CHAPTER VIII

SUPREME COURT AND FUNDAMENTAL RIGHTS

The extent to which a government is civilised or otherwise can be measured by the rights which it allows its citizens to enjoy. It is a further measure of its being high in the scale of civilisation when it grants certain rights to its individuals which it considers inviolable. These rights are known as fundamental rights. All contemporary constitutions embody these fundamental rights. The importance of guaranteeing such rights cannot be overemphasized for they secure to the individual the basic rights for his dignified existence vis-a-vis the government and make him immune from the arbitrary authority of the government to deprive him of these rights. The significance and importance of the fundamental rights was not lost on the framers of the Indian Constitution and the Constituent Assembly provided for these rights in Part III of the Indian Constitution. Thus guaranteeing to the Indian citizen the basic rights for a self respecting existence in the Indian polity and for a full development of his personality.

Supreme Court the Guardian of Fundamental Rights:

The fundamental rights guaranteed under the Constitution of India are justiciable. The Supreme Court of India has been endowed by the Constitution with original as well as appellate jurisdiction not merely to protect these rights against the executive or legislative actions but also to enforce them. Under Article 32 of the Constitution, a person whose fundamental right has been infringed can move the Court for its enforcement. Further
the Supreme Court has the power to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, to enforce the rights guaranteed in Part III of the Constitution. Further Article 32 which gives the right to the individual to move the Court, itself is a guaranteed right. Accordingly any law violating Article 32 itself would also be void ab initio except when the emergency is in force, then the President can under Article 359 suspend the right to move the Court.

Further Article 13(2) lays down that 'no law' shall be made by the State which takes away or abridges the rights conferred by Part III of the Constitution and any law made in contravention of this clause shall, to the extent of contravention be void. This gives power to the Supreme Court to strike down any law which takes away or abridges a fundamental right. The Supreme Court since its inception has been exercising its authority under Articles 13(2) and 32 to uphold the sanctity of fundamental rights. In fact it has gone further in this respect, in its historic judgment in Golak Nath v State of Punjab¹, in which it has declared that Parliament can not amend the fundamental rights by interpreting the word 'law' in Article 13(2) to include even the amending power of the Parliament.

The Supreme Court has thus put a check upon the power of Parliament to amend fundamental rights. It has acted as the protector of fundamental rights, a role that it envisaged for itself since the inception of the Constitution, that the Court is constituted to be "the protector and guarantor of fundamental

rights and it can not, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."¹ The inviolability and sanctity of these rights has been upheld by the Court. In Ram Singh v State of Delhi², Justice Bose observed: "It is our duty and privilege to see that rights which are intended to be fundamental are kept fundamental and to see that neither Parliament nor the executive exceed the bounds within which they are confined by the Constitution." The Supreme Court is a guardian of the fundamental rights, and plays the role of a sentinel on the qui vive³. "This Court has no more important function," observes Justice Subba Rao, "than to preserve the inviolable fundamental rights of the people; for, the fathers of the Constitution, in their fullest confidence, have entrusted them to the care of this Court and given to it all the institutional conditions necessary to exercise its jurisdiction in that regard without fear or favour. The task is delicate and sometimes difficult; but this Court has to discharge it to the best of its ability and not to abdicate it on the fallacious ground of inability or inconvenience."⁴

Checks on the Powers of the Supreme Court in Matters of Fundamental Rights:

It is true that the Supreme Court has put a check upon the power of the Parliament to abridge or amend fundamental rights and

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has also upheld itself as the protector and guardian of these rights and though the Constitution has made these rights justiciable and sacrosanct yet these rights are not absolute. Numerous qualifications are appended to each article, which circumscribe the power of the Supreme Court to protect and guard fundamental rights against their infringement. But a major restriction imposed upon the power of the Supreme Court in the matter of enforcement of fundamental rights is embodied in Articles 358 and 359 of the Constitution when emergency is in operation. Though the Court is empowered by the Constitution to review the measures of the government and strike down those which in its opinion infringe or abridge fundamental rights of the individual as ultra vires of the Constitution. But when emergency is proclaimed by the President the court is denied the right to act as a guardian of the fundamental rights of the individual. The Supreme Court has expressed its inability to question the validity of the restrictions imposed on the enjoyment of fundamental rights during the emergency in its various decisions. In Makhan Singh v State of Punjab, it observed that "How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of emergency are matters .......left to the Executive*."*  

When emergency is proclaimed by the President under Article 358 of the Constitution, Article 19 which provides for seven


*Emphasis is mine.
freedoms¹ is automatically suspended. The individual can not claim any of the freedoms guaranteed therein under Article 19 and the proclamation of emergency can not be questioned in any Court of law. Article 358 was embodied in the Constitution so as not to let anti-social elements avail of the guaranteed freedoms and do such acts which may be against the interests of the country when it faced external or internal danger. At present however, there seems to be no justification for this provision for the suspension of Article 19 by the executive in view of the addition of another ground on which the restrictions on Article 19 can be put, that is, "in the interest of the sovereignty and integrity of India." This point is stressed by N.C.Chatterjee who points out that Article 358 "is utterly out of place in Constitution supposed to rest on the Rule of Law."²

Again under Article 359, the President can suspend the right to move the Courts for the enforcement of those fundamental rights specifically mentioned in the Presidential Order. The order again can not be challenged in a court of law, except as the Supreme Court held recently in case of Ghulam Sarwar³ that the validity of the order itself can be questioned if discriminatory under Article ¹⁴ of the Constitution, for Article 359 does not operate by its own force as does Article 358. The impact of Article 359

1. The seven freedoms guaranteed under Article 19 are : Freedom of speech and expression; Freedom of assembly; Freedom to form associations or unions; Freedom of movement throughout the territory of India; Freedom of residence and Settlement in any part of the territory of India; Freedom to acquire, hold and dispose of property; and Freedom of profession, occupation, trade or business.


otherwise on Article 32 which provides for the remedy to the individual whose fundamental right is infringed to move the Court, is that Article 32 though provides for a guaranteed right, has no locus standi to enforce those rights which are mentioned in the Presidential Order issued under Article 359. The Court has declared in its various decisions that there is no judicial check upon the possibility of abusive use of Article 359 by the President. In this context Justice Gajendragadkar observes: "the sweep of Article 359 is wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims can not be adjudicated upon without examining the question as to whether the citizen is in substance seeking to enforce any of the said fundamental rights."

This means that the Supreme Court is helpless and without power to enforce fundamental rights when the emergency is in operation. Articles 358 and 359 of the Constitution have given a severe blow to the theory of guardianship of the Supreme Court and put a handicap on it. Both these Articles have been criticised by eminent jurists who pleaded for their repeal. In the Constituent Assembly also Article 359 was attached by H.V.Kamath described it as the keystone of the arch of autocratic reaction, an 'autocratic negation of liberty' which has no parallel in the world. "The combined effect of Articles 358 and 359" he commented, "is that during the emergency all the freedoms guaranteed under article 19 will be automatically suspended throughout the Union and further the citizen is denied the right to access to courts

of law for making complaints about the violation of not only the right of the individual freedom but all other fundamental rights during the period of emergency. A general authorisation of this kind for restricting individual freedom has no parallel anywhere else."

It is being advocated by some jurists, the most eminent of whom is N.C. Chatterjee that both the Articles 358 and 359 should be repealed, for the rights which can be enjoyed only during the pleasure of the President can hardly be regarded as fundamental. So long as these two Articles remain in the Constitution it will be a mockery to say that the rights which are designated as fundamental in the Constitution are fundamental.

A further check is placed upon the power of the Supreme Court by Article 33 to enforce fundamental rights vis-a-vis military personnel. Another major check on the powers of the Supreme Court in matters of fundamental rights is the provision for preventive detention by which a person can be detained without trial by the government. It is a negation of the concept of rule of law.

Besides these constitutional limitations, the Court may also be said to be responsible for putting self-imposed restrictions on its power to defend fundamental rights. This the Court

2. Articles 358 and 359 have been discussed in detail in Chapter IX, pp. 334-345.
3. Article 33 of the Constitution provides: "Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."
has done by narrowly interpreting the provisions of the Constitution. For instance, before the Supreme Court decision in Golak Nath v State of Punjab\(^1\), the Court interpreted the word 'law' in Article 13(2) in a very narrow sense. In Shankari Prasad v Union of India\(^2\), it held that 'law' in Article 13(2) can only mean as law passed by the Parliament under its legislative powers and not under its constituent powers and held that Parliament could amend fundamental rights. It applied the principle of harmonious construction to the two Article 13(2) and 368. In fact it made Article 13(2) subservient to Article 368. Article 13(2) which clearly lays down that no law shall be made by the State which takes away or abridges the rights conferred by Part III and any law made in contravention of this provision, to the extent of contravention, be void, was rendered impotent vis-à-vis the amendments to Part III of the Constitution.

The Court affirmed this decision in Sajjan Singh v State of Rajasthan\(^3\). It was only in 1967, that the Court overruled its earlier decision, though prospectively, in Golak Nath v State of Punjab\(^4\), wherein it declared that constitutional amendments were not beyond the purview of Article 13(2) and amendments relating to fundamental rights were ultra vires of the Constitution. But for its overruling in this case, the decision of the Court in earlier cases had paved the way for encroachments upon the fundamental rights. The Parliament in deed had made an inroad in

\(^1\) A.I.R. 1967 S.C. 1643.
\(^3\) A.I.R. 1965 S.C. 845.
Part III of the Constitution by amending it frequently. If the decision pronounced by the Supreme Court in Shankari Prasad case, had continued to be good law, Parliament might have gradually taken away all the rights embodied in Part III and the Supreme Court would have been a helpless witness to it.

There are many other words which the Court has interpreted too narrowly. In Gopalan's case\(^1\) for example it observed that law excludes the concept of natural justice.

Further, whereas the framers of the Constitution made Article 32 a guaranteed right by including it in Part III of the Constitution and described it as the soul of the Constitution\(^2\). The Supreme Court has given a severe blow to the importance and value of this article by interpreting it again narrowly and making it subject to the rule of 'res judicata'. In Daryao v State of U.P.\(^3\) the Court observed that the rule of 'res judicata' is paramount and a person can not resort to Article 32 even if his fundamental right is affected if he fails to go in appeal against the reverse order of the High Court under Article 226. The Court continues to follow this decision.

The vitality of Article 32 is thus hit hard by the 'unmistakable tendency' of the Court of putting restrictions on the right of the citizen to seek relief. This decision of the Court appears to put an impediment in the way of the citizen approaching the highest Court in the land for the vindication of his rights and

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thus frustrate the purpose of the Constitution in creating the remedy. In this connection M.C.Setalvad observes that "It can not be that this guaranteed right consists in merely being allowed to put an application on the file of the Supreme Court, which could be straightway rejected on the application of principle analogous to 'res judicata'. The citizen is entitled to look upon the highest court in the land as the guardian and protector of his freedoms, and it would naturally be a matter of great concern to him that the Court should by the application of some principles seek to narrow or limit this right guaranteed by the Constitution."¹

The Supreme Court has gone a step further in a recent decision, where it dismissed a petition under Article 32 on the ground that it will not inquire into belated and stale claims². The Chief Justice who was a party to the majority opinion³, observed that Article 32 gives the right to move the Supreme Court by appropriate proceedings for enforcement of the rights conferred by Part III of the Constitution. The provision merely keeps open the doors of the Court. The State can not place any hindrance in the way of an aggrieved person seeking to approach the Supreme Court. But the guarantee goes no further at least on the terms of Article 32. Having reached the Court, the extent and manner of interference is for the Court to decide. The Chief Justice admitted that the Court puts itself in restraint in the matter of petitions under Article 32 and this practice has become inveterate.

¹ Presidential address by M.C.Setalvad to the Bar Association of India in 1961.
³ Justice Hedge and Justice Sikri gave dissenting opinion in this case.
This decision of the Supreme Court has further detracted from its exalted position as the protector and guardian of fundamental rights. The right given to the citizen to move the Court under Article 32 is itself a fundamental right and it cannot be circumscribed or curtailed except as provided by the Constitution. Justice Hedge who gave a dissenting opinion in this case, rightly observed that the power conferred on the Supreme Court by Article 32 is not a discretionary power. The mandate of the Constitution under this Article is clear and unambiguous and it has to be obeyed. The Court has a duty to grant appropriate relief to the aggrieved party and laches on the part of the aggrieved party cannot deprive him of the right to get relief from the Supreme Court under Article 32. Justice Hedge apprehends that if the Supreme Court, which is created primarily for the purpose of safeguarding the fundamental rights, narrows down these rights, it is likely to degrade the fundamental rights to the level of other civil rights. He further points out that the Court laid down in Golak Nath v State of Punjab\(^1\), that the Parliament can not by amending the Constitution abridge the fundamental rights conferred under Part III of the Constitution. If the Court is to bring in the provisions of Limitation Act by an indirect process to control the remedies conferred by the Constitution it would mean what the Parliament can not do directly, it can do so indirectly by curtailing the period of limitation for suits against the government. The Court may argue that the provisions of Limitation Act will have only persuasive value, that they do not

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limit the power of this Court, but the truth is otherwise. Very
soon the line that demarcates the rule of prudence and binding
rule is bound to vanish as has happened in the past.

The decision of the Court has been criticised by legal
pundits also. It is felt that what has been declared in
Golak Nath case has been nearly undone in Trilokchand case.
Fundamental rights appear to be no more fundamental and this has
been achieved by "Judicial Legislation." The citizen as well
as the poor Constitution" observes V.G.Ramachandran, "who looked
to the Judiciary as the protector are verily dismayed. The Cons-
titution appears to cry out to the Judiciary "You too Brutus."

The scope of Article 32 which conferred jurisdiction on the
Supreme Court to reach injustice has been so much limited by
construction that it ceases to be an effective instrument for
eradicating deeper maladies but is only useful as palliative to
correct superficial defects. K.M.Munshi, who was a member of the
Constituent Assembly, has a similar observation to make, when he
says that during the last few years the scope of several rights
has been considerably narrowed down by judicial decisions in
several respects. This process can be traced to recent trends in
judicial decisions which apart from judicial cases fight shy of
firmly upholding the paramountancy of fundamental rights. This,

1. Per Justice Hedge, Trilokchand Motichand v H.B.Munshi,

2. V.G.Ramachandran, Is the Constitution Supreme, The Indian

3. Ibid.

4. Justice Subba Rao, Convocation Address, Madras University,
September 13, 1962.
he writes can be attributed inter alia to:

"(a) A growing decline in that sensitive concern for constitutional paramountcy of Fundamental Rights which characterised the judiciary in the early post freedom years;

(b) An increasing though unconscious bias in favour of legislative wisdom, if not supremacy, possibly from our close association with British Constitutional law, and

(c) An inability to resist the influence of economic theories marked by politicians in tabloid slogans of vague implications; the consequent influence of these politicians of the political party that runs the machinery of Government."

It is clear from the above that the Supreme Court has itself imposed checks upon its power to uphold and protect fundamental rights by narrowly interpreting the provisions of Constitution.

It is now proposed to discuss at some length the interpretation and elaboration of the fundamental rights by the Supreme Court.

Elaboration of Fundamental Rights:

Right to Equality: The right to equality, a necessary corollary of the concept of rule of law has been incorporated in the Constitution of India (Articles 14 to 18). Article 14 guarantees 'equality' before the law in general whereas under Articles 15, 16, 17 and 18, discrimination is prohibited on specific grounds.  


According to Article 14 "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The underlying object of this provision is to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the preamble of the Constitution. By this Article, the State is enjoined not to deny any person equality before the law or the equal protection of the laws within the territory of India. The expression in the Article, 'equality before the law' and 'equal protections of the laws' have however, been borrowed from the English doctrine of rule of law and the American Constitution respectively. 'Equality before the law' is a negative concept whereas 'equal protection of the laws' is a positive one. The former declares that every one is equal before the law, that no one can claim special privileges and that all classes are equally subject to the ordinary law of the land; the latter postulates an equal protection to all alike in the same situation and under like circumstances.

Articale 14 has been liberally interpreted by the Court which

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2. Section I of the 14th Amendment provides:
   "No State shall...deny to any person within its jurisdiction the equal protection of the laws."
   The doctrine of equality enshrined in Article 14, though it is said combines the English doctrine of rule of law and the equal protection clause of the 14th Amendment of the Constitution of United States, it can be found in the ancient legal history of India. Mahabharta records how once King Prahlad had to give judgment against his own son, Virochan who had spoken lightly of a Brahman Snochanva and the two had agreed to refer to the King and each staked his life to the victorious party.
has always held that 'equality' guaranteed under this article is not absolute in nature. Chief Justice Das made it clear in his judgment in Basheshar Nath v I.T. Commissioner, Delhi and Rajasthan¹, that "there is no relaxation of restrictions imposed by it such as there are in some of the other Articles e.g., Article 19, clauses (2) to (6)."

In this context the Court has been largely influenced by the decisions of its counterpart in the United States which are often quoted with approval by the judges. The influence of the decisions rendered by the Supreme Court of the United States is further evident from the fact that it is only the expression 'equal protection of the laws' of Article 14 which has been interpreted by the Supreme Court in all the cases so far relating to the interpretation of this Article. Article 14 of the Indian Constitution, corresponds to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Consequently, this Article has been interpreted on the analogy of the interpretation given to the 'protection clause' in the Constitution of the United States, which forbids discriminatory legislation, but does not forbid classification which rests upon reasonable grounds of distinction. Such a legislation requires that all persons subject to such legislation shall be treated alike under like circumstances².

The Supreme Court of India also holds that Article 14 prohibits discrimination³, but permits classification which should

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not be arbitrary. If any legislation deals equally with all of a certain well-defined class, it is not obnoxious, and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons, for the class for which the law has been made is different from other persons and therefore, there is no discrimination amongst equals. Every classification is in some degree likely to produce some inequality but mere production of inequality is not all by itself enough. The inequality produced must be the result of some arbitrary step taken by the State. The Court has affirmed it in many cases that any classification which is arbitrary and made without any basis is no classification. A proper classification, it has held, must always rest upon some difference and must bear reasonable and just relation to the things in respect of which it is proposed.

The Supreme Court had its first opportunity to give its decision involving interpretation of Article 14 in Charanjit Lal v Union of India, and the judges were unanimous in their opinion (though the judgment pronounced was not unanimous) that Article 14 permitted special legislation based on reasonable classification. Subsequently the Supreme Court has invariably upheld this doctrine in many cases. The classification may be based on the nature of

   Kathi Raning v State of West Bengal, A.I.R. 1952 S.C. 123;
   Kedar Nath v State of West Bengal, A.I.R. 1953 S.C. 404;
   Bldi Supply Co. v Union of India, A.I.R. 1956 S.C. 479;
Further the Supreme Court has confirmed that classification is inherent in legislation and that a legislature which has to deal with diverse problems arising out of an indefinite variety of human relations must, of necessity have the power of making special laws to attain particular object and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. In R.C. Cooper v Union of India, Justice Shah observed that "The Courts recognise in the legislature some degree of elasticity in the matter of making a classification between persons, objects and transactions." He further added that the legislature is free to recognise the degree of harm and to restrict the operation of a


Justice Frankfurter's observation deserves notice here: "The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to diversities. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of the legislators those who have the responsibility, for making law fit. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation, the Equal Protection Clause has not forbidden it. To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." (Morey v Doud 354 U.S. 457).
law only to those cases where the need is the clearest. The legislature need not extend the regulation of a law to all cases it may possibly reach, and may make a classification founded on practical grounds of convenience.

The Supreme Court has however laid down two tests for a classification to be valid. Firstly, that the classification is founded on an intelligible differentia which distinguishes persons, transactions or things grouped together from others left out of the group. Secondly, the differentia must have a rational relation to the object sought to be achieved by the Act: there must be a nexus between the basis of classification and the object of the Act.

Besides the above mentioned two broad tests, the Court also laid down few rules for the interpretation of Article 14, which it summarised as follows: (a) That a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who

attacks it to show that there has been clear transgression of the constitutional principles;

(c) That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) That the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) That in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) That while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed; if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality can not be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.¹

The case law on Article 14, makes it clear that the Supreme Court has avoided a doctrinaire approach but it would not be wrong

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¹. These rules were summarised by Chief Justice Das in Bhudhan Chowdhry v State of Bihar (AIR 1955 S.C.91) and R.K.Dalmia v Justice Tendolkar (A.I.R.1958 S.C. 538).
to say that the Supreme Court has given a liberal interpretation of Article 14. It has on more than one occasion upheld legislation meant for a particular individual or object. The Court upheld one such legislation in Charanjit Lal v Union of India in which the Sholapur Spinning and Weaving Company (Emergency Provisions) Act (XXVIII (28) of 1950) was challenged as ultra vires of Article 14, since it selected a particular company and imposed upon it and its shareholders burdens and disabilities on the ground of mismanagement and neglect of duty. The opinion of the Court was not unanimous as Justice Patanjali Sastri and Justice Das dissented from the majority opinion and held the Act as discriminatory because it did not make any classification at all and the selection was arbitrary. Justice Patanjali Sastri observed that "It is undesirable that equal protection of the laws can not mean that all laws must be quite general in their character and application. A legislature ...... must of necessity have the power of making special laws to attain particular objects and must for that purpose possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object which the legislature has in view......" ^2

Justice Mukherjea who concurred with the majority opinion upheld the classification on the ground that a corporation which is engaged in production of a commodity vitally essential to the

community has a special character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one can not say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interests of the community at large.

It may be pointed out here that special legislation is not unconstitutional but a legislation of the kind upheld in Charanjit Lal's case is not devoid of underlying dangers. Justice Sastri was critical of such a legislation because to him it was like a bill of attainder and he emphasised in his judgments that such legislation should not receive judicial encouragement. Apprehensions expressed by him in Charanjit Lal case shortly came to be true when the Supreme Court had to give its verdict in Ameerunnissa Begum v Mahboob Begum. In this case an Act, titled as Hyderabad Waliddowla Succession Act, 1950 was challenged as violative of Article 14 on the ground that the object of the impugned Act was to put an end to a private dispute between two parties concerning the claims of succession. The Court set aside the Act and held that no public purpose was served or advantage was secured to the community as a whole.

3. Ibid p. 94.
Again in Ram Prasad Narayan v State of Bihar, the Sathi Lands (Restoration) Act (34 of 1950), aimed at a single settlement of certain lands of a Ward's Estate, given on lease to two individuals by the Court of Wards was invalidated. The Court held that this was purely a dispute between the private parties and a matter for determination by duly constituted Courts to which is entrusted, in every free and civilised society. The important function of adjudicating on disputed legal rights, after observing the well established procedural safeguards which include the right to be heard, the right to produce witnesses and so forth. This is the protection which the law guarantees equally to all persons and the Constitution prohibits by Article 14 every State from denying such protection to anyone. Any legislation which is contrary to it "is calculated to drain the vitality from the Rule of Law which our Constitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines."  

The Supreme Court, however, again relied on its decision in Charanjit Lal case in Tibbia College v State of Delhi, where the Court upheld the validity of Tibbia College Act, 1952, an Act enacted only to deal with mismanagement of Tibbia College, whereas other institutions in similar situation were not included. Thus the law laid down in Charanjit Lal's case continues to be good law.

Again in State of J. & K. v Bakshi Gulam Muhammad, it was

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contended that the Government had discriminated against Bakshi Gulam Muhammad in a hostile way by picking him up alone out of the entire Cabinet for the purpose of enquiry by the Commission of Enquiry\(^1\). The Supreme Court however, held that since the inquiry is in respect of wealth acquired by Bakshi Gulam Muhammad and his friends and relatives by misuse of his official position, "it would be strange if all the members of the Cabinet voluntarily abused their office for money into the pockets of Bakshi Gulam Muhammad and his friends....He was therefore a class by himself. This classification has further a rational connection with the setting up of the Commission, for the object is to find out whether the wealth had been acquired by Bakshi Gulam Muhammad by the use of his official position."\(^2\)

Again in Andhra Sugars Ltd. v State of A.P\(^3\), the Court upheld the validity of Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act (45 of 1961) and interpreted the differential treatment under the said Act, of the factories producing sugar by means of vacuum pans, khandtsari units producing sugar by open pan process and the cane growers for the manufacture of jaggery, as reasonable and having a rational relation to the object of taxation.

But in Deputy Commissioner Kamrup v Durganath\(^4\), the Court held the Assam Act 6 of 1955 as violative of Article 14. In this case the said Act empowered the Government to acquire land for the

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\(^1\) The Commission of Enquiry was set up under Section 3 of the J.&K. Commission of Enquiry Act (32 of 1962).
\(^3\) A.I.R. 1968 S.C. 601.
purpose of works and measures to be taken in connection with control and prevention of floods, on nominal compensation while adjoining lands could be taken for other public purposes under the Land Acquisition Act of 1894, on payment of adequate compensation. The Court held that this differential treatment under the two Acts was not permissible under Article 14, which requires that all persons shall be treated alike in like circumstances and conditions.

In the State of Uttar Pradesh v Kaushailiya, the Supreme Court reiterated that Article 14 does not prohibit reasonable classification for the purpose of legislation and a law would not be held to infringe Article 14 if the classification is formed on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the law. In this case Section 20 of the Suppression of Immoral Traffic in Women and Girls Act was challenged as violative of Article 14 on the ground that the said Section enabled the Magistrate to discriminate between prostitute and prostitute in the matter of restricting their movements. Justice Subba Rao who delivered the judgment, upholding the validity of the challenged Section, observed that there is a difference between a woman who is a prostitute and who is not and there was a difference between a prostitute who is a public nuisance and one who is not. A prostitute who carries her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health or moral as a prostitute who lives in a busy locality or in an over-crowded town or in a place within the easy reach of public

institutions like religious and educational institutions. Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralise the public morals but, what is worse, is to spread diseases not only affecting the present generation, but also the future one. Such trade in public may also lead to scandals and unseemly broils. There are therefore, pronounced and real differences between a woman who is a prostitute and who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and a prostitute whose actions in public places call for the imposition of restrictions on her movements and even deportation. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act. Section 20 in order to prevent moral decadence in a busy locality, seeks to restrict the movements of the second category of prostitutes. The classification is reasonable and Section 20 of the Act does not infringe Article 14 of the Constitution.

On the whole it may be said that the Supreme Court has upheld the doctrine of classification on one ground or another. The Parliament and the State Legislatures have been given a free hand to enact discriminatory special laws. Recently however, the Supreme Court in the Bank Nationalisation case superseded the earlier judicial theory that it was enough to concentrate on the

powers of the State and the object of the State action to the exclusion of its effect on person or party whose interests were affected\(^1\). The Court in the present case declared the nationalisation of fourteen banks as void on the ground of hostile discrimination. The named banks out of the many commercial banks engaged in the business of banking, were selected for special treatment in that the undertaking of these banks was taken over and they were prevented from carrying on in India and abroad banking business and from engaging in business other than banking. The Government selected these fourteen banks on the ground that these banks held deposits of not less than rupees fifty crores.

The petitioners who challenged nationalisation of these banks pleaded that nationalisation had imposed discriminatory disabilities on the nationalized banks and there was no rational ground for the special treatment. Consequently the right to equality guaranteed by the Constitution had been impaired.

The Government of India on the other hand contended that there was a reasonable relation between the differentia and the object of the Act. It was further contended that the policy of the Union was to control the concentration of private economic resources to ensure achievement of the Directive Principles of State Policy, and for that purpose, selection had been made "with an eye inter alia, to the magnitude and concentration of the economic resources of such enterprises for inclusion in such law as would be essential or substantially conducive to the achievement

\(^1\) See The Tribune, February 13, 1970.
of national policy." And the nationalized banks were selected for acquisition because they have "larger business and wider coverage" in comparison with other banks not selected.

The Court declared that the above grounds did not explain the rational relation of the classification to the object of the Act. It held that the petitioners were on the firm ground in contending that when after acquiring the assets, undertaking, organisation, goodwill and the names of the nationalized banks, they were prohibited from carrying on banking business, whereas other banks - Indian as well as foreign, were permitted to carry on banking business, "a flagrantly hostile discrimination" was practised.

The above decision is clearly a departure from the earlier policy of the Court to uphold discriminatory legislation. The decision of the Court is a cause of great embarrassment to the Parliament, but the Court in rendering this opinion has at once made a significant and far reaching contribution to the corpus of fundamental rights.

Right to Freedom: Article 19 which embodies the right to freedom is another important article which has been frequently invoked before the Supreme Court. This Article guarantees seven fundamental freedoms to the citizen, namely, freedom of speech and expression\(^1\), of peaceful assembly\(^2\), of association\(^3\), of movement\(^4\), of residence\(^5\), freedom to acquire, hold and dispose of property\(^6\).

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\(^*\)Emphasis is mine

1. 19(1)(a).
2. 19(1)(b).
3. 19(1)(c).
4. 19(1)(d).
5. 19(1)(e).
6. 19(1)(f).
and to practice any profession, to carry on any trade or occupation. Article 19 is neither independent nor absolute as it is shadowed by the provisions of Articles 21, 22 and 358. The freedoms contained in this Article can be enjoyed only if a person is free. Article 19 presupposes that the citizen to whom the enjoyment of these freedoms is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessary rests. But when a citizen is lawfully deprived of his freedom as a punishment for committing a crime or breaking a law, there can be no question of his exercising or invoking the rights referred to in clause(1) of Article 19. The above view was held in the Gopalan case: "if a man's person is free, it is then and then only that he can exercise a variety of other auxiliary rights, that is to say, he can within certain limits speak what he likes, assemble where he likes, form any associations or unions." Again the freedoms embodied in Article 19 can be enjoyed only when the proclamation of emergency is not in operation. Article 19 is automatically suspended when emergency is proclaimed under Article 358 of the Constitution.

Further the freedoms guaranteed under this Article are not absolute in nature. Restrictions are envisaged under clauses(2) to (6) of the Article. The word 'restrictions' has, however, been qualified by the word 'reasonable' which contemplates the role of

1. 19(1)(g).
the Court to determine the reasonability. Whether any law has in fact transgressed these limitations is to be ascertained by the Court and if in its view the restrictions imposed by the law are greater than what is permitted by clauses (2) to (6), whichever is applicable, the Court will declare the same to be unconstitutional and therefore, void under Article 13 of the Constitution. "Here....... is scope for the application of the 'intellectual yardstick' of the Court. If, however, the Court finds on scrutiny that the law has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not."¹

As to the question whether the restrictions amounting to prohibition be justified, the Court has given a decision damaging to the enjoyment of the freedoms. It held in Narendra Kumar v Union of India²: ".........there can be no doubt therefore, that they (makers of the Constitution) intended the word 'restriction' to include cases of 'prohibition' also. The contention that the law prohibiting the exercise of any fundamental right is in no case saved can not, therefore be accepted. It is undoubtedly correct, however, that when.....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."

This decision definitely tends to whittle down the fundamental rights guaranteed under Article 19, not withstanding the comforting words on the part of the Court that the greater the

restriction the more strictly it would be scrutinized by the Courts. 

Again a distinguishing feature of Article 19 is that it guarantees the rights embodied in it only to 'citizens'. The word 'person' which has been used in the rest of the Articles in Part III of the Constitution has been avoided in the text of Article 19. Question has arisen whether corporations are citizens, to enjoy the freedoms conferred by Article 19, to this question, the Court has held that corporations are not citizens; but juristic persons and juristic personality does not necessarily imply citizenship. The Court has reaffirmed this view more than once. First in State Trading Corporation of India v C.T.O when it held that juristic persons are not citizens and therefore, cannot claim the freedoms guaranteed exclusively to citizens under Article 19. Again in Tata E. and L. Co. Ltd. v State of Bihar, the Court held that the effect of confining Article 19 to citizens as distinguished from persons to whom other Articles like Article 14 apply, clearly must be that it is only citizens to whom the rights under Article 19 are guaranteed. Since the Corporations are not citizens they cannot get the benefit under Article 19.

A citizen however, is entitled to enjoy each and every freedom guaranteed to him by the Constitution without being made to sacrifice one freedom for the sake of another. One freedom cannot be preferred to another. The State cannot make a law which

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directly restricts one freedom even for securing the better enjoyment of another freedom.  
Right to Freedom of Speech and Expression: The right to freedom of speech and expression is guaranteed by Article 19(1)(a). This is a right which may be said to provide the basis of democratic life. The freedom of speech and expression implies that the individual has a right to think and express himself freely according to his convictions, to advocate any philosophy or ideology he believes in. In the absence of this right thought becomes checked and atrophied. It is in fact the freedom of public expression alone that 'assures' the unfolding of truth and is 'indispensable to the democratic process'. This right has been rightly called the 'boast of democracy', for the principle of 'the consent of the governed' on which it thrives would have no meaning if public discussions or the means and ways by which the public opinion were to be educated, were banned. Justice Cardozo thus calls the freedom of speech and expression as 'the matrix, the indispensable condition of nearly every other form of freedom'.

Freedom of speech and expression implies the communication, dissemination, propagation of ideas, opinions freely by word of mouth, writing, painting, printing, etc. It thus includes freedom of the press, movies, radio and television. Article 19 however does not expressly provide for these freedoms but the Court has

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ruled in numerous cases that the freedom of speech and expression includes the freedom of press.\(^1\)

There is hardly any need to emphasise the importance of the freedom of the press, for a free press stands as one of the great interpreters between the government and the people and is one of the significant means to the end of a free society. Jefferson once remarked that if he had to choose between a free government and a free press, he would opt for the free press. Le Roy Collins\(^2\) justifying the remarks of Jefferson observes that Jefferson knew well that without a free press, any free government would soon perish, while with a free press regardless of other conditions, a free government would soon emerge.

Justice Patanjali Sastri spoke in the same vein in Romesh Thappar v State of Madras\(^3\), that "freedom of speech and press lay at the foundation of all democratic organisations for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."\(^4\)

The Supreme Court has expressed itself as a jealous guardian of this right. In this context it has invariably relied upon the judgments of the Supreme Court of the United States. In Romesh Thappar v State of Madras\(^5\) the validity of Section 9(1-A) of Madras Maintenance of Public Order Act, 1949 under which the Government

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2. Former Governor of Florida.
4. Ibid p. 128.
had imposed a ban on the entry and circulation of the journal 'Cross-Roads' in the State, was challenged as violative of Article 19(1)(a). The Court declared the Section as unconstitutional. Justice Patanjali Sastri speaking for the majority opinion of the Court observed, "there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is envisaged by the freedom of circulation." He relied upon the observation of Justice Field that "liberty of circulation is as essential to the freedom of press as liberty of publishing; indeed without the circulation, the publication will be of little value."¹

Following the same line of thinking, the Court in Brij Bhushan v State of Delhi² held that the "imposition of precensorship is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Article 19(1)(a).". It declared Section 7(1)(a) of East Punjab Safety Act, 1949, under which pre-censorship was imposed on 'The Organiser' an english weekly of Delhi by Chief Commissioner of Delhi, violated the liberty of the press.

Justice Fazl Ali dissented from the majority opinion in this case and criticised the tendency of the modern jurist to deprecate censorship, though they all agree that 'liberty of the press' is not to be confused with its licentiousness³.

Again in Express Newspapers (Private) Ltd. v The Union of India⁴, the Working Journalists Act, 1955, was challenged as ultra

¹. Ex Parte Jackson 96 U.S. 727 (1877).
vires, for infringing besides other fundamental rights, the right to the freedom of press. It was contended on behalf of the petitioners that Article 19(1)(a) which guarantees freedom of speech and expression includes the freedom of the employment of means to exercise those rights and consequently comprehends the freedom of the press. The guarantee of an abstract freedom of expression it was pleaded, would be meaningless unless it contemplated and included in its ambit all the means necessary for practical application of the freedom of speech and expression. They extensively quoted American case law in their support.

Justice Bhagwati who delivered the judgment also made ample reference to the American case law on the subject to explain the freedom of the press. The Working Journalists Act, which he held, is a measure for the amelioration of the conditions of the workmen in the newspaper industry does affect the newspaper establishment and has its repercussions on the freedom of the press and is not saved by any provision of Article 19(2). But the Act could not be struck down as unconstitutional for "neither the intentions nor the effect and operation of the impugned Act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners."¹

Justice Bhagwati laid down a dictum in this case that: "While therefore no such immunity from the general laws can be claimed by the press, it would certainly not be legitimate to subject the press to laws which take away or abridge the freedom of speech and expression or which would curtail circulation and thereby narrow

¹ A.I.R. 1958 S.C. 578.
the scope of dissemination of information, or fetter its freedom
to choose its means of exercising the right or would undermine its
independence by driving it to seek Government aid."¹

The dictum laid down in the Express Newspapers case is how-
ever, of hardly any practical value. Because if not impossible,
it is not easy to ascertain the intention of a legislature. Also
even if the intentions of a legislature were otherwise, if the
effect of any law passed by it were to directly hit the fundamental
freedom such a plea could not be accepted. For example in Sakal
Papers(P) Ltd. v Union of India², the Court declared the Newspaper
(Price and Page) Act, 1956 as unconstitutional. The Act empowered
the Government to regulate the prices of newspapers in relation to
their pages and size, so as to prevent unfair competition among the
newspapers. Consequently the Government issued the Daily Newspaper
(Price and Page) Order, 1960, which affected the right of a news-
paper to publish news and views and to utilise as many pages as it
likes for that purpose depending upon the price charged to the
readers.

The intention in this case though was to prevent unfair
competition, it affected the freedom guaranteed under Article
19(1)(a) for if the price was raised, circulation was affected and
if it was reduced it resulted in the restriction of the disseminat-
ion of news and views. The freedom of a paper, the Court held, to
publish any number of pages or to circulate it to any number of
persons, each is an integral part of the freedom of speech and

expression. A restraint placed on either of these would be a direct infringement of the right to freedom of speech and expression.

In regard to advertisements within the scope of freedom of speech and expression, the question arose in Hamdard Dawakhana v Union of India. It was held that an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Article 19(1)(a) which it seeks to aid by bringing it to the notice of the public. It however, no longer falls within the concept of freedom of speech, when it takes the form of commercial advertisement which has an element of trade or commerce, for the object is not propagation of ideas, social, political or economic or furtherance of literature or human thought but the commendation of the efficacy, value and importance of certain goods. It can not, therefore, be said that every advertisement is a matter dealing with freedom of speech or expression of ideas. Freedom of speech observed Justice Kapur, goes to the heart of the natural right of an organised freedom loving society "to impart and acquire information about that common interest." If any limitation is placed which results in the society being deprived of such a right then no doubt it would fall within the guaranteed freedom under Article 19(1)(a). But if all it does is that it deprives a trader from commending has wares it

2. Ibid.
would not fall within the term. Freedom of speech also includes the freedom of movies, radio and television. There is no judgment of the Supreme Court of India in this respect so far. Recently however, a petition first of its kind has been filed by K.A. Abbas, a film producer before the Constitution Bench of the Supreme Court, challenging the constitutional validity of the relevant provisions of the Cinematographic Act 1952, on the ground of infringement of fundamental right of freedom of speech and expression guaranteed by the Constitution. The producer produced a documentary film entitled 'A Tale of Four Cities', portraying the paradox of development in the country since independence. Exposing social evils, the documentary exhibits the plight of women in what is called "red light area." The documentary when submitted for certification under the Cinematographic Act, to permit its exhibition, the Board of Film Censors did not consider it fit for exhibition and refused to issue the certificate for universal exhibition and issued a certificate for restricted exhibition of the film, namely only for adults. On appeal against this decision, the Union Government directed that the scene of women in "red light area" be shortened and suggestive shots be deleted, as these dealt with the relation between the sexes so as to depict immoral traffic in women and prostitution.

The petitioner has challenged the decision of the Censor Board and of the Government of India, refusing the "universal exhibition" certificate and the relevant censorship law on the

2. In India Radio and Television are controlled by the Union Government and film censorship is a matter of administrative discretion regulated under the Cinematograph Act, 1952.
ground that "films" constituted a form of guaranteed freedom of speech and expression and censorship was an invasion of this basic right of the citizen. It has been further contended that the certificate issued in this case restricting the exhibition to adults only, amounted to a "virtual ban" in as much as all documentary films were released through the Government and in actual practice, no exhibitor would take the risk of exhibiting only a documentary film with such a certificate. The decision of the Court has not been given to date (November, 1970) as the Constitution Bench presided over by Chief Justice Hidayatullah, has decided to see the film first before giving its decision.

There are however many pronouncements of the Supreme Court of the United States on the subject. In 1915, when the question of deciding upon the validity of State laws requiring the licensing of motion pictures came before the Supreme Court, it treated them as spectacles rather than organs of public opinion. But since 1952, the Court has reversed its earlier stand. In Burstyn v Wilson, it set aside the ban on the picture 'Miracle' on the ground that the motion pictures were equally protected under the First and Fourteenth Amendment. Subsequently, the Supreme Court of the United States has been adhering to this policy mostly. The Court has been quite liberal in its outlook in rejecting censorship imposed

1. The Supreme Court of the United States has affirmed in many cases that "Censorship is a form of infringement upon freedom of speech and expression to be especially condemned." See Burstyn v Wilson, 343 U.S. 495.

*Emphasis is mine.

4. See Gelling v Texas, 343 U.S. 960 (1952); Holmby Production Inc. v Vaughn, 350 U.S. 870 (1955); Times Film Corp. v Chicago, 355 U.S. 35 (1957); Superior Film v Ohio, 356 U.S. 587 (1959).
The Constitution of India also envisages 'obscenity' as a ground for reasonable restrictions to be imposed, to maintain 'decency or morality' under Article 19(2). In 1965, for the first time the Supreme Court of India was called upon to decide on the question of obscenity in Ranjit Udeshi v Union of India. The Court held that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech and expression. But it was warranted by the Court that while deciding whether obscenity squares with freedom of speech and expression, it must beware that it may not lean too far away from the guaranteed freedom.

In this case the Court was to decide whether D.H. Lawrence's novel 'Lady Chatterley's Lover' fell within the category of obscene literature. Justice Hidayatullah who delivered the judgment refused to adopt any hard line on the matter but emphasised that in this connection the interests of contemporary society and particularly the influence of the book must not be overlooked. It is true that obscenity pays and true art finds little popular support but where art and obscenity are mixed, art must be so preponderating as to throw the obscenity into a shadow that it can have no effect and may be overlooked. "A balance must be maintained" observed Justice Hidayatullah, "between freedom of speech and expression and public decency and morality but where

1. See Roth v United States, 354 U.S. 355. In this case the Court laid down the test of obscenity: "matter that considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

the latter is transgressed the former must give way." He further laid down a broad test that should generally be applied to determine obscenity: "In our opinion, the test to adopt in our country (regard being had to our community 'mores') is that obscenity without a preponderating social purpose or profit can not have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case."¹

The freedom of speech is further extended to include picketing and demonstration both in the United States² and India but it must be peaceful and orderly and not violent and disorderly³. In Kameshwar Prasad v State of Bihar⁴, it was held that "a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression because speech need not be vocal since signs made by a dumb person would also be a form of speech."⁵

The Supreme Court has thus interpreted liberally the freedom

of speech and expression to include various means of communication. It may however, be pointed out that this freedom is not of absolute nature. The State is empowered under Article 19(2) to place 'reasonable restrictions' by legislation in the interests of sovereignty and integrity of India\(^1\), 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.

Right to Assemble: Freedom of speech and expression is followed by the freedom of assembly, but this freedom is qualified by two conditions viz., the assembly must be 'peaceful' and 'without arms'. Article 19(1)(b) reads: "All citizens shall have the right to assemble peaceably and without arms."

An assembly which is not peaceful, that is, it is violent or is called for the purpose of engaging in violent action, is not permitted and no citizen can claim it as his fundamental freedom. The State can take action against such an assembly. The State is also empowered under Article 19(3) to impose reasonable restrictions in the interests of sovereignty and integrity of India\(^2\) or public order without which the liberty itself would be lost in the excess of unrestrained abuses\(^3\).

In the United States the First Amendment recognises this freedom. It provides: "Congress shall make no law abridging the right of the people to peaceably assemble."

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1. Inserted by the Constitution (Sixteenth Amendment) Act, 1963, Section 2.
2. Ibid.
The First Amendment protects this right against the Congress only. The Supreme Court has however, protected it against the State interference also by interpreting it in the context of 'due process.' Further the First Amendment does not envisage restrictions on this freedom but the Court has held that in exceptional cases the State can regulate and control this freedom. For example in Hague v C.I.O., though the Court held it improper to bar meetings in streets and parks, it upheld the right of the State to regulate the use of streets and parks "in the interests of all."

The Supreme Court of India has also held that the holding of a meeting in the street or highway is public nuisance and restrictions can be placed. Restrictions on holding a meeting on government premises have also been upheld by the Court. In a recent decision the Supreme Court has set aside the Punjab High Court's (Delhi Bench) decision, holding that the rights of 'peaceful assembly' and forming of 'associations' granted under Article 19(1) of the Constitution do not guarantee these rights to any one to hold meetings on government premises. In this case the petitioner, a railway employee and trade union worker had challenged the order of the General Manager (Northern Railway), prohibiting the meetings on the Railway premises, as violative of Article 19(1). The Court held that "it might lead to confusion in public offices" if it was

1. de Jonge v Oregon 299 U.S. 353 (1933).
accepted that the fundamental rights of citizens, freedom of speech, peaceful assembly and forming associations, were capable of being exercised "in whatever place they please." It further held that the exercise of these freedoms came to an end as soon as the right of some one else to hold his property intervened.

Right to Form Associations or Unions: Like the right to free speech and assembly which lies at the foundations of a free society, right to form association is another important right recognised in the Constitution of India under Article 19(1)(c) which states: "All citizens shall have the right - to form associations or unions." Reasonable restrictions can be placed on this right in the interests of the sovereignty and integrity of India or public order or morality.

The right to form associations is different from that of assembly in the sense that the later "includes only the physical meeting of many in one place", while the former "presupposes organisation and a relation of some permanence between many persons!"

The Supreme Court gave a narrow interpretation of Article 19(1)(c) in P. Balakotaiah v Union of India. In this case the petitioners claimed that the Order (under R.3 of Railway Services (Safeguarding of National Security) Rules (1949)) terminating their services because they were communists or trade unionists, violated the freedom to form association guaranteed under Article 19(1)(c).

2. Article 19(4).
The Court rejecting their plea and held that the appellants have no doubt a fundamental right to form associations under Article 19(1)(c) but they have no fundamental right to be continued in employment by the State, and when their services are terminated by the State, they can not claim the infringement of any of their constitutional rights when no question of violation of Article 311 arises.

In Tika Ram Ji v State of U.P., it was contended that the positive right to form associations includes the negative right also, not to form an association. The Court however, rejected this argument. It held that the right not to form an association was there but it could not be included in the positive right as a fundamental right.

Article 19(1)(c) was further elaborated in All India Bank Employees' Association v National Industrial Tribunal. The Court observed that a right to form a union guaranteed by Article 19(1)(c) does not carry with it a fundamental right in the union so formed to achieve every object for which it was formed. It was illustrated in this case that while a right to form union was guaranteed by sub-clause (c), the right of the members of the association to meet would be guaranteed by sub-clause(b), the right to move from place to place within India by sub-clause(d), their right to discuss their problems and propagate their views by sub-clause(a), their right to hold property by sub-clause(f) and so on.

Also see M/s Raghubar Dayal v Union of India, A.I.R. 1962 S.C. 263.
* Emphasis is mine.
Have the government servants the freedom to form associations and unions? To this question, the Court has given an affirmative answer. In O. K. Ghosh v E. X. Joseph the validity of Rule 4 of the Central Civil Services (Conduct) Rules (1955) was challenged as violative of 19(1)(c) on the ground that the rule compelled a government servant to withdraw his membership of the Service Association of Government Servants as soon as recognition to the said Association was withdrawn or if after the Association was formed, no recognition was accorded to it within six months.

The Court declaring the said Rule as invalid, observed that "though Government servants can be subjected to rules which are intended to maintain discipline amongst their ranks and to lead to an efficient discharge of their duties, there is no direct or proximate or reasonable connection between the recognition by the Government of the association and the discipline amongst and the efficiency of the members of the said association. Similarly there is no connection between recognising an association and public order. It is quite possible that recognition may be refused or withdrawn on grounds which are wholly unconnected with public order and it is in such a set up that the right to form associations guaranteed by Article 19(1)(c) is made subject to the rigorous restriction that the association in question must secure and continue to enjoy recognition from the Government. Therefore, the restriction thus imposed would make the guaranteed right under Article 19(1)(c) ineffective and even illusory. The impugned rule 4-B is therefore invalid."  

2. Ibid.
In the same case, the words 'in the interests of public order' occurring in clause (4) of Article 19, came up for interpretation. It was held that 'public order is synonymous with public peace, safety and tranquility.' It was further held that "a restriction can be said to be in the interests of public order only if the relation between the restriction and the public order is proximate and direct. Indirect or far fetched or unreal connection between the restriction and the public order would not fall within the purview of the expression, 'in the interests of public order."¹

Right to Move, Reside and Settle: The right of a citizen to move freely throughout the territory of India, to reside and settle in any part of the territory of India is guaranteed under Articles 19(1)(d) and 19(1)(e), subject to reasonable restrictions in the interests of the general public or for the protection of the interests of any Scheduled Tribe².

In A.K. Gopalan v State of Madras³, it was contended that the right to freedom of movement is a right of personal liberty and that preventive detention was a deprivation of such a right. The Court however, rejected such a wide interpretation of Article 19(1)(d). Elaborating the Article the Court observed that the words "throughout the territory of India" indicate that free movement from one State to another within the Union is protected so that Parliament may not by law curtail it beyond the limits

prescribed by clause (5) of Article 19. Its purpose is not to provide protection for the general right of free movement but to secure a specific and special right of the Indian citizen to move freely throughout the territories of India. It is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian Union. In short it is a protection against provincialism. It has nothing to do with the freedom of the person as such. Justice Fazl Ali however, considered the interpretation given to freedom of movement, narrow and dissented from the majority opinion of the Court. According to him Article 19(1)(d) guarantees the right of freedom of movement in its widest sense. The word "throughout" he said, "is an amplifying expression and not a limiting expression. This expression is used to give the widest scope to the freedom of movement. The juristic conception that personal liberty and freedom of movement connote the same thing, is the correct and true conception and the words used in Article 19(1)(d) must be construed according to this universally accepted legal conception....the freedom of movement being the essence of personal liberty, the right guaranteed under the article is really a right of personal liberty and preventive detention is a deprivation of the right."  

Article 19(1)(d) has been frequently invoked against the externment orders issued by the executive. In N.B. Khare v State of Delhi, an externment order issued on Khare under the East Punjab Public Safety Act, 1949, was challenged as violative of the

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2. A.I.R. 1950 S.C. 211.
freedom guaranteed under sub-clause(d) of Article 19(1). It was upheld by the Court as the order was saved by clause(5) of Article 19 which permits of reasonable restrictions to be placed in the interests of general public. Justice Mukherjea gave a dissenting opinion in this case on the issue of 'reasonability' of the order but reiterated the line of argument held in the Gopalan case that Article 19(1)(d) of the Constitution guarantees "the right to all citizens to go wherever they like in the Indian territory without any kind of restriction whatsoever. They can move not merely from one State to another but from one place to another within the same State and what the Constitution lays stress upon is that the entire Indian territory is one unit so far as the citizens are concerned."\(^1\)

In Kharak Singh v State of U.P.\(^2\), Justice Ayyangar speaking for the majority said that the right to 'move' denotes nothing more than a right of locomotion and in that context the adverb 'freely' would only connote that the freedom to move is without restrictions and is absolute, viz., to move wherever one likes, whenever one likes and however one likes, subject to any valid law enacted or made under clause(5). It is manifest, he further held, that by the knock at the door of a person or by being roused from his sleep, his locomotion is not impeded or prejudiced in any manner.

The Court rejected in this case the contention of the counsel that the knowledge or apprehension that the police were on the


watch for the movements of the suspect might induce a psychological inhibition against his movements. On the other hand it held that "freedom guaranteed by Article 19(1)(d) has reference to something tangible and physical rather and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion."¹

In the case of Indians going abroad and returning to India, restrictions imposed on their entry in the sense that the entry is made subject to the production of a passport or a permit, have been upheld by the Court as reasonable restrictions and not in contravention of freedoms guaranteed in Article 19(1)(d) and (e).

In Abdul Rahim v State of Bombay², Section 3 of the Passport Act (1920) and Rule 3 of the Passport Rules (1950) which require the production of a passport or a permit before entry into India could be allowed, were challenged as ultra vires because they violated the right guaranteed in Article 19(1)(d) and (e). The Court upheld the Act and affirmed its earlier decision in Ebrahim Vazir v State of Bombay³, that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be.

before he can be allowed to enter India and this requirement may well be regarded as a proper restriction upon entry.

**Freedom of Trade and Occupation**: Article 19(1)(g) of the Constitution guarantees to citizens the right to practise any profession, carry on any occupation, trade or business, subject to reasonable restrictions in the interests of the general public as provided in clause (6) of Article 19. This clause was amended in 1951 to empower the State to make laws relating to (i) 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.

The increase in the circumference of the economic activity of the State has resulted in the corresponding decrease in the economic liberty of the individual embodied in Article 19(1)(g).

No hard and fast rules have been laid down by the Supreme Court for the interpretation of Article 19(1)(g), in view of the varying nature of each trade, profession and occupation. The Court has counted the facts of an individual case.

In Babul Chandra v Chief Justice of Patna, the Court upheld the discretionary authority vested in the High Court under the Indian Bar Councils Act, 1926, to refuse to an otherwise qualified lawyer, the right to practice as an advocate.

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1. This amendment was made to negative the effect of the High Court decision in Moti Lal v U.P. (A.I.R.1951,All.257) which had defeated the policy of nationalisation of Road Transport Services initiated by the U.P. Government.

In Cooverjee v Excise Commissioner\(^1\), the Court held that trade in noxious or dangerous goods or trafficking in women may be prohibited altogether but the trade which is not illegal or injurious or of immoral nature may be regulated in the interests of the general public.

Again the Court upheld the State control of essential commodities like foodstuffs, fuel, building material, cotton textiles etc., to ensure the availability to all, the control being in the public interest.\(^2\)

Again in Chintaman Rao v Madhya Pradesh\(^3\), the Court held the total prohibition of bidi making during the agricultural season under the Central Provinces Regulation of Manufacture of Bidis Act, 1948, as invalid. "Though the object of the Act" the Court observed, "was to supply adequate agricultural labour during the bidi manufacturing season, it prohibited altogether the manufacture of bidis even by outside non-agricultural labour which could not have been available for agricultural purposes. It prevented the employment even of residents of the villages who were incapable of serving as agricultural labourers. The statute as it stands prohibits persons who have no connection or relation to agricultural operations from engaging themselves in bidi making and thus earning their livelihood."\(^4\)

Further it may be pointed out that before the amendment of

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clause(6) of Article 19, monopoly was considered as violative of Article 19(1)(g). But the amendment paved the way for the creation of monopoly by the State, which could not be challenged as violating Article 19(1)(g). In Saghir Ahmad v State of U.P., the Court explained the effect of the amendment of Article 19(6) by observing:

"The new clause in Article 19(6) has no doubt been introduced with a view to providing that a state can create a monopoly in its favour in respect of any trade or business; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19(6). The result of the amendment is that the State would not have to justify such action as reasonable in a court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19(1)(g) of the Constitution." 

The Court however, changed the premises of its decision in Akadashi v State of Orissa, for it held that "the amendment made by the legislature (Parliament) in Article 19(6) shows that according to the legislature, a law relating to the creation of a State monopoly should be presumed to be in the public interest."

Article 20: This Article guarantees protection in respect of conviction for offences. It lays down:

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

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

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

Article 20(1) in its broad import has been enacted to prohibit convictions and sentences under 'ex post facto' laws. Interpreting Article 20(1), Justice Jagannadhadas observed in Shiva Bahadur Singh v State of Vindhya Pradesh\(^1\), that "there can be no doubt as to the paramount importance of the principle that such ex post facto laws which retrospectively create offences and punish them are bad as being highly inequitable and unjust."\(^2\) He further observed that this Article must be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of 'ex post facto' laws whether the same was a post-Constitution law or pre-Constitution law\(^3\). No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. If an act is not an offence at the time of commission, no future law can make it an offence. The phrase 'law in force' as used in Article 20(1), the Court has held, must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law deemed to have become operative by virtue of the power of the legislature to pass retrospective laws\(^4\).

3. Ibid.
4. Ibid p. 399.
Article 20(1) can also be invoked if the 'ex post facto' law imposes a penalty greater than that which could be inflicted under the law in force at the time of the commission of the offence.

The word 'offence' used in all the three clauses of Article 20 has not however, been defined in the Constitution. The Court has held that it must be understood to convey the meaning given to it in Section 3(37) of the General Clauses Act, which defines an offence to mean an act or omission made punishable by any law for the time being in force.

Article 20(2) incorporates the well known principle of English jurisprudence that no one ought to be punished twice for one offence, 'nimo debet bis puniri pro uno delicto' and the American doctrine of double jeopardy. The ambit and content of the guarantee in clause (2) of the Article are however, much narrower than those of the Common Law rule in England or the doctrine of double jeopardy embodied in the American Constitution.

Article 20(2) operates as a bar to the second prosecution and punishment for the same offence whose ingredients are the same.

3. "Where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence." Per Justice Charles, Reg. v Miles (1890) 24 Q.B.D. 423.
4. The Fifth Amendment of the Constitution provides "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."
The article thus incorporates within its scope the plea of 'autrefois convict', whereas common law recognises both. There should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. In Venkataraman v Union of India, the Court observed that the "words 'prosecuted and punished' are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attracted." Thus where there is no punishment for the offence as a result of the prosecution, clause (2) of the Article has no application.

Further the Court has held that though the words 'prosecution' and 'punishment' have no fixed connotation and they are susceptible of both a wider and a narrower meaning, in Article 20(2) both the words have been used with reference to an 'offence', it follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what the law prescribes.

In Maqbool Hussain v State of Bombay, the Court observed that the words before a Court of law or judicial tribunal are not to be found in Article 20(2) but in order to invoke the protection of Article 20(2), there must have been a prosecution and punishment

in respect of the same offence before a Court of law or a tribunal required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or administrative enquiry, even though set up by a statute but not required to proceed on legal evidence given on oath. The Article contemplates proceedings of the nature of criminal proceedings before a Court of law or a judicial tribunal\(^1\).

Article 20(3) embodies the principle of protection against compulsion of self-incrimination which has roots again in a maxim well known to the British system of criminal jurisprudence 'nemo tenetur se ipsum accusare' i.e. no man is bound to incriminate himself. In other words a person has a guaranteed right to remain silent unless he chooses to speak in unfettered exercise of his own will.\(^2\)

The underlying value of this guarantee is the recognition of the inviolability of human personality and the respect that the government must accord to the dignity and integrity of an individual. The government seeking to punish an individual must produce the evidence against him by its own independent labours, rather than compelling it from his mouth\(^3\).

For invoking Article 20(3) two facts however, have to be established. Firstly, that the individual concerned was a person

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accused of an offence and secondly, that he was compelled to be a witness against himself. If only one of these facts and not the other is established, the requirements of Article 20(3) will not be fulfilled.¹

The American Constitution also provides for this protection under the Fifth Amendment with a little difference in the text. "No person....shall be compelled in any criminal case to be a witness against himself." This clause has received a broad and liberal interpretation at the hands of the Supreme Court of the United States². The Court has held that the privilege against self-incrimination can be claimed in any proceeding be it civil or criminal, administrative or judicial, investigatory or adjudicatory³.

It is on the analogy of this interpretation that a plea was made before the Supreme Court of India in Narayanlal v M.P.Mistry⁴ for a liberal interpretation of Article 20. After a perusal of case law on Article 20, the Court preferred to stick to its earlier literal approach to the import of Article 20. Justice Gajendragadkar speaking for the majority, observed that for invoking Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the offence which in the normal course may result in

³. Re Gault 387 U.S. 1 ; McCarthy v Arudstein, 294 U.S. 71.
prosecution.

Again the Court held that if a person who is not accused of any offence, is compelled to give evidence and evidence taken from him under compulsion ultimately leads to an accusation against him, that would not be a case which would attract provisions of Article 20(3). Violation of the protection against self incrimination was alleged in Dastagir v State of Madras. In this case the appellant had gone to the house of the Deputy Superintendent of Police to offer him a bribe in a closed envelope with the request that he might drop the case registered against him. The Police Officer threw the envelope at the appellant who picked it up. While the appellant was still at the house he was asked by the Police Officer to produce the envelope and he took out from his pocket some currency notes and placed them on the table without the envelope. The notes were then seized by the Police Officer and a rubber stamp of his office was placed on them. On these facts it was urged that in relying upon the evidence of compelled production of currency notes the prosecution had violated the provisions of Article 20(3). The Court rejected the appellant's arguments and held that the prosecution did not suffer from any infirmity. On the facts it was found that though the offence had in fact been already committed by the appellant he had not been accused of it at that stage when the currency notes were produced by him. It also held that it could not be said that he was compelled to produce the said currency notes, because he

might easily have refused to produce them, and so there was no occasion for him to invoke the constitutional protection against self incrimination.

Further the guarantee embodied in Article 20(3) is against the compulsion 'to be a witness'. In this context, the Supreme Court of India like its counterpart in the United States, subscribes to the 'testimonial theory', that is, 'to be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in a Court or otherwise by a person accused of an offence.

In State of Bombay v Kathi Kalu, the Court ruled that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are included in the expression 'to be a witness.' Earlier in M.P.Sharma v Satish Chandra, the Court had held that, the phrase is 'to be a witness' and not to 'appear as a witness.' It follows that the protection afforded to an accused in so far as it relates to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him.

'Compulsion', the Court has held must mean what in law is called 'duress'. Further 'compulsion' is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous

process as to render the making of the statement involuntary and therefore, extorted\(^1\). In Kathi Kalu case the Court held that an accused person can not be said to have been compelled to be a witness against himself simply because he made a statement while in police custody. In other words the mere fact of being in police custody at the time when the statement in question was made would not by itself as a proposition in law, lend itself to the inference that the accused was compelled to make the statement.

On the question, whether the search and seizure of documents fall within the protection of Article 20(3), the Court took a different stand from that of the Supreme Court of the United States. The Supreme Court of the United States has held that unreasonable search and seizure of documents fall equally within the mischief of the Fourth and Fifth Amendments\(^2\). The Supreme Court of India has held that search or seizure of a thing or document can not be treated as a compelled production of the same\(^3\). It maintains that "a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such power to constitutional limitations by recognition of a fundamental right to privacy analogous to the American Fourth Amendment, we have no justification to import it into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional

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2. See Boyd v United States (1885) 116 U.S. 616; Felix Gould v United States (1921) 255 U.S. 298.
protection under Article 20(3) would be defeated by the statutory provisions for searches....."¹

Right to Life and Personal Liberty: The fathers of the Constitution did not feel satisfied with the scope of freedoms guaranteed under Article 19, consequently, they specifically incorporated 'right to life' and 'personal liberty' in Article 21 of the Constitution².

Article 21 provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

It is a modified version of the right guaranteed in the United States under the Fifth and Fourteenth Amendments of the Constitution. The Fifth Amendment of the Constitution of United States reads: "No person shall be deprived of life, liberty.....without due process of law....."

The Fourteenth Amendment provides: ".....nor shall any State deprive any person of life, liberty.....without due process of law....."

'Due process of law' clause is the most important clause in the Constitution of the United States. In the guise of interpreting "due process of law", the American Courts have gradually arrogated to themselves the power to revise all legislation³.

3. Munro writes 'due process' clause has become a sort of palladium covering all manner of individual rights.(The Government of the United States, (1947), p. 520.
Justice Frankfurter described it as the 'most majestic concept.' But this concept has been defined neither in the Constitution nor by the Supreme Court. In fact the Court has observed that "few phrases of law are so elusive of exact apprehension as this... This Court has always declined to give a comprehensive definition of it and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision of cases as they arise." Consequently, if the Court wants to strike down any legislative or executive act as unconstitutional, it resorts to 'due process' clause, which smacks of arbitrary attitude of the Court. The 'due process of law' is thus understood as 'what the Supreme Court says it is.'

The vague and shifting interpretation of 'due process' has however, evoked strong criticism amongst the juristic circles in the United States. There is a strong feeling in the United States that "opinions of the Supreme Court on 'due process' have confused rather than clarified the subject."

In the Indian Constituent Assembly 'due process' clause was hotly debated. Keeping in view its imprecision and other drawbacks the Assembly preferred to substitute it by the words 'procedure established by law', an expression borrowed from Article 31 of the Constitution of Japan of 1946.

1. Justice Holmes observed in Moyer v Peabody (212 U.S.78,84) "What is due process of law depends upon circumstances. It varies with the subject matter and the necessities of the situation."

Justice Frankfurter observed in Burns v Wilson (346 U.S.137, 149). "There is no table of weights and measures for ascertaining what constitutes due process."


The words 'procedure established by law' were however, sought to be interpreted in A.K.Gopalan v State of Madras\(^1\), on the analogy of interpretation of 'due process of law' by the Supreme Court of the United States. It was contended that the word 'established' had a wider meaning and the word 'law' did not mean enacted law. The word 'law' it was argued meant principles of natural justice.

The Court by majority rejected such a wide contention of the petitioners and held that the 'procedure established by law must be understood to mean procedure prescribed by enacted law of the State. Chief Justice Kania, Patanjali Sastri, B.K.Mukherjea and Das JJ., adopted the same line of argument, though they expressed their views separately in their respective judgments. Justice Fazl Ali gave a dissenting opinion. Chief Justice Kania observed:

"The expression 'procedure established by law' must mean procedure prescribed by the law of the State....To read the word 'law' meaning rules of natural justice will land one in difficulties because the rules of natural justice as regards procedure are nowhere defined and in my opinion the Constitution can not be read as laying down a vague standard. This is particularly so when in omitting to adopt 'due process of law' it was considered that the expression, 'procedure established by law' made the standard specific. It can not be specific except as meaning procedure prescribed by the legislature....By adopting the phrase 'procedure established by law', the Constitution gave the legislature the final word to determine the law."\(^2\)

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2. Ibid p. 39.
Justice Patanjali Sastri observed: "Procedure established by law must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as 'the immutable and universal principles of natural justice.' In my opinion 'law' in Article 21 means 'positive or State made law.'" ¹

Justice Mukherjea observed: "...in Article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice. The Article presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the legislature* and the subject it relates to and does not infringe any of the fundamental rights which the constitution provides for." ²

Justice Das observed: "The right to life and personal liberty protected by Article 21 is not an absolute right but is a qualified right - a right circumscribed by the possibility or risk of being lost according to procedure established by law.... The word 'procedure' in Article 21 must be taken to signify some step or method or manner of proceeding leading up to the deprivation of life or personal liberty. According to the language used in the Article, this procedure has to be 'established by law'....'Established by law'...means 'enacted by law'.....the word law must mean state made law and can not possibly mean the principles of

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¹ A.I.R. 1950 S.C. 27 (72)

* Emphasis is mine.
natural justice for no procedure can be said to have ever been 'enacted' by those principles.\textsuperscript{1}

He further observed that the doctrine of 'due process' can thrive only where the legislature is subordinate to the judiciary and is not applicable where the legislature is supreme. Although the Constitution of India has imposed some limitations on the legislative authorities, in the main, subject to these limitations, the Constitution has preferred the supremacy of the legislature to that of the judiciary. In this context to try to bring in the American doctrine which has been evolved for serving quite a different system, will be to stultify the intention of the Constitution as expressed in Article 21. "A procedure laid down by the legislature", said the Justice, "may offend against the Court's sense of justice and fair play.....may outrage the Court's notions of penology, but that is a wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court can not question its wisdom or policy. The Constitution is supreme. The Court must take the Constitution as it finds it even if it does not accord with its preconceived notions of what an ideal Constitution should be. Our protection against legislative tyranny, if any lies in ultimate analysis in a free and intelligent public opinion which must eventually assert itself....I am not convinced that there is any scope for the introduction into Article 21 of our Constitution of the doctrine of 'due process of law' even as regards procedure I may or may not like it, but that is the result of our Constitution as I understand it."\textsuperscript{2}

\textsuperscript{1} A.I.R. 1950 S.C. 27(114).
Justice Fazl Ali dissenting from the majority opinion pointed out that the word 'law' used in Article 21 does not mean only State-made law. On the analogy of the interpretation of 'due process of law' by Willis, Justice Fazl Ali held that the words 'procedure established by law' must include four essentials: (i) notice, (ii) an opportunity to be heard, (iii) an impartial tribunal, and (iv) an orderly course of procedure.

The majority decision of the Court in the Gopalan case has circumscribed the import of Article 21, for in the light of the interpretation of this Article in this case, protection is afforded only against the executive and the legislature and the role of the Court is limited only to the scrutiny of the procedure followed in depriving an individual of his life and personal liberty. The judgment has been widely criticised in the juristic circles in the country. It is pointed out that the judgment in this case has taken flesh and blood out of the Article, leaving a lifeless skeleton of no value to the ordinary citizen. Interpretation of 'law' in Article 21 as the enacted law by the Court has placed the liberty of the citizen at the mercy of the party in power. A retired judge of the Supreme Court who while on the bench concurred with the majority decision has pleaded for a review of its decision by the Court. He contends that if you take procedure established by law to mean procedure prescribed by the legislature, then there would really be no protection for life and liberty against legislative encroachment on those lines.

2. S. Mohan Kumaramangalam, Personal Liberty, A.I.R. 1955 J. 39. Kumaramangalam suggests that the amendment of Article 21 is vitally necessary if that Article is to have any meaning of the decision in the Gopalan's case (p. 42).
this connection it was unfortunate" observes the Judge, "that the Supreme Court has decided that the procedure established by law meant the same thing as procedure prescribed by law. The Supreme Court has framed the interpretation which was not consistent with the nature of Fundamental Rights and which was contrary to the very essence of Fundamental Rights."\(^1\)

The Supreme Court has however, consistently conformed to its decision given in the Gopalan case that the expression 'procedure established by law means procedure prescribed by law and that it is open to the Parliament to change the procedure by enacting a law. Such procedure becomes the 'procedure established by law' within the meaning of the expression in Article 21 of the Constitution.\(^2\)

Further the word 'life' in Article 21 has been interpreted by the Supreme Court to mean not merely the right to the continuance of a person's animal existence but a right to the possession of each of his organs - his arms, legs, etc.\(^3\) It does not however, include livelihood\(^4\).

Besides providing for the protection of 'life', Article 21 also provides for the protection of 'personal liberty'. The word liberty is qualified by the word 'personal' and therefore, its content is narrow. The qualifying adjective has been employed in order to avoid overlapping of those elements or incidents of

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liberty like freedom of speech or freedom of movement etc., already dealt within Article 19(1) and the liberty guaranteed by Article 21. It is in this context that in A.K.Gopalan v State of Madras\(^1\), it was held by the Supreme Court that Articles 19 and 21 can not be said to be complementary. The subject matter and content of the two provisions are not identical and they proceed on different principles.

Public liberty, according to Justice Mukherjea, means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right of not being subjected to any form of physical restraint or coercion constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory\(^2\). Justice Patanjali also supports this view that whatever may be the generally accepted connotation of the expression 'personal liberty' it is used in Article 21 in a sense which excludes the freedoms dealt within Article 19\(^3\).

In Kharak Singh v State of U.P.\(^4\) the Court held that the words 'personal liberty' in Article 21 are used as a compendious term to include within itself all the varieties of rights which go to make the 'personal liberties' of a man other than those embodied in the seven sub-clauses of Article 19(1). In other words while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises

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2. Ibid p. 97.
The right to personal liberty has been interpreted recently by Supreme Court to include even the right to travel abroad. Chief Justice Subba Rao who delivered the judgment observed that under Article 21 of the Constitution no person could be deprived of his right to travel in India or abroad except according to procedure established by law.

Protection Against Arrest and Detention: Protection against arrest and detention is guaranteed in Article 22 of the Constitution embodying seven clauses. The scheme of Article 22 however, is that clauses (1) and (2) provide safeguards in respect of arrest and detention. These safeguards are excluded in the case of preventive detention by clause 3 of the Article, but safeguards in connection with such detention are provided by four clauses (4 to 7) of the same Article. Article 22(1) provides:

"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."

Article 22(2) lays down:

"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."

The two clauses lay down the procedure to be followed when a person is arrested. These ensure four things:

(a) right to be informed regarding grounds of arrest,

3. Clauses (3) to (7) have been discussed at length under the title 'Preventive Detention', pp. 291-303
(b) right to consult, and to be defended by a legal practitioner of his choice,

(c) right to be produced before a magistrate within twenty four hours, and

(d) freedom from detention beyond the said period except by the order of the magistrate.

The safeguards provided in Articles 22(1) and (2) are to a large extent covered by existing provisions of the Criminal Procedure Code, but their incorporation in Article 22 of the Constitution has the effect of making them inviolable by ordinary legislation. It lays down the minimum rules of procedure that even Parliament can not abrogate or overlook.

In A.K. Gopalan v State of Madras, Chief Justice Kania, observed that Article 22(1) and (2) prescribe limitations on the right given by Article 21. If the procedure mentioned in these Articles in followed the arrest and detention contemplated by Article 22(1) and (2), although infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention.

But in State of Punjab v Ajaib Singh, it was made clear by the Court that Articles 22(1) and (2) did not apply to cases of arrest under a warrant issued by a Court, because in such cases the judicial mind had already been applied. The Court observed that "the language of Article 22(1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by

2. Ibid.
a Court on allegation or accusation that the arrested has or is suspected to have committed or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or State interest. In other words there is indication in the language of Article 22(1) and (2) that it was designed to give protection against the act of the executive or other non-judicial authority.

Right to Property: Right to property which is guaranteed under Article 19(1)(f) and Article 31 of the Constitution, is the most controversial right. While incorporating fundamental rights in the Constitution, the framers of the Indian Constitution were influenced by the American Bill of Rights. Accordingly they recognised the right to property as a natural right and placed it in Part III of the Constitution. The framers did not care to remember that the American Constitution was framed in the era of lassiez faire and by the people who were allied with property. For them it was natural to keep this right beyond the reach of legislature. But the framers of Indian Constitution did not have the same sense of property right. They were charged with the ideas of Marx, Webbs, Green, Laski and others and were committed to establish socialistic pattern of society. Following the American Bill of Rights, they recognised the right to property as a fundamental right; but to keep it in harmony with the principles embodied in Part IV of the Constitution, that concentration of wealth is to be avoided, the right recognised was not of absolute nature. It provided for acquisition of property in the public interest on

payment of compensation.

The Constituent Assembly however, did not contemplate the role of the Courts in matter of compensation. In fact categorical statements were made in the Assembly in this regard that judiciary did not come in the picture. The legislature was the sole determining authority of compensation. For instance Pandit Nehru emphatically ruled out any reference to judiciary on the matter of justiciability of compensation. He said: "The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture........Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no system of judiciary can stand in judgment over the sovereign will of Parliament.......no judiciary can function in the nature of a third House, as a kind of Third House of correction. So it is important that with this limitation the judiciary should function."¹

But when the Constitution came into force and the land reforms were initiated by the State Legislatures, these were challenged in Supreme Court and 'compensation' was the main subject matter of litigation. Contrary to the intentions of the framers of the Constitution the Supreme Court declared that the matter of compensation was justiciable. For example in State of West Bengal v Bela Banerjee², the Court held: "While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the

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amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable."

It has been observed in the preceding pages that to nullify the decisions of the Court in respect of compensation the Parliament amended the Constitution so as to exclude the jurisdiction of the Court to determine such issues. Article 31, in fact has been amended many a time to increase the powers of the government to appropriate property. Article 31 has thus been called a protean Article because it has changed its face many times.

In the face of the amendments brought to this right, the wisdom of the framers of the Constitution to place this right in Part III of the Constitution is questioned. Justice Hidayatullah holds that it was an error to place it that category. The right to property, according to him, like the freedom of trade and commerce should have been placed in a different chapter. Of all the fundamental rights, he maintains, the right to property is the weakest right.

Justice Hidayatullah's views point has been widely accepted amongst the jurists in India who have mooted the idea that right to property, not being a natural right, should be removed from the

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1. The amendments to Article 31 of the Constitution have been discussed in detail in Chapter VII, pp. 175-187.
Chapter of Fundamental Rights. K.V. Raghunatha Reddy, Minister of State for Industrial Development, expressed a similar opinion at a seminar. He said the right to property should be taken away from the list of fundamental rights keeping in tune with the social change that was taking place in the country.

It may be pointed out that the removal of right to property from Part III, would no doubt remove the inherent contradiction in the Constitution between the fundamental rights and the directive principles. But till the impediment placed on the power of the Parliament to amend Part III by the decision of the Supreme Court in Golak Nath case, is removed, it is not possible for Parliament to take away the right to property from this Part.

Article 32: This Article confers special jurisdiction on the Supreme Court of India. Under this Article, the Supreme Court has been empowered to grant relief to those who move the Supreme Court for the enforcement of fundamental rights contained in Part III of the Constitution and the right to move the Supreme Court has been

1. At a seminar held in December 1969, in New Delhi, on "Property Not a Fundamental Right" most of the jurists who participated in the seminar advocated for the removal of right to property from Part III of the Constitution. The prominent amongst those who participated in seminar were N.C. Chatterjee, S.C. Aggarwal, C.K. Daphtary, M. Kumaramanglam, Rabi Ray and A.S.R. Chari.


guaranteed. The key role assigned to the right guaranteed by Article 32 and the width of its content are writ large on the face of its provisions. Article 32 reads as follows:

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

The reason for incorporating this remedial right in Part III of the Constitution was explained by Dr. Ambedkar in the Constituent Assembly: "There can be no right unless the Constitution provides a remedy that makes the right real. If there is no remedy, there is no right at all, and I am therefore, not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enumerating remedies than to have a lot of pious wishes embodied in the Constitution." He further observed that "If I was asked to name any particular article in this Constitution as the most

1. Part III of the Constitution, deals with the fundamental rights.
Important - article without which the Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it...

"..."

Article 32, thus provides guaranteed remedy to the citizens to realise their fundamental rights and the Supreme Court is constituted as the 'protector and guarantor' of these rights. Gajendragadkar C.J., in this context observed in Prem Chand v Excise Commissioner, U.P., "There is no doubt that the right to move this Court conferred on the citizens of this country by Article 32 is itself a guaranteed right and it holds the same place of pride in the Constitution as do the other provisions in respect of the citizen's fundamental rights. The fundamental rights guaranteed by Part III, which have been made justiciable, form the outstanding and distinguishing feature of the Indian Constitution. Justice Gajendragadkar further observed that the reason for making Article 32 a guaranteed right is that the fundamental rights are not absolute and they have to be adjusted in relation to the interests of the general public. But as the scheme of Article 19 illustrates, the difficult task of determining the property or the validity of adjustment made either 'legislatively' or by executive action between the fundamental rights and the demands of socio-economic welfare, has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution. It is in the light of this position that the Constitution makers thought it

advisable to treat the citizen's right to move this Court for the enforcement of their fundamental rights as being a fundamental right by itself.

Since it is a fundamental right to move the Supreme Court and file a petition for a writ, it is not a discretionary authority with the Supreme Court to grant relief. Justice Mahajan, however, did contribute to this view that it was discretionary with the Supreme Court to grant relief under Article 32. Justice Gajendragadkar, negatived his (Justice Mahajan's) view in Daryao v State of U.P. If it is proved to the satisfaction of the Court once that there has been illegal or unconstitutional infringement of any of the fundamental rights, the Supreme Court "can not, consistently with the responsibility laid upon it, refuse to enter-tain applications, seeking protection against the infringement of such rights." Justice Gajendragadkar as a note of advice to the Supreme Court observed in this case that "it must always regard it as its solemn duty to protect the said fundamental rights jealously and vigilantly."

To invoke the jurisdiction of the Supreme Court under Article 32, however, it is necessary that there is an infringement of a fundamental right. The Supreme Court refuses to grant relief, in cases where a right as such is infringed, but which is not a fundamental right, since it is outside the perview of Article 32. A petition for a writ under Article 32 was not maintained in

4. Ibid p. 1461.
5. Ibid.
Bhagwandas v Union of India, for there was no violation of a fundamental right. Thus the scope of this remedy under Article 32 is clearly narrower than that of Article 226, as it is restricted solely to the enforcement of fundamental rights conferred by Part III of the Constitution.

Further to protect fundamental rights, the Supreme Court has been empowered under Article 32 sub-clause (2) to issue writs in the nature of 'habeas corpus', 'mandamus', 'prohibition', 'quo-warranto' and 'certiorari'. The Supreme Court has been vested with wide discretion in the matter of framing writs to suit the exigencies of particular cases. Relief can not be refused just because a proper writ is not asked for, "The application of the petitioner can not be thrown out," observed Justice Mukherjea in Chiranjit Lal v Union of India, "simply on the ground that the proper writ or direction has not been prayed for."4

Besides issuing writs, the Supreme Court may issue orders or directions also. In K.K. Kochunni v State of Madras5 where the objection to the issue of a writ was raised, the Supreme Court held that "its jurisdiction under Article 32 was not merely confined to issuing of writs, it could frame any order to suit the exigencies before it."

Further it may be pointed out that the Supreme Court has set no bar to seek remedy under Article 32, if an alternative remedy

   Also refer to Nain Sukh Bas v U.P. State, A.I.R. 1953 S.C. 384;
   Laxmanappa v Union of India, A.I.R. 1955 S.C. 3;
2. These categories of writs have been discussed in these pages, 76-80.
is available. The mere existence of an alternative legal remedy can not per se be a good and sufficient ground for throwing out the petition under Article 32, if the existence of a fundamental right is alleged and is prima facie established in the petition. The Supreme Court has also held that, "it is erroneous to assume that before the jurisdiction of the Supreme Court under Article 32 could be invoked, the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of the Supreme Court that by State action the fundamental right of a petitioner has been infringed, it is not only the right but the duty of the Supreme Court to afford relief to him by passing appropriate orders in that behalf." Thus even if the remedy is available under Article 226 of the Constitution in which case the petitioner can apply to the High Court for relief, it is no bar to move the Supreme Court under Article 32, for the Supreme Court has original jurisdiction. Justice Wanchoo is of the view that the Supreme Court should not refuse relief to petitioners even if their writ petition which certainly involved a fundamental right, was dis-missed by the High Court and that they have not yet obtained a certificate permitting them to appeal to the Supreme Court.

The Supreme Court has always regarded the protection and defending the sanctity of fundamental rights as its solemn duty.

It has held the acts of the legislative, and of the executive ultra vires, which violate in any manner, any of the fundamental rights. The Supreme Court has even been critical of legislative acts, whenever such acts have affected its jurisdiction under Article 32. It held Section 14 of the Preventive Detention Act ultra vires, in A.K.Gopalan v State of Madras for it prevented the detenue on pain of prosecution from disclosing to the Court the grounds of his detention communicated to him by the detaining authority. It was observed that because of this Section, the Supreme Court could not have the knowledge of grounds, which resulted in rendering the fundamental rights unenforceable.

The Supreme Court grants relief against executive acts as well. It is immaterial for the Court whether an act is legal or illegal. Even if an illegal act is there, the Court shall not exercise its jurisdiction under Article 32, if a fundamental right is not infringed\(^2\). In Kailash Nath v State of U.P.\(^3\) the right to carry on trade was violated by the imposition of a tax by the State. The Supreme Court held that the party affected had the right to move the Court under Article 32 for Article 19(1)(g) was infringed.

The jurisdiction of the Supreme Court, however, can not be invoked under Article 32, if a fundamental right is violated by a private individual. If a right is violated by a private individual, in that case, the person affected should seek 'remedy under the ordinary law and not under Article 32.' In Vidya Verma v Shiv Narain, the right of personal liberty was violated by a

private individual. The Court held that since it was not within the perview of Article 21, petition could not be maintained under Article 32.\(^1\)

As to the question 'who can file a petition', it is clear, that the person whose fundamental right is infringed can file a petition. However, as far as a company or a corporation is concerned, it can not file a petition, though it is a person in the eye of law. In fact Article 32, nowhere clearly bars a company to seek relief under it but the Supreme Court does not permit a company to seek relief under Article 32. The reason for excluding a company from enjoying this right has been explained by Chief Justice Gajendragadkar: "a company or a corporation was not covered up by the definition of citizenship, so it could not file a petition under Article 32, for the enforcement of a right, even though the fundamental right is infringed."\(^2\)

The Supreme Court has however, evoked strong criticism since its decision in Daryao v State of U.P.,\(^3\) in which it applied the doctrine of res judicata to dismiss the petitions under Article 32. The Court held that the rule of res judicata embodied a principle of public policy which in turn was an essential part of the rule of law. It further observed that "the binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is

1. This principle was earlier applied by the Supreme Court in P.D. Shamdasni v The Central Bank of India Ltd., A.I.R. 1952 S.C. 59.
the basis of the administration of justice on which the Constitution lays so much emphasis."

However, there is a section of opinion which holds that by making such a pronouncement the Court in fact has meant that "the express provision of the Constitution guaranteeing the right could therefore be modified by incorporating into it the doctrine of res judicata."¹ "What the Court really brought about by its decision" writes M.C.Setalvad "was a constitutional amendment qualifying the guaranteed right conferred by it under Article 32. . . . . . . It is strange that an express provision of the Constitution designed to promote the enforcement of fundamental rights and the rule of law should have been truncated in the name of the assumed implications of the Rule of Law."²

The Court however affirmed its decision in Amalgamated Coal-fields v Janapada Sabha³, when it held that "the application of the doctrine of res judicata to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted . . . . in courts of law."

It may however, be pointed out that the jurisdiction of the Supreme Court to uphold fundamental rights is not absolute, for the right to move the Supreme Court for the enforcement of fundamental rights can be suspended during emergency. Article 359 of the

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Constitution empowers the President of India to issue an ordinance to that effect. This provision is considered a negation of democracy, since Presidential action can suspend the enjoyment of fundamental rights. It is quite possible that an ambitious President might misuse this power to serve his own ends. Besides other provisions of the Constitution, this provision would further help him to achieve his aim. If the citizens are deprived of their fundamental rights, the Court would be a helpless spectator. This would bring an end to democracy without violating the letter of the Constitution. Otherwise also, the President may be asked by a political party in power to use this power in its interests particularly when the President happens to belong to the same party which is in power. The members of the Constituent Assembly had this apprehension. But Dr. Ambedkar argued in favour of incorporating this provision in the Constitution and his view prevailed. While speaking in favour of the inclusion of this provision in the Constitution he told the Constituent Assembly. "There can be no doubt that while there are certain fundamental rights which the State must guarantee to the individual in order that the individual may have some security and freedom to develop his own personality, it is equally clear that in certain cases, where, for instance, State's very life is in jeopardy, those rights must be subject to certain amount of limitation. In times of emergency the individual himself will be found to have lost his very existence. Consequently, the superior right of the State to protect itself in times of emergency, so that it may survive that emergency and live to discharge its functions in order that the individual under the aegis of the State may develop, must be guaranteed as safely as the
right of the individual. I know of no Constitution which gave fundamental rights but which gives them in such a manner as to deprive the State in time of emergency to protect itself by curtailing the rights of the individual."

Supreme Court and Preventive Detention Act:

It is difficult to reconcile the idea of preventive detention with democratic concepts, but with the accumulating evidence of domestic subversion and other such disruptive activities, reconciliation of liberty and security becomes a recurring necessity in every country. It was realised by the framers of the Indian Constitution also, who did not commit to the idea of absolute liberties or rights and the idea of preventive detention was incorporated in the Constitution. "This sinister looking feature" observed Justice Fatanjali Sastri, "so strongly out of place in a democratic Constitution, which invests personal liberty with sacrosanctity of a fundamental right and so incompatible with the promises of its preamble, is doubtless designed to prevent the use of freedom by anti-social elements which might imperil the national welfare of the infant republic." The distinguishing feature of the law of preventive detention is that to enforce it, condition of emergency is not required as a condition precedent. India is 'the only democratic country in the world whose fundamental law sanctions detention without trial in time of peace and in

2. Abraham Lincoln once wrote (July 4, 1861) 'Is there in all republics this inherent and fatal weakness? Must a government of necessity be too strong for liberties of its own people or too weak to maintain its own existence?' Cf. Harvard Law Review 1951, Vol. 64, p. 389(414).
a situation which is not in the nature of any emergency!

The Act of Preventive Detention was passed by the Parliament by virtue of legislative powers conferred on it under Entry No.9, in List I and Entry No. 3 in list III, on February 25, 1950 for one year but was extended from time to time till December 31, 1970. The Act armed the Government with the power to put under detention any person without trial, to prevent him from acting in any manner prejudicial to: (i) the defence of India, the relations of India with foreign powers or with the security of India, or (ii) the security of the State or maintenance of public order, or (iii) the maintenance of supplies and services to the community.

The compelling circumstances under which the Act was passed were explained by Sardar Patel, the then Home Minister in the following words:

"When law is flouted and offences are committed, ordinarily there is the criminal law which is put into force. But, where the very check of law is sought to be undermined and attempts are made to create a state of affairs in which, to borrow the words of .... ...(Moti Lal Nehru).......'men would not be men and law would not be law,' we feel justified in evoking emergent and extraordinary law."2

The Act was, however, under constant fire till it expired on December 31, 1970. It was described "a black spot on the Constitution"3, and "A slander on self-rule and Indian's capacity to run a democratic government."4 Inspite of the criticism from all

sections of the society, the party in power kept the Act in force till it had comfortable majority to give life to it.

Article 13(2) of the Constitution provides that "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 contravention be void." Ordinarily legislation on preventive detention would be void in view of Article 13(2) as violative of Article 22(1) and (2). But it is protected from being ultra vires by the provisions of Article 22(3) which lays down that:

"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."

The effect of this clause on Article 13(2) is that the words 'any law' in Article 13(2) connote 'law' other than preventive detention.

The only procedural safeguards provided against the preventive detention are embodied in clauses (4) to (7) of Article 22 of the Constitution.

1. Part III of the Constitution.

2. The text of clauses (4) to (7) of Article 22 runs as follows:

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

(a) Any 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)."

Contd.
No person can be detained for more than three months, unless an Advisory Board approves that in its opinion there is sufficient cause for a detention longer than this period. Further the detained person shall be communicated the grounds of detention on which the order for detention is passed except when the authority making such an order considers the disclosure against the public interest. If the grounds are disclosed, the detenu, shall be given the earliest opportunity to represent against the order of detention. Article 22(7) however confers sweeping powers on the Parliament which in effect tantamount to negative the procedural safeguards guaranteed by the preceding clauses of the same Article. The present clause empowers the Parliament to make any law by which it may keep a class or classes of cases of detention beyond the purview of Advisory Board. The persons in such cases can be detained for a period longer than three months without obtaining the opinion of the Advisory Board and the maximum period for which detention shall be laid down by law passed by the Parliament or

(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)."
The Preventive Detention Act was challenged as ultra vires of the Constitution in A.K. Gopalan v State of Madras. This was the first case before the Supreme Court of India, in which it was called upon to interpret the provisions of the Constitution. It was argued in this case that preventive detention violated the fundamental right of personal liberty guaranteed under Article 21 of the Constitution. The Court however, refused to import the implications of 'due process' clause of the American Constitution into the Indian Constitution and hold preventive detention unconstitutional, which is provided for in the Constitution. On the other hand Chief Justice Kania observed that "Article 21 has to be read as supplemented by Article 22. Reading it that way the proper mode of construction will be that to the extent the procedure is prescribed by Article 22 the same is to be observed; otherwise Article 21 will apply."

The Court also ruled out the application of Article 19(d) to preventive detention which guarantees freedom of movement throughout the territory of India. The petitioners contended that preventive detention directly violates that right and therefore, the State must show that the impugned legislation imposes only reasonable restriction on the exercise of that right under Article 19(5). The Court, it was argued, is thus enjoined to enquire

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1. Justice Fazl Ali observed in A.K. Gopalan v State of Madras (A.I.R. 1950 S.C. 27) that "if one has to find some kind of a label for these clauses for a clear understanding of the subject, one may label them as 'dangerous' 'more dangerous' and 'most dangerous'."


3. This Point has been fully discussed in the preceding pages.

whether the restrictions imposed on the detained person are reasonable in the interests of the general public. The Court however, held that sub-clause(d) of Article 19, 'had nothing to do with preventive detention.' In Justice Mukherjea's view 'preventive detention does not come either within the express language or within the spirit and intendment of clause(d) of Article 19 of the Constitution which deals with a totally different aspect or form of civil liberty.'

Further in this case Section 3 of the Preventive Detention Act, was challenged on the ground that it did not provide for an objective standard which the Court can utilize for determining whether the requirements of law have been complied with. Chief Justice Kania observed in this context that no such objective standard of conduct could be prescribed, except as laying down...


2. Ibid p. 96

Justice Mahajan held the same view that Article 19 was not intended to govern a law made under Article 22. Article 19(5), he observed, "is a saving and enabling provision. It empowers Parliament to make a law imposing reasonable restrictions on the right of freedom of movement while Article 22(7) is another enabling provision empowering Parliament to make a law on the subject of preventive detention in certain circumstances. If a law conforms to the conditions laid down in Article 22(7) it would be a good law and it could not have been intended that the law validly made should also conform itself to the provisions of Article 19(5). One enabling provision cannot be considered as a safeguard against another enabling provisions. Article 13(2) has absolutely no application in such a situation. If the intention of the Constitution was that a law made on the subject of preventive detention had to be tested on the touch stone of reasonableness, then it would not have troubled itself by expressly making provision in Article 22 about the precise scope of the limitation subject to which such a law could be made and by mentioning the procedure that the law dealing with the subject had to provide." A.I.R.1950 S.C. 83.
conduct tending to achieve or to avoid a particular object and the purpose of preventive detention was to prevent the individual not merely from acting in a particular way but, achieving a particular object. It will not humanly be possible to tabulate exhaustively all actions which may lead to a particular object.

Clauses (4) and (7) of Article 22 also came up for review in this case before the Court. An attempt to correlate clauses 4(a) and 7(a), the Court held, is opposed both to the language and structure of the clauses. These must be read as two alternatives provided by the Constitution for making laws on preventive detention. The effect of clauses (4) and (7) was that the Parliament could by law authorise in any specified 'class of cases or circumstances' extension of preventive detention beyond the period of three months without any reference to the Advisory Board. The real purpose of clause (7) of Article 22 is to provide for a contingency where compulsory requirement of an Advisory Board may defeat the object of the law of preventive detention. The purpose for the incorporation of this clause in the Constitution was to meet abnormal and exceptional cases, the cases being of a kind where an Advisory Board could not be taken into confidence. The

3. In S.Krishnan v State of Madras, (A.I.R. 1951 S.C. 301 (307)) the Court observed: "if the Parliament by law under Article 22(7) prescribes a maximum period for which any person may be detained under any law providing for preventive detention; then that period does not become a part of the fundamental rights conferred on a person under Part III of the Constitution. Article 22 clause (7) does not confer a fundamental right on a person, on the other hand, in its true concept, it restricts to a certain degree the measure of the fundamental right contained in clause (4)(a) of the Article."
authority to make such drastic legislation was entrusted to the supreme legislature but with the further safeguard that it can only enact a law of such a drastic nature provided it prescribed the circumstances under which power had to be used or in the alternative it prescribed the classes of cases or stated a determinable group of cases in which this could be done. The intention was to lay down some objective standard for the guidance of the detaining authority on the basis of which without consultation of the Advisory Board detention could be ordered beyond the period of three months.¹

The Court also ruled out the plea of the petitioners that Section 12 of the Preventive Detention Act, did not conform to Article 22(7). It was argued that Article 22(7) permits preventive detention beyond three months when the Parliament prescribes the circumstances and the 'class or classes of cases' in which a person may be detained and that both these conditions must be fulfilled. Chief Justice Kania refuted the argument as unsound because the words used in Article 22(7) are themselves against such an interpretation. "The use of the word 'which' twice," he held, "in the first part of the sub-clause, read with the comma put after each

¹. Per Justice Mahajan, A.I.R. 1950 S.C. 27 (85-86). In Puran Lal Lakhan Pal v Union of India (A.I.R.1958 S.C.163), the Court held that "clause(4) of Article 22 does not state that the Advisory Board has to determine whether the person detained should be detained for more than three months. What it has to determine is whether the detention is at all justified. The reference to the Board is only a safeguard against the vagaries and high handed action and is a machinery devised by the Constitution to review the decisions of the Executive on the basis of a representation made by the detenu; the grounds of detention, and where the order is by an officer, the report of such officer. It is not a limitation on the Executive's discretion as to the discharge of its duties connected with preventive detention, it is a safeguard against misuse of power."
shows that the legislature wanted these to be as disjunctive and not as conjunctive. ¹

The Court by such a liberal interpretation ousted its jurisdiction itself to examine whether the circumstances really existed or not to justify the class of cases detained, as prescribed by law.

The Court however, unanimously struck down Section 14 of the Detention Act as unconstitutional. Under this Section the Court was prevented from being informed either by a statement or by leading evidence, of the substance of the grounds conveyed to the detained person or of any representation made by him against the detention order. It also prevented the Court from calling upon any public officer to disclose the substance of the grounds. The Court held that such a provision violated all the principles of natural justice and even infringed the right guaranteed under clause (5) of Article 22. It conferred a right on the detenu, to know, as soon as may be the grounds of his detention and to have an opportunity to make a representation against the order of detention. If a person is given a paper on which three stanzas of a poem are written in three different ways, the requirements of

¹ A.I.R. 1950 S.C. 27 (45).

Patanjali Sastri and Das JJ. also expressed the same view that the Parliament was not obliged under clause (7) to prescribe both the circumstances and the classes (pp. 79, 123).

Justice Fazl Ali and Justice Mahajan dissented from the majority opinion. They held that the provision clearly means that both the circumstances and the class or classes of cases should be prescribed, the prescription of one without prescribing the other will not be enough. (pp. 63, 86).
Article 22 can not be said to have been met. Chief Justice Kania who elaborated the point observed for the validity of the detention order, it is necessary that the grounds of detention should be those on which the order has been made. If the detained person is not in a position to put before the Court this paper, the Court will be prevented from considering whether the requirements of Article 22(5) are complied with and that is a right which is guaranteed to every person. It is thus clear that unless it is in the public interest that the disclosure of the grounds of detention should not be made, the government cannot jeopardise the freedom of the individual without disclosing the grounds to him and affording him an opportunity to represent against these grounds before the Court.

In this the Court followed the policy of its predecessor, the Federal Court of India which had taken the view that the Court had the power to examine the grounds of detention served to the detenu and to see if these were "connected with the order of the detention."2

The Federal Court had also held that 'subjective satisfaction' of the grounds of detention was beyond the purview of the Court. The same attitude has been adopted by the Supreme Court. This is borne out by the observation of the Court in regard to the wording of Section 3 that it is the satisfaction of the Central Government or the State Government on the point, which alone is necessary to be established.3 The Court has held that the

satisfaction of the government, must be based on some grounds. If the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the grounds of malafides can not be challenged in a Court of law.¹

The Supreme Court has absolved itself of its duty of scrutinising the grounds of detention and to substitute its own satisfaction. The Court has consistently followed this approach in many cases². By following the Federal Court decision in Machinder's case, the Supreme Court has divested itself of its role as a protector of the fundamental rights vis-a-vis preventive detention. This has evoked much criticism. One of the points of criticism is that it is unfortunate that the Supreme Court should follow the decisions of its predecessor in such cases. It is being maintained the Supreme Court has not noticed that the advent of the Constitution and the guarantee of civil liberties had introduced a new element necessitating re-examination of the precedents in preventive detention cases³.

The grounds of detention can, however, be challenged if they are 'mala fide' and 'vague'. The burden of proving the absence of good faith is upon the detained person, which is a heavy burden to discharge⁴. But vagueness of grounds without leading to an

inference of malafides or lack of good faith is not a justiciable issue in a Court of law. In this connection the Court has held that where the petitioners are given only vague grounds which are not particularised or made specific so as to afford them the earliest opportunity of making representations against their detention orders, and there having been inexcusable delay in acquainting them with particulars of what is alleged, they are entitled to be released.

Thus it is clear that the Supreme Court has not given up its right to satisfy itself whether the grounds and particulars supplied to the detenu were sufficient to enable him to make a representation against the order of detention. "Sufficiency of the particulars conveyed to a detainee is justiciable" and "can be examined by the Court." But for this, the right under 22(5), indeed will be illusory and not a real right all. In this connection Justice Patanjali observed that preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. The petitioner, he maintained, "has a right under Article 22(5)....to be furnished with particulars of the grounds of his detention 'sufficient to enable him to make a representation which on being considered may give relief to him'......this

constitutional requirement must be satisfied with respect to each of the grounds* communicated to the person detained, subject of course to a claim of privilege under clause (6) of Article 22."¹

Further the Court has held that to satisfy the requirements of the Constitution, the detenu must be given the grounds in a language which he can understand and in a script which he can read, if he is a literate person².

The right of the detenu to be furnished with particulars is however limited under clause (6) of Article 22, whereby the appropriate authority has the right to withhold such facts or particulars the disclosure of which it considers to be against the public interest³. The Court has held that there is no obligation on the authority issuing the detention order to communicate to the detenu the decision not to disclose the facts as well as the ambit of nondisclosure at the time when the grounds are furnished. The necessity for a communication, the Court felt, would arise only if the detenu feeling the grounds to be vague asks for particulars⁴.

Supreme Court and the Directive Principles of State Policy:

The Directive Principles of State Policy enshrined in Part IV of the Constitution⁵ are a 'complex of values' which aim at establishment of a 'welfare state' as distinguished from a 'police state'. The insertion of these principles of social policy in the

* Emphasis is mine.

5. Articles 36-51 of the Constitution of India.
constitutional text is a deliberate attempt on the part of the framers of the Constitution who felt the pulse of the time that the rights and interests of the individual must be engineered and balanced with the interests of the society at large. Further, the framers of the Constitution were also mindful of the difficulties that the American Government had to face in the 'New Deal Era' to bring social legislation, because of the absence of such principles in the Constitution. The Supreme Court tried to frustrate the attempt of the government to bring social and economic legislation by striking it down on one pretext or the other.

The framers of the Indian Constitution, would not thus leave

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1. The Supreme Court was severely criticised for its conservative approach to social problems. A bill was introduced in the Senate to reform the Court, which though was defeated, had a deep impact on the bench of the Court which soon mended its attitude. For instance in West Coast Hotel Company v Parrish (300 U.S. 379, 391), upholding the impugned Act 'Minimum wages for Women', Chief Justice Hughes observed that "the Constitution speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognise an absolute and uncontrollable liberty. 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."

P.K.Tripathi making an observation on the changed trend of the Court has remarked that the Supreme Court of the United States "who in the beginning would not appreciate the significance of the transformation of the entire structure of political economy and would stick to the notions as to the province of the fundamental rights with such tragic faith as to force the very dregs of those rights down the throats of the sprawling, fainting community, did ultimately take an enlightened view of the new balance between the fundamental rights and the social needs and the permitted governmental authority a convenient scope for efficient action. It speaks of the vision and calibre of the Supreme Court of the U.S. that the re-assessment of the province of the fundamental rights in that Constitution could be accomplished without a formal restatement in the text of the Constitution." See P.K.Tripathi's article, Directive Principles of State Policy, Supreme Court Journal, 1954, p.7(18).
it entirely to the Courts to take cognizance of the need for social change and to interpret the Constitution to that effect. They followed the Irish practice and incorporated such principles titled as Directive Principles of State Policy in Part IV of the Constitution.

The Directive Principles as distinguished from the fundamental rights, are not justiciable. What is the attitude of the Supreme Court towards the increasing flow of social legislation is of great importance, especially when it has been denied the power to enforce these principles. Article 37 of the Constitution clearly states: "The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." Literally interpreting this Article, Justice Das of the Supreme Court held the Directive Principles as subservient to the Fundamental Rights in his judgment in State of Madras v Champakam Dorairajan. In this case the Government supported its order which fixed the seats for admission to a medical college on the basis of caste, in accordance with the provision of Article 46 which provides for promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The petitioners on the other hand contended that it violated the fundamental right guaranteed to them under Article 29. The Court


2. Article 29(2) lays down: "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."
upheld the petitioner's claim and held that "The Directive Principles of State Policy which by Article 37 are expressly made unenforceable by a Court can not override the provisions found in Part III which, not withstanding the other provisions are expressly made enforceable by appropriate writs, orders or directions under Article 32. Fundamental Rights are sacrosanct and not liable to be abridged by any legislative or executive act or order except to the extent provided in the particular Article in Part III. The Directive Principles of State Policy have to conform to and run subsidiary to the chapter on Fundamental Rights*. In our opinion that is the correct way in which the provisions found in Part III and IV have to be understood."¹

The above decision of Justice Das has been considered as the 'most damaging' to the values and effectiveness of Directive Principles. It has been suggested that in case of apparent conflict between the Directive Principles and Fundamental Rights solution should be found in harmonious interpretation². In the above case however, no such effort was made.

Since Article 37 bars the enforceability of Directive Principles by the Court, these have been invariably dubbed as a set of 'New Year resolutions;'³ or as 'a cheque on a bank payable at the convenience of the bank'⁴, or as subsidiary to fundamental rights⁵, or condemned as 'declarations of a purposeless piety

*Emphasis is mine.

destined and even designed to remain barren and superfluous.\(^1\)

In this context the question that arises is that, are these Directive Principles mere 'pious homilies' or something 'more' than that.

It can not be denied that it is this judgment of Justice Das which has been responsible for questioning the wisdom of insertion of such principles in the Constitution. But the whole question in fact, revolves round the problem of 'enforceability' of Directive Principles. In the Champakam case also the superiority of the Fundamental Rights was claimed on the ground that these rights were sacrosanct and justiciable, whereas the Directive Principles could not be enforced by the Courts. The claim of superiority of Fundamental Rights on this sole ground has however, been challenged, for this claim survives only on the orthodox interpretation of the word 'enforceable' which has now been rejected in most of the developed legal systems\(^2\). Equating the word 'enforceable' with 'justiciable' Ramachandran observes that supremacy can not be smelt out of the test of justiciability\(^3\).

Other writers are of the opinion that Part III stands in no superior place to Part IV, for the simple reason that no where in Part III the superiority of the provisions of the said part over those of any other part of the Constitution is mentioned. It is however, nugatory to make such a presumption or supposition, in view of the provisions contained in Articles 13(2) and 32. Further to say that the operation and scope of Part III can be affected by

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3. Tripathi also observes that the gist of superiority of fundamental rights seems to be encompassed in the criterion of 'justiciability' which has ceased to exercise the determining influence it once so unquestionably wielded. See Supreme Court Journal, 1954, p. 7.
amending the Constitution under Article 368, to give effect to the Directive Principles, is no more true in view of the Supreme Court judgment in Golak Nath v State of Punjab\(^1\). It may however, be pointed out that the 'non-enforcement' clause of the Directive Principles can not be over-emphasised for it is qualified by another clause with an adjunct 'but', these principles are "nevertheless fundamental in the governance of the Constitution\(^*\) and 'judicial respect short of enforcement is obligatory on the courts.'\(^2\)

It has also been suggested that it is the Fundamental Rights that should conform to the Directive Principles and not the Directive Principles to the Fundamental Rights and that the Courts should declare any legislation that violates the Directive Principles as unconstitutional.\(^3\)

These suggestions, it may be submitted have been stretched too far. Much criticism has flown from the decision of the Court in the Champakam case. It is true that the Court did not show its foresight in this case but its decisions in subsequent cases clearly indicate that there is no cause of being panicky at that

\(^1\) A.I.R. 1967 S. C. 1643.

\(^*\)Emphasis is mine.


\(^3\) See P.K.Tripathi, Directive Principles of State Policy, Supreme Court Journal 1954, p. 7 (12).
decision\(^1\). The Supreme Court in its latter judgments, interpreting Directive Principles has put emphasis on the principle of harmonious construction.

In State of Bihar v Kameshwar Singh\(^2\), only a year after the Supreme Court decision in Champakam case, the Court departed from its literal stand taken in that case. In the present case various legislative Acts of different States which sought to abolish Zamindari system, implementing a directive contained in Article 39\(^3\), were challenged as violative of the fundamental right to property\(^4\) guaranteed under the Constitution. There was thus an apparent clash in this case between the fundamental rights and the directive principles. The Court however, solved this tangle by applying the principle of vicarious orientation, that the fulfillment of objects of Article 39 was a public purpose* and consequently the Acts were held constitutional. Justice Das who delivered

1. G.S. Sharma has rightly observed that the reaction of the Court to the government Order which was communal in nature, at that time was expected and normal. He further added that it would require a time lag, and continuous familiarity with the specific problems of Scheduled Castes and Scheduled Tribes over a period before the Court or any other person could realise that under the special conditions of the Indian society a special treatment to a particular minority for a specific period could be treated as a value comparable to the value of maintaining secular traditions of admissions for educational institutions. See Leaders and Directive Principles, Journal of Indian Law Institute 1965, Vol. 7, p. 173(183).


3. Article 39 of the Constitution directs the States to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; that there is no concentration of wealth and means of production to the common detriment.

4. Article 19(1)(f) and Article 31.

*Emphasis is mine.
the judgment in the Champakam case, was not only a party to the present decision of the Court, but also wrote a separate judgment in which he categorically admitted that law must keep pace with the realities of social and political evolution of the country as reflected in the Constitution. If, therefore, the State is to give effect to those avowed purposes of our Constitution we must regard as a public purpose all that is calculated to promote the welfare of the people as envisaged in these Directive Principles of State Policy, whatever else that expression may mean. "We must not read", observed the Judge, "a measure implementing our mind - 20th Century Constitution through the spectacles tinted with early 19th Century notions as to the sanctity or inviolability of individual rights."¹

He further observed that the ideal set in Article 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may be, a social order in which social economic and political justice shall inform all the institutions of the national life. In the light of this new outlook the purpose of the State in adopting measures for the acquisition of Zamindaries and the interest of the intermediaries surely is to subserve the common good by bringing the land which feeds and sustains the community and also produces wealth by its forest, mineral and other resources, under State ownership or control. This State ownership or control over land is a necessary preliminary step towards the implementation of the Directive Principles of the State Policy and it can not but be a

Thus it is clear that the Supreme Court has interpreted the restrictions on the Fundamental Rights in the light of Directive Principles. The fact that Part IV is a store house of restrictions on Part III, has been affirmed by the Court in numerous cases and the Supreme Court has not merely emphasised but relied on the principle of harmonious construction.

In M.H.Qureshi v State of Bihar, the validity of legislation passed by different States (Bihar, Uttar Pradesh, and Madhya Pradesh) banning the slaughter of animals including the cows, was challenged by the Muslims as violating their fundamental right under Article 25(1) of sacrificing cows and other animals on Bakr-Id-Day. The Court upheld the legislation as it implemented the directive contained in Article 48 and held that Islamic religion did not enjoin on Muslims to make sacrifice of cows on

   Justice Mahajan made a similar observation in the following words: "No it is obvious that the concentration of big blocks of land in the hands of few individuals is contrary to the principles on which the Constitution of India is based. The purpose of acquisition ........therefore, is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which came in the hands of the State so as to subserve the common good as best as possible." A.I.R. 1952 S.C. 252 (274).

   Kerala Education Bill, A.I.R. 1958 S.C. 956;


4. Article 25(1) lays down: "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."

4. Article 48 provides: "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."
Bakr-Id-Day. Speaking about the relation of Fundamental Rights and Directive Principles, the Court held that the Directive Principles can not override this categorical restriction imposed on the legislative power of the State. A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implemented the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be "a mere rope of sand."

The Court again relied upon the doctrine of harmonious construction in Kerala Education Bill. In this case the Kerala Government under Article 45 of the Constitution prohibited the charging of fees from students in the primary classes without assuring the payment of compensation through the grants for the loss of revenue to the schools. The Supreme Court in its opinion held it as violation of the rights guaranteed to minorities under Article 30(1). The Court held that there was nothing in Article 45 of the Constitution which prohibited the Government to carry on its obligation under Article 30(1) while pursuing at the same time the directive in the said Article. It further held that in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body, the Court may not entirely ignore these directive principles of State Policy laid

2. Article 45 states: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."
3. Article 30(1) lays down that "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."
down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give to both as much as possible.

It is however, being felt that the decision of the Court in Golak Nath case will hamper the implementation of Directive Principles. Such an apprehension was put before Justice Mudholkar when he dissented in Sajjan Singh v State of Rajasthan. He however, denied it and observed that the Directive Principles are also fundamental in the governance of the country and the provisions of Part III of the Constitution must be interpreted harmoniously with these principles. Chief Justice Subba Rao also made a reference to this point in Golak Nath case, though he did not elaborate it. He said Part III and Part IV of the Constitution constituted an integrated scheme forming a self-contained code. The scheme, he further added, is made elastic that all the Directive Principles of State Policy can reasonably be enforced without taking away or abridging the fundamental rights.

It is evident thus that though the Directive Principles are not enforceable, the Court has not been immune from their influence. In fact they have been recognised by the Court. The decisions of the Court in M.H. Qureshi v State of Bihar, Kerala Education Bill and R.M.D.C. v Union of India, are index of the fact that the

3. Ibid. p. 864.
Court has not merely emphasised but relied upon the principle of harmonious construction and thus accorded recognition to these principles.

Supreme Courts of Various Federal Countries and Fundamental Rights: The Soviet Union: The Stalin Constitution has been described as 'the most democratic Constitution in the world', for it is 'the genuine charter of the rights of emancipated humanity.' The Constitution embodies a detailed list of fundamental rights which are guaranteed politically, economically and juridically. Apparently these rights appear to be safeguarded more emphatically in the Russian Constitution than in the Constitution of any other country. A commentator points out that it is only in the Soviet Union that the "socialist reality affords the possibility of completely unfolding a doctrine of civil rights and obligations without fear of coming upon a hiatus between reality and theory, between the factual position of personality on the one hand and the civil rights and obligations established by the Constitution on the other."

The rights guaranteed in the Soviet Constitution are set in a new order as these include many new rights which are not guaranteed by the Constitution of any other country. Stalin once said

2. Ibid p. 559.
5. The Constitution guarantees rights like right to rest, to work to material security in the old age, disease or when there is loss of working capacity, etc.
that these rights attest before the world "the facts of triumph in the U.S.S.R. of democracy unfurled and infinitely logical" the authentic socialist democracy of the Soviet State.

Many rights which are considered important in democratic countries are however, not embodied in the Constitution of the U.S.S.R., for example, some of these rights not included in the Constitution of the Soviet Union are right to habeas corpus, protection from ex post facto laws, double jeopardy and several others. Further even the rights which are guaranteed are violated and measures are adopted to control freedom of speech, press and movement by the state. For example, persons above the age of sixteen are required to have an internal passport which is granted for a period of five years in the first instance. Only persons above the age of fifty-five are granted passport for indefinite period. All these limitations detract from the importance and value of the rights guaranteed by the Constitution of the U.S.S.R. It is due to these restrictions that western writers are critical of the rights and consider them of little consequence. It is pointed out by them that fundamental rights included in the Constitution are largely for the sake of propaganda and the provisions dealing with them must be read more as a statement of pious professions and intentions than as an absolute grant of inalienable rights to citizens. They are in the gift of an authoritarian and brutal government that regards its ends as justifying any means, and these 'rights' are used as means. They

are not rights in the sense of something seized by the people for themselves and enforced on the government that is the servant of the people. Rights donated by a despotic master are not rights, but crumbs from the dictator's table.\(^1\) It has been said that the Government of Soviet Russia has granted rights to citizens not in the name of abstract rights of man but exclusively for its own purpose\(^2\).

Soviet jurists on the other hand, criticise western writers for their hollow concept of democracy and rights recognised therein. For example Vyshinsky holds that it is precisely in the area of fundamental rights that "the contradictions between the reality and the rights proclaimed by the bourgeois constitutions are particularly sharp.\(^3\) Stalin also categorically denied that socialist society negates individual freedom: "We have not built this society in order to cramp individual freedom. We built it in order that human personality feel itself. We built it for the sake of genuine personal freedom, freedom without quotation marks. What can be the 'personal freedom' of an unemployed person who goes hungry and finds no use for his toil? Only where exploitation is annihilated, where there is no oppression of some by others, no unemployment, no beggary, and no trembling for fear that a man may on the morrow lose his work, his habitation and his bread - only there is true freedom found.\(^4\)

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The place of rights in the Soviet Union has been well explained by Berman who points out that in the Soviet concept there is an underlying assumption that the subject of law, legal man, is not a mature, independent adult, not the free willing and free wheeling - 'reasonable prudent man' of our tradition, but an immature dependent child or youth whose law-consciousness must be guided, trained and disciplined by official legal rules and processes. Soviet rights are not thought to inhere in the individual but are conferred on the individual by the State, in order to encourage him to be loyal, hardworking, well disciplined, virtuous citizen.¹

The constitutional guarantees of fundamental rights can be better evaluated in the context of socialist legal philosophy in which law has a different purpose. Law is not a body of principles recognised and applied by the Courts in the administration of justice, it is a 'political instrument' to serve the ends of the party. It is an undeniable fact in the Soviet Union that the party leaders consider themselves above the law. Further technically the Constitution is the 'fundamental law' in the Soviet Union, but it is not 'supreme', it is only a mechanism in the hands of the party to control State power. Law is thus not an end in itself but a means to an end. Thus it may be said that in the Soviet Union when there is a conflict between law and policy as enunciated by party leaders, law must give in to policy.

It has already been observed in these pages that in the

Soviet Union Courts do not possess the power of judicial review because the Communist Party has always distrusted them. In the communist philosophy they have been dubbed as 'caste courts’ of the "privileged classes instituted to plug the law's loopholes with the latitudinarian bourgeois conscience."¹ English Court was described by Engles as "essentially a political rather than juridical institution but, since every sort of juridicial being has an innately political nature, the truely juridical element is manifested therein and the English Court of Jurors, as the most developed, is the culmination of juridical falsehood and immorality."²

The Courts in the Soviet Union are an agency of the governmental power - a weapon for the safeguarding of the interests of a given ruling class³. In the communist ideology court is compared to a weapon like a club or a rifle - only more efficient⁴.

The institution of State and legal order are considered as instruments of capitalism to exploit the working classes. The events in Russia however, demonstrate the contradiction in the communist philosophy for the communists can also be said to exploit the working classes for their ends. Every critic is a traitor, every argument a counter revolution⁵. In the Soviet Union legal

4. Ibid.
system is occasionally bypassed or pressurised by the Government to prosecute persons in political disfavour. Russian jurists like Colonel Kalinin, Judge Korzhikov, might call these as 'fairy tales' or 'false impressions', this has even been admitted by Kruschev when he was the Chairman of the Council of Ministers of the U.S.S.R. In his speech to the Twentieth Party Congress, he revealed many instances in which the allegations made against political rivals or opponents were baseless, and fabricated. Forced confessions were obtained by physical torture in a most inhuman manner and in some cases the persons were shot dead without trial and the sentence was passed ex post facto, after their execution. In one case Kruschev told the Congress that Comrade Kedrev who was in jail wrote to the Central Committee: "I am calling to you for help from a gloomy cell in the Lafortorsky Prison......I am being threatened by the investigating judge with more severe, cruel and degrading methods of physical torture. The judges are no longer capable of becoming aware of their error and of recognising that their handling of any case is illegal and impermissible......"

It is needless to multiply examples to stress the point that to maintain the personality cult the rule of law has been flouted in Russia by the Party leaders for self-aggrandisement, by coming

2. Kedrov, Golubev and Golubev's adopted mother Baturina, were shot without trial because they wished to inform the Central Committee of Beria's treacherous activities Kruschev's account to 20th Congress.
3. Kruschev's account to the 20th Congress.
Things have however improved after the Stalin era and the doctrine of 'socialist legality' is being interpreted in a manner as to reestablish law. This is borne out by what a student of Russian legal system has to say as a result of his travels in the Soviet Union that it was universally asserted there that the deficiencies of the legal system and the bypassing of the rule of law by the executive disappeared with the death of Stalin and today the final establishment of the concept of socialist legality has become a reality, with the result that the rule of law is now universal and the courts meet out impartial justice not only as between citizen and citizen but also as between citizen and State. But a Russian Scholar has different opinion about the doctrine of 'Socialist legality' which he dubs as of little 'practical content'. There is some truth in this statement of the Russian Scholar as recent trial of Sinisvsky, Daniel, Khaustov, Bukovsky, Ginzburg and others in Russia demonstrate.

Canada: Seven years less than a century after the passing of the British North America Act (1867), the Canadian Parliament enacted a Bill of Rights in 1960. Thus the Bill is not a part of the Canadian Constitution. The most important rights enumerated in the Bill are: the right to life, liberty, security of the person enjoyment of property, due process, legal equality, freedom of

3. The reason for its legislative form is a practical and political one. The British North America Act contains no amending procedure and it would have been necessary to go to the Imperial Parliament in London for an amendment. The Dominion

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religion, speech, association and of press.  
Section 2 of the Bill provides that every law of Canada should so construed and applied as not to abrogate, abridge or infringe any of the basic rights recognised in Section I, unless it is expressly declared by an Act of Parliament of Canada that it shall not operate notwithstanding the Bill of Rights.

Further Section 3 imposes an obligation on the Minister of Justice to see if any Bill introduced in or presented to the House of Commons is inconsistent with the purposes of the Bill of Rights, if so, to report such inconsistency to the House at the first convenient opportunity.

The Bill of Rights in Canada is not considered of much significance. The Rights guaranteed are not sacrosanct as in the United States or India, for their precarious existence. They can be altered or repealed by the Parliament by passing a new legislation contravening the Bill of Rights. The action of the Parliament can not be challenged before the Courts. Again the Parliament can set aside any interpretation of these rights by the

and the Provinces are presently in a dispute over a desirable amending process and it would have been impossible to obtain the consent of all the provinces to the inclusion of a Bill of Rights in the Constitution. Thus the form adopted was the only possible one. See Schmeiser, Civil Liberties in Canada, (1964), p. 37.

D.M.Gordon also mentions that the primary cause of the Bill was the apprehension of the communists coming into power and passing drastic legislation that could do irrepairable damage. To avoid this they tried to reduce the omnipotence of Parliament following the American plan of putting certain dreaded types of legislation out of the reach of any legislature until it had removed obstacles that would take time. See Canadian Bill of Rights, Canada Bar Journal 1961, 431-432.

Courts. The Courts have, thus hardly any role to play in the protection of these rights. Moreover, the provisions of the Bill are too vague and abstract to be given much effect by the Courts. J.A. Davey also admitted that "the difficulty in interpreting and applying the very general language of the Canadian Bill of Rights has not been exaggerated." 2

Section 2 of the Bill of Rights contemplates the role of the Courts, to see that every law is so construed and applied as not to abrogate, abridge or infringe these rights. But it has been felt in the Canadian juristic circles that the words 'so construed and applied' are not that positive and seem to imply the continued existence of offending legislation especially when coupled with the wording of Section 1 3.

Section I begins with the language: "It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex; the following human rights and fundamental freedoms......"

Interpreting Section I with Section 2 the Supreme Court has refused to invalidate any existing Act as violative of the Bill of Rights.

3. Schmeiser, Civil Liberties in Canada (1964 p. 39. Schmeiser writes that the word 'Construe' however, necessarily presupposes doubt, obscurity or ambiguity for if the meaning is clear and unambiguous, there is nothing to be construed. If this usage is followed in Canada, it would mean that in effect the Bill is simply a directive to the Courts to adopt a liberal interpretation of statutes in case of doubt or ambiguity - something which they are already in the habit of doing.
Rights. It has been held by the Court that "it is quite apparent that a general enactment like the Bill of Rights can not and never was intended to repeal a specific enactment without expressly saying so."¹

The Courts have further held that the Bill is intended to preserve all existing legislation. This reasoning is quite unreasonable in the face of the language of the Bill. Parliament has taken no step to clarify the ambiguity prevailing, presumably it has left this 'mares nest to the Courts to grapple with'?²

It would not however be wrong to say that the Courts in Canada have not taken the Bill of Rights in the spirit in which it has been taken by its counterparts in the United States and India. There is hardly any authoritative interpretation given by the Supreme Court of the rights enlisted in the Bill of Rights.

United States of America: In the United States the rights of the individual are protected through a Bill of Rights incorporated in the Constitution and the Supreme Court being the final interpreter and the guardian of the Constitution is enjoined upon the duty to uphold and protect these rights. The role of the Supreme Court in upholding the liberties of the individual is distinguishing and it has been rightly called as the champion of the liberties of the individual.

The Bill of Rights guarantees the right to freedom, freedom of religion, freedom of movement, freedom to form associations,

². Ibid p. 436.
freedom of speech and press, right to equality and many more. Freedom of movement has been liberally interpreted by the Supreme Court to include the right to travel in the United States as well as abroad. "The right of exist" the Court has held, "is a personal right included within the word 'liberty' as used in the Fifth Amendment." It further stated: "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." 

In Aptheker v The Secretary of State, the Court held that part of the Subversive Activities Control Act of 1950, as unconstitutional where an order of registration had become final against a Communist Organisation, it should be unlawful for any member, having knowledge of that order, to apply for a U.S. passport or its renewal. The Court held the Act "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment."

The freedom to form associations has likewise been protected under the aegis of the First and Fourteenth Amendments. Justice Stewart remarked in this context that "It is beyond dispute that the freedom of association for the purpose of advancing ideas and arising grievances is protected by the Due Process Clause of the

1. It is not possible to discuss all the rights in detail here. An attempt has been made to discuss the approach of the Supreme Court to most important rights.
3. Ibid.
Fourteenth Amendment from invasion by the States. 1 "Freedoms such as these," he further continued "are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference."

The Court has at the same time recognised the right of the State to regulate labour unions with a view to protect public interest. 2 In Communist Party v Subversive Activities Control Board, the Supreme Court held that "secrecy of associations and organisations, even amongst groups concerned exclusively with political processes may constitute a danger which legislatures do not lack constitutional power to curb."

The Court has however, held that the compulsory disclosure or submission of the list of the members of an association, is an infringement of the right to association. 3 In National Association for Advancement of Coloured People v Alabama, the Court observed: "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association.......This Court has recognised the vital relationship between freedom to associate and privacy in one's association....inviolability of privacy in group associations in many circumstances be indispensable to preservation of freedom of association, particularly where a group

2. Ibid.
Shelton v Tucker, 364 U.S. 79 (1960);
6. 357 U. S. 462.
espouses dissident beliefs."

The Court has cautioned more than once that any regulation
that is imposed, 'must be highly selective in order to survive
challenge under the First Amendment.' Justice Stewart has opined
that 'even though the governmental purpose be legitimate and
substantial, that purpose can not be pursued by means that broadly
stifle fundamental personal liberties when they can be more
narrowly achieved.'

Freedom to speak and write, especially about public questions
has been jealously guarded by the Court. It is as important to
the life of the government, holds Justice Black, "as is the heart
to the human body. In fact this privilege is the heart of our
Government. If that heart be weakened the result is diliberation,
if it be stilted, the result is death."

The freedom of speech and expression has been liberally
interpreted to include other means of communication also, for
example motion pictures, radio and television. The Court has held
that they are equally protected under the First and Fourteenth
Amendments.

The right to freedom of speech and expression is however,
not unlicensed. Statutory restrictions have been imposed on this
freedom in the interests of national security. In this regard the
Supreme Court of the United States has delivered certain 'preced-
ent making' decisions. For instance Justice Holmes laid down the

The principle of "clear and present danger" in Schenck v United States.1 "The question," he said, "in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has the right to prevent. It is a question of proximity and degree."2

The Court however, bid farewell to this principle in Dennis v United States3, when it was called upon to interpret Smith Act (of 1940). This Act forbids the advocacy of violent overthrow of the government and conspiracies designed to cause this overthrow. The test of "clear and present danger" was described as a "bad tendency test". Instead the Court applied the "grave and probable danger" test. But the Court soon reverted to the 'clear and present danger' test in Yates v United States4.

Again the Court has set a precedent by rejecting its old doctrine of "separate but equal" in the segregation cases. The right to equality had earlier been interpreted by the Court in Plessey v Ferguson5 to admit separation but on equal footing. The coloured people were to be given same facilities but separately. In the said case the Court had held that "in the nature of things (the Fourteenth Amendment) could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

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2. Ibid.
5. 163 U. S. 537 (1896).
The Court however, lately withdrew its constitutional sanct-ion to the principle of separate but equal. It was in public school cases, Brown v Board of Education\textsuperscript{1}, and Bolling v Sharpe\textsuperscript{2}, that for the first time the Court declared that "in the field of public education the doctrine of 'separate but equal' has no place\textsuperscript{3}" and that Negroes could not be denied admission to schools meant for white people. The Supreme Court held that "in approaching this problem we can not turn the clock back to 1868 when the amendment was adopted, or even to 1896 when Plessy v Furguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation............. Separate educational facilities are inherently unequal."\textsuperscript{4}

The Supreme Court has been under fire from Southern States since its decisions on segregation in 1954. But the Court has not yielded to its criticism. It has given similar decisions in public park and play ground cases\textsuperscript{5}. In 1962, in Bailey v Patterson\textsuperscript{6}, the Court observed that "we have settled beyond question that no state may require racial segregation of inter-state or intra-state transportation facilities.....the question is no

\begin{enumerate}
\item 347 U. S. 483 (1954).
\item 347 U. S. 497 (1954).
\item Brown v Board of Education, 343 U.S. 483 (1954).
\item Muir v Louisville Park, Theatrical Association, 347 U.S.971 (1954).
\item 369 U.S. 31 (1962).
\end{enumerate}
longer open, it is foreclosed as a litigable issue." The issue, however, is not closed. There are many 'sit in' cases before the Court in which the Negroes present the problem that they are permitted to 'sit in' the restaurants but are 'not served'. The Court has thus much task still to perform in establishing this freedom.

It is obvious thus, that the Supreme Court of the United States has relentlessly struggled for the maintenance of the sanctity of the rights incorporated in the Constitution. The Constitution does not provide for any restrictions to be placed upon these rights but whenever the Congress has placed statutory restrictions, the Court has maintained the balance between the national interest and the interest of the individual. By its undeterred decisions the Supreme Court has made the rights real and significant.

Conclusion:

From the foregoing discussion, it is evident that the Supreme Court is the guardian of fundamental rights embodied in Part III of the Constitution. The power of the Court to protect these rights is not absolute. Reasonable restrictions can be imposed upon the enjoyment of fundamental rights by the legislature. The enjoyment of these rights can also be suspended during the period when emergency is in operation. The Court has also many a time narrowly interpreted the provisions of the Constitution relating to fundamental rights so as limit its own power of enforcing these rights.
The Supreme Court has delivered very significant judgments in respect of fundamental rights. For instance while the right to equality has been upheld by the Court, it has avoided a doctrinaire approach and permits class legislation. Likewise the seven freedoms embodied in Article 19 have been invariably upheld. The Court reserves the right to examine the reasonability of the restrictions imposed on the enjoyment of these freedoms. Similarly the right against double jeopardy and self incrimination and right to life and personal liberty have been protected by the Court except in cases of preventive detention.

The decisions of the Court in respect of right to property have evoked maximum controversy and even responsible for quite a few important amendments to the Constitution. It is being felt that the right to property should not have found place in the chapter of fundamental rights. In view of the Court's decision in Golak Nath case it is difficult now to take away the right to property from Part III of the Constitution.

The most significant Article in Part III is Article 32, which guarantees to the individual the right to move the Court for the enforcement of the fundamental rights. The Court has however, restricted the scope of this Article by applying the doctrine of res judicata and also refusing the relief under this Article in case of laches.

There have been a few cases before the Court in which the fundamental rights have been in clash with the directive principles. The Court in its earlier decisions had unequivocally declared that
the directive principles are subservient to the fundamental rights because the former are not enforceable while the latter are. But soon after the Court shifted to the doctrine of harmonious construction upon which it continues to put emphasis.

The position of the Supreme Court vis-a-vis the fundamental rights in federal countries like Russia, Canada and the United States of America has also been discussed. The Supreme Court of Russia is denied the power to protect the rights enumerated in the Constitution. The position of the Supreme Court of Canada is delicate in this respect because the Bill of Rights is not a part of the Constitution, but is a statutory enactment. The Supreme Court of the United States, however, is considered as the champion of the liberties of the people. The Bill of Rights does not empower the Congress to impose restrictions on the enjoyment of the rights but the Court has permitted such restrictions to be imposed which are in the larger interest of society or in the interest of the security of the State.

The Supreme Court of India has borrowed much from the American jurisprudence in this field. But the sanctity of the fundamental rights till late was subject to amending power of the Parliament. The Supreme Court has however, by its historic judgment in Golak Nath case placed the fundamental rights beyond the reach of the Parliament, thus making the fundamental rights as sacrosanct and inviolable in the real sense.