any restriction merely on 'permissible ground'
is not sufficient for the purpose of saving it. But such a permissible restriction is expected to be 'reasonable'. Thus a restriction must be on permissible ground and must be reasonable one. It follows that restriction though on permissible ground, if is not reasonable will not be valid. Issue of reasonableness is made justifiable one. It is for courts to apply standard of reasonableness, to evolve tests for reasonableness and thereby specify the scope of legislative activity in the matters of imposing restrictions under the garb of exceptions to the constitutional guarantee of freedom of speech and expression.

1.3 **ART.19(6)**:

Provisions directly relating to essential concept of freedom of press are under clauses 19(1)(a) and (2). However, in this context provisions in clauses (1)(g) and (6) are also to be noted. It has been already explained earlier, the press is not only a medium of expression, but also a business. Hence so far as commercial activities of a press are concerned, its ambit of rights, and the limitations is to be derived from clauses 19(1)(g) and (6). The question of harmonization of the dual operation of
the two provisions in Art.19, viz., under clause (1)(a) and clause (1)(g) has been already discussed in the previous chapter.

1.4 DETERMINATIONS:

This leads us to the following conclusions:

(A) Freedoms guaranteed under our constitution are not absolute but are subject to restrictions. Thus theory of absolute rights has been discarded by our constitution makers.

(B) A fine balance in between two competing interests i.e. freedom of individual and social interest has been achieved by our constitution makers by providing rights under Art.19(1) and reasonable restrictions under Art.19(2) to (6). Constitutional exceptions are thus in a way limitations put upon the individual freedom.

(C) Term 'reasonable' is relative one and it is made justiciable. Thus it is left to the courts to decide standards of reasonableness of a particular restriction. Thus courts are the architects or authors of the standards of reasonableness.
(D) Reasonableness of restrictions is to be examined by court and not reasonableness of any impugned legislation.

(E) Term 'reasonable restrictions' indicate the intelligence applied by our constitution makers in maintaining security and safety of guarantee of freedom under Art.19(1).

(F) Tests of reasonableness under the Indian Constitution while determining whether a restriction on fundamental rights is reasonable or not, will have to be determined on the touchstone of pronouncements of Supreme Court and different High Courts on the point. This is discussed in the next Chapter of the thesis.

1.5 CONSTITUTIONAL AMENDMENTS DEERMINATING THE EXCEPTIONS:

Art.19(2) as it stands today, is inserted by constitution (1st amendment) Act, 1951, with retrospective effect. When draft of the constitution was submitted to the Constituent Assembly, article 13 contained the statement about fundamental rights and sub-clause (2) listed all exceptions in which state was authorised
to make a law abrogating fundamental rights.

However, in the final draft as approved article 13 became article 19 which contained fundamental rights. Thus when constitution was declared to be enforced on 26th January 1950, fundamental rights under article 19 came into existence without incorporation of reasonable restrictions under Art.19(2).

1.5.1. CONSTITUTIONAL AMENDMENTS:

On May 1951, A Bill was introduced in the Parliament which was later on referred to a select committee. This was the Bill for 1st Amendment to the constitution and it was introduced in the Parliament within fifteen months from the date of enforcement of the constitution. The statement of objects and reasons for amendment throws light upon necessity of amendment. A part of which is reproduced below:

"During the last fifteen months of the working of the constitution certain difficulties have been brought to light by judicial decisions and pronouncements especially in regard to the chapter on fundamental rights. The citizen’s right to freedom of speech and expression guaranteed by
Art. 19(1)(a) has been held by some courts to be so comprehensive as not render a person culpable even if he advocates murder and other crimes of violence. In other countries with written constitutions freedom of speech and of the press is not regarded as debarring the State from punishing or preventing abuse of this freedom.⁵

Thereafter Art. 19(2) was added in Art. 19 of the Constitution.

Some important points to be noted regarding draft article 13 and amended article 19(2) are as under: In the draft article 13(2) 'Sedition' was one of the grounds of restriction. However in the amended article 19(2), it is dropped. It is so because Shri K.M. Munshi attacked the inclusion of 'Sedition' as a ground of restriction. He thought that it had been an expression of varying import and created considerable doubt in the minds of not only the members of the Assembly but also of the court of many countries. He said:

"Its definition has been very simple and given so far back as 1868. It says, 'sedition' embraces all those practices whether by word or deed or writing which are
calculated to disturb the tranquility of
the state and lead ignorant persons to
subvert the Government'. But in practice
it has had a curious fortune. A hundred
and fifty years ago in England, holding
a meeting or conducting a procession was
considered sedition. Even holding an
opinion against, which will bring ill-
will towards Government, was considered
sedition once. Our notorious section
124-A of Penal Code was sometimes const-
rued so widely that I remember in a case
a criticism of a District Magistrate was
urged to be covered by Sec. 124-A. But
the public opinion has changed conside-
rably since and now that we have a
democratic government a line must be
drawn between criticism of Government
which should be welcomed and incitement
which would undermine the security or
order on which civilized life is based,
or which is calculated to overthrow the
State....

As a matter of fact the essence of demo-
cracy is criticism of Government. The party system which necessarily involves an advocacy of the replacement of one Government by another is its only bul-
work; the advocacy of a different system of Government should be welcome because that gives validity to a democracy. The object therefore of this amendment is to make a distinction between the two positions.6

On the motion of Shri Munshi the ground of sedition was dropped.

In the initial stage of the constitution making, 'Public Order' as a ground of restriction was suggested by several members, but it did not find place in the draft article 13. However, in amended article 19(2) it is added. A member objected to the incorporation of both 'public order' and 'morality' in the draft article. In his opinion, these expressions were vague and their connotation changed from time to time. In regard to the latter he said that in a land of many religions with differing conceptions of morality, different customs, usages and ideals, it would be very difficult to ensure unanimity on what constituted morality.7
Another important aspect is that the restrictions must be 'reasonable'. In the original draft the word reasonable was not there. The change was brought out on the recommendation of the select committee. In its report on the Bill, the Committee observed:

"Our discussion centered mainly round the proposed clause (2) of Art.19. After considering several alternative forms, we have come to the conclusion that the only substantial change required in the draft clause is the insertion of the word 'reasonable', before the word 'restrictions'. This will bring clause (2) into line with clauses (3) to (6) all of which refer to laws imposing reasonable restrictions".

Accordingly, any legislation imposing restrictions on the right to freedom of speech and expression must be reasonable one. In other words a law is protected in so far as it imposes reasonable restrictions on the exercise of rights conferred by article 19(1)(a).

As a result of the cries and agitations on the part of certain parties for secession from India, a committee on National Integration and Regionalism recommended in 1962 further amendment of Art.19(2) with a
view to conferring adequate power on the government to preserve and maintain sovereignty and integrity of India. Accordingly, Constitution was secondly amended with regard to the provisions of Art.19(2) in the year 1963. By virtue of Sec.2 of the Constitution (Sixteenth Amendment) Act 1963, one more ground of limitation for justifying restraint has been added namely "the sovereignty and integrity of India".

Thus after commencement of the Constitution on 26th January 1950, Art.19(2) was amended twice — First time in 1951 with retrospective effect and second time in 1963.

Art.19(2) is not only an amending but also a validating provision, as it is to be deemed always to have been enacted in the amended form. However, for express validation of the existing laws it has been held that article cannot be retrospective in its application.8

1.5.2 CASES LEADING TO FIRST AMENDMENT:

In respect of the first amendment three cases are noteworthy, Romesh Thapar V State of Madras,9 Brij Bhusan V State of Delhi,10 and the Bharati Press.11 These cases were decided on unamended Art.19(2) and led to the
retrospective amendment of Art.19(2). In Romesh Thappar, the Supreme Court struck down as violative of Art.19(1)(a) the Madras Maintenance of Public Order Act 1949 whose section 9(1A) sought to impose restrictions on the freedom of press not against undermining the security of the State or its overthrow but for the wider purpose of securing public safety or the maintenance of Public Order. In this case while justifying impugned order it was contended that the 'Public Safety' in the impugned Act means security of the province, and, therefore, the 'security of the State' within the meaning of Art.19(2). While rejecting this contention Supreme Court held that public order is an expression of wide connotation and it must be taken that Public safety is part of the wider concept of Public Order. It seems that the Court did not find any reason to treat these expressions distinctly as contended because no specific definition of Public Safety has been drawn before the court nor court felt that the words had acquired any technical signification as words of art.12

In respect of contention that expression security of Public Safety can be covered by security of the State or its overthrow, it was observed that both are distinct expressions. Moreover, purposes of securing public
safety and maintenance of public order are wider than the purposes of security of or the overthrow of the State. Both the expressions are distinctly treated by the Constitution as well as by Indian Penal Code. (while defining and providing punishments to the offences on the subject). It was held that the impugned Act cannot saved on the ground of security of the State or its overthrow.

While holding as above a reference was made to the omission of the word 'Sedition' in the Art.19(2) which was included therein the draft Art.13(2). This was taken as indication that mere criticism of the Government existing disaffection or bad feelings was not sufficient to be regarded as justifying restrictions on the freedom of speech and expression unless it was such as to undermine the security of the State or tended to its overthrow. In this case Justice Fazal Ali dissented. In the dissenting judgement he explained that framers of the Constitution avoided to use word 'sedition' by using word 'public order' to be inclusive of and rather, wider than 'sedition'. He further observed that literal construction of the impugned Act may justify restrictions in cases of trivial offences, and in the context of the Act, it could only relate to serious offences affecting
'public order'. This view of justice Fazal Ali is greeted by well known constitutionalist H.M. Seervai with complimenting comment that insertion of word 'public order' in Art.19(2) by first amendment amounts to the acceptance of Fazal Ali Justice's view in dissent.\textsuperscript{15}

On the same date and on essentially the same considerations, the court also struck down in Brij Bhusan the East Punjab Public Safety Act 1949, which through its section 7(1)(c), provided for special measures to ensure public safety and the maintenance of public order.

In Bharati Press the validity of Sec.4(1)(a) of the Press (Emergency Powers) Act 1931 was at sake. In this case the Government of Bihar issued an order under the Act demanding security from the keeper of the Bharati Press as the press was used for publishing matters in violation of this section which dealt with inciting to or encouraging or tending to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence. Patna High Court declared the section ultra vires the constitution as it was worded in general terms and might apply both to aggravated forms of offences like political assassinations as also to ordinary murders or cognizable
offences involving violence. In view of Romesh Thappar and Brij Bhusan, the court said the impugned provision could not be saved as permissible legislation under Art.19(2). The effect of the retrospective amendment to Art.19(2) was considered in Bihar V Shailabala Devi.\textsuperscript{16}...

In this case sec.4(1)(a) of the Indian Press (Emergency Powers) Act 1931 was under challenge. As stated above in Bharati Press, impugned Act was held unconstitutional in this case also. However, it was further observed by Mahajan J. that Romesh Thappar and Brij Bhusan cases were inapplicable after amendment, more particularly after insertion of words 'public order' in Art.19(2).

It is submitted that, after amendment courts refused to enlarge the scope of Art.19(2) in the matter of the freedom of speech and expression particularly in the matter of freedom of press. It is submitted that Romesh Thappar and Brij Bhusan are no good law after first Amendment to Indian Constitution.

2. **LIMITATIONS IN UNITED STATES:**

2.1 **LIMITATIONS ON FREEDOM OF PRESS:**

Under United States Constitution freedom of speech or of the press does not prohibit all legislation by the congress. It is also in case of the States.
Therefore, it may be said that both the State and federal government have the power to limit freedom of speech and of the press except so far as the constitutional guarantee limits governmental power.

So far as the First Amendment is concerned, it may be said that neither intrinsic of free expression nor its "social function" result in First Amendment's operating as an absolute ban on all official restrictions on speech or press. Further the 'due process' clause protects personal liberty only if it is of more importance than any other competing social interest. Thus the collective good, the nation's or public safety warrants some restrictions on individual's freedom to publish or to express. The Supreme Court has interpreted the federal guarantee to be limited by the police power of the State to restrain and punish abuses of the freedom by the violation of laws safeguarding the security of the State or the public peace or public morals or protecting an individual against libel. Thus it has been held under the national constitution that guarantee of freedom of speech and of the press was intended to ensure that changes in the government may be effected by peaceful means. The State has the right to interfere
if this freedom is abused by inciting people to resort to violence.\textsuperscript{17} In such a case, though the freedom itself cannot be curtailed, the abuse of such freedom may be punished:

"...The states are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action.... These rights may be abused by using speech or press... in order to incite the violence or crime. The people through their legislatures may protect themselves against that abuse...."\textsuperscript{18}

Freedom of speech or of the press was not intended to be an 'Unbrilled licence' to do anything inimical to the 'public welfare', the concept of which is wider than the prevention of subversion of the government by violence.\textsuperscript{19} The State is accordingly, entitled to punish those who abuse. This freedom by utterances 'tending to corrupt public morals, incite to crime, or disturb the public peace... endangering the foundations of organised government and threatening its overthrow by unlawful means', or utterances causing 'private injury.'\textsuperscript{20}
It has been the task of the courts to balance the community's interest against individual's rights. Further to determine that when order and safety of nation and public demand that limits be set to individual freedom. Different tests are evolved by the courts to balance the competing interests of individual freedom and social and national safety. These cases are discussed in detail in another chapter of this thesis.

2.2 DUE PROCESS: WHAT IT IS?

The fifth amendment to United States Constitution contains original due process guarantee. In Barron V Baltimore Chief Justice Marshal made plain that its reach was limited to federal action. The Fourteenth amendment, added in 1668, included a similar guarantee specifically directed against State Action. Thus the constitution twice promises the individual that Government will not deprive him of life, liberty or property without due process of law. Neither of these guarantees - in the fifth and Fourteenth amendments - protect absolutely against loss of life, liberty or property. They simply assure the individual that this deprivation will occur only after the government has adhered to certain standard approved procedure. Therefore, 'due process' as the plain meaning of the words indicates, is
nothing more than the due procedure. If once it is established that the authorities have adopted the procedure while dealing with an individual as laid down by statute, the sphere of inquiry by the court is exhausted. Court is not to go into the question of the validity of the procedure or of the statute laying down such procedure. This was the interpretation in earlier decisions of the Supreme Court of United States. About a century is spent by the Supreme Court in answering this question. Therefore, interpretation of due process as a constitutional doctrine in addition to its power of judicial review, has been invoked by the Supreme Court frequently. It has also acquired a place of test which is evolved in striking balance in between the rights of individuals and powers of the states to regulate the liberties.

The first majority opinion accepting that the due process clause in fourteenth amendment enabled the citizen to seek protection against encroachment by the legislature of the State came in Munn V Illinois. In this case Chief Justice Waite observed that the provisions of the amendment are new in the constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized
Government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into constitution of the United States as a limitation upon the powers of the National Government, and by the Fourteenth, as a guarantee against any encroachments upon an acknowledged right of citizenship by the legislatures of the States...

In an another judgement in Davidson V New Orleans Justice Miller noted that:

"While it (due process) has been a part of the constitution, as a restraint upon the power of the States, only a few years, the docket of this court is crowded with cases in which we have asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists same strange misconception of scope of this provision as found in the fourteenth Amendment."

This view gives indication that of the notion that due process fixes substance as well as procedural limitations
Judiciary has actively protected certain fundamental civil liberties of the citizens of the States against State action. In this context famous foot note written in the case United States V Carolene products Company\textsuperscript{25} may reproduced here as under:

(i) There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the fourteenth....

(ii) It is necessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

Despite the many landmark due process decisions, Justice Felix Frank further\textsuperscript{26} explained the provisions to be incomplete as under:
"Due process of law...conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, eventhough, as a matter of human experience, some may not too rhetorically be called eternal varieties. It is of the very nature of free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

It is pointed out that due process of law means fair and reasonable legal framework for imposition of obligation on individuals. For this purpose, any law which the legislature chooses to enact will not be upheld as valid by the Court if it affects the guaranteed freedoms of an individuals. Such laws will be tested by the standards of 'Justness', fairness, or reasonableness of procedure which the courts drawn from universal or immutable principles of justice.
It may be said that principles governing the due process clause are established, it seems that Supreme Court has declined to define in precise terms the due procedure clause. It is evident from the words of Justice Frank further:

"'due process' unlike some legal rules, is not a technical conception with a fixed content....Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment...."

Thomas M. Cooley mentions that:

"The phrase 'due process (or course) of law' is sometimes employed under the different State Constitutions and 'the law of the land', and some times both; but meaning is the same in every case".

He further states that:

"The definition of these terms to be found in the reported cases are so various that some difficulty arises in fixing upon one which shall be accurate, complete in itself, and at the same time applicable to all cases."
It is submitted that there can be an agreement with Justice Frankfurter and the great constitutionalist Thomas M. Cooley that 'due process of law' is difficult to be defined in precise words. It is submitted that due process is a continuing and evolving process which puts limitations on the police power of the States as well as that of federal power while competing the same with individual rights guaranteed by United States Constitution. And that it gets meaning from judicial pronouncement, one which is not specifically mentioned under the U.S. Constitution.

In this context A.G. Noorani, a scholarly writer mentions as under:

"Great concepts like 'due process of law' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact.' Justice Frankfurter wrote these lines in a dissenting opinion in 1949. . . . For, not very long before, he had pronounced an anathema in these ringing words - 'The due process clause ought to go.'"
3. INDIAN AND AMERICAN LAW COMPARED:

It has been observed by Indian Supreme Court, in Express Newspaper V Union of India,\(^{30}\) (Per Bhagawati J.) "...the fundamental right to freedom of speech and expression enshrined in ... our constitution is based on (the provisions in) Amendment 1st of the Constitution of United States...."

The United States constitution did not provide for any exception to the freedoms guaranteed by the Constitution. It has casted a duty on the United States Supreme Court to permit certain restrictions as and when excigencies of situations demand them. Therefore, United States Supreme Court had to evolve such exceptions by judicial decisions. Naturally the process of evolution is not harmonious. But the Supreme Court of United States has, after a labourious process of evolution, arrived at a general formula to provide guidance in the matters affecting freedom of press. In India the position is different. The right to freedom of speech and expression is contained in Art.19(1)(a) and specific enumeration of limitations to that right are contained in Art.19(2). Laws which fall under Art.19(2) are expressly permitted by the Indian Constitution. Legislative enactments,
until and unless challenged will be presumed to be permissible by Art.19(2). It is only in the event of challenge that the courts in India have to determine whether impugned law falls within the ambit of restrictions under Art.19(2) or not. By specific enumeration, Indian Constitution has made grounds of restrictions certain which cannot be enlarged either by legislature without adopting procedure for constitutional amendment or even the courts have no power to enlarge it. In the same way a law made must be presumed to be constitutionally valid and due weight must be given to the legislative judgements on the question of reasonableness though that judgement is subject to judicial review. However, it will be eliminating here to quote Dr. Ambedkar during deliberations of the Constituent Assembly. On the issue of constitutional exceptions fundamental rights under the Indian and United States Constitution. He said 31:

"It is wrong to say that fundamental rights in America are absolute. The difference between the position under the American constitution and the draft constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute."
In support of every exception to the fundamental rights set out in the draft constitution one can refer to one judgement of the United States Supreme Court. It would be sufficient to quote one such judgement of the Supreme Court in justification of the limitation on the right of free speech contained in Art.13 of the draft constitution. In Gitlow (v) New York in which the issue was the constitutionality of a New York 'Criminal anarchy' law which purported to punish utterances calculated to bring about violent change, the Supreme Court said: 'It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.'

It is therefore wrong to say that the fundamental rights in America are absolute, while those in the draft constitution are not. It is argued that if any fundamental rights require
qualification, if it for the constitution itself to qualify them as is done in the constitution of the United States and where it does not do so it should be left to be determined by the Judiciary upon a consideration of all the relevant considerations. All this...is a complete misrepresentation if not a misunderstanding of the United States Constitution. The American Constitution does nothing of the kind. Except in one matter, namely, the right of assembly, the American Constitution does not itself impose any limitations upon the fundamental rights guaranteed to the American citizens. Nor it is correct to say that the American Constitution leaves it to the judiciary to impose limitations on fundamental rights. The right to impose limitations belongs to the Congress. The real position is different from what is assumed by the critics. In America the fundamental rights as enacted by the Constitution were no doubt absolute, congress, however, soon found that it was absolutely essential to qualify these fundamental rights by limitations. When the question arose as to the constitutionality of these limitations before the Supreme Court, it was contended that the constitution gave no power to the United States Congress to impose such
limitation, the Supreme Court invented the doctrine of Police Power and refuted the advocates of absolute fundamental rights by the argument that every state has inherent in it police power which is not required to be conferred on it expressly by the Constitution. To use the language of the Supreme Court in the case I have already referred to, it said that 'a state in the exercise of its Police Power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question...' What the Draft Constitution has 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 no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute.
The difference between the First Amendment and Art.19(1)(a) was noted by Douglas J. in Kingsley Corporation V Regents of the University of New York, in the following words:

"If we had a provision in our constitution for reasonable regulation of press such as India had included in hers, there would be room for argument that censorship in the interest of morality would be permissible".

4. SUMMARY:

Under Indian Constitution there is no mention of expression 'due process of law' as that of United States Constitution. It might be so because it was not possible to introduce the concept as it stands in United States under Indian circumstances. But, at the same time it may not necessarily follow, as has been observed by majority judges in Gopalan's case, that the Courts in India would have no power of judicial review at all if
a legislature of competent jurisdiction enacted a law depriving a person of his life or personal liberty. Such power could not be derived by reading articles 14, 19 and 21 of the Constitution together. These articles require that an individual be accorded a fair process if his liberty is to be restrained. The limitation clauses under Art.19 i.e. Clause (2) to (6), open the door to judicial review of legislation in India in same manner as the doctrine of police power of the State and due process clause have done in the United States. These clauses under Art.19 imported the doctrine of police power with the difference that while the 'grounds' of abridgement of the individual rights were not enumerated in the American Constitution and had to be evolved by the Courts, under the Indian Constitution they have been specified.

Further the restriction imposed on these grounds must be a 'reasonable restriction'. And reasonableness of a restriction is to be tested by the Court. The concept of 'reasonableness', which is studied in detail in other part of this work, is nothing but the reflection of the "common right and reason" of which Coke C.J.spoke. It is submitted that it is this universal sense of fairness running through the judicial role by 'common right and reason' under English law, by 'due process
clause' in United States Constitution and by 'reasonableness of restriction' under the Indian Constitution.

To sum up it may be submitted that provisions in respect of exceptions in both the constitutions may be substantially same but are materially different. The scope for discretion and creative activity for the judge is very much the same under provisions of the two constitutions; yet Indian Constitution provides for more exhaustive and more express statement of matters of exceptions which leads to rigidity while American Constitution without specifying matters of exceptions leaves the American Judge in a sort of multidimensional control of the situation. If seen in the context of mind of constitution makers of Indian Constitution, provisions are not basically different. But there is a material difference in the technique, procedure and form. Because it is difficult, though not impossible to read into the words 'reasonable restrictions'. Provided by the Indian Constitution, the test of 'clear and present danger' evolved by the United States Supreme Court in dealing with the freedom of speech and of the press. Therefore, whatever can be firmly stated is that the theory of absolute rights is discarded in both the countries.

...
REFERENCES


2. Charanjitlal Choudhari v Union of India, AIR 1951 SC 41, See also State of Bombay v F.N. Balsara, AIR 1951, SC. 318.


5. The Gazette of India, 19 May 1951.


8. Dr. Suresh Chandra v Punit Gopal, AIR 1951, Calcutta, 176.


11. See Supra Note No. 3.
12. See Supra Note 7, at page 127.

13. Schedule 7, List III (Concurrent list) Entry No.3.

14. Chapter XIV, Sec.279, 280 relate to public health Safety, Convenience etc., Chapter VI; Sec.121, 124-A relate to waging war and sedition.

Chapter VIII; Sec.141, 146, 153-A, 159 relate to Public Tranquillity.


18. Ibid.


21. Relevant provision in Article V in first Ten Amendments is as follows:

"No person shall...., nor be deprived of life, liberty, or property, without due process of law;.....".

22. (I) 4 Blackstone Commentaries, 424: The protection of right of subject in the free enjoyment of his life, his liberty and his property except as they
might be declared, by the judgement of his peers or the law of the land, to be forfeited was guaranteed by Magna Charta which states that "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will the King pass upon him, or commit him to prison, unless by the judgement of his peers or the law of land."

Blackstone describes above provision in Magna Charta as "which alone would have merited the title that it bears, of the great charter."

(II) I Charles I, Chapter 1.
The petition of right—prayed among other things, "That no man be compelled to make or yield any gift, loan, benevolence, tax or such like charge, without common consent, by act of parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the kings special command, without any charge."


24. 96 U.S. 97, 103-4 (1878).
25. 304 U.S. 144 (1938).


