CHAPTER VI

CONCLUSION
American were first to give Bill of Right a Constitutional status. Thus when the Constitution of India was being framed the background for the incorporation of Bill of Rights was already present. The framers took inspiration from this and incorporated a full Chapter in the Constitution dealing with fundamental rights. But the declaration of fundamental rights in the Indian Constitution is the most elaborate and comprehensive yet framed by any State.

The inclusion of a Chapter of Fundamental Rights in the Constitution of India is in accordance with the trend of modern democratic thought, the idea being to preserve that which is an indispensable condition of a free society. The aim of having a declaration of fundamental rights is that certain elementary rights, such as, right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majority in Legislature of the country should not have a free hand in interfering with these fundamental rights¹.

Fundamental Rights were deemed essential to protect the rights and liberties of the people against the encroachment of the

¹A.K. Gopalan’s case, AIR 1950 SC 27.
power delegated by them to their Government. They are limitations upon all the powers of the Government, legislative as well as executive and they are essential for the preservation of public and private rights, notwithstanding the representative character of political instruments. Speaking about the importance of fundamental rights in the historic judgment of *Maneka Gandhi vs. Union of India*, Bhagwati, J., observed: “These fundamental rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a ‘pattern of guarantee’ on the basic structure of human rights, and impose negative obligation on the State not to encroach on individual liberty in its various dimensions”.

The Indian society is fragmented into many religious, cultural and linguistic groups and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitrary at times. Though democracy was being

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2 Harindo vs. People of California, 28 Led 232, per Mathews J.
introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimized by having a Bill of Rights in the Constitution⁴.

Article 12 to 35 of the Constitution pertain to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bill of Rights in the U.S. Constitution but the former cover a much wider ground than the latter. Also, the U.S. Constitution declares the Fundamental Rights to broad and general terms. But as no right is the Fundamental Rights in broad and general terms. But as no right is absolute, the Courts have, in course of time, spelled out some restrictions and limitations on the Rights. The Indian Constitution, however, adopts a different approach in so far as some Rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

The framers of the Indian Constitution, learning from the experiences of the U.S.A., visualized a great many difficulties in enunciating the Fundamental Rights in general terms and in having it to the Courts to enforce them, viz., the Legislature not being in a position to know what view the Courts would take of a particular enactment, the process of legislation becomes difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.

The strength of the U.S. Constitution has inspired other nations’ Constitution-makers. Dr. B.R. Ambedkar, the father of the Indian Constitution, identified American constitutional concepts applicable to Indian needs. Chief among those were the U.S. Constitution’s Bill of Rights and the notion of judicial review. India, a nation as heterogeneous as the United States, saw the value of clearly stated guarantees, and affirmed the Fundamental Rights of Indian citizens in its own Constitution.

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5 B.N. Rau, India’s Constitution in the Making, 245.
In a democratic society based on the rule of law, freedom of expression is not a luxury but a necessity. It constitutes one of the essential foundation of such a society. In the felicitous language of the great Justice Cardozo, ‘freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom’. Freedom of expression, if it is to be real and meaningful, must have a capacious content. It cannot be restricted to expression of thoughts and ideas, which are accepted and acceptable, but must extend to those that ‘offend, shock or disturb, the State or any section of the population’. It must accord an accommodation as hospitable to the thought which we hate as that which it assures to the orthodoxies of the day. Right conclusions are more likely to emerge from a multitude of voices than through one voice preaching the official gospel.

In its essence, freedom of expression embodies the people’s right to know, their right to receive information from diverse and antagonistic sources. Accountability is the sine qua non of every democratic society. In order to hold the institutions of government accountable it is essential that people should have access to information about the functioning of the government and about every

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public act that is done in a public way by public functionaries. Informed public opinion is the most potent of all checks on maladministration. James Madison, a leading figure in the drafting of the US Constitution, aptly highlighted the importance of an informed citizenry to democratic governance: 'A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives'. Freedom of expression, undoubtedly one of the most basic human rights, is however not an end in itself. It is the means to the attainment of a society in which law and order prevail and where human dignity and other human rights are respected.

Again unbridled exercise of freedom of speech at all times and in all circumstances can bring it in conflict with other fundamental rights. Limitation on freedom of expression would stem from the observance and acceptance of the basic human rights of other persons. Freedom of speech and expression is guaranteed as a fundamental right by Article 19(1)(a) of the Constitution of India. Freedom of expression, like other fundamental rights guaranteed by the Indian Constitution, is not absolute.
Freedom of speech in the United States is generally protected by the First Amendment to the United States Constitution. However, there are many exceptions to this general rule, including the Miller test for obscenity and greater regulation of so-called commercial speech, such as advertising. Other limitations or regulations include copyright, fighting words, campaign finance laws, slander and some content-neutral laws that affect speech. The current enforcement of free speech is generally considered good, although problems are occasionally faced, particularly in the freedom of press. In its free speech jurisprudence, the U.S. Supreme Court has favoured allowing as much expression as possible. Rather than let people simmer with rage or wander around with their blind ignorance, it is thought that they should be encouraged to express their ideas and hopefully good ideas will triumph over the bad. However, publicity of good ideas remains under debate as the mass publishing in the United States is dominated by corporations favouring certain points of view. Another policy is that allowing criticism of the government, its policies, and its officials will encourage good government, because if a policy is ineffective or an official is corrupt, some activist or journalist is thought to eventually expose it. In practice, however, it is often impossible to expose the corruption, abuses and ineffective
policies since the United States government does not enforce transparency and openness such as in Nordic European countries⁷.

The fundamental right to the freedom of speech and expression enshrined in Article 19(1)(a) of the Constitution of India is based on the provision in Amendment 1 of the Constitution of the United States of America and it would be therefore legitimate and proper to refer to the decisions of the Supreme Court of the U.S.A. in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by the Supreme Court against the use of American and other cases⁸. Where the object of an enactment in regulating the space for advertisements is to prevent unfair competition, it is directed against circulation of a newspaper. When a law is intended to bring about this result, there would be direct interference with the right of freedom of speech and expression guaranteed under Article 19(1)(a)⁹. Where the object of an enactment was not designed to affect the freedom of speech and expression but to regulate certain conditions of service of working journalists and other persons employed in the newspaper establishment, the enactment would not come within the prohibition of Article 19(1)(a). An advertisement relates to commerce or trade and not to propagating of

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⁸ [State of Travancore-Cochin vs. Bombay Co. Ltd., AIR 1952 SC 366].
⁹ [Sakal Papers(P) Ltd. vs. Union of India AIR 1962 SC 305].
ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interests of the general public, cannot be speech within the meaning of freedom of speech and would not fall within Article 19(1)(a)\textsuperscript{10}.

In \textit{M.R.F. Ltd. Vs. Inspector Kerala Government}\textsuperscript{11} the following principles on the reasonableness of restrictions imposed upon the Fundamental Rights available under Article 19 have been laid down on a conspectus of various decisions of the Supreme Court:

1. While considering the reasonableness of the restrictions, the Court has to keep in mind the Directive Principles of State Policy.

2. Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

3. In order to judge the reasonableness of the restrictions, to abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution prevailing conditions and the surrounding circumstances.

\textsuperscript{10} Hamdard Dawakhana vs. Union of India, AIR 1960 SC 554.
\textsuperscript{11} (1998) 8 SCC 227.
4. A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19 of the Constitution.

5. Prevailing social values as also social needs which are intended to be satisfied\textsuperscript{12}.

6. There must be a direct and proximate nexus or a reasonable connection between the restrictions and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise\textsuperscript{13}.

In the United States of America freedom of speech was originally restricted by the doctrine of \textit{clear and present danger} propounded by Holmes, J. in \textit{Schenck vs. United States}. 1919 (249) US 47. In that case the Supreme Court of America dealt with the military censorship provisions of the Espionage Act of 1917, which imposed certain limitations upon press and speech. The case involved an appeal from a conviction on a charge of circulating anti-draft leaflets among members of the United States armed forces. The Espionage Act made it a felony to attempt to obstruct the enlistment and resulting services of the United States. Appellants advocate

\textsuperscript{12} State of UP vs. Kaushaliya AIR 1964 SC 416; (1964) 4 SCR 1002.

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contended that the Espionage Act violated the First Amendment right guaranteeing freedom of speech.

It was held that freedom of speech could be abridged if the Government could show that there was a clear and present danger to the State arising from the abuse of that freedom.

The test of clear and present danger was abandoned in Dennis vs. United States, 1951 (341) US 495. In that case the validity of the Alien Registration Act, 1940 (Smith Act) was in question. The Statute made it unlawful for any person to advocate, the overthrow of the Government in the United States by force or violence and penalized even a conspiracy to commit such forbidden acts. The petitioners leading members of the Communist Party were charged with a conspiracy to form a party for teaching and advocating the overthrow of Government by force. They contended that the statute could not stand the constitutional test of "clear and present danger" and that their conviction by the below was, therefore, liable to be set aside.

The test of clear and present danger was discharged and the test of clear and probable danger has been substituted. The time factor has been thus eliminated from the test. Judged by the new test it was held that the impugned statute was constitutional, though it
penalized even conspiring to advocate the future overthrow of the State and no imminent danger is to be apprehended thereby. The arm of the law has been lengthened thereby. No doubt Douglas, J., in his dissenting opinion bewails that "free speech the glory of our system of Government" had been eclipsed by the majority ruling in *Dennis* case.

In *Yates vs. United States*, 1957 US 298, while appearing to adhere to the modification of the "clear and present danger" test, the Supreme Court has in a measure really overruled the *Dennis* case. In *Yates case* the Supreme Court set aside the conviction of fourteen Communists who had been convicted under the Smith Act. It was held that the advocacy of the overthrow of the Government as an abstract principle did not constitute an offence under the Smith Act. It is only when action to that end, though it may not be immediate action, has been advocated that the offence would be committed. The decision in *Yates case* restored to some extent the protection to freedom of speech which had been withdrawn in *Dennis* case.

A comparison of the protection afforded to freedom of speech under the Indian and American Constitutions reveals a close identity Article 19 clause (2) as originally drafted seems to be based on the "clear and present danger" test of the United States. After the
amendment it has come into line with the “clear and probable danger” test applied in the United States.

The United States of America incorporated the Bill of Rights in the Constitution by various amendments. The first ten amendments were adopted on December 15, 1791, Jackson, J. of the Supreme Court of America explained the purpose of fundamental rights as follows:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the Courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be subjected to vote, they depend on the outcome of no election”14.

“Police Power” is the right of the legislature to pass such legislation as is necessary in furtherance of security, morality and general welfare of the community, except in cases where it is expressly prohibited from exercising it, by the Constitution. The American Supreme Court laid down, “it (Police Power) extends not only to regulations which promote the public health, morals and

safety, but to those which promote the public convenience or the
general prosperity. It is the most essential of the power, at times most
insistent, and always one of the least limitable of the powers of the
government"15. Mr. Justice Holmes who described ‘Police Power’ as
one of the apologetic phrases of American constitutional law,
remarked, “It be said in a general way that the Police Power extends
to all the great public needs”. The doctrine of ‘Police Power’ is based
on the theory that the State is armed with an inherent authority to
protect public health, safety and morals. It is the power of the people
evacuated through the State Governments to restrain an individual in
the interest of the public. The introduction of this doctrine was
necessitated, it is said, in U.S.A. on account of the very liberal
interpretation of the ‘due process’ clause, Justice Patanjali Sastri of
the Supreme Court of India said, “When that power (legislative
power) was threatened with prostration by the excesses of due
process, the equally vague and expansive doctrine of ‘Police Powers’,
i.e. the power of the Government to regulate private rights in public
interest, was evolved to counteract such excesses”16. Das, J. (later
C.J.) also remarked that the content of the ‘due process of law’ had to
be narrowed down by the enunciation and application of the new

doctrines of ‘Police Power’ as an antidote or palliative to that power. With great respect to their Lordships, it is submitted that the doctrine of ‘Police Power’ was not evolved merely to counteract the consequences of the ‘due process’ clause. The absence of any power in the legislature to restrict the Fundamental Rights was the efficient cause of the birth of this doctrine.

The framers of the Indian Constitution were standing on the shoulders of the founding fathers of the American Constitution. They were benefited to a great extent by the working of the Constitution of the U.S.A. Hence, they did not frame fundamental rights in absolute terms, leaving it to the judiciary to invent the doctrine of ‘Police Power’ for bringing about social control. Dr. Ambedkar explained the underlying principle in the speech made in the constituent Assembly on November 4, 1948, in these words: “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”. With due respect to the learned jurist it is submitted that there is a difference in the result.
There is a greater element of certainty about the Indian Constitution on account of the mention of the specific heads in clauses (2) to (6) of Article 19, which delimit the scope and extent of restrictions on the Fundamental Rights. Thus, the danger of vagueness and variety of views that may be held by individual judges in the field of restrictions on individual freedom is much minimized in the Indian Constitution. The Constitution of the U.S.A. suffers in this respect from vagueness. This is a very important point of distinction between the Constitution of the United States of America and that of India. This gave Indian Constitution a far more certainty than the American Constitution. There is another point of distinction to be noted in 'separation of powers'. But there is no rigid 'separation of powers' in the Indian Constitution. These differences naturally lead to the conclusion that the decisions of the American Supreme Court should not be blindly followed in interpreting the Indian Constitution. Moreover social conditions and habits of the people are different.\(^\text{17}\)

As the doctrine of 'Police Power' has no place in the Indian Constitution, so also the doctrines of immunity of instrumentalities and 'political questions' have no place in the Indian Constitution. The doctrine of 'immunity of instrumentalities was first

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\(^{17}\) Pathumuna vs. State of Kerala, (1978) 2 SCC 1.
propounded by Marshall, C.J.\textsuperscript{18} but it was later rejected in the United States itself. It was also not accepted by the Privy Council\textsuperscript{19}.

In the \textit{Narendra Kumar case}\textsuperscript{20} the Court laid down, "In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy to the beneficial effect reasonably expected to result to the general public. It will be necessary to consider... whether the restraint caused by the law is more than necessary in the interest of the general public". The Supreme Court further explained the interpretation of the expression 'reasonable restriction' in \textit{Shree Meenakshi Mills Ltd. Vs. Union of India}\textsuperscript{21}. The expression 'reasonable restrictions' has introduced the doctrine of judicial review. The Supreme Court laid down, "The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive. it is subject to the supervision of this Court. In the matter of fundamental rights, the Supreme Court watches and guards the rights guaranteed by the Constitution and in exercising its

\textsuperscript{18} M. Culloch vs. Maryland, 17 US (4 West) 316, 436; 4 Led 579 (1819).
\textsuperscript{19} Attorney General for British Columbia vs. Attorney General for Canada, 1924 AC 222 (PC).
\textsuperscript{20} AIR 1952 SC 200; 1952 SCR 607.
\textsuperscript{21} (1974) 1 SCC 468.
functions it has the power to set aside an Act of the legislature if it is in violation of the freedoms guaranteed by the Constitution. The Court also observed, 'legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."\(^{22}\)

In determining the reasonableness, the Court looked not only to the surrounding circumstances, but also to other laws which were passed as a part of a single scheme. If the restriction in one law was offset by countervailing advantage contained in another law forming, a part of the same legislative scheme the restriction would be reasonable. The Courts have taken into account the directive principles of State Policy in determining reasonableness of restrictions. Reasonableness of restrictions is to be considered from the point of view of the general public and not from the point of view of the person upon whom restrictions are imposed. The restrictions must be reasonable both from the stand-point of substantive as well as procedural law. The restrictions must not be excessive. The Courts have adopted the principle of natural justice in determining

\(^{22}\) Id. at 199.
reasonableness or otherwise of restrictions imposed on one of the rights conferred by Article 19(1) cannot have much value as a precedent for adjudging the validity of the restrictions imposed on another right, even when the constitutional criterion is the same, namely reasonableness, as the conclusion must depend upon the cumulative effect of the varying facts and circumstances of each case.

In the United States of America, the freedom of expression has been given preferred position in the judgments of the Supreme Court. The Court was ready to uphold 'social and economic legislation', but was rather cautious when legislation limiting the exercise of freedom of expression was challenged before it. Thus, there was a double standard accepted by the Court. Justice Frankfurter did not like this preferred position given to the freedom of expression. This doctrine of preferred freedom was developed in the United States of America by the Roosevelt Court through Justice Black, Douglas, Murphy, Stone and Rutledge. The result of this doctrine was to shift the burden of proof on the shoulders of those defending the legislation without raising in their favour the presumption of the validity of legislation. This doctrine was abandoned by a majority of judges after 1949. Justice Frankfurter

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described it as "a complicated process of constitutional adjudication by deceptive formulae". However, the Supreme Court adopted a different yardstick in deciding reasonableness of restrictions when cases came before it in the context of economic development. In such cases the Court considered the opinion of the Government for imposing restrictions and practically in all such cases upheld such restrictions as reasonable. But, the Court did not permit the Government to use its discretion in an arbitrary manner in such cases. Court of India did not follow American Supreme Court decision while interpreting Article 19(1)(a) and 19(2). The Court observed, "it is hardly fruitful to refer to the American decisions particularly when the Court has more than once clearly enunciated the scope and effect of Article 19(1)(a) and 19(2)... our Constitution provides reasonably precise general guidance in this matter. It would thus be misleading to construe in the light of the American decisions given in a different context".

Judiciary has been enlarging the area covered by the fundamental right to freedom of speech and expression. The Kerala High Court in a Full Bench decision laid down that the freedom of...
speech and expression includes freedom to acquire knowledge, to read books, periodicals and read any type of literature subject to reasonable restrictions placed on the right. The Supreme Court went a little further and laid down that the right of free speech and expression conferred by Article 19(1)(a) is not confined to the territory of India. It can be exercised outside India.\textsuperscript{27}

In \textit{Dennis vs. United States}\textsuperscript{28} the Supreme Court of United States observed as follows: "Unless we are to hold our Government captive in a judge made verbal trap, we must approach the problem of a well-organised, nation-wide conspiracy, such as I have described, as realistically as our predecessors faced with trivialities that were being prosecuted until they were checked with a rule of reason. I think reason is lacking for applying the test to this case." In 1957, the Supreme Court of U.S.A. accepted a new test known as 'balancing test'. If there was a balance between free speech and government interest, the restrictions were valid. In 1969, the Court accepted a new test known as 'incitement test'. Thus, it appears that the Supreme Court of the U.S.A. has not been able to find a single comprehensive approach to the First Amendment.

\textsuperscript{27} Maneka Gandhi vs. Union of India, (1978) 1 SCC 248.
\textsuperscript{28} 341 US 494: 95 L.Ed 1137 (1951).
In India the Supreme Court has not accepted the clear and present danger test. It is submitted that there cannot be a permanent rule to decide the nature of the dangers to society by the abuse of the freedom of the press. In India, as the Constitution itself mentions the heads under which the right to freedom of speech and expression may be curtailed, the legislature is on a surer footing than its counterpart in the United States. The reasonableness of the restrictions, however, will be decided by the judiciary. It deserves to be noted that in clause (2) of Article 19, as originally adopted, the term 'reasonable' was absent. It was introduced by the First Amendment Act, 1951.

Article 19(1)(a) provides that "all citizens shall have the right to freedom of speech and expression". Article 19(2) as originally enacted provided that:

"Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law in so far as it relates to or prevents 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."

This sub-Article was retrospectively amended by the Constitution (1st Amendment) Act, 1951, which provides
“(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 security of the State, friendly relations with foreign States, public order, decency of morality, or in relation to contempt of Court. Defamation or incitement to an offence”.

As the First Amendment to the US. Constitution has been referred to by our Sup. Ct. in considering Article 19(1)(a), the relevant part runs: “Congress shall make no law... abridging the freedom of speech, or of the press”. Although Article 19(1)(a) does not mention the freedom of the press it was early settled by Sup. Ct. decisions that freedom of speech and expression includes freedom of the press and circulation29. But ... being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech and expression of a citizen and that no privilege attaches to the Press as such, that is to say, as distinct from the freedom of the citizen.

As the science of comparison teaches us that the experience gained by a legal or constitutional system in any area may

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29 The Tata Engineering & Locomotive Co. Ltd. Vs. Bihar (1964) 6 SCR 885, (65) ASC 40.
be most valuable for another system, it is necessary to adopt a comparative approach to study freedom of the press and the law of libel. An orthodox theory of comparison maintains that only like can be compared with like. It is necessary, therefore, to see whether the American freedom of speech and of press and the Indian freedom of speech are alike. Our Supreme Court has not spoken with one voice on the comparability of these freedoms. The *Express Newspapers* case recognized that the Indian provision was based on the American provision and that it was proper to consult American decisions "to appreciate the true nature, scope and extent of this right". But *Santok Singh*\(^{30}\) struck a discordant note. Justice Douglas looked upon the Indian and the American provisions as different because of Article 19(2). *Babulal*\(^{31}\) rejected the American theory of clear and present danger. But this theory was rarely used by the American Court as a rule of adjudication. In the recent *Express Newspapers* case the Court said that "in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country we may take them (the American cases) into consideration". On the basis of the formal or structural differences between these two guarantees. Several supports *Santok Singh* and not the *Express

\(^{30}\) Santok Singh vs. Delhi Admn., AIR 1973 SC 1091, 1095.

\(^{31}\) Babulal Pavate vs. State of Bombay, AIR 1968 SC 51.
Newspapers case. A careful look at Ambedkar’s inspiring address to the Constituent Assembly after introducing the draft Constitution, however, shows that all the arguments that Seerval has advanced to support Santok Singh had been advanced in the Constituent Assembly and that Ambedkar\textsuperscript{32} had rejected them. He said:

\begin{quote}
\ldots it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American and the Draft Constitution is one of form and not of substance. In support of every exception of the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court.
\end{quote}

After citing from Gitlow vs. New York to show that the American guarantee on freedom of speech was not absolute, he pointed out that in that country the right to impose limitations on fundamental rights belonged to the congress and not to the judiciary and that the American Court went to the rescue of congress when it was found that there could only be regulated freedom in an ordered society. He then said:

\begin{quote}
What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme
\end{quote}

\textsuperscript{32} Constituent Assembly Debate (CAD) 40 (1948, Nov. 4).
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.

From Ramesh Thaper to the Express Newspapers case there is hardly any free speech case in which the Indian Court has not cited and consulted American cases on freedom of the press. Ramesh Thapar echoed Madison's famous opinion on the need for protecting erroneous statements, which the American Court had adopted. It also echoed the American cases endorsing Blackstone's erroneous conception of liberty of the press. In the first Express Newspapers case the Court quoted with approval the proposition from Thomas vs. Collins\(^{33}\) that the first amendment “forecloses public authority from assuming guardianship of the public mind”. Justice Mathew subscribed to the opinion of the American Court in Time vs. Hill that “freedom of speech and of press are not for the benefit of the press so much as for the benefit of all the people”. He also followed Griswold vs. Connecticut to hold that “freedom of speech and of press includes not only the right to utter or to print but the right to read”. In the Express Newspapers case Justice Venkataramiah approved of Justice

\(^{33}\) Thomas Collins.
Mathew’s dissent on these issues. The number of American cases cited and consulted by Justice Venkataramiah on whether freedom of the press grants to the press immunity from taxation is very large. It is evident from this case that the opinions of American judges and jurists on freedom of speech have found a good deal of resonance among the Indian judges. There is, therefore, no room for “cult of the local law” here. At the same time our process of comparison should not reduce our Constitution to a second hand copy of any foreign Constitution.

Though the power of the state in respect of the freedom of speech and expression is limited in definitive terms of Clause (2), yet its reach is long enough. Restriction can be placed not only for reasons connected with the stated heads of restrictions, but also in the interests of those purposes. ‘Whatever promotes the stated social purposes in the interests of the society the individual must be willing to sacrifice to be able to advance the general public interest. The insistence on the reasonableness of restrictions ensures that they are not unqualified, prohibitive, arbitrary, discriminative, or penal. There must be an element of reason, intelligent care and policy deliberation in their imposition. It implies proportion and objectivity, and a choice of course which is rationally supportable, and is dictated by reason.
In *Express Newspapers (Private) Ltd. vs. Union* Bhagwati J. said that there was a paucity of authority in India on the nature, scope and extent of the fundamental right to the freedom of speech and expression and he added:

"... the fundamental right to the freedom of speech and expression enshrined in ... our Constitution is based on (the provisions in) Amendment 1 of the Constitution of United States and it would be therefore legitimate and proper to refer to those decisions of (the U.S. Sup. Ct.) to appreciate the true nature, scope and extent of the right in spite of the warning administered by this Court against use of American and other cases".

It is submitted that the provisions of the two constitutions as to freedom of speech and expression are essentially different, the difference being accentuated by provisions in our Constitution for preventive detention which have no counterpart in the U.S. Constitution. The First Amendment enacts an absolute prohibition, so that a heavy burden lies on anyone transgressing it to justify such transgression. Again, since the Amendment contains no exceptions, it is not surprising that exceptions have had to be evolved by judicial decisions which have limited the scope of such exceptions with increasing stringency. The position in India is different. The right to the freedom of speech and expression and the limitations on that right,
are contained in Article 19(1)(a) read with sub Article (2). Laws which fall under sub-Article (2) are expressly permitted by the Constitution and the problem in India is to determine whether an impugned law falls within Article 19(2) and that is essentially a problem of construction. No doubt Article 19(2) authorizes the imposition of "reasonable restrictions", and in the end, the question of reasonableness is a question for a Court to decide. However, a law made in respect of the matters referred to in Article 19(2) must *prima facie* be presumed to be constitutionally valid and due weight must be given to the legislative judgment on the question of reasonableness, though that judgment is subject to judicial review. It is difficult, if not impossible, to read into the words "reasonable restrictions" the test of "clear and present danger" evolved by the U.S. Sup. Ct. in dealing with the freedom of speech and the press. The difference between the First Amendment and Article 19(1)(a) was noted by Douglas J. in Kingsley Corp. vs. Regents of the University of New York. In holding that all pre-censorship of cinema films was constitutionally void, he said:

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

It has become necessary to point out the radical difference between the provisions as to freedom of speech in the U.S. Constitution and our own, because the observations in the *Express Newspapers Case* would otherwise lead to the application of tests in India which are wholly inconsistent with Article 19(1)(a) and (2). It is submitted that in *Santokh Singh vs. Delhi Administration* Sup. Ct. has, in substance, overruled the observations of Bhagwati J. set out above, when it observed:

“In our opinion, it is hardly fruitful to refer to the American decision particularly when this Court has more than once clearly enunciated the scope and effect of Article 19(1)(a) and 19(2). Our Constitution provides reasonably precise, general guidance in this matter. It would thus be misleading to construe it in the light of American decisions given in a different context”.

The test of “clear and present danger” has been rejected by our Sup. Ct. because the framework of our Constitution differed from that of the US Constitution. It is submitted that the framers of our Constitution appear to have taken the view which Lord Sumner expressed in a passage as famous as that of Holmes J.
"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed editions, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before in the present day, reasonable men do not apprehend the dissolution or downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experiences in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the
right of society to protect itself by process of law from the dangers of the movement, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion... which prevents us from varying their application to the particular circumstances of our time in accordance with that experience" and judgments of the Indian Courts show that the approach indicated by Lord Sumner is best adapted for determining the reasonableness of restrictions.

Reverting to freedom of speech, it has been submitted above that Article 19(1)(a) read with sub-Article (2) is very different from the Final Amendment to the U.S. Constitution and that the test of "clear and present danger" is inapplicable to the freedom of speech and expression guaranteed by our Constitution. Nowhere is the difference more marked than in cases of contempt of Court decided in the United States and in India. We have seen that the First Amendment to the U.S. Constitution contains an absolute prohibition: however, Article 19(2) expressly saves restrictions in relation to contempt of Court. The power to commit for contempt has been held
to be inherent in every Court of Record, and the High Courts in India have exercised that power according to well-recognised principles governing its exercise in England. In the United States the guarantee of the freedom of speech and press has been construed to mean that the test of "clear and present danger" applies also to proceedings for contempt of Court and a latitude is permitted in the United States both as regards insulting observations about a judge and as regards pending matters which would not be permitted in India or in England.

There is a greater element of certainty about the Indian Constitution on account of the mention of the specific heads in Clauses (2) to (6) of Article 19, which delimit the scope and extent of restrictions on the Fundamental Rights. Thus, the danger of vagueness and variety of views that may be held by individual judges in the field of restrictions on individual freedom is much minimized in the Indian Constitution. The Constitution of the U.S.A. suffers in this respect from vagueness. This is a very important point of distinction between the Constitution of the United States and that of India. This gave Indian Constitution a far more certainty than the American Constitution. There is another point of distinction to be noted in this behalf. The American Constitution is based on the doctrine of 'separation of powers'. But there is no rigid 'separation of powers' in
the Indian Constitution. These differences naturally lead to the conclusion that the decisions of the American Supreme Court should not be blindly followed in interpreting the Indian Constitution. Moreover, historical background, social conditions and habits of the people are different. We find democratic type of government in both the countries. But the working of the different unit of the government is unique in each case.