RIGHT TO FORM ASSOCIATIONS OR UNIONS: CONSTITUTIONAL, LEGISLATIVE AND JUDICIAL PERSPECTIVES

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DECLARATION

I do hereby declare that this thesis entitled **"Right to Form Associations or Unions: Constitutional, Legislative and Judicial Perspectives"** for the award of the Degree of Doctor of Philosophy is the record of the original research work carried out by me under the guidance and supervision of Prof. (Dr.) M. C. Valson, the National University of Advanced Legal Studies. I further declare that this thesis has not previously formed the basis for the award of any degree, diploma, associationship, fellowship or any other title or recognition from any university/ Institution.

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This is to certify that all corrections and modifications suggested by the Research Committee in the Pre-submission seminar have been incorporated in the thesis entitled **"Right to Form Associations or Unions: Constitutional, Legislative and Judicial Perspectives"** submitted by Abhayachandran K. for the award of the Degree of Doctor of Philosophy.

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This is to certify that the major research findings of this thesis entitled **"Right to Form Associations or Unions: Constitutional, Legislative and Judicial Perspectives"** submitted by Abhayachandran K., for the award of the Degree of Doctor of Philosophy is to the best of my knowledge, a bonafide record of research work carried out by him at the National University of Advanced Legal Studies under my guidance and supervision. This thesis, or any part thereof, has not been submitted elsewhere for any degree.

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CONTENTS

ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
ACHR	-	American Convention on Human Rights
AIIMS	-	All India Institute of Medical Sciences
AIR	-	All India Reporter
AITUC	-	All India Trade Union Congress
ALJ	-	Allahabad Law Journal
All ER	-	All England Law Reports
CA	-	Court of Appeal
CAD	-	Constituent Assembly Debates
C.P.C	-	Code of Civil Procedure
CEACR	-	Committee of Experts on the Application of Conventions and Recommendations
CFA	-	Committee on the Freedom of Association
Cr.P.C		Criminal Procedure Code
DLT	-	Delhi Law Times
ECHR	-	European Convention on Human Rights
ECtHR	-	European Court of Human Rights
EHRR	-	European Human Rights Reports
ESMA	-	Essential Services Maintenance Act
EU	-	European Union

GREF	-	General Reserve Engineering Force
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICWA	-	Indian Council of World Affairs
IJETST	-	International Journal of Emerging Trends in Science and Technology
ILO	-	International Labour Organisation
Int'l Lab. Rev	-	International Labour Review
JILI	-	Journal of Indian Law Institute
KLT	-	Kerala Law Times
LGBTQIA	-	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual
LRCs	-	Labour Relations Commissions
MANU	-	Manupatra Online Journal
NAACP	-	National Association for the Advancement of Colored People
NIC	-	National Integration Council
NHRC	-	National Human Rights Commission
SCC	-	Supreme Court Cases
SCR	-	Supreme Court Reporter
TADA	-	Terrorist and Disruptive Activities (Prevention) Act

UDHR	-	Universal Declaration of Human Rights
ULFA	-	United Liberation Front of Asom

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Chapter 1

Introduction

A person lives in association with other human beings from birth to death. First, the family, then the school, the workplace, the leisure centers, etc. The number and circumstances of the association will continue to increase as man is a social being. He cannot live without associating with his fellow creatures. He interacts with other people in almost all of his activities and connects with like-minded people for a common purpose. Some of such associations are voluntary, and others are non-voluntary. Non-voluntary means he is part of a group or association, even without his consent or knowledge. Many of such associations exist for their own sake, that is, for the sake of associating with one another so that the associations offer lasting connections with specific people, such as, parents, children, spouses, and colleagues. Sometimes people voluntarily associate with others for a common intention or independent goals, such as financial success, worship, recreation, achievement, joint self-expression, or political control. As it is voluntary in nature, no one,

especially no legislator, can attack the freedom of association without impairing the very foundations of society[1].

All living things in the world cooperate to move forward with their lives. Coexistence serves many purposes, for overcoming life crises, recreation, taming nature, and making life more effortless, so that coexistence or association of all living beings is a universal truth. Wide varieties of associations are formed by human beings in the process of living in a society. Most societies have traditions similar to the golden rule of doing unto others as you would have others do unto you. The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Koran (Quran), and the Analects of Confucius are the five oldest written sources addressing questions about people's duties, rights, and responsibilities. All societies, whether oral or written, have their systems of ownership and justice and the means to the health and well-being of their members[2]. Society precedes the individual as propounded by Aristotle, who stated that society existed even before the rights and liberty of man developed as human rights[3].

Freedoms in article 19 (1) are civil liberties that are fundamental and the lifeblood of any democratic state. The country had to wage many struggles to incorporate these rights into the Constitution and recognize these rights after a

[1] Alexis de Toqueville, *Democracy in America*, 222 (1835)

[2] http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Intro/acknowledgements.htm/15-08-2021

[3] Aristotle the legendary Greek philosopher said, "Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Society is something that precedes the individual."

bitter war. The associational right has been recognized by almost all the democratic legal systems globally as civil liberties. It was incorporated into their constitutions as a result of labour, political, and human rights movements after the second world war. Our founding fathers of the Constitution included the right to form associations or unions in Part III as a fundamental right under article 19 (1) (c) of the Constitution of India. Article 33 of the Constitution provides that the fundamental rights of armed forces, or forces charged with maintaining public order, can be abridged or abrogated by law.

A question regarding the exercise of the concomitant right of associations or unions came into the discussion in the decision of the Supreme Court in *All India Bank Employees' Association* v. *National Industrial Tribunal*[4]. The Court denied the concept of concomitant rights and collective bargaining under article 19 (1) (c) of the Constitution. Recently, there have been significant developments in the interpretation of constitutional rights and changes in the attitude towards the right to form associations. Recently there have been significant developments in society and changes in the attitude towards the right to form associations, unions, or co-operative societies. Therefore, the researcher examines the scope of association rights in the Constitution of India due to the judicial interpretations and its developments, the international conventions, and treaties.

[4] (1962) 3 S.C.R. 269

The right to participate is a growing area, and its interpretations are changing according to the political environment. From family ties to large political organizations, the association is part of freedom. Business organizations, political revolutions, and trade unions are examples of freedom. Many political, social, and educational changes have taken place due to the independence of the association.

1.1. Relevance of the study

The correlation of article 19 and other rights in part III of the Constitution becomes a bone of discussion among the laurel fraternity from the *A. K. Gopalan* v. *State of Madras*[5] case. One of the central issues of the case was that personal liberty in article 21 included all the freedoms conferred by article 19 (1) (a) to (g). Does personal liberty include all or any of the freedoms conferred on citizens by article 19 of the Constitution? The answer to this question has been blurred till *Rustom Cavasjee Cooper* v *Union*[6]. By majority, the ratio of *A.K. Gopalan* v. *State of Madras*[7] case was reconsidered and held that it was wrongly decided that the fundamental rights conferred by the various articles were mutually exclusive[8]. These established interconnections between

[5] AIR 1950 SC 27
[6] AIR 1970 SC 564
[7] AIR 1950 SC 27
[8] Majority of *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27 held that Article 22 was a complete code. *See also* H.M. Seervai, Constitutional Law of India, p. 969, the legislative history of Article 21 is this: Draft Article 15 (now Article 21) as originally passed by the Constitutent Assembly, provided that "No person shall be deprived of his life or liberty without due process of law....". the Drafting Committed suggested two changes in this Article:

the different rights or freedoms are not accepted in the interpretations of article 19 (1) (c). Moreover, the Supreme Court decisions have left the interpretations of article 19 (1) (c) in some confusion. This study was inspired by the differences and arguments arising from the judgment of the Supreme Court in *T.K. Rangarajan* v. *State of Tamil Nadu*[9].

The dissertation focused mainly on the fundamental right to form associations, unions, and co-operative societies for citizens and the working class in India. Therefore, the labour legislation in India needs to be examined for the analysis and clarification of constitutional freedom to form associations, unions, and co-operative societies. Given this fact, the title of the study is framed as "*Right to Form Associations or Unions: Constitutional, Legislative and Judicial Perspectives*".

1.2. Research questions

1. Does article 19 (1) (c) impliedly guarantee the right to fulfill all the objectives of the formation of an association?
2. In light of liberal interpretations of the fundamental rights, can the theory of concomitant right be applied to the freedom to form associations or unions? Is collective bargaining accepted as an interpretation of article 19 (1) (c) of the Constitution?

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(1) the addition of the word "personal" before the word "liberty" and (2) the substitution of the expression "except according to procedure established by law" for the words "without due process of law".

[9] AIR 2003 SC 3032

3. Can government employees get the protection of article 19 (1) (c) of the Constitution? Or will the fundamental rights available to a citizen under article 19 be denied as he receives government service? Do government employees have a constitutional, legal or moral right to strike or participate in a strike?
4. Are the formation and functioning of a trade union protected under the framework of article 19 (1) (c)? Is the right to strike recognized as a fundamental right as a broad interpretation of any freedom under Article 19 of the Constitution?
5. Are there any contradictory views of the Supreme Court on interpreting the right to form associations or unions? Should the ratio of the Supreme Court in the *All India Bank Employees Association* v. *National Industrial Tribunal*[10] case need to be reconsidered in light of the liberal interpretations given to the fundamental rights of the Constitution of India?

1.3. Objectives of the study

The study intends to analyze judicial decisions relating to article 19 (1) (c) of the Constitution by finding interrelationships between different fundamental rights by analyzing the interpretations given to Part III of the Constitution. To examine if the right to organize is guaranteed as a fundamental right in international treaties, and if so, to what extent. The real nature of

[10] AIR 1962 SC 171

grounds of reasonable restrictions imposed on freedom of associations or unions and to seek whether such restrictions are vague and susceptible to accept any restrictions. Review whether the judgments of the Indian courts are in accordance with international labour instruments. The importance of a strike in an industry is also explored as part of a collective bargaining process in which workers can claim the fundamental right to strike in their industries. Find out the additional restrictions imposed on the freedom of government employees to form associations or unions and find out if government employees have any fundamental or legal right to strike.

1.4. Hypothesis

a) The right to form associations or unions under article 19 (1) (c) of the Constitution of India means that it achieves all the legal objectives for which it was formed and that any legislation not covered by article 19 (4) would be unconstitutional and invalid if it in any way impedes its fulfillment. Therefore, the ratio of the Supreme Court in *All India Bank Employees Association* v. *National Industrial Tribunal*[11] was erroneous, and the larger bench of the Supreme Court should reconsider the said judgment.

[11] AIR 1962 SC 171

b) The theory of concomitant right that the right to strike is a natural deduction from the right to form unions guaranteed by sub-clause (c) of clause (1) of article 19 is an integral part of the freedom.

1.5. Research methodology

The research is intended to be doctrinal, and the research design used for the study is mainly descriptive. The research relied on primary and secondary sources. It used primary material such as legislations from India and other countries, judicial decisions across various jurisdictions, international and other instruments. Secondary sources relied upon include research papers, books, articles, working papers, etc., published in various journals and other online sources. All material relied on has been enumerated and acknowledged at appropriate places.

1.6. Structure of the study

The research was carried out by dividing the entire work into eleven chapters. Chapter II describes the doctrinal development of freedom to associations or unions in the jurisprudential context. The different theories on individual freedoms explained that associations or unions of human beings are an extension of civil liberties in society. The chapter examines the importance of freedom of associations in various social participation and activities by enjoying family, religious, cultural, and political freedoms in an individual's social life. The thesis examines the extent to which the state interferes with the

freedom of association of citizens in a country with an egalitarian constitution based on the arguments of John Rawls and Ronald Dworkin. The interpretations given by the U.S. Supreme Court to fundamental rights, particularly freedom to form associations or unions, are broad and meaningful. But the Indian court did not go further, and even today, the courts in India follow what the court held in 1964. The freedom to form an association as a fundamental right of citizens has undergone a definite evolution through the interpretations of the U.S. Supreme Court. This chapter, therefore, examines in detail the interpretations given to the freedom of association of the American court.

Chapter III describes the international tools and treaties on the freedom to form associations within unions. International human rights instruments and labour agreements examine how the freedom to form associations or unions is protected in their respective fields. To this end, the human rights treaties like UDHR and ICESCR and the special labour agreements of the International Labour Organization were examined separately. This chapter examines the freedoms and restrictions available to government employees in the context of the Labour Relations (Public Service) Convention 1978 established by the ILO.

The researcher in Chapter IV explains the importance of fundamental rights under the Indian Constitution and how this section protects the Indian people from legislation passed by Parliament and the state legislatures. The most varied interpretations of the Constitution are included in the section on

fundamental rights. In a democracy, not only the rights of the citizens but also the legitimate interventions of the citizens in governing the democratically elected governments of that country must be protected. This chapter seeks to examine the interventions of the courts in protecting the democratic rights required to correct government actions through the right to criticize governments, the right to deny government policies, and the right to strike.

In Chapter V, the constitutional development of association freedom is examined and analyzed in detail. Judicial interpretations of this area were analysed from the beginning of the Constitution to the most recent decisions. The Constitution enshrines the freedom to form associations or unions as one of the fundamental civil liberties necessary to live in a democracy like India. The content of association rights based on the developed interpretations and the extent to which citizens can be granted rights are discussed in light of the different opinions in court decisions. The Court was reluctant to accept the principle of the interconnection of rights and freedoms guaranteed in Part III of the Constitution to article 19 (1) (c) and gave very narrow interpretations to the article. At the same time, dynamic interpretations can be seen to have expanded the scope of fundamental rights in line with the development of human rights jurisprudence. This chapter's spirit is to inquire why the Court did not accept this broad scope in the interpretation of article 19 (1) (c) of the Constitution.

It is essential and common for a government to impose certain restrictions on the rights of individuals so as not to affect the very existence of

that state and to protect the rights of other individuals. But the legal validity of the restrictions imposed on how to do so must be ensured. The Constitution of India allows for the imposition of such reasonable restrictions on the freedom to form associations or unions. Chapter VI elaborately discussed reasonable restrictions and exceptions imposed on the freedom to form associations or unions under article 19 (1) (c) of the Constitution. Certain restrictions imposed by the government based on sovereignty or integrity, public order, or morality are challenged in Court because of excessive restrictions or violation of fundamental rights. In such cases, the Court acts as a guardian of fundamental rights, analyses the rationale for the restrictions, and makes appropriate interpretations. This chapter, therefore, includes a detailed analysis of the court interpretations. Article 32 of the Constitution prohibits the armed forces from exercising their freedom to form associations or unions to maintain strict discipline. However, by interpretation of the relevant articles of the Constitution and statutes, the courts determined the categories within the armed forces. This chapter discusses the rules and interpretations of the courts regarding the armed forces and allied categories of employment for freedom of association and trade union rights.

Chapter VII deals with the constitutional status of societies and co-operative societies and the freedoms to form societies for different purposes and co-operative societies to conduct business and other benefits for its members. The term co-operative societies have been included in article 19 (1)

(c) of the Constitution by the parliamentary through 97th Constitution Amendment Act, 2001. The settled law before the amendment was that the freedom to form co-operative societies was not a fundamental right under article 19 (1) (c) of the Constitution before the amendment. The first part of this chapter examines the registration of a society under the Society Registration Act and how government encroachments on the fundamental rights of its members are justified. The second section discusses the interventions of governments through co-operative societies in the context of the fundamental right of individuals to form associations or unions or co-operative societies.

Chapter VIII deals with trade union rights in the context of the fundamental rights guaranteed by the Constitution. Trade unionism in India has a long history. Freedom of association in the labour sector has expanded before independent India. The trade unions carried out sacrificial activities in the Indian freedom struggle. Union rights were included in the list of fundamental rights in the Constitution of independent India based on the democratic values that had developed in the international arena and in India itself.

This chapter discusses the position of trade unions in different countries dominated by ideologies such as capitalism and communism. It traces the historical development of trade unionism in India and how legislation regulated it. The trade union in India was influenced by various ideologies such as Gandhism and other ideologies that assisted the freedom struggle in India. The chapter discusses the laws relating to trade unions, such as the Trade Union Act

and the Industrial Relations Code, 2020. One of the significant problems facing Indian trade unions is organization workers and contract workers in the unorganized sector. This chapter examines the doctrine of collective bargaining as a group right available to workers in the industry to protect their labour rights and create favourable conditions at the workplace.

The right to strike is an integral part of trade unionism and is accepted in many international instruments as one of the basic rights of modern democracies. Chapter IX examined this right as part of our constitutional framework and the legislation regarding industries and similar institutions. The right to organise and the right to deny are fundamental rights in a democratic society. The Supreme Court has long held that the right to strike is not a fundamental right, no matter what is included in the scope of the fundamental rights. But what is being examined in this chapter is the statutory rights and restrictions on strike in the industrial field. As the components of a strike in an industrial unit, the right to collective bargaining, the right to negotiate, and the mechanisms available in the industry to participate in the collective bargaining process are also discussed. At the beginning of the chapter, the importance of strike in an industrial sector, its origin, and development are discussed. The concept of the right to strike is theoretically analyzed.

The next chapter deals with the associational rights of government employees and other employees employed in public companies and corporations. This chapter examines in light of the fundamental rights

guaranteed by the Constitution of India whether certain fundamental rights, especially the right to organize and the right to freedom of expression, have to be subverted when an individual steps into government service. This chapter, therefore, discusses in detail the judicial decisions and the service laws of India. The concluding chapter contains the results of the tested hypothesis of this thesis and the answers and findings to research questions.

Chapter 2

Associational right: origin and development

This chapter explores the various philosophical debates about the nature of the freedoms of association and its existence. It deals with different associations, ranging from intimate family relationships to strained relations between strangers in an association. The analysis will evaluate the meaning, function, and value of association independence within the holistic image of associational life. Historians and legal scholars have commented on the journey of associations and social life of human beings.

2.1. Historical origin

Associational activities of men are as old as the history of human beings[1]. Men of all ages, all situations in life, and all types of dispositions are forever forming an association of a thousand different types. Throughout history, people have gained rights and responsibilities through membership in groups – family, religion, class, community and state. The plethora of associational forms makes it difficult to fit all associations into a single

[1] De Tocqueville, *Democracy in America* 485 (1966). He said religious, moral, serious, futile, very general and very limited, immensely large and very minute are created by men in his walk of life.

analytical framework.[2] One might be inclined to break down the above list into three distinct categories, viz, primary associations such as families where the contact is relatively intimate, and one's choice is relatively limited; secondary associations such as a parent-teacher association where the engagement is focused, somewhat less intimate, and slightly more voluntary; tertiary such as the reproductive rights alliance where the involvement is intermittent and connection as transitory as might like. History tells us that an association can help restore a person's self-esteem and confidence and that human fellowship can restore companionship. To maintain a normal relationship in family, religion, economic, politics, and society, people rely on others in various spheres of life. Thus, group formation is natural to human beings. Many different legal systems have recognized this phenomenon from ancient times to the present day[3].

2.2. Theoretical foundations

Man is a social animal by nature. Aristotle[4], the legendary Greek philosopher, pointed out that society precedes the individuals or even the rights and liberties of individuals developed in a society. In his book *Politics*,

[2] David Cole rightly noted that because 'virtually all conduct is at least potentially associational, we are presented with serious challenges to crafting a coherent jurisprudence. Hanging with the Wrong Crowd: Of Gangs, Terrorists and Freedom of Association (1999) *Sup Ct Rev* 203, 204. This difficulty does not prevent one from identifying an array of justifications for the freedom. To give up on a unified theory of everything associational does not require one to give up on theory.

[3] Gerrit Pienaar, *Freedom of Association in the United States and South Africa — A Comparative Analysis*, 26 Comparative and International Law Journal of Southern Africa, 147, 147 (1993)

[4] 384–322 BC

Aristotle believed the man was a political animal because he is a social creature with the power of speech and moral reasoning[5]. They are naturally attracted to various social, political, and economic associations to meet their social needs. Aristotle discussed friendship in his book *Nicomachean Ethics* with following manner:

> *For without friendship no one would choose to live though he had all other goods; even rich men and those in possession of office and of dominating power are thought to need friends most of all.... And in poverty and in other misfortunes men think friends are the only refuge. It helps the young too, to keep from error*[6].

Friendship is an association or a kind of relation which shows warmth and strong bondages among members and struggles to discover, shape, and pursue ideas of what constitutes a good life. It is a community governed by love and cooperation. Friendships can be rooted in mutual advantage, status and convenience. It is a virtue in itself and a necessity of life. Rich and poor, young and old, all people need friends. Parents and children - not only among humans but also among animals - have a natural friendship with one another. According to John Locke, man is considered as an isolated person and a member of a group[7].

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[5] Aristotle, *Politics*, He said man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity, http://classics.mit.edu/Aristotle/politics.1.one.html, accessed on 23/02/2021

[6] http://classics.mit.edu//Aristotle/nicomachaen.html, Aristotle, *Nicomachean Ethics, Book* VIII, accessed on 12/06/2020.

[7] William O. Douglas, *Right of Association*, 63 Colum. L. Rev. 1361, 1361 (1963)

2.3. Core domains of individual freedoms

Theorists explain the right of association as an extension of the right to personal liberty in a society. According to John Stuart Mill, freedom of association is one of the core domains of individual freedoms. He observed that one has the freedom, in combination with other people, to unite for any purpose not involving harm to others and the persons combining being supposed to be of full age and not forced or deceived. He also said that one has the right to choose the society most acceptable to them, free from governmental interference[8]. He explained freedom of association based on the principle of harm. Freedom of association is subject to this harm principle that permits to interfere with someone's conduct only to prevent harm to others. In every legal system and its constitution, associational rights must be protected for lawful purposes.

De Tocqueville viewed freedom of association as so fundamental as to have a source in natural law. He rightly explained the inalienable nature of this freedom as follows:

> *The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. No legislator can attack it without impairing the foundations of society*[9].

[8] John Stuart Mill, *On Liberty*, (1859)
[9] *Supra*, n. 1 at 178

Therefore, associations formed by human are meant not only for getting together or for entertainment but also to serve different purposes at every point in the course of human life like commercial, industrial purposes religious, moral, serious, futile, very general, very limited, immensely large, and every minute[10].

Tocqueville further noted the ubiquitous character of American voluntary association in the following words:

> *Societies are formed to resist enemies which are exclusively of a moral nature and to diminish the vice of intemperance in the United States associations are established to promote public order, commerce, industry morality, and religion, for there is end which the human will, seconded by the collective exertions of individuals, despairs of attaining. Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds – religious, moral, serous, futile, extensive or restricted enormous or diminutive... wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association*[11].

Association or union is a socio-political activity that has been found essential at all points of human existence. History has shown that associational

[10] De Tocqueville has describes so many association in his book like Churches, synagogues, and mosques, colleges, universities, and museums, corporations, trade unions, and lobbying groups, sports leagues, literary societies, sororal and fraternal orders, environmental groups, national and international charitable organizations, and self-help groups, parent-teachers associations, residential associations etc

[11] *Supra* n. 1 at 114

freedom has helped man to make all kinds of progress. Legal systems have protected group rights in several ways: cultural rights, linguistic rights and religious rights.

2.4. Natural rights theory

Definitions of fundamental principles are often derived from the philosophy of invisible and natural rights, which the constitutional framework relies upon, because the framers found certain rights in the laws of nature rather than merely in the law or constitutions of men[12]. According to natural rights theory nature endows every individual with certain rights which are absolute and imprescriptible because they are anterior to society. If rights are anterior to society, then certainly it is wrong and illegitimate on the part of State to place any restrictions on their enjoyment by the citizens.[13]

The desire to join a group is an innate human trait. This is considered a natural right because it is a right that society recognizes from time to time. Throughout history, the idea of society stems from the internalization of humanity, developed through the struggle of human life[14]. Society is a

[12] Reena Raggi, *An Independent Right to Freedom of Association*, 12 Harv. C.R.-C.L. L. Rev. 1, 13 (1977). It is clear that Locke, Harrington, and Montesquieu, all exponents of the theory that man's inalienable rights precede government, exercised far more of an influence on the Revolutionary generation than did Hobbes and Rousseau who denied the existence of natural rights.

[13] J. P. Duda, *Fundamental Rights and Personal Liberty under our Constitution Some Observations* 37, 37, 11 (4) the Indian Journal of Political Science (1950)

[14] Nancy Flowers, *Human Rights Here and Now Celebrating the Universal Declaration of Human Rights*, http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm, accessed on 12/5/2021

collective of human beings who share common goals with the intention of the welfare society. Groups formed for illegal purposes are not protected by law and unacceptable by society. A group can be called a formal association or unorganised association with members who have a common intention. Independence is the heart of the association and it plays a crucial role in the development of one's identity. Whichever the organization, be it the devotional community, entertainment club, business association, or union, there are certain natural features of the organization, including values, beliefs, interests, selection criteria etc.

Accordance to sociologists the individual is not anterior to society in any sense of the terms. Therefore it cannot conceive of an individual apart from his relation to society. What an individual is or is capable of becoming and what he actually becomes all this conditioned by the nature of the society in which he is born and lives, moves, and has his being.[15] Thus viewed human rights would nothing but different ways of stating human relationship in society. These relations are not fixed and immutable; they are relative to the historical development of society and therefore variable. Being the products of society, they grow with the growth of society and degenerate if society becomes unprogressive

[15] *Supra* n. 13 at 39

Wesley Hohfeld while discussing rights and freedom, identified eight normative positions that together make four pairs of correlates and four pairs of opposites.[16] Using this Hohfeldian terminology, freedom of association can refer to any one of the following positions and its correlate:

Permission: We might be at liberty, i.e., have moral or legal authorization, to associate or dissociate with other people. When we have permission to associate with, or dissociate from, someone, we have no duty not to act, and, hence, correlatively, other people have no claim upon us that we act otherwise. Moral and legal permissions do not always go hand in hand. An adult might have legal permission to marry a child, but he has no moral permission to do so.

Claim-right: We might have a moral or legal claim-right against others interfering with our conduct, which issues in a protected sphere of action to associate with or dissociate from, people in specific ways even if we commit moral wrongs by doing so. When we have such a claim, others have a duty not to interfere and may positively protect our sphere of action.

Power: We might have a moral or legal power to alter our associative status about other people. The power to join an association can produce new rights and duties or remove previously valid rights and duties. When we marry

[16] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916-1917).

someone, we exercise the power to alter their normative status and our own by creating new claims, rights, duties, and powers. As parents, we have the ability to decide whether our children will be friends with other kids. If we divorce, we exercise power to alter our children's associative position about us and possibly each other. When we have such powers to affect others' normative associative position, they have a *liability* to be affected by how we use our power.

Immunity: We might have a moral or legal immunity against other people exercising their rights to association or dissociation in ways that would alter our associative status. When we are immune, other people are disabled from exercising power over us. For instance, once we mature, our parents no longer have the power to decide whether we'll associate with certain people or not[17]. In the case of intimate associations, members of such associations have the exclusive right to exclude others from being members.

Everyone has a duty not to interfere in the rights of others, which is considered one of the most critical points of the right to privacy, as well as a fundamental principle of association rights.

2.5. Liberal and egalitarian perspectives

Some philosophers explore two perspectives of associational freedom based on intrinsic value: Liberal and Egalitarian perspectives. According to liberal perfectionists, associational right is not an individual right but is a

[17] https://plato.stanford.edu/entries/freedom-association, accessed on 26/05/2020

concrete form of the fundamental right to liberty. Associational rights and other political liberties are essential as they enable people to lead autonomous lives. Personal autonomy refers to an ideal of self-directed action, of persons being authors of their own lives that allow individuals to live autonomous lives with others[18]. State intervention, therefore, in a liberal society is relatively low. Egalitarians argued that society's first and foremost concern is that every person should treat others with equal treatment and respect. They believe that if people are unjustly denied access to associations, it would be ruled by force rather than consent. Contemporary liberal theorists, particularly John Rawls[19] and Ronald Dworkin,[20] have given too much weight to egalitarian concerns than a libertarian concept on the question of state intervention in associations[21]. They have strongly supported state intervention into the internal matters of associations to maintain equality among members in a liberal democracy. Ronald Dworkin opined that fundamental rights are trump cards that protect individuals from being treated as unequal. The ultimate justification for these rights are that they are necessary to protect equal concern and respect.

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[18] *See* Richard C. Sinopoli, *Associational Freedom, Equality, and Rights against the State*, 47 Political Research Quarterly, 891(1994)

[19] John Rawls (1921-2002) was an American political philosopher in the liberal tradition. His theory of *justice as fairness* describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system. *See* John Rawls, *A Theory of Justice* (1971)

[20] Ronald Myles Dworkin was an American philosopher and jurist. His theory of law interpret the law in terms of moral principles especially justice and fairness. *See* Ronald Dworkin, *Taking Rights Seriously* (2013)

[21] *Supra* n.18 at 893

Fundamental rights are derived from an egalitarian concern regarding how it is morally permissible to treat others[22]. On the contrary, the liberal perfectionist's view is that a person joins an association for pleasure and participates in activities from within the framework of the association to advance his idea of good with others.

Rawls highlighted that freedom of association, like other basic rights and liberties, has a certain priority in political reasoning and cannot easily be defeated by countervailing considerations. In a Rawlsian framework, the scope and limits of freedom of association are justified with reference to two concepts that Rawls calls the two moral powers: the capacity for a sense of justice and the capacity for a conception of the good[23]. It is pointed out that freedom of association, like other fundamental rights and freedoms, has a special priority in political logic and cannot be easily defeated by resisting considerations. According to him, the association is the political right of an individual to engage in social life, and that it is an essential practice for achieving justice. This is a broader view of freedom of association, focusing on the diverse range of associational rights and highlighting the array of social goods[24].

[22] *Id* at 898
[23] John Rawls, *Political Liberalism*, 19-20 (1993)
[24] *Id.*

2.6. Nature and contents - group rights

A group right is a right possessed by a group qua group rather than by its members. It contrasts with a right held by a person as an individual. The meaning of group rights is quite different from individual rights[25]. This right is a collective right not available to individual members. Much of the controversy surrounding group rights is focused on whether groups can hold rights. Suppose a group can properly hold itself as an individual, in that case, such a group must step into the individual's shoes, and the group has the same character and status as an individual. Group rights should not be confused with the rights that people possess as members of groups.

The average interference of association rights with other freedoms is indispensable for obtaining the objects required by the association. Such interactions are pre-requisites for associations. No two people can be friends without interacting with each other or exchanging their ideas with each other. Sociability within the environment is a form of association that is inevitable to a human being for his existence in society. For example, the phenomena of "neighborhood effects" on voting behavior, one's attitudes to strangers, and self-esteem are essential in thinking about the associative value in one's routine connections that fall short of thicker forms of association[26].

[25] Standford Encyclopaedia, https://plato.stanford.edu/ accessed on 18-07-2020

[26] Robert J. Sampson , *Great American City: Chicago and the Enduring aneighbourhood Effect,* (2011). In the book, author defied the idea that society

Associational rights as an essential individual liberty is interconnected with other rights of persons who live in a society. It may be conceived that everything a person is at liberty to do individually is also at liberty to do with others[27]. Freedom 'to do collectively what they are allowed to do individually' is the view that persons should not have less freedom as a group than they have as individuals[28].

2.7. Political freedom to form association

Political freedom to form an association is a new entrance in the array of associational freedoms. The political freedom of association and its concomitant freedoms of assembly and expression of opinion do not have a long history in western civilizations. When the feudal system was strong in the middle ages, groups were prevented from being formed in a constitutional sense. During that period, the formation of commercial groups, guilds, and church groups such as the Roman Catholic Church was permissible, but freedom of political associations did not exist. Freedom of association has received little attention among political philosophers. They were more concerned with freedom of speech and expression, freedom of assembly and

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is dead. Some social theorists have argued that people only act as individuals who choose their own destiny regardless of their surroundings. Some other theories place people at the mercy of global forces beyond their control. But the author argued that communities are still important because life is decisively shaped by where you live.

[27] *Supra* n. 18 at 894

[28] Tonia Novits, *Workers'Freedom of Association, in Human Right in Labour and Employment Relations: International and Domestic Perspectives* 126 (Edited Book by James A. Gross and Lance Compa)

religious freedoms etc[29]. However, the nobility did, in due course, begin to claim political group rights, with the result that the *Magna Carta Liberatum* in 1215[30], *Petition of Rights* in 1689[31] , and the *Habeas Corpus* in 1679[32] saw the light of day in England. The same development occurred in France after the French Revolution, while in the Netherlands, it was initiated by the works of Hugo de Groot[33]. Freedom of political association of individuals is equally important in a democratic society because the government is built on the right of every citizen to engage in political expression and association[34].

The Constitution of the United States of America, dating back to 1787, is the first Constitution with a bill of rights protecting the freedoms of individual

[29] Amy Gutmann, *Freedom of Association: An Introductory Essay*, 3 (1998)

[30] Magna Carta, English Great Charter, charter of English liberties granted by King John on June 15, 1215, under threat of civil war and reissued, with alterations, in 1216, 1217, and 1225. By declaring the sovereign to be subject to the rule of law and documenting the liberties held by "free men," the Magna Carta provided the foundation for individual rights in Anglo-American jurisprudence. https://www.britannica.com/topic/Magna-Carta, 08/03/2021

[31] Petition of Right, (1628) is an English Constitutional document setting out specific individual protections against the State. petition sent by the English Parliament to King Charles I complaining of a series of breaches of law. The petition sought recognition of four principles: no taxation without the consent of Parliament, no imprisonment without cause, no quartering of soldiers on subjects, and no martial law in peacetime.

[32] Habeas Corpus Act of 1679 is an Act of Parliament, still in force today which authorized judges to issue the writ when courts were on vacation and provided severe penalties for any judge who refused to comply with it. Habeas corpus**,** an ancient common-law writ, issued by a court or judge directing one who holds another in custody to produce the person before the court for some specified purpose. Although there have been and are many varieties of the writ, the most important is that used to correct violations of personal liberty by directing judicial inquiry into the legality of a detention. The habeas corpus remedy is recognized in the countries of the Anglo-American legal system but is generally not found in civil-law countries, although some of the latter have adopted comparable procedures. https://www.britannica.com/topic/habeas-corpus#ref273158, 08/03/2021

[33] *Supra* n. 3 at 147-148 (1993).

[34] *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)

citizens against state tyranny or suppression by majority groups. The First[35] and Fourteenth Amendments[36] to the U.S. Constitution are fundamental to the civil rights of American citizens. They are closely related to the right to form an association or union. The First Amendment covers all the most important socio-political rights for the maintenance of a democratic government. The Due Process Clause of the Fourteenth Amendment prohibits the state from losing life, liberty, and property without due process.

Whitney v. *California*[37] had developed free speech jurisprudence in America. Justice Holmes and Brandeis, in separate opinions, formulated their clear and present danger test and developed their underlying theories of free speech. However, *Whitney* was not a free speech case at all. It was a case about association and assembly[38]. Although the First Amendment does not explicitly guarantee the freedom of association, the Supreme Court has repeatedly

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[35] Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[36] The Fourteenth Amendment is the longest amendment to the Constitution. It was ratified in 1868 in order to protect the civil rights, equal protection under the law due process and the requirement of the states.
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[37] 274 US 357 (1927)

[38] Ashutosh Bhagwat, *Associational Speech*, 120 Yale L.J. 978, 983 (2011)

affirmed that freedom of association is implied by freedom of assembly and freedom of speech.

Until 1958, it remained a controversial question as to whether associational rights were a part of American Constitutional jurisprudence[39]. Finally, the U.S. Supreme Court in *National Association for the Advancement of Colored People* (NAACP) v. *Alabama*[40] observed that even though the associational right is not expressly mentioned in any provision or amendments, it can be deducted from the entire concept of liberty represented in constitutional values[41]. The U.S. Supreme Court has, by its most exclusive interpretation, found two constitutional sources of freedom of association, classifying them as 'instrumental' and 'intrinsic'. The source of the 'instrumental' is the First Amendment, which protects the right to engage in expressive activities. At the same time, intrinsic is inherent in the Fourteenth Amendment to the Constitution to protect the privacy rights of members of an association[42]. The First Amendment has three collective rights: the freedom of the press, the freedom of assembly, and the free exercise of religion. The

[39] The year in which the American Supreme Court delivered the judgment in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958).

[40] 357 U.S. 449 (1958)

[41] Similar view was expressed by the Supreme Court of India in *M. Nagaraj* v *Union of India*, (2006) 8 SCC 212 that the Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III, Fundamental Right of the Constitution of India, on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

[42] Justice Brennan identified these two sources in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

freedom of association is inherent in these three rights. Any more general right of association must come through the due process clauses of the Fifth and Fourteenth Amendments[43]. Association is liberty; liberty may not be reduced except by due process[44]. Otherwise, it may be said that liberty includes association to run a farm or corporation and to drink whiskey in a club as much as it provides association to engage in sexual activities of one's choice[45].

In 1957, the U.S. Supreme Court upheld the constitutional rights of the Association's independence, thereby prohibiting government involvement in the internal affairs of an association. In the *NAACP* case, the Court held that the organization need not disclose its membership lists to hostile state authorities. The right of association belongs to its individual members as augmenting the power of their individual speech. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment, which embraces freedom of speech.[46]

The respondent, Alabama, demanded that the Petitioner, the NAACP, provide a list of all Alabama NAACP members based on the state's foreign corporation registration law made in the course of an injunction action brought to stop the petitioner from conducting activities in the state. The respondent

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[43] Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harvard Journal of Law and Public Policy 91, 91 (1987)
[44] *Id*
[45] *Id*
[46] *Supra* n. 39

moved for the production of a large number of the petitioner's records. The petitioner produced almost all the requested data except for membership lists. The Supreme Court heard the case based on whether compelled disclosure of membership lists violates the petitioner's members' rights of freedom of association? Whether respondent has demonstrated an interest in obtaining the membership lists, which is sufficient to justify the deterrent effect which releasing these lists would have on the free exercise of the constitutionally protected right of association? Did Alabama's requirement violate the due process clause of the Fourteenth Amendment? In the *NAACP* case, the Supreme Court of the U.S established the relationship between its members' right to association and privacy. The Court also looked into the effects on the association's ability to advocate the beliefs of its members. The judgment of *Roberts* v *United States Jaycees*[47]case witnessed another development in America concerning associational rights.

2.8. Content of associational rights

There is a historical, social, and political development in determining the content of association rights. It can be seen that this is directly related to the evolution of civil rights. Therefore, while examining the development of the rights to form associations or unions, some of the factors inherent in it have been explored and revealed by judges and philosophers from time to time.

[47] 468 U.S. 609 (1984)

2.8.1. Organizational autonomy

Organizational autonomy is crucial in ensuring the autonomy of the association, which begins with the election of members to the associations and makes decisions without the intervention of any authorities. While associations do not have absolute rights to exclude or exit, they do not necessarily have full rights over their organizational autonomy. Associational freedom also secures the so-called private goods. It is believed that intimate associations are crucial to one's self-understanding.[48] The right of the family to conform to patriarchal values, the right of unions to maintain hierarchical decision procedures, and the rights of churches to refuse women access to positions of authority are all consequences of those associations being allowed to shape their organization without outside interference. These rights find their limits when they do indefensible harm to members, particularly to those members who cannot consent[49]. At the same time, forced inclusion of individuals in a particular group in the name of anti-discrimination law appears to be detrimental to the autonomy of the group[50].

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[48] But that self-understanding does not mean that we, as individuals, do have or should have relatively unfettered control over decisions about intimate relationships. See § 44.1*(b)* infra. See also Jed Rubenfeld 'The Right of Privacy' (1989) 102 *Harvard LR* 737 (The general effect of anti-contraception, anti-abortion, anti-homosexuality or anti-miscegenation laws is to force one's life into extremely limited patterns—patterns which inform, if not dictate, the totality of one's life. Seen this way, a right to intimate association is not about 'the freedom to do certain, particular acts' but rather the 'freedom not to have one's life too totally determined by a progressively more normalizing state'.)

[49] Larry Alexander, *What Is Freedom of Association, and What Is Its Denial?*, *Social Philosophy and Policy*, 25(2) 1, 14 (2008): pages 1-21, page 14

[50] *See Supra* n. 47

2.8.2. Right to refuse membership

The freedom of each organization to choose its members is guaranteed within the freedom of association. The right to leave and refuse membership is as fundamental and integral as the freedom of association. Disagreements between members of an association should not destroy the main reason for which the association was formed. Freedom of association is often subject to internal restrictions that may prevent individuals from enjoying their freedom. A person's positive right to associate with other people is based on whether other people want to associate with that person or not. Friendship, family, and private clubs are organizations that work together according to each other's wishes. The consent of the members of those associations depends on the selection and retention of new or existing members. However, in some cases, the right to refuse to include new members in the association is a very complex issue, e.g., the right to admission in educational institutions. For example, school or association refuses to admit a student to school based on colour, religion or sex. In that case, it is not consistently recognized and protected under the cover of an association right. The alleged association of people who tried to deny them the right and opportunities for their education is also incompatible with the rights of freedom of associations or unions. Similarly, if some sports clubs discriminate against girls for membership, girls lose the freedom to study with their peers and teachers, especially if they do not join

such sports clubs. In such a case, the law prohibits girls from forming a special sports club for their training[51].

Taking membership in an association is based on the purpose of the association. In this view, an association like the sports club, church, or business will decide its own rules on who is in and who is out. It may be an inherent value of free association. Suppose a homosexual is recognized in an association whose primary purpose is to discourage homosexuality among young people. It will destroy the purpose of the association, and such members are not admitted to the association[52].

Membership of an individual is determined when it is subject to the collective opinion of the associates. If a person does not agree to the terms of that association, he may chose to leave the association. If a person does not explain his views, he can join several associations. Associational relationships are not all the same. Some relationships are strong, secretive in nature, and inaccessible to others.

The right to form associations or unions, therefore, the right not to be associated with any associations or union or right to exit from an association or unions is an integral part of the right to form associations or unions. The right to exit the association and an individual's right to refuse to join the association

[51] In the context of *Boys scouts of America* v *Dale*, 530 U.S. 640(2000) new groups were developed with more comprehensive membership policies and more liberal ideas.

[52] *See Boy Scouts of America v Dale* 530 U.S. 640(2000)

is a democratic process within freedom. Tolerance to disagreement must be encouraged as it is the soul of democracy. The purposes of an association are open to reasonable disagreement, and this often necessitates judicial interpretation and decision.

2.9. Categories of associations

The nature and character of associations may be classified into different categories. It may be classified into intimate and expressive or collective, voluntary and non-voluntary, hierarchical and non-hierarchical in considering its relationship among the members of associations. It is tough to classify associations into intimate[53] and expressive or collective associations. Association in terms of protection guaranteed by the Constitution of U. S. is divided by the American Supreme Court into express association and intimate association in 1984 in the *Roberts* v. *United States Jaycees*[54]case. The decision was a milestone in the discussion of freedom of association and, at the same time, led to further controversy. The court addressed the challenges relating to the right to association and anti-discrimination in the categories of intimate and expressive association. The intimate association is defined as "a fundamental element of personal liberty," whereas the expressive association is explained as "a right to associate to engage in those activities protected by the First

[53] The category of intimate association likely originated in 1980. *See* Kenneth *The Freedom of Intimate Association* 89 YALE L.J. 624, 626 (1980)

[54] *Supra* n. 47

Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.[55]

2.9.1. Intimate associations

The nature of an intimate association determines the association bonds of such relationships. There is a general perception that the right to intimate associations is limited to organizations with particular characteristics. Members of intimate associations are usually relatives, friends, and loved ones. Members interacts directly with other members through affection, interest, care, concern, and love. The nature of such associations is that the member acts for the welfare and well-being of their members, not for others. Thus, it is an association that promotes a way of life, not causes[56]. Elements of non-voluntary and hierarchical nature are found in intimate associations. Human history shows that family is the best example of intimate associations: spousal, parental, and sibling relationships are the primary forms of relationship. Security, financial gain and avoiding bad alternatives can all be reasons for creating intimate associations such as getting married and forming families.

Forming a family is an inherent right of a person, and this is deeply associated with his or her freedom of association because without valid reasons, the state or any individual cannot interfere with his or her association. Inclusion and exclusion in the family is not an easy task. Traditionally, not all eligible

[55] *Id.* at 618
[56] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)

family members have equal power to determine membership. Patriarchy has long controlled who is welcome into the family: for example, the expulsion of certain members, especially women who fail to fulfil certain virtues. However, in some cases, individual members have the right to exclude others or even members of the family and welcome new members into the family, such as the right to refuse a marriage proposal, the right to access contraception, the right to divorce and right to adoption. If a member is excluded from the family, this does not mean that he is free from all obligations to the family. Divorced spouses cannot relieve themselves of all obligations to their former partners, especially if that partner is taking care of their children. The intimate associations usually receive strong constitutional protections that flow from rights to privacy to human dignity and equality.

Intimate associations receive the highest level of constitutional protection regardless of whether they are also expressive.[57] The concept of intimate association provides no constitutional safeguards beyond those afforded by the right to privacy. In *Grisworld* v. *Connecticut*[58] the court established the foundation of the right of intimate association by identifying the right of privacy as falling within the 'penumbras' formed by the various specific guarantees in the Bill of Rights.

[57] John D. Inasu, *The Unsettling Well Settled Law of Freedom of Association*, 43 Conn. L. Rev. 149, 155. (2010)
[58] *Supra* n. 56

According to *Roberts* v. *United States Jaycees*[59] the by-law of United States Jaycees was restricted to men between the ages of eighteen and thirty-five. Women and older men were denied associate membership, barred from voting, or holding local or national positions. Two chapters of the Jaycees in Minnesota, contrary to the bylaws, recognized women as full members. When the national organization revoked the Chapters' licenses, they filed a discriminatory claim under the Minnesota Anti-Discrimination Act. The national organization filed a lawsuit against Kathryn Roberts of the Minnesota Department of Human Rights, responsible for enforcing anti-discrimination laws. The case addressed the conflict of opinion on the state's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association. One of the contentions of the association was that the Minnesota Human Rights Act violates the First and Fourteenth Amendment rights of the organization's members.

This case mainly examined whether the application of the Minnesota Statute to the membership policies of the association would create a direct and substantial interference with the freedom of the association. Justice Brennan explained that there are two protected freedoms of association: freedom of intimate association, which is a component of the Fourteenth Amendment's guarantee of substantive due process, and freedom of expressive

[59] *Supra* n. 47

association, covered under the First Amendment. The court concluded that the Fourteenth Amendment's guarantee of intimate association does not apply to the Jaycees because they are not a sufficiently intimate group[60]. The court sought to balance equality against group autonomy because the court never considered the theoretical underpinnings of the two categories of associations, i.e., intimate and expressive.

Before the *Robert* case, the Supreme Court of the United States had issued numerous judgments relating to close associations, even if they were not explicitly mentioned, e. g., the judgments about marriage, the decision on whether or not to give birth, the legality of parenthood, and the parent-child relationship etc[61].

Association is sometimes the special relationship of individuals that excludes others from enjoying such freedom, which is an intrinsic component of individual freedom. Individual freedom in an intimate association is, therefore, different from freedom of expressive associations. It is explained in the case as follows:

> *...certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. ... The*

[60] *Id.* at 620
[61] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 (4) YALE L.J., 624, 627 (1980)

> *personal affiliations that exemplify these considerations are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty*[62].

Personal interests, love, affection, and greater inclusion like privacy play a more significant role in a particular type of association. This is just as important as expressive associations. All these relationships contribute to the cultural, political, and social development of a nation.

The most recent turn in the courts' modern association jurisprudence occurred in the case of *Boy Scouts of America* v. *Dale*[63] where the Boy Scouts revoked James Dale's adult membership and position as an assistant scoutmaster upon learning that Dale was homosexual and a gay rights activist. The court defended the Boy Scouts message that the organization was hostile to homosexuality and that Dale's inclusion would interfere with the ability to convey that message.

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[62] *Supra* n.58 at 627; *See also* Karst 'Freedom of intimate association' 1980 Yale Law Journal 624.

[63] *Supra* n. 52

2.9.2. Expressive associations

The expressive association is an association formed for the expression and possession of political views, which promotes an open forum for discussion, and democratically shapes public opinion. In other words, an important function of many expressive associations is to check the power of the state. Expressive associations have also a role to play in increasing the various experiments of living to which people have access. A plurality of opinions, creeds, and ideologies increases the chance that people will find ways of life that suit them[64]. The right to associate for expressive purposes is not absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests.

The expressive associations have the right to exclude certain categories of people from memberships of such associations if the inclusion of such categories would prevent the association from acting or engaging in the activities protected by the political freedoms of the Constitution. Expressive associations include not only advocacy groups and civil rights groups but also segregationist groups and xenophobic groups[65].

The nature of express associations is more general than that of close associations, as such associations must act following public law when

[64] *Supra* n.8 at ch. III

[65] Examples of expressive associations include the ACLU, the NAACP, Amnesty International, the LGBTQIA community, the NRA, and the KKK.

exercising rights such as anti-discrimination policies. The distinct features of expressive associations are following they are intertwined with other expressive rights, such as freedom of expression and religious freedom[66]. They enhance the quality of democracy by promoting citizenship, promoting open forums for public discourse and autonomy. It can check the powers of the state; they are also involved in enhancing the various life experiments. A plethora of opinions, religions and ideologies increase the chance of people finding a suitable lifestyle. Allowing groups to exclude people who fail to comply with a lifestyle is a valuable addition to the diversity of fertility lifestyles. Therefore, people who are not suitable for the organization are expelled[67].

2.9.3. Private associations

A private association is an association formed by close members voluntarily or involuntarily for purely personal purposes. It does not intend to create public opinion, interfere in government affairs, and not intend to form a widespread association. Therefore, disputes regarding membership or any other matters relating to a private association are governed by private law. Public law is commonly not applicable in this area. But more often than not, the state is seen as interfering in the internal affairs of the private association because the

[66] Article 18 of Universal Declaration of Human Rights says that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".
[67] *Supra* n. 52

distinction between public and private associations has become blurred in liberal democratic societies[68].

The nature of associations is very relevant to the application of the state's indiscriminate membership policy. One of the basic questions regarding this matter is whether purely private and intimate associations are the subject of indiscriminate state policies. The state may intrude social clubs, corporations, and educational institutions in various ways like tax exceptions and giving grants, etc.[69] Even if equal opportunity to get education in public educational institutions expanding civil rights legislation, more and more private activities became subject to regulation[70]. Private associations may conflict with anti-discrimination laws in several contexts[71].

2.10. Principle of equality

State intervention to apply the principle of equality to private organizations has been controversial. The courts have often asked the question as to whether state infiltration can be justified based on the constitutional

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[68] Richard C. Sinopoli, *Associational Freedom, Equality, and Rights against the State,* 893, 47(4) Political Research Quarterly, (1994)

[69] *Brown v Board of Education* 347 U.S. 483 (1954)

[70] Evelyn Brody, Entrance, Voice, and Exit: *The Constitutional Bounds of the Right of Association,* 35 U.C Davis L. Rev. 821, 837 (2002)

[71] *Runyou* v *McCrary* 427 U.S 160 (1976), When Michael McCrary and other black students were denied admission to unintegrated private schools, their parents brought a civil suit against the schools under a Post- Civil War Federal law prohibiting racial discrimination in the making and enforcing of private contracts. The Supreme Court found that these schools, because of their methods of soliciting students were "more public than private" and did not fall under any exceptions in the statute. The Court proceeded to uphold the federal statute against the school's claim of freedom of association.

principle of equality to private relations such as family, marriage, and other blood relations.

The tension between associational freedom and equality is more important aspect the tension between the concept of equality and liberty, which assumes that each individual has personal interests and goals. The state has to ensure and protect the right to equality of its citizens. At the same time, state also needs to ensure that it does not disturb the privacy of citizens who come together for some lawful purposes. This issue is elaborately discussed in *Roberts* v. *United States Jaycees*[72] in which the Court addressed the tension between associational freedom and equality principle fundamentally propounded by the State. If an association exists solely for the benefit of male members, a woman may be denied her right to enter the association, on the contrary, if women members are permitted to become full members of such organization that would violate the existing members' freedom of association. The Court, however, consistently rejected the members' claim on association rights because the anti-discrimination law must be applied in areas such as employment, education, and access to commercial enterprises[73]. The Court held that applying the Minnesota Human Rights Act to compel the Jaycees to accept women as regular members did not abridge either male members' freedom of intimate association or their freedom of expressive association. This decision

[72] *Supra* n. 47
[73] *See also Railway Mail Assn.* v. *Corsi*, 326 U.S. 88 (1945)

sparked a debate on the implementation of anti-discriminatory law to private associations and whether it amounted to the interference of associational rights of members of the association.

The significance of the Jaycees decision is that even private associations are not free from the State's obligation to apply anti-discrimination laws. Access to opportunities and equal access to public institutions as a compelling State interest would be the highest order. However, the State has the responsibility to ensure the freedom of association in the name of equality, but it shall not compromise the right of privacy and personal liberty of individuals. A need for a balancing approach is an inevitable solution to tackle the issue. In a liberal society, the distinction between purely public and private associations is increasingly becoming blurred. The State has in many ways intervened in the domestic affairs of many organizations, such as clubs, corporations, and universities, in the name of tax breaks and subsidies. However, responding to the question of establishing the rights of a member in an association, the court held that not all associations could be treated equally. A family as an association of intimate relatives and blood ties can only be interpreted based on the privacy of family members[74]. Therefore, associations are divided into two groups based on a state's ability to interfere with the internal affairs of an association, such as freedom of intimate association and freedom of expressive

[74] *Supra* n. 47.

association. State legislation cannot compel any association to accept the association members who do not wish to become members of the intimate association[75].

Freedom of association means freedom to choose organizations. Two questions are very important regarding the rights of members of a private association: can a private association unilaterally select its members by exercising associational freedom? Are private organizations outside the scope of legislations that should aim to meet the principle of anti-discrimination? A person's privacy may include selecting an association that respects his interests. One aspect of constitutionally protected liberty is that a person can choose an 'intimate association' or be a member of that organization based on his privacy rights[76]. A strong argument against the state intervention on the fundamental nature of the right to select one's intimate associates is derived from the concept of "zone of privacy" which was established in *Griswold v. Connecticut* decision[77] and constitutional protection of due process clause. The right to privacy of a person denotes a deep attachment and commitment of intensively personal intimacy, but in certain associations, members share not only ideas and experiences but also the distinctively personal and unique aspects of one's life. Family is a type of association where no one can enter the family without

[75] *Id*. at. 617
[76] *Bell v. Maryland*, 378 U.S. 226, 313 (1964)
[77] *Supra* n. 56

the consent of the family members. The right to privacy of the family is protected by keeping the family as a private organization. The state does not have an opportunity to enforce the anti-discrimination law on family ties because it is a unique group. Marriage is an association between two individuals. The state should not infringe on the privacy rights of those individuals because the practice of contraception is part of the privacy of a marriage institution[78]. Like all human rights, the unrestricted use of the freedom of association may jeopardize the rights of others, particularly the right to privacy.

Under the U.S Constitution, commercial associations will get only minimal constitutional protection[79], but how to differentiate it from the expressive association is a challenge before the courts of law. An association formed to engage in civil rights activities is likely to engage in several economic activities such as dues to be collected, office equipment to be purchased, coffee to be served, and halls to be rented. Commercial associations may also engage in accidental activities such as advertising, discussions, and negotiating that are not subject to commercial freedom but may be subject to freedom of speech and expression.

[78] *Id*
[79] *Id,* (O'Connor J.)

2.11. Inter-connections with other freedoms

Since the traditional idea of separating the civil and economic rights of an individual in a civil society is not appropriate in the new interpretations of civil and political rights, it can be seen that freedom of association is a compilation of civil, political, and economic rights. The recent trends of interpretation are that the concept of freedom includes civil and political rights and economic and cultural rights give new dimensions to the enjoyment of group rights. In short, in a democracy, water compartment separations of rights are not amenable to modern democratic values. In the *NAACP* case, the U.S. Supreme Court recognized the close link between freedom of association and other freedoms. It has rightly observed as follows:

> *This Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the 14th Amendment, which embraces freedom of speech.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny*[80].

The link between freedom of association and other related freedoms has already been established because association freedom is essential for citizens to enjoy

[80] *Supra* n. 46 at 460-61

other freedoms. The right to exclude an individual from joining an association restricts his or her other personal freedoms, such as freedom of speech, religion, and educational opportunities[81]. Although the organization is established for a purpose, it cannot achieve the main objective without the support of ancillary objectives in the journey towards that goal. The primary and obvious goal of most religious churches is spiritual. But many churches serve important civil and political goals that do not violate the constitutional prohibition on the establishment of religion and its propagandas.[82]

Associations do not form automatically, and individuals who want to form an association need to communicate their views and values to each other, identify their common traits, and come together frequently. They must also be able to recruit strangers to join them based on common values. As Tocqueville points out in a democracy, an association cannot be powerful unless it is numerous.[83] Tocqueville emphasized newspapers' role in forming and maintaining the common values and goals at the core of associations[84].

The complementarities and inclusiveness of freedoms are essential elements in a democracy. Although the expression 'thought, religion and conscience' can be applied individually, their exercise may require or enhance

[81] UN Human Rights Council resolution 15/21 The right to freedom of peaceful assembly and of association, "due to the colour of skin, excluding anyone from well-resourced groups diminishes their ability to develop political opinions, engage in literary arts, and other cultural, economic and social activities"
[82] *Supra* n. 29
[83] *See Supra* n. 1
[84] *Supra* n. 38 at 998

association with others. Collective effort is often required to achieve civil, political, and economic rights through freedom of association. Association and assembly are often discussed as two sides of a single right. Universal Declaration of Human Rights (UDHR) declares both rights together that "everyone has the right to freedom of peaceful assembly and association"[85]. Commentaries on drafting the UDHR agreed on these two rights in a single article because draftees were mainly concerned with protecting political associations and trade unions[86]. The right of peaceful assembly and association are equally fundamental rights as free speech and free press, which are essential to maintain the opportunity for free political discussions[87].

2.12. Concept of liberty

Liberty is the sum of political, economic, and social rights with which human being have to live in dignity in a democratic system. The nature of liberty has been explained rightly by the Supreme Court of U.S in *Board of Education v. Barnette*[88] which finally ended the controversy over the sanctity and importance of fundamental rights and also clarified the position of the rights in democratic constitutions. The U.S. Supreme Court has emphasised the position as follows:

[85] Article 20.1 of the Universal Declaration of Human Rights (UDHR)
[86] https://plato.stanford.edu/entries/freedom-association/ (May 26, 2020, 12:29 PM).
[87] *See De Jonge v Oregon* 299 US 353, 364 (1937)
[88] 319 US 624 (1943)

> *The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections*[89].

When it comes to restrictions on liberty, the state must carefully circumscribe, especially in areas where there are highly sensitive freedoms, such as freedom of speech and freedom of political associations.[90] The court held in *NAACP v. Alabama*[91] case that any order from the State authorities to produce the membership list of an association was unnecessary for the State. Associational right is much broader and covers the entire spectrum in political ideology[92].

The above analysis shows that associations are groups of persons who share common interests or a common purpose and are permanent or non-permanent groups with a specific structure formed by like-minded people to achieve a common goal. Associations can be formed for different purposes, and the way to achieve that goal is different. The purpose must be lawful, and the law only governs associations with a legitimate object and the means to achieve

[89] *Id.* at 638
[90] *Supra* n. 46
[91] *Supra* n. 89
[92] *Supra* n. 7 at 1374-75

those goals in peaceful ways. The object and its mode of operation must be in accordance with the norms of a government. Joining a legal association without government intervention, such as joining a church and attending rituals, is an association activity that falls within the scope of natural behaviour of human beings.

The exclusion of others from the association is one of the crucial components of the rights of the association. Intimate associations, such as marriage and the formation of a family, are an inherent right of an individual in a society, which is recognized by society long before the state is formed. At the same time, the expressive association is a right recognized as a natural, civil right by the formal documents of the political government. Thus both types of associations are natural and fundamental to all individuals, but the recognition of the expressive right depends on the nature of the government and society. Most associations have an intrinsic interest in controlling entrance, voice, and exit because the autonomy of association is being protected to maintain distinctive culture and educational groups. Dissociation or the right not to associate is often viewed as an inevitable component of justification for the right to associate.

Chapter 3

International Instruments on Right to Freedom of Associations

After first world war, international consultations on the recognition and protection of human rights were initiated and strengthened by establishing the League of Nations. In the aftermath of second world war, this demand was further strengthened. The nations adopted concrete procedures for it and became partners in international, regional, and national human rights declarations, charters and treaties. Through this, legal action has been taken against human rights violators at various levels. The principles contained in the Universal Declaration of Human Rights (UDHR) were codified into seminal books of 1966, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Both treaties are the most influential human rights instruments. The recognition of freedom of association in various national and international treaties, including the International Covenant on Civil and

Political Rights[1] and the Charter of Fundamental Rights of the European Union,[2] indicates its value. Regional tools for association rights in Europe are contained in two instruments, the European Convention on Human Rights, 1950, and the European Social Charter, 1961. This chapter examines how freedom of association and associated rights are included in international instruments as part of human rights protections.

3.1. Universal Declaration of Human Rights, 1948

The General Assembly of the United Nations Organization (UNO) has recognized inherent dignity, equality, and inalienable rights of all members of the human family in the form of the Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society. UDHR declared that the foundation of freedom, justice, and peace in the world depends upon recognizing the inherent dignity and the equal and inalienable rights of all members of the human family. These rights derive from the inherent dignity of man. It is declared that all human beings are born free and equal in dignity and

[1] International Covenant on Civil and Political Rights, 1966. art 22. 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.'

[2] Charter of Fundamental Rights of the European Union, 2000. art. 12. provides that, '1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.' In the workplace context, see also, art 5 and art 6 of the European Social Charter and the preamble to the Constitution of the International Labour Organization (the 'ILO'), as well as the ILO's Convention No 87 on 'Freedom of Association and Protection of the Right to Organise'.

rights, regardless of race, color, gender, language, religion[3]. Article 20 (1) has declared that everyone has the right to freedom of peaceful assembly and association, and clause (2) ensured that no one might be compelled to belong to an association. In this case, the right to association and dissociation have been established as two sides of the same coin. It is interesting to note that this Article had no reference to the formation and functioning of trade unions as an expression of the freedom of association[4]. Instead, article 23 (4) provided that everyone has the right to form and to join trade unions for the protection of his interest[5]. As the UDHR is a non-legally binding document, for a man to enjoy all the rights enshrined in the UDHR, it has to create a system where everyone can enjoy his civil, political, economic, social, and political-cultural rights. Before adopting UDHR, a broad agreement existed stating that the rights that were to be enshrined in the declaration were to be transformed into legally binding obligations by negotiating one or more treaties. In 1966, two separate treaties, covering almost entirely all the rights enshrined in the Universal Declaration of Human Rights were adopted after approximately 20 years of

[3] Universal Declaration of Human Rights, 1948. art. 1

[4] Tonia Novits, *Workers'Freedom of Association* 123, 131 (2009) in Human Right in Labour and Employment Relations: International and Domestic Perspectives, edited by James A. Gross and Lance Compa.

[5] Universal Declaration of Human Rights, 1948. art. 23:
(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

negotiations: one for civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), and one for economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR).

3.2. International Convention on Civil and Political Rights 1966

The United Nations International Covenant on Civil and Political Rights (ICCPR)[6] attempts to protect civil and political rights. The unifying themes and values of the ICCPR are found in articles 2 and 3 and are based on non-discrimination. Article 2 ensures that rights recognized in the ICCPR will be respected and be available to everyone within the territory of those states who have ratified the Covenant (State Party). Article 3 ensures the equal right of both men and women to the enjoyment of all civil and political rights set out in the ICCPR. The Declaration and Conventions impose certain obligations upon individuals and States Parties. The parties must respect and monitor human rights and freedoms. The Declaration and Convention state that each person has a responsibility to strive for the promotion that he or she has obligations to every person, a duty to other individuals and society, and is responsible to strive for uplifting and observance of the rights recognized in the Convention on Civil and Political Rights. The Covenant undertakes to ensure the equal right

[6] The International Covenant on Civil and Political Rights is a multilateral treaty adopted by United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976 in accordance with Article 49 of the covenant.

of men and women to the enjoyment of all civil and political rights outlined in the Covenant[7].

There are certain rights in the ICCPR that are indirectly related to the rights of the association, i.e., such rights cannot be enjoyed without the association rights of the individual. They are the right to privacy[8], freedom of thought, conscience and religion[9], the right to hold opinion without interference[10], the right of peaceful assembly[11], right to equality[12]. At the same

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[7] International Covenant on Civil and Political Rights, 1966. art. 3

[8] *Id.* art. 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

[9] *Id.* art. 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3.Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[10] *Id.* art. 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

[11] International Covenant on Civil and Political Rights, 1966. art. 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a

time, article 22 of the Covenant dealt with the right to freedom of association. It specifically stated freedom of association with others, including the right to form and join trade unions to protect his interests. The restrictions imposed on the right must be endorsed by law which is necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedom of others. However, the Article clarified that state parties might impose reasonable restrictions on the armed forces and the police[13]. Article 22 of the International Covenant on Civil and Political Rights is its only detailed Article on freedom of association. The first paragraph of that Article is an almost exact restatement of Article 23(4) of the Universal Declaration of Human Rights. The International Covenant on Economic, Social, and Cultural Rights contains a more detailed treatment of the same subject.

democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[12] *Id.* art. 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[13] *Id.* art. 21. 2

3.3. International Convention on Economic, Social and Cultural Rights 1966

The International Convention on Economic, Social and Cultural Rights, 1966[14] (ICESCR) provides the legal framework to protect and preserve the most basic economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, education and enjoyment of the benefits of cultural freedom and scientific progress. As per article 4, States parties may, in certain circumstances, limit some rights enshrined in the Covenant; however, such limitations must be determined by law, compatible with the nature of the rights included in the Convention, and imposed to promote the general welfare in a democratic society.

Article 8 of the Covenant directly declares that everyone has the right to choose trade union membership to form trade unions and promote and protect individuals' economic and social interests. There is no authority to regulate his fundamental freedom other than the laws of the organization concerned, and no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the

[14] International Convention on Economic, Social and Cultural Rights, 1966 (ICESCR) is an international human rights multilateral treaty adopted by the United Nations General Assembly on 16 December 1966 through GA. Resolution 2200A (XXI), and came in force from 3 January 1976. India agreed to follow and ratified ICESCR in April 10, 1979.

interests of national security or public order or for any protection of the rights and freedoms of others. This right includes establishing national federations or confederations and the right of the latter to form or join international trade union organizations[15]. The Convention guarantees the right to strike in accordance with the laws of the respective countries[16]. However, this article does not preclude statutory restrictions on the enforcement of trade unions and related rights by members of the armed forces, the police, or the administration of the state[17]. The ICESCR contains more far-reaching provisions relating to trade unions rather than freedom of association per see, including qualified recognition of the right to strike.

Both instruments, however, indicate the extent of the "freedom" which is not to be restricted or limited other than as "prescribed by law" and necessary in a democratic society in the interest of national security or public order or the protection of the rights and freedoms of others and does not extend to members of the armed forces or police[18].

3.4. International Labour Organization

International Labour Organization (ILO) is a permanent organization established in 1919, as part of the Treaty of Versailles that ended the first world war, to reflect that universal and lasting peace can be accomplished if it is

[15] International Convention on Economic, Social and Cultural Rights, 1966. art. 8 (1) (b)
[16] International Convention on Economic, Social and Cultural Rights, 1966. art. 8 (1) (d)
[17] *Id.* art. 8 (2)
[18] *Supra n.* 4 at 132

based on social justice. Before establishing the organization, there had been early attempts to adopt international agreements on workers' rights through negotiations between the states, but they were not successful. At the end of the first world war in 1919, the League of Nations and the International Labour Organization were established. The organization set about adopting international Conventions on conditions of work[19]. It is a tripartite organization in which the representatives of workers and the representatives of employers stand on an equal footing with those who speak for the government. The acceptability of conventions generally reaches more areas of industry, as final decisions come only after negotiations with workers and employers by representatives of governments. The driving force for the ILO's formation came from security, humanitarian, political and economic considerations. The founders of the ILO recognized the importance of social justice in securing peace in the face of exploiting workers in industrialized countries at that time. There was a greater understanding of the world's economic interdependence, and the need for cooperation to achieve the uniformity of the working conditions in countries is the driving force of the organization[20].

[19] Lee Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, 137 Int'l Lab. Rev. 169, 171 (1998).

[20] https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm 06/07/2020, 12:19 PM

The Constitution of ILO assured that universal and lasting peace could be established if it is based upon social justice[21]. *The different ILO bodies, the functioning of the Conference, and the adoption and application of international labour standards are governed by the Constitution*[22]. The preamble to the first Constitution of the ILO in 1919 stated that freedom of association was a principle of "special and urgent importance" applied for "all lawful purposes" to both the employed and employers. The conference considers that the preamble to the Constitution of the International Labour Organization declares recognition of the principle of freedom of association to improve conditions of labour and establish peace. In 1944, the conference adopted the Declaration of Philadelphia[23], which restated the fundamental aims and purposes of the ILO and gave the organization's social mandate a powerful and lasting impetus. The principle of freedom of association is at the core of the ILO's values: it is enshrined in the ILO Constitution (1919), the ILO Declaration of Philadelphia (1944), and the ILO Declaration on Freedom of

[21] Preamble of the Constitution, further the preamble says that the conditions of labour were too bad, injustice and hardship existed which produce unrest so great that the peace and harmony of the world are imperilled. So the improvement of those conditions was urgently required by regulating hours of work including establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, recognition of the principle of equal remuneration etc.

[22] The Constitution of the ILO was drafted in early 1919 by the Labour Commission, chaired by Samuel Gompers, head of the American Federation of Labour (AFL) in the United States. It was composed of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

[23] The Declaration of Philadelphia was adopted by unanimous approval at the 26th Conference of the ILO in 1944 and was added as annex to the Constitution of ILO

Association and Protection of the Right to Organise Convention, 1948, Right to Organise and Collective Bargaining Convention, 1949, Fundamental Principles and Rights at Work (1998).

3.4.1. Declaration of Philadelphia

The Declaration continued to work on the principles of International Labour Standards and the ILO's original vision. It emphasized the core principles of sustainable development and freedom of association that achieve social justice. The conference reaffirmed the organization's basic principles, particularly declaring that labour is not a commodity; freedom of expression and association is essential to sustained progress. The declaration can be seen as one of the key documents that shaped the world order after the second world war and set out the guiding principles for national economic and social policies within that order[24]. The declaration listed nine principles[25] to guide the social policy of members of the League of Nations. It declared that labour is not a commodity and that the right to freedom of association is essential for sustainable development. The ILO's constitutional statements were explained in particular through the medium of the conventions. This thesis discusses a few conventions that are directly related to the right to freedom of association.

[24] Eddy Lee, *The Declaration of Philadelphia: Restrospect and Prospect*, 133 Int'l Lab. Rev. 467, 468 (1994).

[25] Nine principles are labour is not a commodity; the right of association; payment of an adequate wage to maintain a reasonable standard of living; equal pay for equal work; an 8-hour day or 48-hour week; a weekly rest of at least 24 hours; abolition of child labour; equitable economic treatment of all workers in a country; and an inspection system to ensure the enforcement of laws and worker protection.

3.4.2. Freedom of Association and Protection of the Right to Organise Convention[26] 1948

Freedom of Association and Protection of the Right to Organise Convention, 1948 is one of the eight conventions that form the core of international labour law. The essential importance of this convention is that it has strived to reach a common understanding internationally and in legitimizing the fundamental rights inherent in this principle. It is the most comprehensive international instrument ever made about human rights, which has become a pivotal reference point within the broad areas of organizational rights of labours[27]. This primary convention specifies and ensures workers' and employers' right to set up and join organizations of their own free will without the interference of power by previous authorization[28] and states that associational right is subject only to the organizations' rules. Article 3 draws on the organizational structure and independence that gives workers and employers the freedom to organize their constitutions and laws, elect their representatives with absolute freedom, organize their administration and activities, and develop their programs. Hence, freedom of association includes the right to draw up their constitution and rules, elect their representatives in full freedom, organize their administration and activities, and formulate their

[26] Adopted by the General Conference of the International Labour Organization at San Francisco in its Thirty-First Session on 17 June 1948
its 31st session
[27] Geraldo von Potobsky, *Freedom of Association: The Impact of Convention No. 87 and ILO Action*, 137 Int'l Lab. Rev. 195 (1998).
[28] Freedom of Association and Protection of the Right to Organise Convention, 1948.art. 2

programmes. Workers' and employers' organizations shall organize freely and not be liable to be dissolved or suspended by the administrative authority. They shall have the right to establish and join federations and confederations, which may in turn affiliate with international organizations of workers and employers[29]. The convention declared that every member of the International Labour Organization who ratified this convention should take all necessary and appropriate measures to ensure that workers and employers are free to exercise their right to organize[30]. The national government shall determine the extent to which the guarantee provided in this convention applies to the armed forces and the police in accordance with national laws or regulations[31].

All countries which ratified this convention had an obligation to implement each of these provisions[32]. In 1951, the ILO Governing Body established the Tripartite Committee of Freedom of Association (CFA) to investigate complaints of violation of the rights of an employees union. To date, the Government of India has not ratified the Convention on Freedom of Association.

[29] *Id.* art. 4 & 5
[30] *Id.* art. art. 10
[31] *Id.* art. art. 9
[32] *Id.* art. art. 15.1

3.4.3. Right to Organise and Collective Bargaining Convention 1949

This fundamental convention[33] provides that workers enjoy adequate protection against acts of anti-union discrimination, including requirements that a worker not join a union or relinquish trade union membership for employment or dismissal of a worker because of union membership or participation in union activities. Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other, in particular the establishment of workers' organizations under the domination of employers or employers' organizations, or the support of workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations. This convention does not deal with the position of civil servants involved in the administration of the state and does not prejudice their rights or privileges[34]. Although it is one of the fundamental conventions of the ILO, it is not ratified by the Government of India. India is a founder member of the International Labour Organization, which came into existence in 1919.

3.4.4. Workers' Representative Convention 1971

Workers' Representative Convention[35] protects the workers' representatives in an industry against any act prejudicial to them. Workers'

[33] Adopted at Geneva, 32nd ILC session (01 Jul 1949)
[34] Right to Organise and Collective Bargaining Convention, 1949, art. 6
[35] Adopted the Convention by the 56th Session of International Labour Conference at Geneva on 23rd June 1971

representatives get special protection to stand with workers against unnecessary action of employers that includes dismissal in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements[36]. This convention stipulates that such protections may be appropriate to enable workers' representatives to carry out their activities quickly and efficiently[37]. Facilities in the undertaking shall be afforded to workers' representatives as appropriate to enable them to carry out their functions promptly and efficiently. For this convention, the term workers' representatives are defined as persons recognized in accordance with national law or practice. They are trade union representatives designated or elected by trade unions or elected representatives who the workers of the undertaking freely elect in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities that are recognized as the exclusive prerogative of trade unions in the country concerned[38]. This convention may affect national laws, statutes, collective agreements, or any other manner consistent with a national practice[39]. India has not ratified the convention.

[36] Workers' Representative Convention 1971. art. 1
[37] *Id.* art. 2
[38] *Id.* art. 3
[39] *Id.* art. 6

3.4.5. Rural Workers' Organizations Convention 1975

The convention[40] fully recognizes the principles of the independence of rural workers' organizations and ensures that rural workers' organizations are free and voluntary, free from all interference, coercion, and oppression. It applies to all types of organizations of rural workers, including organizations other than restricted organizations[41] so, all categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations, of their choosing without previous authorization. Rural workers mean any person engaged in agriculture, handicrafts or a related occupation in a rural area including a self-employed person such as a tenant, sharecropper or small owner-occupier who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not permanently employ workers; or employ a substantial number of seasonal workers, or have any land cultivated by sharecroppers or tenants[42].

The principles of freedom of association shall be fully respected; rural workers' organizations shall be independent and voluntary and shall remain free from all interference, coercion, or repression. The national policy shall

[40] Adopted at Geneva, 60th ILC session (23 Jun 1975)
[41] Rural Workers' Organizations Convention 1975, art. 1
[42] *Id.* art. 2

facilitate the establishment and growth, voluntarily, of solid and independent organizations of rural workers as an effective means of ensuring the participation of these workers in economic and social development. National law should not weaken the guarantees afforded by the convention. To enable rural workers' organizations to play their role in economic and social development, the convention stipulates that each member of the convention will adopt and implement an active incentive policy for those organizations; in particular, to eliminate barriers in their organization, growth and pursuit of their legal actions, as well as legislative and administrative discrimination against rural worker organizations and their members[43]. India has ratified this convention on 18th August 1977.

3.4.6. Labour Relations (Public Service) Convention 1978

In considering the expansion of public service activities in many countries, the ILO realized that its large amounts of conventions do not cover specific categories of public employment. In contrast, many public employees are excluded from the scope of the right to organize and collective bargaining convention. This convention applies to all persons employed by public authorities, however to what extent the guarantees provided by this convention shall apply to high-level employees who are generally considered policy-making or managerial, or to employees whose duties are highly confidential,

[43] *Id.* art. 5

shall be determined by concerned national legislations. In addition, it states that the national legislation or regulations shall determine the extent to which it applies to the armed forces and the police[44]. The convention guaranteed the public employees to enjoy adequate protection against acts of anti-union discrimination in respect of their employment mainly make any statement that they will not join or shall relinquish membership of a public employees' organization; cause the dismissal of or otherwise prejudice a public employee because of membership of a public employees' organization or because of participation in the normal activities of such an organization[45]. The convention ensured that public employees' organizations enjoy complete independence from public authorities; it would enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning, or administration[46]. The convention also assured certain facilities for their smooth functioning of organizational activities as may be appropriate to enable the representatives of recognized public employees' organizations to carry out their functions promptly and efficiently, both during and outside their hours of work. However, providing such facilities should not hinder the efficient functioning of the respective services[47].

[44] Labour Relations (Public Service) Convention 1978, article 1
[45] *Id.* art. 4
[46] *Id.* art. 5
[47] *Id.* art. 6

Public employees as defined by the convention shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Their organizations shall enjoy complete independence from public authorities and adequate protection against any acts of interference by a public authority in their establishment, functioning, or administration. India however has not ratified the convention till date.

India has not ratified the fundamental conventions, namely Freedom of Association and Protection of the Right to Organise Convention, 1948 and Right to Organise and Collective Bargaining Convention, 1949. The Government of India is reluctant to approve significant conventions, such as freedom of association, the right to organize, and collective bargaining over fears of freedom for government employees and the armed forces. If the Government of India ratifies these conventions, certain rights prohibited under the constitution, such as the right to strike and the right to criticize the government, will be obliged to be conferred on government employees and the armed forces.

Conventions of ILO relating to freedom of association are not ratified by India except the Rural Workers' Organizations Convention in 1975. The important conventions which are not ratified are Freedom of Association and Protection of the Right to Organise Convention, 1948; Right to Organise and Collective Bargaining Convention, 1949; Workers' Representative Convention, 1971; Labour Relations (Public Service) Convention 1978.

3.5. Regional Instruments

3.5.1. European Convention on Human Rights, 1950

The convention[48] aims to lead European Union (EU) member states to the protection of human rights and fundamental freedoms. It is the first instrument to give effect and binding force to certain rights enshrined in the Universal Declaration of Human Rights. The first treaty was also to establish a supranational organ to ensure that the States Parties fulfilled their undertakings. To join the Council of Europe, a State must first sign and ratify the European Convention on Human Rights, thus confirming its commitments to the aims of the organization, namely the achievement of greater unity between its members based on human rights and fundamental freedoms, peace and respect for democracy and the rule of law. Once states had accepted that a supranational court could challenge decisions taken by their courts' human rights *de facto* gained precedence over national legislation and practice. Any individual, group of individuals, company or non-governmental organization can apply to the Strasbourg court, provided that they have exhausted all domestic remedies.

Freedom of assembly and association guaranteed under article 11 of the European Convention includes the right to form and join trade unions to protect an individual's interests. The charter provides that everyone has the right to freedom of peaceful assembly and freedom of association with others,

[48] The European Convention on Human Rights was signed in Rome (Italy) on 4 November 1950 by 12 member states of the Council of Europe and entered into force on 3 September 1953.

including the right to form and join trade unions to protect his interests[49]. Although the article specifically addresses trade union rights for the protection of organized labour, the European Court of Human Rights (ECtHR) has interpreted that the provision is not limited to trade unions but applies to all associations. European Convention on Human Rights (ECHR) deliberately selected a different formulation, whereby freedom of association was explicitly linked to the right to form and join trade unions. No mention was made of the negative freedom to disassociate[50]. The European Court of Human Rights has subsequently found that negative freedom association is implicit in article 11 of the ECHR[51]. The ECtHR has also held that article 11 includes the right of an association to determine its membership freely[52]. An association must voluntarily form and set up an organizational framework, membership, mutual or public benefit according to this provision to achieve a legitimate goal. Therefore, the association must be democratically organized. Each signatory to the ECHR is under a positive duty to ensure that the right to freedom of association is complied with within their jurisdiction and a negative duty to avoid interference in the right.

[49] European Convention on Human Rights, 1950, art. 11
[50] *Supra* n. 4
[51] *Young, James and Webster* v. *UK* (1982) 4 EHRR 38
[52] *Cheall* v *United Kingdom* (1986) 8 EHRR CD74 [6] 'In the exercise of rights under Article 11 (1), unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union.'

The court (ECtHR) was established under article 19[53] and jurisdiction over all matters concerning the interpretation and application of the European Convention on Human Rights and its Protocols[54]. Interstate cases are heard in which any party to the union can be brought to court for alleged violation of the provisions of the convention[55]. Any person who claims to be a victim of a violation of the rights outlined in the convention may receive personal requests from the court, any person, non-governmental organization, or group of individuals[56].

3.5.2. European Social Charter, 1961

European Social Charter was established to support the European Convention on Human Rights, which is principally for civil and political rights, and to broaden the scope of protected fundamental rights to include social and economic rights, directs members of the European Union that all workers and

[53] European Convention on Human Rights, 1950, art.19. Establishment of the Court to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

[54] European Convention on Human Rights, 1950, art. 32 Jurisdiction of the Court 1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

[55] European Convention on Human Rights, 1950, art. 33. Inter-State cases Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

[56] *Id.* art. 34. Individual applications The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

employers have the right to freedom of association in national or international organizations for the protection of their economic and social interests. The provision also says that the extent to which national laws and regulations may determine this right applicable to police and armed forces[57].

The European Social Charter of 1961 is the counterpart of the European Convention on Human Rights in economic and social rights. It guarantees the enjoyment, without discrimination, of fundamental social and economic rights defined in a social policy framework that parties undertake to pursue by all appropriate means. The European Social Charter sets up an international supervision system of its application by the parties based on national reports. Every year the parties submit a report on some of the accepted provisions of the charter indicating how they implemented the Charter in law and practice. The charter ensures that all workers and employers have the right to freedom of association in national or international organizations to protect their economic and social interests. To ensure or promote the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations,

[57] European Social Charter,1961, art. 5 of the European Social Charter (Revised), 1996, "The right to organise With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations".

the contracting parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair this freedom. National laws or regulations shall determine the extent to which the guarantees provided shall apply to the police. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations[58], and workers and employers also have the right to bargain collectively[59].

Certain restrictions could be placed on some institutions or services, especially on the members of the armed forces, police, or administration of the state. These restrictions are stated elaborately in articles 6 and 31 of the European Social Charter 1961. Article 31 says that restriction or limitations could be permissible in so far as they were "prescribed by law and are necessary for a democratic society to protect the rights and freedoms of others or for the protection of public interest, national security, public health or morals".[60]

[58] European Social Charter, 1961, art. 5
[59] *Id.* art. 6
[60] *Id.* art. 31 – Restrictions:
1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

3.5.3. American Convention of Human Rights[61]

Article 16 of the American Convention of Human Rights upholds that everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports, or other purposes. The right is not absolute but subject to the restrictions established by law as may be necessary for a democratic society. These restrictions may be imposed in the interest of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others. This article does not bar the imposition of legal restrictions on members of armed forces and the police.

3.5.4. African Charter on Human and Peoples' Rights (ACHPR) 1981

The African Charter on Human and Peoples' Rights is an international human rights instrument to promote and protect human rights and fundamental freedoms on the African continent. There is no direct provision in the charter regarding the freedom of association of employers or workers, but article 10 declares that everyone has the right to free association in general but stipulates that it must be legal. Article 10 of the convention states that every individual shall have the right to free association provided that he abides by the law. Also,

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

[61] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

it is subject to the obligation of solidarity provided in article 29[62] no one may be compelled to join an association. Article 29 provides that individuals have certain obligations to their family and community.

Associational freedom has been made an undeniable right through these declarations, charters, conventions, particularly the Freedom of Association and Protection of Right to Organize, 1948 and the Right to Organize and Collective Bargaining, 1949. The convention concerns Protection of Right to Organise and Procedures for determining conditions of employment in the public service, 1978. The bare texts of these ILO instruments do not appropriately interpret the guarantees of freedom of association contained therein. This apparent lacuna has been remedied by the ILO Governing Body Committee on Freedom of Association (CFA). Many countries, especially the United States, United Kingdom, Canada, China and even India have not given due attention to the

[62] African Charter on Human and Peoples' Rights, 1981, art. 29: The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

fundamental conventions of ILO, and domestic labour laws do not wholly comply with its labour standards[63].

International law is fairly clear and remarkably consistent on the question of freedom of association and protection of the right to organize and to bargain collectively. The association and the concomitant rights of associations are well recognized through international instruments. This includes public servants who are not involved in ministerial functions engaged in government and even the armed forces and the police for their welfare activities. The international agreements and declarations examined in this chapter do not state that government employees are denied the right to association freedom but that certain restrictions are imposed on certain categories of government employees. The key finding from the above discussion is that freedom of association is a human right for all sections of the population granted without undue government restrictions.

The right to form association for all categories of the population is considered as a fundamental human right. No one shall be compelled to be part of any associations. National laws or regulations can make necessary modifications for the enjoyment of associational rights for certain categories. Associational rights include the independence of the structural framework of organizations, including membership, representatives, election, etc. National laws, in particular, should not undermine the fundamental freedoms of

[63] *Supra* n. 4 at 134

associations available to workers. The restrictions imposed on the right must be endorsed by law which is necessary for a democratic society in the interest of national security or public safety. The principle discussed above illustrates that people can do whatever they want, as long as they do not harm others; a person should have the freedom to join an organization and work with others. It should be noted that the freedom to the association, the right to organize, and the right to engage in collective bargaining do not remain unqualified. Everyone has the right to form and to join trade unions for the protection of his interest as well as that of the society he lives in. The right to strike is recognised as an important human right however subject to national laws and regulations in this regard. There is no authority to regulate the `1fundamental freedom other than the laws of the organization concerned, and no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for any protection of the rights and freedoms of others.

Chapter 4

Nature and scope fundamental rights of the Constitution of India

Constitution was written to create a government that protected the rights of individuals, and gave the government limited and enumerated powers.[1] Citizens need protection from their representatives because power and authority often undermine the freedom of their citizens. Many a modern constitution contains a declaration of fundamental rights. The contents of these rights are not the same in all the constitutions. They vary according to the political philosophy, experience and practical needs of different people.[2] The Constitution of India is considered a progressive constitution because it enshrines the fundamental rights of citizens.[3] Part III of the Constitution incorporates the basic human rights necessary for the development and growth of an individual as a whole. These rights represent the basic values of a civilized society and the constitution-makers declared that they shall be given a place of pride in the Constitution and elevated to the status of fundamental rights.[4]

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[1] Randall G. Holcombe, *Constitutions and Democracy*, 47 (2001)
[2] V.N. Shukla, *Constitution of India*, 42 (2013)
[3] J. P. Duda, *Fundamental Rights and Personal Liberty under our Constitution Some Observations* 11 (4) the Indian Journal of Political Science 37, 37 (1950)
[4] *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, 301

This chapter seeks to examine the constitutional development of rights and, most importantly, to analyses the interpretations given to Part III of the Constitution, thereby emphasizing the significant of the right to form associations for various purposes, formation of trade unions for the protection of labour rights, and co - operative societies for the welfare activities and business interest of its members as part of the sacred freedom under Part III of the Constitution. The language and structure of setting in Part III of the constitution clearly show that it is intended to protect those rights and freedoms against the state. Violation of rights and freedoms by individual is not within the purview of this Part III.[5]

The very purpose of inclusion of fundamental rights is to withdraw certain subjects from the vicissitude of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Fundamental rights may not be submitted to vote: they depend on the outcome of no elections.[6] The Constitution of India declares certain fundamental rights of individuals.[7] Some of these can only be claimed by a citizen of India, while others can be claimed equally by non-

[5] *P. D. Shamdasani* v. *Centra Bank of India Ltd.* ARI 1954 SC 92

[6] Jackson, J., dealing with the purpose of a Bill of Rights observed in *West Virginia State Board of Education* v. *Barnettee*, 87 L.ed 1628, 1638; 319 U.S. 624 (1943). The U.S. constitution is considered to be the first living example of a written constitution having provided for the fundamental rights. The U.S and Indian constitutions differ with respect to the expression of fundamental rights. In the U.S. constitution, the rights are expressed in absolute terms.

[7] The Government of India Act, 1935 contained no affirmation of fundamental rights. Both Simon Commission and the Joint Parliamentary Committee were opposed to the inclusion of a declaration to that effect in a constitutional document. *See* V.N. Shukla, *Constitution of India*, 41 (2013)

citizens and groups. A law which violates any of the fundamental rights is void.[8] The fundamental rights are binding on the legislature as well as the executive.

4.1. Fundamental rights

Fundamental rights conceived by the constitution-makers were not intended in a narrow, limited sense but their broadest sweep. Fundamental rights are universal, but under article 19 of the Constitution, only citizens can claim freedom against the state. In the early years, the scope of fundamental rights was considered to be very narrow[9]. Individuals could only claim limited protection against the state. Now the position has changed a lot. The scope of fundamental rights has been broadened and even wider interpretations have been attempted when scrutiny against violations and excessive actions by state authorities have been put forth. The fundamental rights have proved to be the most significant constitutional control on the Government, particularly legislative power.[10]

These rights available to the people of India represent the fundamental values and roots deep in the freedom struggles for more than two hundred years. Its exercise is pivotal to facilitate every human being in developing his

[8] Constitution of India, art. 13 (1) says that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of part III shall to the extent of such inconsistency, be void. Clause (2) says that the state shall not make any law which takes away or abridges the rights conferred by part III and any law made in contravention of Clause (2) shall to the extent of the contravention, be void.

[9] *See A. K. Gopalan* v. *State of Madras,* AIR 1950 SC 27

[10] *I.R.Coelho* v. *State of Tamil Nadu,* AIR 2007 SC 861

personality to the maximum. The aim and objective were to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons. It provides full scope and opportunity to achieve maximum development of his personality, creativity, and individual dignity. To achieve the goals enshrined in the fundamental rights, certain basic freedoms, such as freedom of speech and expression, freedom of association, personal liberty to move where he likes, and so on, form an integral part of the scheme of the fundamental rights. These are universal, and it is difficult to believe that when the constitution-makers declared these rights, they intended to confine them only within the territory of India.[11] These rights are manifestations of the fair and enlightened system of justice. The rights are merely the expression of the basic freedoms reserved by the people for themselves. It is impossible to hold that an Act of Parliament can abolish fundamental rights.[12]

In several judgments, the Supreme Court has ruled that primary purpose of part III is to help the individual discover his potential, express his creativity, and prevent the government and other forces from distancing themselves from

[11] *Supra* n. 4 at 301

[12] N.A.Palkhivala, *Propositions submitted before the Supreme Court* (1973) 4 SCC 1(J),10. He opined that Constitutional guarantees which are away from extinction only by a bare majority or a two-thirds majority of a five year Parliament are no guarantees at all. The word "law" was construed by the Supreme Court in *Golak Nath* v.*State of Punjab*, (1967) 2 SCR 762 as including constitutional amendments; and it was held in that case that Parliament could not abridge or take away the Fundamental Rights in exercise of its power under Article 368 to amend the Constitution. The ratio, however, in *Golak Nath Cae* was overruled by the Supreme Court in *Kesavananda Bharati case*, it was held that Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution.

individuals' creative impulses. The fundamental rights enshrined in the Constitution of India are the sum of Indian cultural values and values derived from the freedom struggle. Justice Bhagwati describes how the blend of cultural values of India and independence movement helped to develop human rights, especially fundamental rights as below:

> *The long years of the freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and the entire cultural and spiritual history of India formed the background against which these rights were enacted and consequently, these rights were conceived by the constitution-makers, not in a narrow limited sense but their widest sweep, for the aim and objective, was to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be the full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured. The Constitution-makers recognized the spiritual dimension of man and they were conscious that he is an embodiment of divinity, what the great Upanishadic verse describes as "the children of immortality" and his mission in life is to realize the ultimate truth. This he cannot achieve unless he has certain basic freedoms, such as freedom of thought, freedom of conscience, freedom of speech and expression, personal liberty to move where he likes, and so forth. It was this vast conception of man in society and universe that animated the formulation of fundamental rights and it is difficult to believe that when the constitution-makers declared these rights, they intended to confine them only within the territory of India.*[13]

[13] *Supra* n. 4 at 301

Fundamental rights are not a gift from anybody. A right becomes a fundamental right because it has foundational value. Every right has content. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated.[14] In *M.Nagaraj* v. *Union of India*,[15] the Supreme Court strongly upheld this view. Individuals possess basic human rights since they are members of the human race. Part III to the Constitution only gives protection to the significant rights. The rights have fundamental values. The court observed comprehensively the nature, content, and constitutional development of fundamental rights. The court also clarified the purpose of incorporating Part III in the Constitution. It is notable to state here what the court has observed:

> *It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.*[16]

[14] *Infra.*
[15] (2006) 8 SCC 212
[16] *Id.* at 241

The purpose is not only to enjoy individual freedom but also to help the individual to find his liability. Thus, the fundamental rights protect the basic values cherished and the dignity of every human being and the development of his personality to the fullest extent. It represents the noble causes of freedom struggle and great cultural values. Further, its purpose is not only to enjoy individual freedom but also to help the individual to find his liability. According to this view, there are two objects of fundamental rights: negative state intervention and fulfilment of personal liberty.

4.1.2. Negative and positive interventions

Dominant theories of human rights are generally accepted as a negative obligation of the state not to interfere with the liberty of the individuals.[17] The principle of negative intervention on the part of the state is very much embodied in the Constitution, which does not interfere with the liberty of the individual in exercising the rights and freedoms. Therefore, whether the Constitution says it expressly or impliedly in the Constitution is immaterial. It is generally assumed that the fundamental rights given to individuals are available only against the state, against the actions of the state and its officials. The language and structure of fundamental rights, particularly article 19, clearly show that the articles were intended to protect those freedoms against state[18]. Patanjali Sastri C J, said the entire purpose of Part III of the Constitution is to

[17] *Supra* n. 2 at 24
[18] *Supra* n. 5

provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the state.[19] But this does not mean that the whole structure of fundamental rights prevents any kind of state intervention. The elements of liberal democracy and welfare states are essential to achieve the constitutional goal; the founding fathers have perfectly blended positive and negative interventions on the part of the state into the Part III of the Constitution. This is explained in two different ways. While interpreting the principles of equality, the court welcomes the positive intervention of the state, but the freedoms under article 19 allow for negative intervention.

4.1.3. Interpretations of fundamental rights

The Constitution is a dynamic document, and therefore its interpretation may not be static or outdated. In many judgments, the attitude of the courts when interpreting the constitutional provision, especially Part III of the Constitution had been dealt with in detail. The Supreme Court certainly has three roles in relation to fundamental rights. In the first place, it acts as the protector and guardian of these rights. In the second place, it acts as the interpreter of fundamental rights, and in the third, it seeks to integrate directive principles with fundamental rights.[20]

In this regard, Fazal Ali J. has rightly said about the approach of the Court when interpreting the constitutional provisions. In brief, the Court should

[19] *State of W.B* v. *Subodh Gopal Bose,* AIR 1954 SC 92
[20] M.P.Jain, *The Supreme Court and Fundamental Rights*, 2 (2000) in *Fifty years of the Supreme Court of India: Its Grosp and Reach,* edited by K.S.Verma, Kusum.

keep in mind certain things while it interprets: a complete consciousness and deep awareness of the growing requirements of the society; the increasing needs of the nation; the burning problem of the day; the complex issues faced by the people, etc. It may be handy to quote the exact wording of the learned judge here:

> *The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society, so that when such right clashes with the larger interest of the country it must yield to the latter.*[21]

This observation clarifies without ambiguity what the position of the courts should be. Interpretations should be in a way that validates the protection of human rights. There must also be liberation from feudal myths and idols. Such interpretations, therefore, point to the need to give adequate consideration to social rights. Thus, in the conflict between fundamental rights and society's larger and broader interests, the latter should succeed. Legislation is one of the best ways to bring social reforms for the upliftment of the backward and weaker sections of society and improve poor people. Therefore, the court may

[21] *Pathumma* v. *State of Kerala,* 1978 SCR (2) 537, 543

intervene in the process only when the rights granted to the citizen under Part III of the Constitution are violated or for reasons beyond the legislative capacity of the state or any other reason.[22]

In the early days, the Supreme Court had taken literal and narrow interpretation of a vital fundamental right in the Indian Constitution.[23] article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to the procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. The Supreme Court overruled its previous decision in *A.K. Gopalan* and held in its landmark judgment in *Maneka Gandhi* v. *Union of India*[24] that the procedure contemplated by article 21 must answer the test of reasonableness. The Court further held that the procedure should also conform to the principles of natural justice.

In *Sakal Papers (P) Ltd.* v. *Union of India*[25] the Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down.

[22] *Id.* at 544
[23] *See Supra* n. 9
[24] *Supra* n. 4
[25] AIR 1967 SC 305

The court must interpret the Constitution in a manner that would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. Therefore, a narrow interpretation of fundamental rights is a thing of the past.[26] Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as transcendental, inalienable and primordial. They constitute the ark of the Constitution[27].

The court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.[28]

4.2. Instrumentality test and registered society

The fundamental rights as guaranteed under Part III of the Constitution of India are enforceable against the state or any other authorities who may come under the purview of article 12 of the Constitution. Definition of state is necessary because rights and freedoms under this part are expressly guaranteed against the state. The definition of state under article 12[29] is very clear and there is no ambiguity. article 12 are specifically states that the government and parliament of India; the government and the legislature of each of the states; all

[26] *Supra* n. 10
[27] *Kesavanada Bharati* v. *State of Kerala,* AIR 1973 SC 1461
[28] *Supra* n. 15
[29] Constitution of India, art. 12:- In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

local authorities; and other authorities within the territory of India or under the control of the government of India. Other authorities which include all authorities created by the constitution or statute on whom powers are conferred by law. It was not necessary that the statutory authority should be engaged in performing government or sovereign functions.[30] However, definition of institutions under the control of the state was very broad and in some cases ambiguous. Therefore, authorities and instrumentalities not specified in it may also fall within it if they otherwise satisfy the characteristics of the state as defined in this article.

In *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*[31] the Supreme Court considering the question whether statutory corporations came within the definition of the state. It was held that the corporations created by statute are states within the meaning under article 12 of the Constitution and had statutory power to make binding rules and regulations and was subject to pervasive governmental control. Some authority or corporations acting as instrumentality or agency of government would define as state.[32]

In *Ajay Hasia* v. *Khalid Mujib Sehravardi*[33] the Court vividly differentiated the two purposes of the State. The definition of state in Article

[30] *Electricity Board, Rajasthan SEB* v. *Mohan Lal* AIR 1967 SC 1857
[31] AIR 1975 SC 1331
[32] *See Ramana Dayaram Shetty* v. *International Airport Authority* AIR 1979 SC 1628; *See also Ajay Hasia* v. *Khalid Mujib Sehravardi* AIR 1981 SC 487
[33] (1981) 1 SCC 722

12, which includes an 'authority' within the territory of India or under the control of the Government of India, is limited in its application only to Part III and by virtue of article 36 to Part IV of the Constitution. So it would not be applied to any other provisions of the Constitution[34].

Following the instrumentality test many of the societies registered under the Societies Registration Act, 1860 were considered as state[35]. Societies registered as cooperative societies, corporations and companies are under the definition of authorities in article 12 of the Constitution if it comes under the government's purview of instrumentality or agency. Justice P.N. Bhagwati held that the concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society[36]. However, the 'authority' is not a State for articles 309, 310, and 311 of the Constitution.

4.3. Freedoms under article 19 and its scope

Article 19 enumerates certain freedoms under the caption 'right to freedom'. Article 19 of the Constitution says as follows:

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

(a) to freedom of speech and expression;

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[34] *See*, *S.L.Aggarwal* v. *Hindustan Steel Ltd* (1970) 1 SCC 177

[35] *See U.P. State Cooperative Land Development Bank Ltd.* v. *Chandra Bhan Dubey* AIR 1999 SC 753; *Virendra Kumar Srivastava* v. *U. P. Rajya Karmachari Kalyan Nigam* (2005) 1 SCC 149

[36] *Supra* n. 33 at 738. *See also R.D.Shetty* v. *International Airport Authority of India* (1979) 3 SCC 489

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) [37]

(g) To practise any profession, or to carry on any occupation, trade or business.

It deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country.[38] Freedoms under article 19 (1) of the Constitution are, therefore, the very life of civil liberty and fundamental to every citizen in India. H. M. Seervai boldly argued that there are no natural or inalienable rights. Part III itself does not provide all the basic freedoms for non - citizens; for example, freedoms under article 19 is only available for citizens in India. He says that if there were natural rights, why they were not conferred on non-citizens.[39] S.M.Sikri, C.J., says that the answer seems to be that they are natural rights, but our country does not think it expedient to confer these fundamental rights, mentioned in article 19, on non-citizens. Other rights have been conferred on non-citizens because the Constitution-makers thought it would not be

[37] Sub-clause (f) omitted by the Constitution (Forty-fourth Amendment) Act, 1978
[38] Patanjali Sastri, CJ, in *State of W.B.* v. *Subodh Gopal Bose* (1954) SCR. 587, 596
[39] *Supra* n. 27 at para. 319

detrimental to their interests.[40] The country had to make so many struggles to attain these rights, and after a grim battle, succeeded in getting these rights recognised. These rights, therefore, should not be restricted so much, and all oppositions that are peaceful and not seditious should get the full opportunity because the opposition is a vital part of every democratic Government. Suppression of lawful and peaceful oppositions means heading towards fascism.[41]

4.3.1. Status of article 19 when emergency was proclaimed

According to article 358 of the Constitution, during the proclamation of national emergency under article 352, all fundamental rights shall continue to be in force except article 19. The Fundamental Rights under article 19 were automatically suspended, and this suspension continued till the end of the emergency. It says that, while a proclamation of Emergency is in operation nothing in article 19 shall restrict the power of the state to make any law or to take any executive action abridging or taking away the rights guaranteed by article 19 of the constitution. It means that as soon as the proclamation of emergency is made the freedoms guaranteed by article 19 are automatically suspended. Normally, the rights guaranteed by article 19 cannot be taken away or abridged by any law of parliament or state legislature. But article 19 ceases to restrict the legislative or the executive power of the centre or the states for

[40] *Id.*
[41] Sardar Bhopinder Singh Man, CAD, Thursday, the 2th December, 1948

the period of emergency and any law made by the legislature or any action taken by the executive cannot be challenged on the ground that they are in consistent with the rights guaranteed by article 19.

The 44th Constitution Amendment Act, 1978, has made two important changes in article 358: First, article 19 will be suspended only when a proclamation of emergency is declared on the ground of war or external aggression and not when emergency is declared on the ground of armed rebellion. Secondly, it has inserted a new clause (2) in article 358 which says that nothing in clause (1) shall apply to - any law which does not contain a recital to the effect that such law is in relation to the proclamation of emergency, or (b) to any executive action taken otherwise than under a law containing such recital.

However, one of the contentions which arose in the *Bennett Coleman Case*[42] was that under article 358, while a proclamation of emergency is in operation, nothing in article 19 shall restrict the power of the State to make any law or take any executive action. *M.M.Pathak* v. *Union of India*[43] the Supreme Court held that the effect of proclamation of Emergency on fundamental rights is that the rights guaranteed by article 14 and 19 are not suspended during the emergency but only their operation is suspended. This means that only the

[42] *Bennett Coleman & Co.* v. *Union of India,* MANU/SC/0038/1972
[43] AIR 1978 SC 803

validity of an attack based on article 14 and 19 is suspended during the emergency.

Freedoms under article 19 (1) are not absolute or uncontrolled, for each is liable to be curtailed by-laws made or to be made by the state to the extent mentioned in clauses (2) to (6) of article 19. The restrictions which may be imposed under any of the clauses must be reasonable[44], and it must be based on different conditions. Hence a law restricting the exercise of any of the rights guaranteed by clauses of article 19 to be constitutionally valid must satisfy two conditions, namely, the restriction must be for the particular purpose mentioned in the clause permitting the imposition of the restriction on that particular right, and second, the restriction must be reasonable[45]. The determination by the Legislature of what constitutes a reasonable restriction is not final or conclusive. It is subject to the interpretation of courts.

4.4. Common nature of reasonable restrictions to article 19

Restrictions would make more beauty not destroying the true spirit of freedoms.[46] All the rights which are listed in article 19 have varying dimensions and underlying philosophies. Instead of common restrictions imposed on the freedoms, the restrictions are mentioned in clauses (2) to (6) of article 19. There is nothing parallel to these restrictions in any Constitution of the world. In the

[44] The Constitution (1st Amendment) Act, 1951 inserted the word "reasonable" before the word "restrictions" in clause (2).
[45] *Supra* n. 2 at 128
[46] Shri. Algu Rai Shastri, *Constituent Assembly Debates*, 767.

American Constitution, all these rights have been entrusted to the judiciary[47]. The Constitution of India does not define the expression 'reasonable restrictions'. The common thread throughout the restrictions is its reasonableness. It is not possible to establish an abstract criterion or general pattern that makes sense for all cases and circumstances. The criteria for reasonable restrictions, therefore, an elastic one; it varies with time, space and conditions and from case to case.[48] Each restriction must be reasonable and such restrictions must be related to the purposes mentioned in articles 19 (2) to (6)[49]. The three main features of the articles 19 (2) to (6) are very clear. Firstly, the restrictions can be imposed only by or under the authority of a law; no restriction can be imposed by executive action alone without the backing of a law. Secondly, each restriction must be reasonable and finally, a restriction must be related to the purposes mentioned in clauses 19 (2) to (6).

The limitations imposed by article 19 (2) to (6) serve a twofold purpose;[50] they specify that these freedoms are not absolute but are subject to regulations, and they put a limitation on the power of a legislature to restrict these freedoms. A legislature cannot restrict these freedoms beyond the requirement of article 19 (2) to (6). The limitations are not destroys the balance which article 19 was designed to achieve. It is therefore necessary to examine

[47] Simply because the political parties who are elected from time to time cannot be entrusted with the interpretation of laws.
[48] *Supra* n. 2 at 129
[49] *Id.*
[50] M.P.Jain, *Indian Constitutional Law,* 1147 (2003)

whether the restrictions make reasonable. Since the restrictions do not have a common standard, the court examines them on the basis of individual cases. One of the challenging questions before the Court is the parameters for deciding the validity of a legislation passed to restrict fundamental freedoms. The test may vary from right to right restricted by the impugned law.

4.4.1. Tests of reasonable restrictions

The word reasonable implies intelligent care and deliberation, that is, the choice of a course which reason dictates[51]. The judicial mind can apply impugned restrictions, and its reasonableness has to be decided by the court. However, the test to be applied is not whether a judge personally considers particular restrictions unreasonable but whether a reasonable man would necessarily consider them unreasonable.[52] The test to be applied is not whether a judge personally considers particular restrictions unreasonable, but whether a reasonable man would necessarily consider them unreasonable.[53] The reasonableness of the restriction has to be judged not in reference to the ground on which it can be imposed, but with reference to the fundamental right which is restricted.

There have been a number of judgments regarding the constitutional validity of restrictions and whether the restrictions are reasonable. But the

[51] *Chintaman Rao* v. *State of MP,* AIR 1951 SC 118, (1950) SCR 759
[52] H.M.Seervai, *Constitutional Law of India*, 705 (2008)
[53] Holmes.J. in his classic dissent in *Lochner* v. *New York*, (1904) 198 U.S. 45, 49.

verdict in the *State of Madras* v. *V.G.Row*[54] case has given a clear understanding of the criteria for reasonable restrictions and is still considered fundamental today. This case was a milestone decision that determined the constitutionality of reasonability of restrictions.

The Constitution Bench of the Supreme Court has laid down certain principles and guidelines which should be kept in mind while considering the Constitutional validity of restrictions imposed on fundamental rights.[55] Certain general considerations have been laid down in amplifying the tests of reasonableness. The test of reasonableness as laid down by Sastri C.J. in *State of Madras* v. *V.G. Row*[56] has generally been accepted as correct. For adjudging reasonableness of a restriction, the courts consider such factors as: the nature of right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

The reasonableness of the impugned provisions not to be judged by a priori standards unrelated to the facts and circumstances of a situation which occasioned the legislation.[57] In 1950 itself, in *Dr. N. B. Khare* v. *State of*

[54] AIR 1952 SC 196; 1952 SCR 596 The Bench consists Patanjali Sastri,C.J., Mahajan, B.K.Mukherjea, S.R.Das, N.Chandrasekhara Aiyer.
[55] For more detailed discussion see chapter VI
[56] *Supra* n. 54
[57] *Raghubar Dayal* v. *Union of India,* AIR 1962 SC 263

Delhi[58], the apex court ensured that both the substantive and procedural aspects of restrictive law should be reviewed from the point of view of reasonableness. So the Court should consider not only the factors such as duration and extent of restrictions but also the circumstances under which and the manner in which the imposition has been authorised.

4.4.2. Procedural reasonableness and substantive reasonableness

In determining the reasonableness of a statute, the court would see both the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. Not only substantive but procedural provisions of a statute also enter into the verdict of its reasonableness. Procedural requirement of natural justice flows from article 19.[59] So principles of natural justice are an element in considering the reasonableness of a restriction under article 19. The court while considering reasonableness of restrictions should think not only the factors such as the duration and the extent of the restrictions but also the circumstances under which and how their imposition has been authorized. It requires recording reasons for the decision taken, and a copy of the order is needed to be communicated to all concerned. The decision is to be displayed within a reasonable period.[60] In *Khare* v. *State of Delhi* [61], Supreme Court observed that

[58] AIR 1950 SC 211
[59] *Supra* n. 2 at 130
[60] *See Khare* v. *State of Delhi*, 1950 SCR 519
[61] *Khare* v. *State of Delhi*, 1950 SCR 519

both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness.

4.4.3. Reasonable restrictions should not be arbitrary or of an excessive nature

It ensures a proper balance between the restrictions imposed on freedoms under article 19 and the freedoms enumerated in that article. Therefore, restrictions should not be an excessive nature and not beyond what is required in the public interest. Restrictions imposed upon the freedoms under article 19 (1) should not be arbitrary or of an excessive nature.[62] In this regard, the observations of Mahajan, J., in *Chintaman Rao case*[63] are more beneficial. He rightly pointed out that:

> *The phrase 'reasonable restriction' connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation that arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.*[64]

Therefore, the settled law is that the restrictions must not be arbitrary or of an excessive nature to go beyond the requirement of the general public

[62] *Supra* n. 51
[63] *Id.*
[64] *Id.*

interest. The test to be applied is not whether a judge personally considers particular restrictions unreasonable[65]. Courts are entitled to consider whether the restrictions are disproportionate to the situation[66].

In *State of AP* v. *McDowell & Co*.[67] the court held that violation of any of the rights (a) to (g) of article 19 (1) must be shown as not saved by any of the clauses (2) to (6). The Court cannot sit in judgment over the wisdom of the Legislature and, therefore, if any Act is stroked down, it must be unjustified and mere allegations are not enough to strike down an enactment.

The position is that the court has to take not a rigid or dogmatic but an elastic and pragmatic approach to the facts of the case and to take an overall view of all the circumstances, factors, and issues facing the situation. Obviously, it is left to the Court, in case of dispute, to determine the reasonableness of the restrictions imposed by the law. In determining the question of reasonableness, the court cannot proceed on a general notion of what is reasonable in the abstract sense. All persons have the right to enjoy, in the true sense of all the freedoms enshrined in article 19, primarily when these rights are directly related to the political rights of an individual. Therefore, the Constitution does not allow for the restriction of the rights of individuals, including association, without sufficient cause.

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[65] *Supra n.* 52 at 705
[66] *OmKumar* v. *Union of India* AIR 2000 SC 3689
[67] (1996) 3 SCC 709, AIR 1996 SC 1627

4.4.4. Principle of proportionality

The principle of proportionality is a legal method used to review and control the constitutionality of the legislative and administrative measures by the courts. It is a kind of test with various parameters that determined the courts as to the circum- stances in which it is permissible to limit rights.[68] As per the principle of proportionality, the court would consider whether the restriction imposed by legislation on the fundamental rights are disproportionate to the situation and are not the least restrictive of the choices[69]. The principle of proportionality requires a balancing test between the need to protect individual constitutional rights and the benefits of the restriction of those rights for the need to protect wider general interests. The principle ensures that the restrictions should not be arbitrary or of an excessive nature, beyond what is required for achieving the objects of the legislation. Therefore, reasonableness demands proportionality.[70]

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[68] Dafni Diliagka, *The Legality of Public Pension Reforms in Times of Financial Crisis*, 187 (2018) https://www.jstor.org/stable/j.ctv941rcf.9 accessed on 24/09/2019

[69] *Supra* n. 66

[70] The principle of proportionality has been primarily developed in Ger- man jurisprudence concerning the German administrative and constitutional law and from German origins, it has been expanded across Europe as well as across the countries with common law system (i.e. UK, Canada, South Africa, New Zealand) becoming a dominant tool for the judiciary to manage conflict between individual rights and public interests. *See* Dafni Diliagka, *The Legality of Public Pension Reforms in Times of Financial Crisis*, 187 (2018) https://www.jstor.org/stable/j.ctv941rcf.9 accessed on 24/09/2019. The proportionality requirement of the Eighth Amendment was first recognized by the United States Supreme Court in *Weems* v. *United States*, 111 U.S. 349, 377 (1910) (striking down a criminal sentence as "cruel in its excess of imprisonment") In India the Supreme Court in *E. Royappa* v. *State of Tamil Nadu* AIR 1974 SC 555, accepted the principle a very restrictive vesion of proportionality in the area of administrative action. If the administrative action is

Restrictions may be partial, complete, permanent, or temporary, but they must bear a close nexus with the object in the interest of which they are imposed. Sometimes, even a complete prohibition of the fundamental right to trade may be upheld if the commodity in which the trade is carried on is essential to the community's life and the said restriction has been imposed for limited period to achieve the goal. Freezing of stocks of food grains to secure equitable distribution and availability on fair prices has been held to be a reasonable restriction.[71]

4.4.5. Restrictions for promoting Directive Principles of State Policy

The declared purpose of the Constitution is to create an egalitarian welfare state. Directive Principles of State Policy outlined in Part IV of the Constitution guide the state to promote the people's welfare by securing and protecting. Even though the right to close a business is an integral part of the fundamental right to carry on a business, it is not absolute in its scope, and so is the nature of this right. It can certainly be restricted, regulated, or controlled by law in the interest of the general public.[72] So in the greater public interest for maintaining industrial peace and harmony and to prevent unemployment without just cause, the restriction imposed cannot be held to be arbitrary, unreasonable, or far in excess of the need for which such restriction has been

arbitrary, it could be struck down under Art. 14. Arbitrary action by an administrator is described as one that is irrational and unreasonable.

[71] *Narendra Kumar* v. *The Union of India* (1960) 2 SCR 375: *M/s.Diwan Sugar and General Mills (P) Ltd.*v. *Union of India* (1959) 2 Supp. SCR 123: *The State of Rajasthan* v. *Nath Mal and Mitha Mal* (1954) SCR 982

[72] *Excel Wear* v. *Union of India,* (1978) 4 SCC 224; (1979) 1 SCR 1009

sought to be imposed.[73] The Court *Laxmi Khendsari Etc* v. *State of U.P*[74] held that fixation of fair price to essential consumer goods could not be an unreasonable restriction if it considers the aspect of the controlled economy and fair and equitable distribution, etc.[75]

Fazal Ali, J., in *Laxmi Khendsari Etc* v. *State of U.P*[76], propounded some of the general principles based on which the quality of reasonableness of a particular restriction can be judged. Social control has to be one of the primary considerations to test the reasonableness of the restrictions. Further, the learned judge laid down some guidelines to test reasonableness in the light of social control and promote the welfare of society. It is manifested that in adopting the social control, one of the primary considerations which should weigh with the Court is that as the directive principles contained in the Constitution aim at the establishment of an egalitarian society to bring about a welfare state within the framework of the Constitution, these principles also should be kept in mind in judging the question as to whether or not the restrictions are reasonable. If the restrictions imposed, appear to be consistent with the directive principles of State policy, they would have to be upheld as the same would be in the public interest and manifestly reasonable.[77]

[73] *Papnasam Labour Union* v. *Madura Coast Ltd.* (1995) 1 SCC 501,.515
[74] 1981 SCR (3) 92, 107
[75] *Laxmi Khendsari Etc* v. *State of U.P,* 1981 SCR (3) 92, 107
[76] 1981 SCR (3) 92
[77] *Supra* n. 75 at 105-6

4.4.6. Awareness about societal needs

In certain circumstances, the courts would consider the requirements of the society and its needs. Social conditions, the burning problems of the day, and the complex issues facing the people would justify reasonable restrictions[78]. The decision of the Supreme Court in *Pathumma v. State of Kerala*[79], the constitutional validity of section 20 of the Kerala Agriculturists Debt Relief Act was considered by a larger Bench of seven Judges. It has been held by upholding the validity of section 20 of the Kerala Act. Before testing the arbitrariness or reasonableness of a particular statute, the Court has to consider the prevailing social conditions. The Court observed that while interpreting the constitutional provision, the Court should keep in mind the social setting of the country to show a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people which the Legislature in its wisdom through beneficial legislation, seeks to solve. Therefore, Fazal Ali,J, speaking for the Court:

> *To remove poverty by eradicating rural indebtedness is one of the very important social purposes sought to be achieved by our Constitution and it cannot be said that the invasion of the right of the appellants is so excessive as to be branded by the quality of unreasonableness. Having regard to the economic conditions prevailing in Kerala before the*

[78] *Supra* n. 1148 (2003)
[79] *Supra* n. 21

> *passing of the Act, it cannot be said that the restrictions are in any way arbitrary or excessive or beyond the requirements of the situation. Thus, all the tests laid down by this, Court for determining the reasonableness of a restriction has been amply fulfilled in this case and we are unable to find any constitutional infirmity in this case on the ground that the Act is violative of Article 19(1) (f). We are clearly of the opinion that the provisions of the Act are reasonable restrictions within the meaning of clause (6) of Article 19.*[80]

Restrictions imposed on article 19 of the Constitution to attain Directive Principles of State Policy under Part IV of the Constitution may not be arbitrary or of excess nature. Freezing of stocks of food grains to secure equitable distribution and availability on fair prices has been held to be a reasonable restriction.[81]

The Division Bench of the Supreme Court in *Papnasam Labour Union* v. *Madura Coast Ltd.*[82] had summarised the test applied by various judgments hitherto and pointed out some principles and guidelines which should be kept in mind for considering the constitutionality of a statutory provision upon a challenge on the alleged vice of the unreasonableness of the restriction imposed by it. They are: The restriction sought to be imposed on the Fundamental Rights guaranteed by article 19 of the Constitution must not be arbitrary or of an

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[80] *Id.* at 559

[81] *Narendra Kumar* v. *The Union of India* (1960) 2 SCR 375: *M/s.Diwan Sugar and General Mills (P) Ltd.*v. *Union of India* (1959) 2 Supp. SCR 123: *The State of Rajasthan* v. *Nath Mal and Mitha Mal* (1954) SCR 982

[82] The Bench consists of G.N.Ray and B.L.Hansaria, JJ., in *Papnasam Labour Union* v. *Madura Coast Ltd.* AIR 1995 SC 2200, (1995) 1 SCC 501

excessive nature to go beyond the requirement of the felt need of the society and object sought to be achieved[83]. There must be a direct and proximate nexus or a reasonable connection between the restriction imposed, and the object sought to be achieved.[84]. No abstract or fixed principle can be laid down, which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case.[85] In interpreting constitutional provisions, courts should be alive to the felt need of the society and complex issues facing the people, which the Legislature intends to solve through effective legislation.[86] In appreciating such problems and the felt needs of the society, the judicial approach must necessarily be dynamic, pragmatic, and elastic.[87] It is imperative that for consideration of the reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in article 19 is being effectuated by the restriction imposed on the Fundamental rights.[88] Although article 19 guarantees

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[83] *Chintaman Rao* v. *State of M.P,* AIR 1951 SC 118, 1950 SCR 759, *Dwarka Prasad Laxmi Narain* v. *State of U.P,* 1954 SCR 803; AIR 1954 SC 224, *Excel Wear* v. *Union of India,* (1978) 4 SCC 224; (1979) 1 SCR 1009

[84] *O.K.Ghosh* v. *E.X.Joseph,* AIR 1963 SC 813, *Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771, *Workman* v. *Meenakshi Mills Ltd,* (1992) 3 SCC 336

[85] *Kavalappara Kottarathil Kochumi* v. *State of Madras & Kerala,* AIR 1960 SC 1080; (1960) 3 SCR 887; *Jyoti Pershad* v. *Administrator for Union Territory of Delhi,* AIR 1961 SCC 1602; (1962) 2 SCR 125; *Supra* n. 21

[86] *Jyoti Pershad v. Administrator for Union Territory of Delhi,* AIR 1961 SCC 1602; (1962) 2 SCR 125; *Supra* n. 21

[87] *Jyoti Pershad v. Administrator for Union Territory of Delhi,* AIR 1961 SCC 1602; (1962) 2 SCR 125; *Fatehchand Himmatlal v. State of Maharashra* (1977) 2 SCC 670; AIR 1977 SC 1825

[88] *State of Madras v. V.G.Row* AIR 1952 SC 196; 1952 SCR 597, *State of U P v. Kaushariliya* AIR 1964 SC 416; (1964) 4 SCR 1002, *Pathuma v. State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

all the six freedoms to the citizen, such a guarantee does not confer any absolute or unconditional right. Still, it is subject to a reasonable restriction which the legislature may impose in the public interest. It is, therefore, necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.[89] The reasonableness has got to be tested both from the procedural and substantive aspects.[90] The restriction imposed on the fundamental rights guaranteed under article 19 of the Constitution must not be arbitrary, unbridled, uncanalised, and excessive, and so not unreasonably discriminatory. Therefore, for a restriction to be reasonable, it must be consistent with article 14 of the Constitution. In judging the reasonableness of the restriction imposed by clause (6) of article 19, the Court has to bear in mind the Directive Principles of State Policy.[91] Ordinarily, any restriction imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in the public interest.

It is submitted that the quality of reasonableness is a question of a proper balance between the fundamental rights guaranteed and the restriction imposed

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[89] *State of Madras v. V.G.Row* AIR 1952 SC 196; 1952 SCR 597, *Bachan Singh v. State of Punjab* (1971) 1 SCC 712; AIR 1971 SC 2164, *Pathuma v. State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

[90] *Fatehchand Himmatlal v. State of Maharashra* (1977) 2 SCC 670; AIR 1977 SC 1825, *Excel Wear v. Union of India,* (1978) 4 SCC 224; (1979) 1 SCR 1009

[91] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461, *State of Kerala v. N.M.Thomas* (1976) 2 SCC 310; AIR 1976 SC 490, *Pathuma v. State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

thereon. Restrictions may be partial, complete, permanent, or temporary, but they must bear a close nexus with the object in the interest of which they are imposed. Sometimes, even an absolute prohibition of the freedoms may be upheld if the restriction is essential to the community's life. The said restriction may be imposed for a limited period to achieve the goal. Promoting or effectuating a directive principle can be presumed to be a reasonable restriction in the public interest. Social control is one reason for justifying reasonable restrictions. Therefore, as per the above observations of the Court, the restrictions imposed on freedoms under article 19 do not come under the purview of unreasonableness. In such situations, a doctrinaire approach may not be made, but care should be taken to see that the real purpose which is sought to be achieved by restricting the rights of the citizens is subserved.

It may be summed up as restrictions that may be imposed for the social control where the necessities of the situation demand. Restrictions aim at the establishment of an egalitarian society. It may be for the manifestation of Directive Principles of State Policy which contain Part IV of the Constitution. The restrictions must bear a direct nexus with the object in the interest of which they are imposed. It must be in the public interest and must be imposed by striking a just balance between the deprivation of right and the danger or evil sought to be avoided. The restrictions should not be excessive or arbitrary. The restrictions set out in article 19 are not the same and vary according to the

nature of individual liberty. The court found that certain general factors need to be considered when determining the validity of each of the restrictions imposed by article 19 of the Constitution. They are reasonableness, against arbitrariness, etc. Examining the interpretation given in article 19 of the Constitution, it can be seen that the relationship between the citizen and the company, corporation, or associations is well established. Although article 19 deals with the rights of the citizen, in the final analysis it can be seen that a group or company has benefited when the rights of the citizen have been established. The right to form an association is the very lifeblood of democracy, without which political parties cannot be formed, and without such parties, a democratic form of government, especially that of the parliamentary type, cannot run properly[92].

[92] *Supra* n. 50 at 1193

Chapter 5

Right to form associations or unions, co-operative societies[1]: Constitutional developments

The right to form associations or unions under article 19 (1) (c) of the Constitution has comprehensive coverage of all sorts of lawful associations, formations, continuation, winding up, functions, and processes that come under the purview of this article. All legally binding relationships of human beings fall within the scope of associations, including political parties, clubs, societies, companies, organizations, partnerships, trade unions, and indeed everybody of persons. This chapter examines the constitutional developments of the right to form associations, unions, or cooperative societies in India and analysis of judicial pronouncements.

The formation of associations, unions, or cooperative societies and independent activities of such organizations is vital as the right to life in a democracy. A democratic country can function properly only in an environment where political parties can be formed, freedom of action is allowed and public opinion can be formed[2]. The right to form an association implies that several

[1] Ins. by the Constitution (Ninety-seventh Amendment) Act, 2011, (w.e.f. 12-1-2012).
[2] M.P.Jain, *Indian Constitutional Law*, 1193 (2003)

individuals voluntarily form an association with a common aim, legitimate purpose, and a community of interests. Therefore, the association is a group or collection of individuals, the community or the group formed by members either voluntarily or involuntarily. Formation of association with the interests of common aim must be legitimate. According to the scope of article 19 (1) (c) of the Constitution, all the citizens in India enjoy qualified liberty of associations, unions, or cooperative societies for any lawful object.[3]

5.1. Constitutional provisions on associational right

Freedom of association as a fundamental right is enjoyed by three types of bodies or groups under article 19 (1) (c) of the Constitution. The state has limited powers to regulate these rights. They are associations, unions, or cooperative societies. Article 19 of the Construction says about the protection of certain rights regarding freedom of speech, etc. – clause (1) provide all citizens shall have the specified rights mentioned in sub clauses (a) to (g). Clause (1) sub clause (c) states that 'all citizens shall have the right to form associations or union, cooperative societies.[4] Article 19 (4) deals with the restrictions upon the right to form associations or unions, cooperative societies, which states:

> *Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from*

[3] V.N.Shukla, *Constitution of India*, 128 (2013)
[4] *Supra* n. 1

> *making any law imposing, in the interests of [the sovereignty and integrity of India or][5] public order in morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*

Like any other fundamental right, an association does not have the absolute right to do what it desires but are bound to act within reasonable restrictions outlined in article 19 (4) of the Constitution. The State's interference in the associational rights of private institutions, social clubs, trade unions, cooperative societies, universities, corporations shall be justified under article 19 (4) of the Constitution.

Historically and philosophically, India has developed a strong tradition of collective rights and duties, flourishing in the patterns of joint family, guilds, religious bodies, and social organizations[6]. There are group rights enjoyed by specific classes such as denominations, minorities, and sections of citizens having distinct cultures, languages, or scripts of their own[7].

5.2. *Locus standi* under article 19 (1) (c)

Freedom under article 19 of the Constitution is not available to all the persons living in India. Unlike articles 14 and 21 of the Constitution, this right is granted only to citizens in India. Therefore, article 19(1) (c) is not open to

[5] *Ins.* by the Constitution (16th Amendment) Act, 1963, s.2.
[6] Prof. P. Ishwara Bhat, *Constitution, Associational Freedom and Judiciary: The Attainments and Incoherences in Constitutional Value Jurisprudence* in *Constitutional Development through Judicial Process* (edited by Prof. G. Manoher Rao) 98 (2012)
[7] *Id.* at 99.

juristic or other persons and entities who are non-citizens. In this regard, the Supreme Court examined the nature of a person who qualified as a citizen under the article. In *Tata E&L. Co. Ltd* v. *State of Bihar*[8] a question arose as to whether the State Trading Corporation Ltd can claim to be a citizen within the meaning of article 19 of the Constitution? The majority decisions held that the petitioner as a state trading corporation is not a citizen and so could not claim the protection under this article. A corporation or company does not come under the purview of association under article 19 (1) (c) of the Constitution. The Court clarified that they are the statutory authorities and are to be treated like a legal entity and not as a natural person.

Fundamental rights cannot be taken away by legislation, however, legislation can impose reasonable restrictions on the exercise of such rights. At the same time, the legal rights of individuals or citizens can be lost or taken away by legislation. In this regard, the question is that whether the State Trading Corporation Ltd can claim to be a citizen within the meaning of article 19 of the Constitution? [9] The majority decision of the Supreme Court in *Tata E&L. Co. Ltd* v. *State of Bihar*[10], that the petitioner as a state trading corporation is not a citizen under article 19, and so, could not claim the protection of the freedoms. Further, the court has observed that:

[8] AIR 1965 SC 40

[9] *Id.*

[10] *Id.*

> *The true legal position in regard to the character of a corporation or company which owes its corporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose.*[11]

This approach is a well-recognized principle of common law that corporations and companies are not citizens. The Constitution intended that they should not get the benefit of article 19. Further, Gajendra Gadkar, J., stated why corporations are not treated as citizens under article 19 of the Constitution of India. The learned judge, speaking for the Court, observed as follows:

> *The effect of confining Article 19 to citizens as distinguished from persons to whom other articles like 14 apply clearly must be that only citizens to whom the rights under Article 19 are guaranteed. If the Legislature intends that the benefit of Article 19 should be made available to the corporations, it would not be difficult for it to adopt a proper measure on that behalf by enlarging the definition of 'citizen' prescribed by the Citizenship Act passed by the Parliament by virtue of the powers conferred on it by Article 10, 11. On the other hand, the fact that the Parliament has not chosen to make any such provision indicates that it was not the intention of the Parliament to treat corporations as citizens.*[12]

[11] *Id.* at 46. This position has been established ever since the decision in the case of *Saloman* v. *Saloman and Co*, 1897 AC 22
[12] *Id.* at 48

Parliament did not intend to treat corporations and companies as citizens. This approach is a well-recognized principle of common law. It means that the corporations and companies are not citizens; the Constitution intended that they should not benefit from article 19. The corporation's entity is entirely separate from that of its shareholders; it bears its name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its purpose.

However, an individual member or a shareholder of a corporation or company as a citizen can avail protection under article 19 of the Constitution. In *R. C. Cooper* v. *Union of India*[13], the nature of the shareholders' rights was considered. The question was whether the shareholders, who are all citizens have the rights that article 19(1) can invoke[14]. The Court held that the jurisdiction of the Court to grant relief could not be denied when by state action, the rights of the individual shareholder are impaired. As a result of the case, a shareholder is entitled to the protection of article 19 (1). It has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. The reason is that the shareholders' rights are equally and necessarily affected if the company's rights are affected. Hence the court accepted the test in determining whether the

[13] (1970) 3 SCR 530

[14] The grievances of petitioner were: the Act and Ordinance were without legislative competence; the Act and Ordinance interfered with the guarantee of freedom of trade; they were not made in public interest; the President had no power to promulgate the Ordinance, etc.

shareholder's right is impaired is not formal; it is essentially qualitative; if the state action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief[15].

In *R. C. Cooper* v. *Union of India*[16], the Supreme Court examined the nature of shareholder rights, considering whether shareholders can claim the rights under article 19 (1) if they are citizens. Shah, J. speaking for the majority, dealt with the contention raised about the maintainability of the petition. The petitioner was a shareholder, a Director, and holder of deposit of current accounts in the Bank. The petitioner's locus standi was challenged because no fundamental right of the petitioner there was directly impaired by the enactment of the Ordinance and the Act or any action taken thereunder. The petitioner claimed that the rights guaranteed to him under articles 14, 19, and 31 of the Constitution were impaired. The court held that the jurisdiction of the Court to grant relief could not be denied when by State action, the rights of the individual shareholder are impaired. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the company, the court will not concentrate merely upon the technical operation of the action, deny itself jurisdiction to grant relief. As a result of the decision, a shareholder

[15] The rulings in Sakal Papers case, Express Newspapers case and Bennett Coleman case affirmed the stand. *Bennett Coleman & Co*. v. *Union of India* MANU/SC/0038/1972
[16] *Supra* n. 13

is entitled to the protection of article 19. It has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. The reason is that the shareholders' rights are equally and necessarily affected if the company's rights are affected.

Again, in the Bennett Coleman group of cases, one shareholder, a reader of the publication, and three editors of the three dailies published by the Bennett Coleman Group were the petitioners. One of the questions in the case was whether they have invoked the right to freedom under article 19 (1) of the Constitution. In this regard, A.N.Ray J, for the majority opinion in *Bennett Coleman & Co.* v. *Union of India*[17] pointed out that the rights of shareholders in relation to article 19(1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent them from giving relief to the shareholders, editors, and printers who have asked for protection of their fundamental rights because of the law's effect and the action upon their rights.[18] The locus standi of the

[17] 1973 SCR (2) 757
[18] *Id* at 773

hareholder on behalf of a company or association is beyond challenge after ruling in the *R. C. Cooper* v. *Union of India*[19].

Justice A.N.Ray delivered the decision for the majority opinion has pointed out as follows:

> *The rights of shareholders concerning Article 19(1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through the newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of this Court in the Bank Nationalisation case. The presence of the company is on the same ruling not a bar to the grant of relief. The rulings in Sakal Papers case and Express News-papers case also support the competence of the petitioners to maintain the proceedings.*[20]

The association as an institution does not have locus standi, but members of the association and those holding responsible positions can approach the

[19] *Supra* n. 13, *See also Express News papers (p) Ltd.* v. *Union of India* AIR 1958 SC 578 and *Sakal Papers (P) Ltd.* v. *Union of India* AIR 1962 SC 305 the rulings in also support the competence of the petitioners to maintain the proceedings.
[20] *Id.* at 773

courts for the association. Association is a legal person but not a natural citizen to claim the protection of article 19 (1) (c) of the Constitution.

Associations as a group of citizens, naturally, a question has arisen as to whether organizations can justify themselves as citizens under the scheme of article 19 of the Constitution, and thus whether this right is open to citizens organizations or whether stream can rise higher than the source. The settled law that evens a very liberal interpretation of article 19 (1) (c) cannot conclude that the stream can rise higher than the source.[21] Associations or a group of citizen as such cannot claim the fundamental rights guaranteed by that article solely based on their being an aggregation of citizens.[22] Article 19 (1) (c) does not identify the group by itself nor protect the activities of groups.

5.3. Autonomy

Freedom also implies the negative right of not joining associations or unions. The right to form an association includes the right not to constitute it and right to continue with the association.[23]. *Tikaramji* v. *State of Uttar*

[21] *See All India Bank Employees Association* v. *National Industrial Tribunal* AIR 1962 SC 171 the Supreme court observed in this case that even a very liberal interpretation of sub-clause (c) of clause (1) of Article 19 cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to declare a lock-out may be controlled or restricted by appropriate industrial legislation, and the validity of such legislation would have to be tested not with reference to the criteria laid down in clause (4) of Article 19 but by totally different considerations.

[22] *BCCI* v. *Cricket Association of Bihar* (2016) 8 SCC 535, 586

[23] *V. G. Rao* v *State of Madras* AIR 1951 Mad 147

Pradesh[24] the court viewed that assuming that the right to form an association implies a right not to form an association. Right to continue means association may take all the reasonable steps to enjoy the right.

Autonomy of association or unions is determined by its free choices of formation of the association. The essential elements of the right to right to form associations free choices of membership, functions of associations without any external intervention in terms of any public policy, right to free exit, etc. It is a well-established principle that associational rights of individuals are free from any unnecessary and unreasonable interventions even from governmental authorities. In determining independence, its nature and impact on the public and affecting their rights are decisive factors. Intimate associations like family and similar associations are more free from any kind of interventions except the necessary to maintain the reasonable interest of the society.

The autonomy of an association includes the regulation of internal relations between members in an association. The rights and duties of the members of the association, its office-bearers and the relationships among them are generally determined by the rules and by-laws of the Association. Once an association is registered under the applicable law, the terms of such relationship may, to a certain extent, be governed by the statute governing the association.

[24] AIR 1956 SC 676

5.4. Registration

Associations or unions may or may not be registered under any statute for registration of associations, but the status of the members of a society may change upon registration. A trade union may register in accordance with the relevant provisions of the Industrial Relations Code, 2020, likewise registration of cultural societies and other associations under the Societies Registration Act. Once an association or union is registered under the relevant statutes, it is necessary that members should accept the regulations and restrictions of the concerned statute. In other words, he is subject to the acts, regulations, and bye-laws for the society. In the case of *Raghubar Dayal Jai Prakash* v. *Union of India*[25], the Supreme Court considered this question. At the same time, the court examined the validity of the conditions for registration of an association for certain purposes.

According to facts of the case traders like the petitioner combined together to form an association, the objects of which were to regulate forward transactions in the sale and purchase of gur and other commodities entered into between the members of the association, as also to declare the rates at which the contracts were to be settled on the dates fixed for delivery. The petitioner had entered into forward contracts of purchase of gur at certain rates and had also deposited as the buyer the amount as well as the special margin required to be deposited under the bye-laws of the association. According to the

[25] AIR 1962 SC 263

notification issued by the Central Government, under Section 15 of the Forward Contracts (Regulation) Act, 1952, all forward contracts made by unauthorized associations for the purchase of any goods specified in the notification in the specified area shall be illegal. The association in question of which the petitioner was a member was not recognised by the central government under s. 6 of the Act, as a result of which the forward contracts entered into by him became illegal and void. The petitioner challenged the validity of the provisions of the Act on the ground inter alia that it infringed the freedom guaranteed by article 19 (1) (c) of the Constitution of India.

The court also examined whether any rule compelling an association for recognition was a violation of the freedom of association. Before an association could be recognized, section 5 requires the body to apply to the central government furnishing the details and particulars specified in section 5(2).[26]

[26] Forward Contracts (Regulation) Act, 1952, s.5. Application for recognition of associations.—

(1) Any association concerned with the regulation and control of forward contracts which is desirous of being recognised for the purposes of this Act may make an application in the prescribed manner to the Central Government.

(2) Every application made under sub-section (1) shall contain such particulars as may be prescribed and shall be accompanied by a copy of the bye-laws for the regulation and control of forward contracts and also a copy of the rules relating in general to the constitution of the association, and in particular, to—

(a) the governing body of such association, its constitution and powers of management and the manner in which its business is to be transacted;
(b) the powers and duties of the office-bearers of the association;
(c) the admission into the association of various classes of members, the qualifications of members, and the exclusion, suspension, expulsion and readmission of members therefrom or there into;
(d) the procedure for registration of partnerships as members of the association and the nomination and appointment of authorised representatives and clerks.

The government might make such inquiry as might be necessary and, after obtaining such further information as may be required, are empowered to grant recognition to associations under section 6. Such recognition was to specify the goods or classes of goods concerning which forward contracts may be entered into between members of such associations or through or with any such member. Section 6 (2) contains conditions that ought to be complied with by associations before recognition was granted and provision was made in section 6 (3) for the rules of the association not being amended except with the approval of the central government. [27]

[27] Forward Contracts (Regulation) Act, 1952, s.6. Grant of recognition to association.—

(1) If the Central Government, after making such inquiry as may be necessary in this behalf and after obtaining such further information, if any, as it may require, is satisfied that it would be in the interest of the trade and also in the public interest to grant recognition to the association which has made an application under section 5, it may grant recognition to the association in such form and subject to such conditions as may be prescribed or specified, and shall specify in such recognition the goods or classes of goods with respect to which forward contracts may be entered into between members of such association or through or with any such member.

(2) Before granting recognition under sub-section (1), the Central Government may, by order direct,—

(a) that there shall be no limitation on the number of members of the association or that there shall be such limitation on the number of members as may be specified;

(b) that the association shall provide for the appointment by the Central Government of a person, whether a member of the association or not, as its representative on, and of not more than three persons representing interests not directly represented through membership of the association as member or members of, the governing body of such association, and may require the association to incorporate in its rules any such direction and the conditions, if any, accompanying it.

(3) No rules of a recognised association shall be amended except with the approval of the Central Government.

(4) Every grant of recognition under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised association is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.

It was contended that the nature of freedom to form associations or unions under article 19 (1) (c) of the Constitution carried with it a right in the association to determine its internal arrangements in the matter of selecting the persons who shall manage it, the framing of the bye-laws and regulations which shall govern the relationship between the association and its members and also between its members without any interference by the state unless the law providing for such interference was grounded on morality or public order. Therefore, the text would indicate that the right to form an association would include the functioning of the association without any restraints not dictated by the need for preserving order or the interests of morality. In every way, the state's interference through statute in the internal management of an association would be violative of the right guaranteed by the Constitution.

The court ruled that registration was not required to enjoy the association rights of citizens of India and held that no association is compelled to apply to the government for recognition. However, the court upheld the provisions of the law which provide that an association may voluntarily apply for recognition and is not obliged to register the association with any authority. The court says that the restriction imposed by section 6 of the Forward Contracts (Regulation) Act, 1952, is for recognition, and no association is compelled to apply to the government for recognition under that Act. This is explained in the following ways:

> *We consider this argument is without force. In the first place, the restriction imposed by section 6 of the Act is for the purpose of recognition and no association is compelled to apply to the Government for recognition under that Act. An application for the recognition of the association for the purpose of functioning under the enactment is a voluntary act on the part of the association and if the statute imposes conditions subject to which alone recognition could be accorded or continued, it is a little difficult to see how the freedom to form the association is affected unless, of course, that freedom implies or involves a guaranteed right to recognition also.*[28]

The court further held that any provision of the Act for compulsory registration of associations is contrary to the spirit of forming associations or unions under article 19 (1) (c).[29] The freedom of association cannot be said to be independent if the law imposes the condition that association recognition is mandatory.[30] The court, therefore, ruled that the regulations were not unconstitutional as long as they did not encroach on the independent internal affairs of organizations without any reasonable cause. Therefore, if the law requires an association to be registered, it can be considered a violation of the fundamental rights of citizens due to the interference of external authority without the consent of the members.

[28] *Supra* n. 25 at 270
[29] *Id.*
[30] *Id.*

5.5. Concomitant right

Concomitant right is the right which is not explicitly mentioned by name in a particular provision, but it can happen along with expressed rights and, therefore, can be treated as a part of expressed right. The interpretation of the Supreme Court of India on freedom of press is a classic example of this. It was held that even though freedom of the press is not expressly included in the list of fundamental rights, the right to freedom of speech and expression could not be effectively exercised without it.[31] The freedom of press is not confined to newspapers and periodicals, but includes also pamphlets, leaflets, circulars, and every sort of publication which affords a vehicle of information and opinion.[32] Freedom of the press includes the freedom of employment or non-employment of the necessary means of exercising this right, such as freedom of employment in the editorial force of a newspaper and also freedom from a measure intended or calculated to undermine the independence of the press by driving it to seek government aid.[33] The freedom guaranteed by article 19 (1) (c) must extend not only to the formation of the association but also to the effective functioning of the association and enable it to achieve its legal objectives. It has been argued from the beginning that if such freedom is not guaranteed, it will be illusory.

[31] *See. Sakal Papers (P) Ltd.* v. *Union of India* AIR 1962 SC 305; *Express Newspapers (P) Ltd.* v. *Union of India* AIR 1958 SC 578; *Brij Bhusan* v. *State of Delhi* AIR 1950 SC 129
[32] *Sakal Papers (P) Ltd.* v. *Union of India* AIR 1962 SC 305.
[33] *Id.*

All India Bank Employees' Association v. *The National Industrial Tribunal*[34] is the leading case in which the nature and scope of the article 19 (1) (c) were thoroughly discussed. The pertinent question in the case was the constitutional validity of section 34A of the Banking Companies Act, 1949, which came into force on August 26, 1960, as an amendment to the parent Act. Section 34-A of the Act, 1949, stipulates that no banking company shall be compelled to produce or inspect books containing books of accounts which the company claims to be confidential. This section also protects the bank from disclosing any information related to the reserve money which is not shown in the balance sheet in case of bad and suspicious debts. Here, the Act extended the protection from compulsory disclosure to shareholders and the general public, including the workmen.

Rule 34-A contravened the fundamental right guaranteed to trade unions by article 19(1) (c) of the Constitution. It prevented them from effectively exercising the concomitant right of collective bargaining regarding wages, bonuses, etc. The appellants argued that without collective bargaining and concomitant rights as part of the right to associations or unions, such rights form most illusory. Therefore, it is impossible to enforce the fundamental right to form associations or unions as a mere means of registering their union with the authorities. This right gives unions the right to work effectively as a tool for

[34] AIR1962 SC 171

agitation and negotiation through collective bargaining, to uphold or implement their demands about workers' wages, opportunities, or working conditions.

The nutshell of the arguments regarding concomitant right may be summed up here as the concomitant right renders the members of the unions to achieve the object for which they have formed; thereby, labour unions and similar associations get the protection of collective bargaining under article 19 (1) (c) of the Constitution. The right guaranteed to form a union carries with it a concomitant right that the achievement of the object for which the union is formed shall not be restricted by legislation unless such restrictions were imposed in the interest of public order or morality. Therefore, the right to strike would be a natural deduction from the right.

The court, however, negated the argument and opined that the right guaranteed article 19 (1) (c) does not carry with it a concomitant right that the unions formed for protecting the interest of labour shall achieve the purpose for which they were brought into existence.[35] Therefore, the court vividly pointed out that every object for which the associations or unions constituted is not protected under the scheme of article 19 (1) (c) of the constitution. The right can be claimed to constitute associations or unions in the beginning stage only. At the outset, the right is applicable only to constitute unions, not to conduct strikes either as part of collective bargaining or otherwise.

[35] *Id.* at 182-183

Article 19 (1) (c) of the constitution does not protect all rights and objectives of an association or union. It was held that the appellants' arguments would contradict the scheme of several fundamental rights under Part III of the Constitution. Associations may be formed for different purposes, but not all such purposes are covered under this scheme. Association may be formed to conduct partnership business, or company constituted to do business. Such association freedom has different characteristics, and so it is to be tested by different standards. As the stream can rise no higher than the source, associations of citizens cannot lay claim to rights not open to citizens, or claim freedom from restriction to which the citizens composing it are subject.[36] The court opined that a series of ever-expanding concentric circles in the shape of rights concomitant to concomitant rights and so on lead to an almost grotesque result. If the fulfilment of every object for which a union of workmen was formed were held to be a guaranteed right, it would logically follow that a similar content ought to be given to the same freedom when applied to a union of employers, which would result in absurdity.[37] In this line of thinking, the court hesitated to extend the meaning given to the right.

In *All India Bank Employees' Association* v. *The National Industrial Tribunal*[38], the Supreme Court had settled some crucial issues on the contents

[36] *Id.* at 190
[37] *Id.* at 190
[38] *Supra* n. 34

of freedom of associational rights in India. This judgment has expressly rejected the theory of concomitant right and collective bargaining of labourers. Outraging interpretations that may come in the future are effectively blocked through the act of discarding the theory of concomitant right and collective bargaining. Therefore, the court vividly pointed out that every object for which the associations or unions were constituted would not be protected under the scheme of article 19 (1) (c) of the Constitution. The right can be claimed only for the initial constitution of associations or unions. Therefore, the right is not extended to all activities even it lawful of members and is not permitted to carry on in their desired manner[39]. At the outset, the right is applicable only to constitute unions and not to conduct strikes either as part of collective bargaining or otherwise.

The rationale for this conclusion is that the freedom to form associations or unions under article 19 (1) (c) is guaranteed only to citizens and not to trade unions as such, hence trade unions cannot claim the right to strike as a concomitant right to freedom to form an association. Supreme Court in *Dharan Dutt* v. *Union of India*[40] clarified the settled position by stating as follows:

> *A right to form unions 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 with the legal consequence that any*

[39] *Id.* at 971
[40] (2004) 1 SCC 712

> *legislation not falling with in clause (4) of Article 19 which might in any way hamper the fulfilment of those objects, should be declared unconstitutional and void. Even a very liberal interpretation cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to declare a lockout may be controlled or restricted by appropriate industrial legislation, and the validity of such legislation would have to be tested not with reference to the criteria laid down in clause (4) of Article 19 but by totally different considerations. A right guaranteed by Article 19 (1) (c) on a literal reading thereof can be subjected to those restrictions which satisfy the test of clause (4) of Article 19. The rights not included in the literal meaning of Article 19 (1) (c) but which are sought to be included therein as flowing therefrom i.e. every right which is necessary in order that the association brought into existence fulfils every object for which it is formed, the qualifications therefore would not merely be those in clause (4) of Article 19 but would be more numerous and very different. Restrictions which bore upon and took into account the several fields in which associations or unions of citizens might legitimately engage themselves would also become relevant*[41].

The right to form associations does not involves or carry with it the concomitant right that such union should be able to achieve the objects which might be supposed to underlie the formation of an association. The ratio was reiterated in *BCCI* v. *Cricket Association of Bihar*[42] that the right under article

[41] *Id.* at 735
[42] *Supra* n. 22

19 (1) (c) does not guarantee the citizens the concomitant right to pursue their goals and objects uninhibited by any regulatory or other control.[43]

The ratio in *All India Bank Employees' Association* v. *The National Industrial Tribunal*[44] found by the Supreme Court under article 19 (1) (c) is contrary to the broad interpretations received from time to time for Part III of the Constitution and the interrelation of freedoms of article 19 (1) of the Constitution itself. Prior to this decision, the court had developed a very broad interpretation of freedoms under article 19 (1) of the Constitution.

In *Romesh Thappar* v. *State of Madras*[45], the Supreme Court had expressed that turning now to the merits, there can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that the freedom of circulation ensures freedom. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation, the publication would be of little value[46]. Freedom of speech and expression includes within its scope the freedom of the press[47].

In an advisory opinion *In Re the Kerala Education Bill*[48] the Supreme Court examined the Kerala Education Bill, which denied recognition to educational institutions run by minorities. It was argued that the provisions of

[43] *Id.* at 584
[44] *Supra* n.34
[45] AIR 1950 SC 124; 1950 S.C.R. 594
[46] *See also Ex parte Jackson*, 96 U.S.727
[47] *Express Newspapers (P) Ltd* v. *Union of India* AIR 1958 SC 578
[48] (1959) 1 SCR 995

the Bill were contrary to clause (1) of article 30, which guarantees all minorities a right to establish and administer educational institutions of their choice. In this case, the court observed that without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and therefore, the rights under article 30 (1) cannot effectively be exercised. The right to run educational institutions of their choice must, therefore, mean the right to establish educational institutions which would effectively serve the needs of their community and the scholars who resort to their educational institutions. Article 30 (1) guarantees the constitutional right to administer the educational institutions of one's choice. There is no doubt that the Kerala Education Bill violates the rights guaranteed to minorities by denying recognition to educational institutions and deprives them of their rights under article 30 (1).

The court denied all these explanations in *All India Bank Employees' Association* v. *The National Industrial Tribunal*[49] case for three different reasons. The Court distinguished this case with *Romesh Thoppar*[50] and pointed out that it was unable to discern any analogy between the two cases for the reason that the press with the printed word is merely the mechanism by which the freedom is exercised and does not carry the matter any further. The view of

[49] *Supra* n. 34
[50] *Supra* n. 45

Supreme Court *In Re the Kerala Education Bill*[51] case was also denied by the Court since the expansion of associational right into its concomitant right is not tenable to the scheme of article 19 (1) (c) of the Constitution. The Court stated its reasons for denial of such expanding interpretations as follows.

> *"The observations of the learned Chief Justice and the conclusion drawn are about the construction of article 30 and cannot be divorced from the context. They do not purport to lay down any general rule of construction for the freedoms guaranteed under the several sub-heads of clause (1) of Article 19, and pointed out earlier should suffice to indicate the impossibility of upholding any such construction of the freedom guaranteed by the article.*[52]*"*

Therefore, the right does not include the right to achieve the purpose for which the association is formed which is why the concomitant rights are not protected under the article[53].

One of the reasons pointed out by the court for not considering the concomitant right was the observation of the American Supreme Court in *Dorchy* v. *Kansas*[54] which stated neither the common law nor the 14th Amendment confers the absolute right to strike. The question is not whether the trade union has been given the absolute right to strike but whether the right to

[51] (1959) 1 SCR 995
[52] *Supra* n. 34 at para 29
[53] *See All India Bank Employees Association v. National Industrial Tribunal* AIR 1962 SC 171, *Balakotiah v. Union of India* AIR 1963 SC 232, *O. K. Ghosh v. E. X. Joseph,* AIR 1963 SC 812, *T. K. Rangarajan v. State of T. N,* AIR 2003 SC 3032
[54] 272 U.S. 306 (1926)

strike is a concomitant right available under article 19 of the right to form a union. The absolute right to strike is not protected anywhere in the world constitutions, but the right to strike is essential to gaining and maintaining labour rights in the workplace. It may be submitted that the interpretations given in article 19 (1) of the Constitution are not limited and exclusive, but the interpretations given to one clause of article 19 (1) may apply to other clauses of article 19 (1) to some extent.

5.6. Voluntary associations

Voluntary associations are distinct from other associations. Members of the association enjoy greater freedom in all internal matters of association if the association is voluntarily constituted. The members have the right to be associated only with those whom they consider eligible to be admitted and the right to deny admission to those with whom they do not want to associate. Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out or any law that takes away the membership of those who have voluntarily joined will violate the right to form an association.[55]

There are several judicial pronouncements by the Supreme Court regarding the right to form voluntary associations or unions. A significant

[55] *Damyanti Naranga* v. *Union of India*, (1971) 1 SCC 678, 684

decision in this connection was in *Damyanti Naranga* v. *Union of India*[56]. The constitution bench of the Supreme Court dealt with several questions regarding the formation of association or unions under the scope of article 19 (1) (c) of the Constitution of India. This significantly contributed to the constitutional development of the right to form associations or unions. The fact of the case, in brief, is as follows:

In the year 1910, some eminent educationists assembled at Banaras and founded an association named the Hindi Sahitya Sammelan to develop Hindi language and its propagation throughout the country. It was registered as a society under the Societies Registration Act, 1860, in 1914. According to the rules and bye-laws of the society, it had three classes of members, viz., special members (Vishisht sadasya), permanent members (Sthayi sadasya), and ordinary members (Sadharan sadasya). Apart from the original members who constituted the society, more members could be admitted under those three classifications elected by the working committee of the society. The society owned landed properties and buildings at Allahabad and some other places and had considerable funds for carrying on its activities. The society worked very successfully for several years. In the year 1950, some differences arose between the members of the society, and an attempt was made to alter the constitution of the society. This resulted in litigation, and ultimately, the court appointed a

[56] *Id.*

receiver. In these circumstances, the UP legislature passed an Act known as the UP Hindi Sahitya Sammelan Act, 1956, under which a statutory body called Hindi Sahitya Sammelan was created. The Sammelan took over the management and assets of the original Sammelan under the new law. The constitutional validity of the Act was challenged before the Court.

In this case, the court asked some crucial questions about the freedom of associations and tried to find answers to them. Is this right available to a citizen only at the initial stage of forming associations or unions? or to engage in activities necessary to achieve the objectives for which the associations formed? Can the government change the structure of an association through legislation? Will such restrictions violate the association rights of citizens? After lengthy discussions on the nature of association rights, the Supreme Court ruled that the UP Hindi Sahitya Sammelan Act 1956 violated the freedom of association under article 19 (1) (c) of the Constitution available to the members of the society.

By the Act of taking over the association, the members who voluntarily formed the association were compelled to act in that association with other members who have been imposed as members by the statute or Act and in whose admission to membership they had no say. The court found that the Act did not create a new association but only tried to modify the structure of the existing association without the consent of its members. On behalf of the court,

Justice Bhargava brought a clear picture of the right to form associations or unions under article 19 (1) (c) of the Constitution. He observed as follows:

> *The right to form an association, in our opinion, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit to the association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Article 19(1) (c) is confined to the initial stage of forming an association and does not protect the right to continue the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association.*[57]

Alteration in the composition of the association by the imposition of the provisions of the Act interfered with the right to continue to function as members of the association which the founders voluntarily formed. Through this observation, the court issued three very important interpretations. Firstly, the court expanded the scope and meaning of the right to form associations or unions by stating that ensuring the importance of the existing members of the

[57] *Id.* at 684-85

association and that free opinion in the election of new members is a necessity of the association's right. Secondly, the right to form associations or unions available to the citizen includes the initial formation of the association and the right of the association or union to remain subject to the rules and regulations of the association. Forcible inclusion or exclusion of a citizen into associations or unions by law is tantamount to violating his associational rights. Thirdly, the interference into an existing voluntary association and altering the composition of its membership by an act of law is an invasion of the rights of its members. The constitutional right of freedom to form associations or unions can only be ensured if the organization continues to function without fear of government intervention.

Directions to change the structure of an association are tantamount to government intervention in the internal affairs of an association. In *Damyanti Naranga* v. *The Union of India*[58], the court found that any alteration of the composition of the membership of a society compulsorily by legislation would amount to a breach of associational rights and right to continue as its original members desired. The court further held as follows:

> *The Act does not merely regulate the administration of the affairs of the society, what it does is to alter the composition of the society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the*

[58] *Supra* n. 55

> *Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders.*[59]

The court had also pointed out three reasons for not accepting the submission of the respondent. Firstly, the Act reconstituted the society but did not create a separate and independent body in the form of a new sammelan. Secondly, there is a lack of legislative competency of Parliament where the constitution of the society is under List II of the Seventh Schedule[60]. Finally, even though the Parliament had the power to pass the Act to transfer all the properties and assets of the society to the sammelan, the Act would contravene article 19 (1) (f) of the Constitution.

It is to be noted that the nature of any association is very significant while deciding the validity of a law that interfered with the association's rights. Hence, the statutory associations are different from the associations which were voluntarily constituted. Therefore, the ratio made by the court in this regard could be applied to (a) associations which were formed voluntarily, registered or unregistered, and (b) associations whose composition was altered by

[59] *Id.* at 684
[60] In fact, the declaration was made on the basis of legislative power under Entry 63 of List I that the Hindi Sahitya Sammelan, Allahabad, was an institution of national importance.

imposing new members into the society by an Act. However, this ruling does not apply to the societies created and established by a statute in the interest of national importance. So if the association is not a statutory association, the observations made by the court are right. Article 19(1) (c) guarantees to all citizens the right to form associations or unions of their choice voluntarily, subject to reasonable restrictions imposed by law. Formation of the unions under article 19(1) (c) is a voluntary act. Thus, unwarranted or impermissible statutory intervention is not desired[61].

In *Daman Singh* v. *State of Punjab*[62], a case where an unregistered society was by statute converted into a registered society that bore no resemblance whatever to the original society. The Act transformed the composition of the society itself and the voluntary nature of the association of the members who formed the original society was totally destroyed. The court struck down the Act.

In *Periyar Self-Respect Propaganda Institution* v. *State of Tamil Nadu*[63] the Madras high court denied claiming life membership or life offices. It opined that a plain reading of article 19 (1) (c) showed no one could claim that his right to hold office for life is an integral part of his fundamental right to form an association. Holding of an office for a particular tenure or, for that matter, for

[61] *A. P. Diary Development Corporation Federation* v. *B. Narasimha Reddy*, (2011) 9 SCC 286, 300
[62] AIR 1985 SC 973
[63] AIR 1988 MAD 27

life is a matter of internal arrangement amongst members constituting the society. The state shall not interfere in the internal affairs of any association or union by compulsory affiliation of association or by the acquisition of the association by law.

Although many questions about freedom of association have been resolved, there are some obstacles to assessing it as the final word, as the decision of the larger bench of the Supreme Court is somewhat contrary to this decision. The subsequent pronouncements could not follow the ratio of this decision due to the ratio of larger bench in *All India Bank Employees' Association* v. *The National Industrial Tribunal*[64].

5.7. Compulsory affiliation

The government usually does the compulsory affiliation of an association by enacting a law. If an association is affiliated by law with any association or institution, some questions naturally arise about the freedom of associations of its members. One of the leading decisions in this regard is the *D.A.V. College, Jalandhar* v. *State of Punjab*[65]. The Supreme Court sought to answer whether compulsory affiliation affects the rights of members of associations.

[64] *Supra* n. 34
[65] 1971 (2) SCC 269

D. A. V. College challenged the Constitutional validity of certain provisions of Guru Nanak University, Amritsar Act, 1969. It is contended that the compulsory affiliation of the Petitioners to the university affects their fundamental right of freedom of association as guaranteed under article 19(1) (c) of the constitution. Therefore the notification under section 5(3) affiliating them to the university is bad. The relevant question before the court was whether the forcible affiliation of a college with a university was a violation of the right to form associations or unions and the compulsory affiliation with the university amounted to affecting the aims and objectives of the association. Although it was argued in this case that the requirement of compulsory affiliation was a violation of the right to freedom of association guaranteed by article 19 (1) (c), the court rejected it. It was held that the notification providing for compulsory affiliation with the university did not in any manner interfere or attempt to interfere with the petitioners' right to form an association under article 19(1) (c). After the *Damyanti case*[66] case was referred, the court distinguished the decision. The court explained the reasons as follows:

> *A reference has been made to a recent case of Smt. Damayanti Narang v. Union of India*[67]*. Writ Petition No. 91 of 1964, decided on 23-2-71. 45-1,that a compulsory affiliation by statute would interfere with the right of Association. This argument in our view is untenable because in that case Parliament passed a law under entry 63 of List II of Schedule*

[66] *Supra* n. 56
[67] *Id.*

> *VII to the Constitution under which a Hindi Sammelan was to be constituted which was to consist of the first members of the Hindi Sammelan registered under the Societies Registration Act and all persons who become members thereof in accordance with the rules in that behalf. This statutory Sammelan was constituted as a body corporate the first members of which were to consist of persons who immediately before the appointed day were life members of the society had been President's of the Society or were awarded the Mangla Prasad Paritoshik by the society. There were also other provisions by which the Hindi Sammelan Society, its Constitution as well as its property was affected. In those circumstances it was held that the Act in so far as it interferes with the composition of the society in constituting the Sammelan violated the rights of the original members of the society to form an Association guaranteed under Article 19(1)(c). No such thing was intended or affected by Section 5 of the Act. At any rate the D.A.V. College Trust and Management Society is not being interfered with, by any attempt to form an Association with the University. We can see no infringement of Article 19(1)(c).*[68]

It was observed that the Act, so far as it interfered with the composition of the society violated the rights of the original members of the society to form an association guaranteed under article 19 (1) (c). No such thing was intended or affected this case where at any rate, the D.A.V. College Trust and Management Society was not interfered with, by any attempt to form an association with the University. Hence the court could see no infringement of

[68] *Supra* n. 65 at 281

article 19 (1) (c).[69] Therefore, the Supreme Court held that compulsory affiliation of an educational institution to a university did not interfere with the freedom of the D.A.V. Society. It could not insist that its activity or imparting the education should also be allowed to go on unrestricted[70]. Taking over a research institute established by a society, without interfering with the Constitution and powers of the society is not an interference with the right under the provision[71]. However, the Court held that this decision could not be linked to the fundamental right to form an association with the fundamental right to pursue any trade or business. In the case of self-financed colleges, it should be interpreted in the light of article 19 (1) (g) and article 19 (6) of the Constitution.

5.8. State intervention on the composition of an association

The State can impose a array of restrictions on the freedom of associations or unions; for example, the State may acquire the assets of an association, intervene in the structure of association membership, and take over the entire association in terms of national importance. But such restrictions imposed by the State must be justified under article 19 (4) of the Constitution of India. Such interventions were examined by the Constitution Benches of the

[69] *Id.*
[70] *Id.*
[71] *Infra*

Supreme Court in various cases, since the nature of the interventions is different, those different cases need to be examined here.

The freedom to continue within the framework of which the individuals who form the association voluntarily agree is the spirit of the associational right. Whether the law can change the structure of an association or its members without the consent of the existing members is very pertinent to the functioning of the independent association. The Supreme Court considered this question in three important decisions. In *L.M.N. Institute of Economic Development and Social Change* v. *State of Bihar*[72] where the state took over the activities of a society named L.M.N. Institute of Economic Development and Social Change. In second case, *Asom Rashtrabhasha Prachar Samiti* v. *State of Assam*[73] the government took over the society which was registered under the Societies Registration Act, 1860 was questioned and it was held that the state intervention amounted to a violation of associational rights of its members. Finally, in *Dharan Dutt v. Union of India*[74], the acquisition of a society's property was justified by the court on account of its national importance.

[72] *L.N.M. Institute of Economic Development and Social Change* v. *State of Bihar,* AIR 1988 SC 1136; (1988) 2 SCC 433
[73] 1989 SCC (4) 496; AIR 1989 SC 2126; 1989 SCR Supl. (1) 160
[74] *Supra* n. 40

In *L.M.N. Institute of Economic Development and Social Change* v. *State of Bihar*[75] case the L.M.N. Institute of Economic Development and Social Change, Patna was registered under the Societies Registration Act, 1860. Under auspicious of this society, an institute was started in the same name as Society for Research Activities. This institution got recognition from different universities as a research institution. In 1986, the state government of Bihar took over the institute by way of an Executive Order. Later, the order was replaced by the Bihar Private Educational Institutions (Taking Over) Act, 1987. This was challenged in high court by the society but the court refused the contentions of the appellant. In the appeal, the Supreme Court discussed the various issues of the case elaborately. One major attack of the petitioner Society was that the impugned Act violated the provision of article 19 (1) (c) of the Constitution. It was contended that by the impugned Act, the management of the society had been totally displaced, and its composition changed. All assets and properties got vested in the state government and the commissioner took charge of the Institute. What was left to the company was paper ownership and management. As such, in substance and effect, the right of association of the society was affected. Further, they contended that the Act was not saved under article 19 (4) of the Constitution because the fundamental right of the society to form an association was interfered not within the interests of the sovereignty integrity of India or public order or morality. The question, thus,

[75] *Supra* n. 72

was whether the fundamental right of the petitioner society, as conferred by article 19 (1) (c), has been infringed or not.

The court, here, extracted the scope of the concomitant right. The court concluded that the composition of the society had not been touched at all by way of the acquisition of L.M.N Institute of Economic Development and Social Change through the Bihar Private Educational Institutions (Taking Over) Act, 1987. Although the name of the society and the Institute were the same, they were two different entities even though the society established the institute. The government did not take over the society but only the institute through legislation Therefore the associational right of the society remained unimpaired into and un-interfered by the impugned Act and Ordinances. All that was done, including acquiring the assets and properties relating to the Institute, was to nationalize society's institute.

On the contrary, in *Asom Rashtrabhasha Prachar Samiti* v. *State of Assam*[76] case, the Samiti constituted and registered under the Societies Registration Act, 1860. The society conducted different examinations in Hindi, published textbooks in Hindi for schools, imparted training and teaching in Hindi, and issued certificates that the government of India recognized. The management and administration of the Samiti were run by elected bodies named Byabasthapika Sabha and Karyapalika, each having five years term

[76] *Supra* n. 73

from the date of holding its first meeting. The Chief Minister of Assam was the Ex-officio Adhyaksha of the Samiti. Later, when the Government took over the management and control of Samiti by way of the Ordinance, it replaced the Asom Rashtrabhasha Prachar Samiti (taking over of Management and Control) Act, 1984. Under Section 3[77] of this Act, the Asom Rashtrabhasha Prachar Samiti (taking over of Management and Control) Act, 1984, was substituted by a Board appointed by the government and all the functions, properties and affairs of the Samiti were taken over by this Board. The action of the government was challenged before the court.

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[77] Asom Rashtrabhasha Prachar Samiti (taking over of Management and Control) Act, 1984, s. 3 (1) The Government shall constitute a Board to be called the Asom Rastrabhasa Prachar Board for the purpose of taking over the management and control of the Samiti consisting of not more than 13 members;
Provided that if the Board is constituted with less than 13 members, the Government may at any time. Appoint such other member or members as may be considered necessary, the total number of members of the Board not exceeding 13, excluding the Secretary:
Provided further that the Board may exercise all powers and duties under this Act notwithstanding that the number of members of the Board is at any time less than the total permissible strength of 13.
(2) The Board shall be constituted with the following persons:
PRESIDENT :-
(a) The Chief Minister, Assam.
VICE-PRESIDENT :-
(b) The Education Minister, Assam.
MEMBERS :-
(c) Secretary to the Government of Assam, Education Department.
(d) Director of Public Instruction, Assam.
(e) Secretary to the Government of Assam, Finance Department.
(f) 3 (three) persons with outstanding contribution to Hindi to be nominated by the President.
(g) The Managing Dirctor, Assam Text Book Corporation.
(h) 4 (four) representative members belonging to ethnic and religious groups as may be nominated by the Government.
(3) The Board shall be a body corporate having perpetual succession and a common seal and shall sue and be sued by the name of Asom Rastrabhasa Prachar Board.
(4) The President shall appoint an officer of the Assam Civil Service, Senior Grade, as Secretary of the Board.

The petitioners' contentions were that the Act infringed the fundamental rights of the members by taking over the Samiti and was deprived of its assets and properties. Further, the petitioners alleged that the government had gone to the extent of changing the institution's name.

In the present case, the government has used the power under section 3[78] to appoint a board and the government of Assam can appoint anyone not connected with the society at all in the board. In the Act, it is left to the discretion of the government to appoint the whole of the board, which will take the place of not only the Managing Committee, i.e., the Karyapalika, but also the place of Byabasthapika Sabha, which normally used to be an elected body.

It is a clear violation of the right to form associations of the members of society because there is no choice of existing members to select future members of society. In *Damayanti* decision, it was held that future members could only come in due to their choice[79]. The court observed as follows:

> *It is therefore clear that so far as the present case is concerned it is not only that the new members are introduced, not only that the complete control is left to the Board to be nominated by the Government, about the persons no norms have been laid down, the person so nominated could be anyone and no control is kept to those who formed the society, those who had a right to form an association will be kept away and the society shall be run by group*

[78] *Supra* n. 73
[79] *Supra* n. 55 at 684

> *of persons nominated by the Government in accordance with Section 3. It is therefore clear that what was done in the Sammelan Acts which were under examination in the Constitution Bench judgment referred to above, much more has been done in this case. In this case virtually the right of association has been taken away and not only that it is a sort of deprivation for all times as it is not even provided that this Board may be an interim Board and thereafter a proper Board will be elected but here this Board will continue to control and manage the affairs of the society*[80].

The court found that the board nominated or appointed under section 3 of the Act controlled the affairs of the society. In the line of observations made in *Damyanti*[81] case the learned judge held that the Act and the notification issued under this Act for taking over the management of the Rashtrabhasha Prachar Samiti could not be accepted to be in accordance with the Constitution[82]. The court observed that this infringed the fundamental rights of the members who constitute the Samiti. The judge held that:

> *It is therefore clear that so far as the present case is concerned it is not only that the new members are introduced, not only that the complete control is left to the Board to be nominated by the Government, about the persons no norms have been laid down, the person so nominated could be anyone and no control is kept to those who formed the society, those who had a right to form an association will be kept away and the society shall be run by group of persons nominated by the Government*

[80] *Supra* n. 73 at 507
[81] *Supra* n. 55
[82] *Id.* at 175 *Asom Rashtrabhasha Prachar Samiti* v. *State of Assam*

> *in accordance with Section 3. In this case virtually the right of association has been taken away and not only that it is a sort of deprivation for all times as it is not even provided that this Board may be an interim Board and thereafter a proper Board will be elected but here this Board will continue to control and manage the affairs of the society*[83].

In the light of this judgment, it may be submitted that it was an invasion of the right to form associations or unions of citizens by using statute due to the following reasons: (i) The Act had nothing to say about the intention of temporary taking over of the society; (ii) There was no intention to restore the body to the elected bodies under the Constitution of society itself; (iii) Government-appointed members in the Board who were not at all connected with the society; (iv) The person so nominated could be anyone and no control was held on him by those who formed the society; (v) Society shall be run by a group of persons nominated by the government in accordance with section 3 of the Act. The court found that neither in the counter nor during arguments anything was said on behalf of the state for a permanent justification of taking over the Samiti's management depriving its members the right under article 19(1) (c) of the Constitution of India[84]. In this case, the Supreme Court

[83] *Id.* at 174 *Asom Rashtrabhasha Prachar Samiti* v. *State of Assam*
[84] *Supra* n. 73 at 506

affirmed the Constitution Bench of the Supreme Court in *Damyanti Naranga* v *Union of India*[85] decision.

After the decision in *Damyanti*[86] case, the settled law is that the right to form an association necessarily implies that forming the association have also the right to continue to be associated with only those whom they voluntarily admit to the association. Hence, any attempt to interfere or intentionally alter the existing composition of members of the association by a statute and consequently, the original members who voluntarily constituted the association had to associate with other members who have been imposed as members in whose admission to membership they had no say is obviously, a violation of the right to form associations or unions. However, contrary to this view, a society or an institution may be acquired in the name of national importance, but such acquisitions would not alter membership composition in the existing body. Therefore the acquired institution is different from the society.

Damayanti Naranga v. Union of India[87] and *Asom Rashtrabhasha Prachar Samiti* v. *State of Assam*[88] cases are contrary to *All India Bank Employees Association*[89] case in terms of extended interpretation of article 19 (1) (c) of the Constitution. Hence, it is submitted that freedom is available to

[85] *Supra* n. 55
[86] *Id.*
[87] *Id.*
[88] *Supra* n. 73
[89] *Supra* n. 34

citizens not only to the initial formation of association but also for the continuation of the association with its assets, properties and objectives.

In another case the Division Bench of the Supreme Court in *Dharan Dutt* v. *Union of India*[90] examined the constitutional validity of the Indian Council of World Affairs Act, 2001 by which the Institute of Indian Council of World Affairs was taken over in the name of national importance from the management of a society formed by distinguished eminent personalities. In 1943, the Indian Council of World Affairs was established by about fifty distinguished eminent public personalities as a non-official, non-political, and non-profit organization. On 31 March 1945, the association was registered as a society under the Societies Registration Act, 1860. The principal object of the society, as set in the memorandum of association, was to promote the study of Indian and international questions to develop a body of informed opinion on world affairs and Indian relation to it through analysis, research, discussion, lectures, exchange of ideas and information, etc. The activities of the society were housed in a building known as Sapru House. The society received grants from the Government of India from 1974 until the year 1987, where after the grant was discontinued. On June 30, 1990, the President of India promulgated an ordinance whereby a statutory body known as the Indian Council of World Affairs was constituted, having perpetual succession and a common seal.

[90] *Supra* n. 40

Finally on 08 May 2001, the ordinance was replaced by an Act of Parliament, which received the assent of the President of India.

According to the writ petition, Sapru House was a building constructed by the society. The society owned the building, the library and all other movables in Sapru House. By promulgating the impugned ordinance and enacting the impugned Act, the central government took over society and its movable and immovable properties. This resulted in the violation of the right of the writ petitioners to the freedom of speech and expression and to form associations or unions as conferred on citizens by sub-clauses (a) and (c) of clause (1) of article 19 of the Constitution of India. The counter-affidavit filed by the Union of India said that the Indian Council of World affairs (ICWA) had attained international stature in connection with world affairs and the foreign policies of India. However, society was mismanaged and maladministered. Several instances were highlighted under the title "Glaring instances Maladministration" in the affidavit. Further, as per the submission of the Union of India, the society has not been touched. It continued to survive as before and therefore, the question of any fundamental right within the meaning of sub-section (a) and (c) of clause (1) of article 19 of the Constitution of India having been breached, did not arise.

After an elaborate reference of case laws, the Division Bench reached the following conclusion that the preamble to the Act declares the Indian

Council of World Affairs (ICWA) to be an institution of national importance and to provide for its incorporation. The pre-existing Society ICWA and the new body corporate, also given the name of ICWA, bear a similarity of names. Yet, it is clear that the impugned Act only deals with ICWA, the pre-existing body and ICWA, the body corporate under the impugned Act. The new body takes over the activities of the pre-existing society by running the institution which too is known as ICWA. So far as the Society ICWA is concerned, it has been left intact, untouched and not interfered with. There is no tampering with the membership or the governing body of the society. The society is still free to carry on its other activities[91]. The Court observed position in following works:

> *No membership of the old society has been dropped. No new member has been forced or thrust upon the society. The impugned legislation nominates members who will be members of the Council, the new body corporate, different from the society. The pith and substance of the impugned legislation are to take over an institution of national importance. As the formation of the society, which is a voluntary association, is not adversely affected and the members of the society are free to continue with such association, the validity of the impugned legislation cannot be tested by reference to sub-clauses (a) and (c) of clause (1) of Article 19. The activity of the society which was being conducted through the institution ICWA has been adversely affected and to that extent, the validity of the legislation shall have to be tested by reference to sub-clause (g) of clause (1) of Article 19. The activity was of the society and the society cannot claim a fundamental right. Even*

[91] *Id.* at 741

otherwise, the impugned legislation is a reasonable legislation enacted in the interest of the general public and to govern an institution of national importance. It is valid[92].

Thus, according to the above-stated reasons, it was held that the Indian Council of World Affairs Act, 2001 did not offend the right of members of the old society guaranteed by article 19 (1) (c) since the Act was not intended to interfere with the internal freedom of the society in any way. The association was still free to carry on its other activities. Memberships of the old Society remain the same even after the acquisition of property of the society. No new member has been forced upon society. The Institute of Indian Council of World Affairs was taken over by the Government, considering its significance as an institution of national importance. However, the society was left intact and the Act did not, in any way, interfere with the membership and activities of existing society. The society as a voluntary association had the freedom to continue.

The court also pointed out certain important points that were cardinal in distinguishing unreasonable interference into the right to form of associations or unions. They are: the new body corporate constituted by impugned statute is different from the society. There is no tampering with the membership or the governing body of the society. The society is still free to carry on its other activities. No membership of the old society has been dropped. No new member has been forced or thrust upon the society, and finally, the pith and

[92] *Id.* at 742

substance of the impugned legislation are to take over an institution of national importance.

5.9. Merger

A merger of associations is a legal process that involves one association that dissolves, with its business affairs wound down and its assets and liabilities transferred to the other association. The assigned territory of both associations is also combined. When an association merges with another association by law, some important questions naturally arise regarding the right of its members to form associations. In *Seethapathi Nageswara Rao* v. *Government of Andhra Pradesh*[93], one of the questions posed before the Full Bench of Andhra Pradesh high court was whether the merger or liquidation of association amounted to a violation of the right to form association. The court rejected this and held that the effect of merger regulated the business activity of the society and not the right of the members to form an association[94].

One ground for the attack in the case[95] was that the merger, amalgamation, or liquidation of the society envisaged under s. 15-A (1) of the Andhra Pradesh Co-operative Societies Act, 1964 affects the rights of the members of the society under article 19 (1) (c), (g), and (f) of the Constitution. The court held that the merger or liquidation contemplated under S. 15-A was

[93] AIR 1978 AP 121
[94] *Id.*
[95] *Id.*

only to achieve the underlying object of forming a cooperative society. In substance and effect, the provision relating to merger or liquidation is a reasonable restriction imposed on the business activity of the cooperative society regulating its trade or business activity. There is no question of violation of article 19 (1) (c) of the Constitution.

5.10. Distinction between associational rights and trade or business

Provisions of article 19 (1) can only be claimed by citizens, not by business entities or corporations. It is a matter of dispute whether the fundamental right of associations can be coupled with the fundamental right of any trade or business. There are some questions may be asked such as how to define the relationship between these two freedoms? whether these relationships are complementary or Can one right governs over another? Cooperative societies, companies, etc., are constituted to do business activities for the welfare or economic interest. In cases where the law imposes any restrictions on the freedom of trade or business in certain circumstances, the organisations often go to the high courts or the Supreme Court alleging that their freedom is curtailed by law. Constitution Bench of the Supreme Court, while explaining the scope of article 19(1) (c), distinguished the right to form associations or unions and the right to carry on any such business or other activity chosen by such union or association.[96] The court observed as follows:

[96] *Supra* n. 34

> *If an association was formed to carry on business, the right to form it would be guaranteed by sub-clause (c) of clause (1) of Article 19 subject to any law restricting that right conforming to clause (4) of Article 19. As regards its business activities, however, and the achievement of the objects for which it was brought into existence, its rights would be those guaranteed by sub-clause (g) of clause (1) of Article 19 subject to any relevant law on the matter conforming to clause (6) of Article 19; while the property which the association acquires or possesses would be protected by sub-clause (f) of clause (1) of Article 19 subject to legislation within the limits laid down by clause (5) of Article 19*[97].

The position was clarified by the Supreme Court in *All India Bank Employees Association*[98] decision. Article 19 (1) (g) guaranteed the right of a citizen to continue to work in a trade or business. The validity of the law that imposes any restriction on this guaranteed right should be examined in article 19 (6).[99]

In *Tata Engg.and Locomotive Co.Ltd.* v. *State of Bihar*[100] the articles 19(1) (c) and 19(1) (g) of the Constitution came up for consideration in which corporations and companies alleged violation of their fundamental rights. The Constitution Bench clarified that once a company or a corporation is formed, the business which the said company or corporation carries on is the business of

[97] *Id.* at 189
[98] *Id.*
[99] *Id.* at 189-190
[100] *Supra* n. 10

the company or corporation and is not the business of the citizens who get the company or corporation formed or incorporated. The rights of the incorporated body must be judged on that footing alone. They cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. When an organization starts business activities, it would be treated differentially and would come under the purview of article 19 (1) (g) of the Constitution.[101] In view of the above, it becomes evident that the right of the citizens to form the association is different from running the business by that association. Therefore, the right of individuals to form society has to be understood in a completely different context.

The right to form associations guaranteed under article 19 (1) (c) does not imply the fulfilment of every objective of an association as it would be contradictory to the scheme underlying the text and the frame of the several fundamental rights guaranteed by Part III and particularly by the scheme of the guarantees conferred by sub-clauses (a) to (g) of clause (1) of article 19. While the right to form an association is to be tested by reference to article 19 (1) (c) and the validity of restriction thereon by reference to article 19 (4), once the individual citizens have formed an association and carry on some activity, the validity of legislation restricting the activities of the association shall have to be judged by reference to article 19 (1) (g) read with 19 (6). A restriction on the

[101] *Id.*

association's activities such as business or trade is not a restriction on the activities of the individual citizens forming membership of the association[102].

The principle evolved by the Supreme Court of India in *All India Bank Employees Association* case in certain extends contrary to the subsequent decisions of the same court. For instant, the ratio of the case that achieving all the purposes of an association or running an institution or business is concomitant right or concomitant to concomitant right of the freedom to form associations or unions, and not a fundamental right under article 19 (1) (c) of the Constitution of India. The right to form associations under article 19 (1) (c) does not imply the fulfilment of every objective of an association. It is contrary to the framework of several fundamental rights guaranteed by Part III. This is also contrary to the theories contained in the scheme of guarantees provided by article 19 (1) (a) to (g) of the Constitution.

5.11. Inter-connections of freedoms

Associations may be constituted for different purposes, viz, political, trade unions, religious, charitable, non-governmental organisations and to conduct economic purposes like partnership firm and company etc. The protection of freedom of association must be provided not only for starting an organization but also for achieving its goal if it is lawful. For example, if an

[102] After considering the important case laws in this regard, the Supreme Court summarized the position of the law in *Dharam Dutt. v. Union of India*,[102] "From a reading of the two decisions, namely, *Smt. Maneka Gandhi's* case (supra), (seven-Judges Bench) and *All India Bank Employees Association's* case (supra), (five-Judges Bench)

organization is formed to carry out a partnership business, the protections of article 19 (1) (c) and article (1) (g) is interpreted as mutually inclusive. A controversy came up on the scope of associational rights coupled with the right to carry on trade or business. Several cases have been brought before the Supreme Court. For example, co-operatives and companies are formed to carry out business activities for their own welfare or financial interests.

In *Tata Engg.and Locomotive Co.Ltd.* v. *State of Bihar*[103] the Constitution Bench of the Supreme Court has clarified this issue as follows:

> *Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation, and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing alone and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. When an organization starts business activities, it would be treated differentially and would come under the purview of Article 19 (1) (g) of the Constitution*[104].

The statement of the court that when an organization starts its business, it will be treated differently and covered by article 19 (1) (g) of the Constitution is wrong because only a citizen is eligible for the protection of article 19 (1) (g), companies are not eligible for the protection since they are the artificial

[103] *Supra* n. 10
[104] *Id.*

persons. Therefore the company is eligible neither for protection of article 19 (1) (c) nor article 19 (1) (g) of the Constitution.

The Constitution Bench of the Supreme Court in *Damyanti Naranga v. The Union of India*[105] has cleared the position by holding that the right to form an association includes the right to its continuance and any law altering the composition of the association compulsorily will be a breach of the right to form the association. The word 'form' therefore, must refer not only to the initial commencement of the association, but also to the continuance of the association as such"[106]. But the court in several cases rejected the coverage of protection of article 19 (1) (c) to concomitant right of associational rights.

An association is a group of volunteers who work together for a common cause. It is, therefore, different from communities or groups because associations generally have the decision-making ability to determine membership and leadership qualifications, members' code of conduct, and procedural by laws[107]. The importance of this right in democratic countries has been emphasized by Dr. Toequeville[108] in the following words:

> *In democratic countries, the science of association is the mother of sciences, the progress of all the rest depends upon the progress it has*

[105] *Supra* n. 55
[106] *Id.*
[107] Richard C. Sinopoli, *Associational Freedom, Equality, and Rights against the State*, 47 Political Research Quarterly, 891, 908(1994) https://www.jstor.org/stable/448864 Accessed: 29-11-2019 06:19 UTC
[108] Dr. Toequeville, *Democracy in America* 134, (1863)

> *made. It has, therefore, to be placed on the highest pedestal because without it, democracy cannot survive, nor could it be preserved against totalitarianism. It comprehends the right to form an association of citizens, political, economic, religious, cultural, fraternal, and social, which are indispensable allies in the struggle to preserve democracy. It also included the right of the industrial association*[109].

The interpretation given to the freedom of associations or unions in *All India Bank Employees Association*[110] case is still unquestioned. Many subsequent Supreme Court decisions have tried to question its rationale, but the benches have not been adequate to overcome it. The decision in 1964 can be questioned for several reasons, except for the definite legal statement that the right to strike does not fall within the interpretation of article 19 (1) (c).

The fundamental right to form associations or unions is not absolute, but democracy would not creatively function devoid of it as well. However unrestricted and free use may create various problems in a democracy. But to what extent these restrictions are to be imposed is a cardinal question faced by democratic nations. Therefore, the restrictions imposed on the freedoms of citizens should be reasonable. Two conditions may be born in mind while examining the restrictions on the right to form associations or unions. One is that the right under article 19 (1) (c) was not made subject to significant restriction than as permitted by article 19 (4). Second, the question of

[109] *Id.* at 134
[110] *Supra* n. 34

reasonable restrictions can arise only if they are imposed by a valid law as defined in article 13. Decisions of the Supreme Court on the right to form associations or unions are different from interpretations given to other fundamental rights. There is no doubt that the court is not free to give unnatural and artificial meanings to terms used based on ideological considerations.

Chapter 6

Associational rights: restrictions and exceptions

The scheme of fundamental rights under part III of the Constitution of India prevents the state from interfering right to form associations, unions, co-operative societies of its citizens by way of any laws, ordinances, or rules other than the reasonable restrictions enforced under article 19 (4) of the Constitution. Some restrictions on one's rights are required to exercise another's rights properly, and also, a proper exercise of rights may have, implicit in them, certain restrictions. The fundamental rights are subject to the elementary need for order, without which the guarantee of those rights would be a mockery[1]. Thus, right to form associations or unions is not an absolute right like any other fundamental rights. Reasonable restrictions may be imposed by law on the exercise of associational rights of citizens.

Article 19 (4) of the Constitution of India empowers the state to impose reasonable restrictions on the freedom to form associations or unions, co-operative societies. It says as follows:

[1] Ram Jethmalani & D. S. Chopra, 1 *Media Law*, 628 (2014)

> *Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*[2]

The state has the power to impose reasonable restrictions on the right of citizens to form associations or unions, co-operative societies by making law only on three grounds, namely protecting the interests of sovereignty and integrity of India, public order, and morality. They are examined one by one in this chapter. The restrictions imposed on rights under article 19 (4) should not be remote, imaginary, or problematic in the network of relations with the sovereignty and integrity in India, public order, and morality.

State of Madras v. *V.G.Row*[3] case was a milestone decision that determined the constitutionality of restrictions imposed upon article 19 (1) (c) of the Constitution. It has given a clear understanding of the criteria for reasonable restrictions and is still considered fundamental today. In this case, the court made a significant observation that the dispute was not about the restrictions in question imposed in the interests of public order, but whether they were reasonable restrictions within the meaning of article 19 (4) or not. Test of reasonableness is, therefore, should be applied to each individual

[2] Constitution art. 19 (4)
[3] AIR 1952 SC 196; 1952 SCR 596 The Bench consists Patanjali Sastri,C.J., Mahajan, B.K.Mukherjea, S.R.Das, N.Chandrasekhara Aiyer.

statute, and there is no standard or general patterns to decide the reasonableness of restrictions imposed under article 19 of the Constitution[4]. Test of reasonableness, therefore, should be applied to each individual statute, and there are no standard or general patterns to decide the reasonableness of restrictions imposed under article 19 of the Constitution[5]. In each case the Court examined the following points separately that the nature of the right alleged to have been violated; the underlying purpose of the restrictions imposed, extent and urgency of the evil sought to be remedied thereby; the disproportion of the imposition and the prevailing conditions at the time[6]. The test of reasonableness laid down by Patanjali Sastri, C.J., in this case has generally been accepted as correct.[7]

Chintaman Rao v. *State of M.P.*[8] held that restrictions imposed upon the freedoms under article 19 (1) should not be arbitrary or excessive in nature. A proper balance between freedoms and its restrictions must be ensured to avoid arbitrariness. Therefore, restrictions should not be an excessive nature and not beyond what is required in the interest of the public.

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] In 1950 itself *Dr. N.B.Khare* v. *State of Delhi*, AIR 1950 SC 211, the Court ensured that both the substantive and procedural aspects of restrictive law should be reviewed from the point of view of reasonableness. So the court should consider not only the factors such as duration and extent of restrictions but also the circumstances under which and the manner in which the imposition has been authorised.
[8] *Chintaman Rao* v. *State of MP*, AIR 1951 SC 118, (1950) SCR 759

In *Papnasam Labour Union* v. *Madura Coats Ltd*.[9] the Supreme Court has stated that the following principles and guidelines should be kept in view while considering the constitutionality of a statutory provision imposing restrictions on right to form associations or unions guaranteed by article 19 (1) (c) when challenged on the ground of unreasonableness of the restriction imposed by it. They are the restriction must not be arbitrary or of an excessive nature; there must be a direct and proximate nexus or reasonable connection between the restriction imposed and the object sought to be achieved; no abstract or fixed principle can be laid down which may have universal application in all cases; in interpreting the constitutional provisions, the court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation; in appreciating the problems and the felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic; the reasonableness has got to be tested both from the procedural and substantive aspects; a restriction to be reasonable must also be consistent with article 14 of the Constitution; and finally the restriction so imposed which has the effect of promoting or effectuating a Directive Principle can be presumed to be reasonable restriction in public interest[10].

[9] AIR 1955 SC 2200
[10] *See* M. P. Jain, *Indian Constitution* 984 (2008)

In *Superintendent, Central Prison Fatehgarh* v. *Dr. Ram Manohar Lohia*[11] the court had briefly stated reasonable restriction as the word reasonable has been defined by the court in many decisions. It has been held that in order to be reasonable, restrictions must have reasonable relations to the object which the legislation seeks to achieve and must not go in excess of that object.[12]

6.1. Sovereignty and integrity of India[13]

According to the preamble of the Constitution, the people of India have fully decided to make India a Sovereign Socialist Secular Democratic Republic and ensure the security of all its citizens. So no one is allowed to undermine the supreme power of India's sovereignty in the name of freedoms available to citizens. Sovereignty refers to the supremacy of the state, both internally and externally. Security of the state is of paramount importance, and as such, reasonable restrictions on the exercise of the rights available under the article 19 (1) are permissible.

Pursuant to the acceptance of recommendations of the Committee on National Integration and Regionalisation[14], the Constitution (Sixteenth

[11] AIR 1960 SC 633
[12] *Id.* at 640
[13] This ground has been added subsequently by the Constitution (Sixteenth Amendment) Act, 1963.
[14] The National Integration Council appointed a Committee on National Integration and Regionalisation to look into, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. The Prime Minister, Shri Jawaharlal Nehru, convened National Integration Conference in September-October, 1961 to find ways and means to

Amendment) Act, 1963, enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. The Committee on National Integration and Regionalisation appointed by the National Integration Council (N.I.C.) recommended that article 19 of the Constitution be so amended that adequate powers become available for the preservation and maintenance of the integrity and sovereignty of the nation. It proposed to give effect to these recommendations by amending clauses (2), (3), and (4) of article 19 for enabling the state to make any law imposing reasonable restrictions on the exercise of the rights conferred by sub-clause (a), (b) and (c) of clause (1) of that article in the interests of the sovereignty and integrity of India.[15]

6.1.1. Alteration of constitution of the society

A newly elected managing committee ceased by an order of assistant registrar. The term of managing committee of a co-operative bank on expiry was extended from 3 to 5 years through an amendment made to the Haryana

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combat the evils of communalism, casteism, regionalism, linguism and narrow-mindedness, and to formulate definite conclusions in order to give a lead to the country. This Conference decided to set up a National Integration Council (NIC) to review all matters pertaining to national integration and to make recommendations thereon. The NIC was constituted accordingly and held its first meeting in 1962.

[15] The Committee were further of the view that every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union and that forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose. It is also proposed to amend articles 84 and 173 and forms of oath in the Third Schedule to the Constitution so as to provide that every candidate for the membership of Parliament or State Legislature, Union and State Ministers, Members of Parliament and State Legislatures, Judges of the Supreme Court and High Courts and the Comptroller and Auditor-General of India should take an oath to uphold the sovereignty and integrity of India.

Co-operative Society Act in the interest of sovereignty and integrity. The newly elected managing committee argued that they had a vested right to continue as members of the managing committee is a constitutional protection provided under article 19 (1) (c) so that this act was amount to restriction of article 19 (1) (c) of the constitution. The High Court in *Mani Ram* v *State of Haryana*[16] held that alteration of the Constitution of the society in the manner laid down by the Act was not in the interests of the sovereignty and integrity of India, or in the interests of public order or morality, therefore the Act was not protected under article 19 (4) and held void[17]. Under article 19 (4), reasonable restrictions can only be imposed on the interests of India's sovereignty and integrity, public order or morality.[18]

Parliament can make laws to prevent citizens from forming associations or unions to engage in any form of illegal or unlawful activities. It is the responsibility of the government to prevent any attempt to undermine this framework in the name of fundamental freedoms in order to maintain the sovereignty and integrity of India. Therefore, if anybody forms an organization to separate any part of India's territory from the union, it will be lawful for Parliament to regulate the freedom of association or union rights. It may be noticed here that the restrictions are with respect to India's territorial integrity

[16] AIR 1996 P H 92
[17] *Id.*
[18] *See also Damayanti Naranga* v *Union of India*, AIR 1971 SC 966

and not about the preservation of the territorial integrity of the constituent states[19]. The Constitution itself contemplates changes in the territorial limits of the constituent states[20]. Based on this, the Indian Parliament passed the Prevention of Terrorism Act, 2002 (POTA)[21] is enacted to protect sovereignty and integrity of India from the menace of terrorism and therefore imposing restriction under article 19(4) also includes declaring an organization as a terrorist organization as provided under POTA. The Act replaced the Prevention of Terrorism Ordinance, 2001(POTO), the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). The POTA was repealed in 2004.

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[19] V.N.Shukla, *Constitution of India* 145 (2013)

[20] Constitution of India, Art. 3 Formation of new States and alteration of areas, boundaries or names of existing States:- Parliament may by law –

a) Form a new State by separation of territory from any State or by uniting two or more States ro parts of states or by uniting any territory to a part of any State;
b) Increase the area of any State;
c) Diminish the area of any State;
d) Alter the boundaries of any State;
e) Alter the name of any State;

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the State, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

Explanation I – In this article, in clauses (a) to (c), "State" includes a Union territory, but in the proviso, "State" does not include a Union territory.

Explanation II – The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

[21] The Prevention of Terrorism Act, 2002 (POTA) was an Act passed by the Parliament of India in 2002, with the objective of strengthening anti-terrorism operations. The Act was enacted due to several terrorist attacks that were being carried out in India and especially in response to the attack on the Parliament.

Arup Bhuyan v. *State of Assam*[22] the appellant was alleged to be a member of United Liberation Front of Asom (ULFA) and the only material produced by the prosecution against the appellant is his alleged confessional statement made before the superintendent of police. Confession to a police officer is inadmissible vide section 25 of the Evidence Act, but it is admissible in TADA cases vide section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. The TADA Court has convicted the appellant under section 3(5) of the TADA which makes mere membership of a banned organisation criminal. Although the appellant has denied that he was a member of ULFA, which is a banned organisation.

The court in this case has respectfully accepted the ratio in the U.S. Supreme Court decision in *Elfbrandt* v. *Russell*[23] which has rejected the doctrine of guilt by association. Mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence. Mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or create public disorder by violence or incitement to violence.[24]

[22] (2011) 2 SCC 377
[23] 384 U.S. 17 (1966). *See also Kedar Nath* v. *State of Bihar,* AIR 1962 SCC 955 para 26
[24] *Supra* n. 22 at 379

Unlawful Activities (Prevention) Act was passed by the Indian Parliament in 1967 and amended from time to time to suit national and international concerns.[25] The statute provide for more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities etc.

6.2. Unlawful Activities (Prevention) Act, 1967

The Act was enacted in 1967[26] for more effective prevention of certain unlawful activities of individuals and associations and matters connected. Its main objective was to enable the government to take punitive measures against associations or individuals who acted against the integrity and sovereignty of India. The Act empowered the central government to declare an association as unlawful on the grounds that such association endangers public peace or maintains public order, or interferes with the administration of law. The state, therefore, should specify the grounds for declaring an association as an unlawful association, and a reasonable period should be fixed for representation against the declaration made by the central government. However, the

[25] The Security Council of the United Nations in its 4385th meeting adopted Resolution 1373 (2001) on 28th September, 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat international terrorism; and Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) of the Security Council of the United Nations require the States to take action against certain terrorists and terrorist organisations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;

[26] The Act was amended in several times

government was authorized not to disclose any facts which are regarded as being against the public interest.[27] The government had to place the notification and the representation against it before the tribunal, which is constituted under the provisions of the Act within thirty days from the date of the publication of the notification[28], if the tribunal found no sufficient cause for declaring the association unlawful after considering the material, the government was bound to cancel the order.[29]

Association simply means any combination or body of individuals[30]. The Act defined unlawful association based on the object of an association, which is a relevant factor in deciding the nature of such associations. For an association

[27] Unlawful Activities (Prevention) Act, 1967, s. 3. Declaration of an association as unlawful.—

(1) If the Central Government is of opinion that any association is, or has become, an unlawful association, it may, by notification in the Official Gazette, declare such association to be unlawful.

(2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary: Provided that nothing in this sub-section shall require the Central Government to disclose any fact which it considers to be against the public interest to disclose.

(3) No such notification shall have effect until the Tribunal has, by an order made under section 4, confirmed the declaration made therein and the order is published in the Official Gazette:

Provided that if the Central Government is of opinion that circumstances exist which render it necessary for that Government to declare an association to be unlawful with immediate effect, it may, for reasons to be stated in writing, direct that the notification shall, subject to any order that may be made under section 4, have effect from the date of its publication in the Official Gazette.

[28] Unlawful Activities (Prevention) Act, 1967, s. 4. Reference to Tribunal.—

(1) Where any association has been declared unlawful by a notification issued under sub-section (1) of section 3, the Central Government shall, within thirty days from the date of the publication of the notification under the said sub-section, refer the notification to the Tribunal for the purpose of adjudicating whether or not there is sufficient cause for declaring the association unlawful.

[29] See M.P.Jain, *Indian Constitutional Law*, 1193 (2003)

[30] Unlawful Activities (Prevention) Act, 1967, s. 2 (a) has defined the word 'association'

to be an unlawful association, it must have two purposeful activities or encourage others. The purpose of such an association should be to commit or promote unlawful activities or to commit an offense punishable under sections 153A or 153B of the I.P.C.[31]

6.2.1. Privileges of the central government

The Act gives the central government the broad right to prohibit any organization or organizational activities. The central government's right to claim privilege against disclosure of certain information, in the public interest, in the manner prescribed by law, is not in controversy, therefore, the confidentiality of matters in respect is not questioned[32]. The declaration made by the central government about an association as an unlawful association after the conformation of the tribunal may remain in force for two years from the date on which the notification becomes effective. However, the central government may either on its own motion or on the application of any person

[31] Unlawful Activities (Prevention) Act, 1967, s.2 (1) (p) "unlawful association" means any association,--

(i) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(ii) (ii) which has for its object any activity which is punishable under section 153A (45 of 1860) or section 153B of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity:

[32] *Infra* n. 37

aggrieved, at any time, cancel the notification even if the tribunal confirms the notification[33].

In a case, the Kerala high court considered whether special reasons other than those given in the ordinary notification were required for the immediate banning of an organization[34]. The court upheld the notification issued by the central government to ban the illegal association with immediate effect for no particular reason other than the reasons given in the notification for banning the association[35]. The court further observed that where both sets of reasons either wholly or partly overlap, it may not be necessary for the central government to a repeater in the notification issued under section 3 (1) the reasons for bringing the notification into immediate effect once again when such reasons have already been set out in the grounds for the issuance of the notification under section 3 (2).[36]

In *Jamaat-e-Islami Hind* v. *Union of India*[37], the petitioner filed before the Supreme Court for a declaration that the provisions of the UAPA and the Rules framed there under are unconstitutional and *ultra vires* to some of the fundamental rights guaranteed in the Constitutional of India. The court held that the provisions of the Act were constitutionally valid because the scheme of the

[33] Section 6 clause (1) and (2)
[34] *Abdul Nazar* v. *State of Kerala* 1993 (1) KLT 337
[35] *Id.*
[36] *Id.* at 345
[37] (1995) 1 SCC 428

Act provides judicial scrutiny, and publication of notifications in accordance with the statutory requirement is given to associations. The court observed as follows:

> *In State of Madras v. V.G. Row*[38]*, the question for decision related to the constitutional validity of a law empowering the State to declare associations illegal by notification, wherein there was no provision for judicial inquiry or for service of notification on the association or its office bearers. The absence of a provision for judicial inquiry and notice to the association of the basis for the action taken was held to be an unreasonable restriction on the right to form associations under Article 19 (1) (c) read with Article 19 (4) of the Constitution as it then stood. By the Constitution (Sixteenth Amendment) Act, 1963, the expression "the sovereignty and integrity of India or" was inserted prior to "public order or morality" to permit reasonable restrictions to be imposed also in the interests of the sovereignty and integrity of India in addition to those in the interests of public order or morality. The significance, however, is that in V.G. Row, the absence of a provision for judicial inquiry to scrutinize the reasonableness of restrictions on the exercise of the right conferred by sub-clause (c) of clause (1) of Article 19 was the ground on which the law was held to be constitutionally invalid*[39].

The court declared the UAPA and its provisions constitutionally valid. Although the right to join a group is a fundamental right, strong restrictions can be imposed on national security. Arbitrary restrictions cannot be imposed as there is a judicial committee to examine it within the law itself.

[38] *Supra* n. 3
[39] *Supra* n. 37 at 444-45

6.3. Public order

The expression public order[40] has the same meaning in clauses (2) and (4) of article 19.[41] It is virtually synonymous with public peace, safety, and tranquillity[42]. 'Public order' is used as a broader concept of those severe and aggravated forms of public disorder[43] since order is the basic need in any organized society. It implies the orderly state of society or community in which citizens can peacefully pursue their normal activities of life.[44] The implication evident here is that anything that disturbs public peace and public tranquillity harms public order.[45] The offenses would breach the peace of a great variety of conduct destroying or menacing public order and tranquillity; therefore, the State may prohibit and punish the causing of 'loud and raucous noise in streets and public places.[46] There should be a proximate connection between the provisions and the maintenance of public order.[47] The restriction must not be

[40] Inserted in Article 19 (2) by 1st Amendment Act, 1951. The amendment was done because of the decision of the Supreme Court in the *Romash Thappar* v. *State of Madras,* AIR 1950 SC 124, that refused to grant permission to exercise the right to freedom of expression in the interests of public order.

[41] *Supra* n. 19 at 161

[42] *See O.K.Ghosh* v *E.X.Joseph,* AIR 1963 SC 812, *See also The Superintendent Central Prison, Fatehgarh* v. *Ram Manohar Lohia,* AIR 1960 SC 633

[43] *Romesh Thapar* v. *State of Madras* AIR 1950 SC 124

[44] *Supra* n. 1 at 628

[45] *Om Prakash* v. *Emperor*, A.I.R. 1948 Nag. 199

[46] *Cantewell* v. *Connecticut,* (1940) 310 US 269, 306

[47] *Dalbir Singh* v. *State of Punjab,* AIR 1962 SC 1106, the Supreme Court held that the impugned provision did not violate article 19 (1) (a) since there was a proximate connection between the provisions and the maintenance of public order.

far-fetched, hypothetical or problematic, or too remote in the chain of its relation with public order.[48]

In *State of Madras* v. *V.G.Row*[49] case the Supreme Court examined the legitimacy of the restrictions imposed by the government on the ground of public order to freedom of citizens to form associations or unions. Based on the facts of the case, the state of Tamil Nadu declared the People's Education Society as an unlawful association by an ordinance stating that the association interfered with the administration and maintenance of law and order. Chairman of the Society Mr. V. G. Rao challenged the order before Madras high court. The state government amended the Criminal Law Amendment Act, 1908, to justify the ordinance while the petition was pending before the high court. The Madras high court had ruled that section 15 (2) (b) of the Indian Criminal Law Amendment Act, 1908 as unconstitutional and void. The state of Madras approached the Supreme Court against the decision. The Constitution Bench[50] of the Supreme Court upheld the decision of the Madras high court and has laid down certain principles and guidelines which should be kept in mind while considering the Constitutional validity of restrictions imposed on fundamental rights.

[48] *Supra* n. 11
[49] *Supra* n. 3
[50] The Bench consists Patanjali Sastri and C.J., Mahajan, B.K.Mukherjea, S.R.Das, N.Chandrasekhara Aiyer.

The restriction made in the interest of public order must also have a reasonable relation to the object to be achieved i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause[51]. Public order is an expression of broad connotation. It signifies a state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the government which they have established. It must be taken that 'public safety' is used as a part of the wider concept of public order[52]. Public order is connected with serious offences which affect the security of the state etc.[53]

The difference between maintenance of law and order and maintenance of public order was considered by the Supreme Court in *Arun Ghosh* v. *State of W.B*[54]. It held that public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. The degree of disturbance and its effect upon the community's life in a locality determines whether the disturbance amounts only to a breach of

[51] *Supra* n.11 at 640
[52] *Supra* n. 43
[53] *Supra* n. 11
[54] AIR 1970 SC 1228

law and order[55]. Public order means the even tempo of the life of the community taking within its fold even a specified locality and a substantial section of the society as a whole. To preserve public order, the even tempo of community life in a locality and substantial Section of the society ought not to be disturbed[56].

Superintendent, Central Prison Fatehgarh v. *Dr. Ram Mohohar Lohia*[57] raised the question of interpretation of the words "in the interest of public order" in the context of article 19 (2) of the Constitution. According to the general concern of the restrictions, two conditions should be complied with, namely the restrictions imposed must be reasonable, and they should be in the interest of public order. Public order is synonymous with public safety and tranquillity. It is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State[58].

In *Babulal Parate* v. *State of Maharashtra*[59] the Supreme Court of India examined the constitutionality of section 144 of Cr.P.C. The district magistrate issued an order for 15 days under section 144 Cr.PC to prevent large demonstrations and meetings in Nagpur city led by the Nagpur Mill Mazdoor group.

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[55] *Id.* at 1229
[56] *Nagen Murmu* v. *State of West Bengal* AIR 1973 SC 844
[57] *Supra* n. 11
[58] *Id.*
[59] MANU/SC/0155/1961

It was alleged that the order under Section 144 Cr.PC gives the District Magistrate extensive powers in imposing restrictions on fundamental freedoms. Section 144 adopts "likelihood" or "tendency" as tests for judging criminality; the test of determining the criminality in advance was unreasonable. Even assuming that section 144 of the Code of Criminal Procedure, 1973 is not *ultra vires* the Constitution, the order passed by the district magistrate, in this case, places restrictions that go far beyond the scope of clauses (2) and (3) of article 19 and thus that order is unconstitutional. The court's answer to the argument that the Magistrate has been given broad powers under section 144 of the Cr.P.C. is as follows;

> *It seems to us, however, that wide though the power appears to be, it can be exercised only in an emergency and for the purpose of preventing obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the republic tranquillity or a riot, or "an affray". These factors condition the exercise of the power and it would consequently be wrong to regard that power as being unlimited or untrammelled. Further, it should be borne in mind that no one has a right to cause "obstruction, annoyance or injury etc.," to anyone. Since the judgment has to be of a magistrate as to whether in the particular circumstances of a case an order, in exercise of these powers, should be made or not, we are entitled to assume that the powers will be exercised legitimately and honestly. The Section cannot be struck down on the ground that the Magistrate may possibly abuse his powers.*[60]

[60] *Id.* at para. 19

The restrictions on the rights are imposed in the interest of public order and not in the interest of the general public. Even though some of the objects for an order passed to prevent obstruction, annoyance, injury, etc., the prevention of such activities would be in the "public interest," but it would be no less in the interest of maintaining "public order."[61] Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order.[62] This is further explained in *Dr. Ram Manohar Lohia* v. *State of Bihar*[63], where the Court held:

> *It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.*[64]

In *Dr. Ram Manohar Lohia's case*, the Supreme Court differentiated between the maintenance of law and order from the maintenance of public

[61] *Id.* at para. 15
[62] *Id.* at para. 28
[63] [1966] 1 S.C.R. 709
[64] *Id.* at 746

order. Public order embraces more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even as a localised entity. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility[65].

In *Shreya Singhal* v. *Union of India*[66] the Supreme Court has tested the constitutionality of section 66A of the Information Technology Act, 2000[67]. The section made it a punishable offence for any person to send grossly offensive or menacing information using a computer resource or communication device.[68] The court held that there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then

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[65] *See also Arun Ghosh* v. *State of West Bengal*, [1970] 3 S.C.R. 288

[66] AIR 2015 SC 1523

[67] The Supreme Court examined s. 66A of the Information Technolagy Act that inserted through an Amendment Act of 2009 with effect from 27.10.2009.

[68] Information Technology Act, 2000 s. 66 A :- Punishment for sending offensive messages through communication service, etc. -Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation. -For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the section has no proximate relationship to public order whatsoever. Under Section 66A, the offence is complete by sending a message for annoying, either persistently or otherwise, without in any manner impacting public order[69], mere annoyance need not cause disturbance of public order.

6.3.1. Direct and proximate connection

Kania C.J. and Fazal Ali J. adopted the direct and proximate connection test, sometimes called the form and object test or pith and substance rule[70] in *A.K.Gopalan* v. *State of Madras*[71]. The Supreme Court applied this test in *O.K.Ghosh* v. *E.X.Joseph*[72]on restrictions imposed under article 19 (4) of the Constitution of India. When questioning the validity of rule 4-A and 4-B of the Central Civil Services (Code of Conduct) Rules, 1955, the Court considered the theory of direct and proximate relationship. The court struck down the impugned regulation on account of no connection between recognition and public order, therefore, held that the impugned rule 4-B was invalid.

One of the questions raised in this case was whether the restriction imposed on the rights of the association was a reasonable restriction in the name of public order. The court opined that conditioned rights amounted to a

[69] *Supra* n. 66 at para. 35
[70] H.M. Seervai, *Constitutional Law of India*, (2) 1020 (2008)
[71] AIR 1950 SC 27,
[72] *O.K.Ghosh* v. *E.X.Joseph*, AIR 1963 SC 812

violation of fundamental rights of government servants. It was difficult to see any direct or proximate reasonable connection between the association and the discipline amongst and the efficiency of the said association member[73]. There is no direct or proximate relationship between the recognition imposed by the government and the discipline of members of the association. The reasons for withdrawal of recognition should be reasonably connected with the object sought to be achieved unless it would be wholly unconnected with public order. The restrictions are directly connected with the rule intended to ensure discipline and efficiency in services is not contrary to the guaranteed right to form associations or unions.

In *Superintendent, Central Prison Fatehgarh* v. *Dr. Ram Manohar Lohia*[74] the court had briefly stated reasonable restriction as follow:

> *The restriction made "in the interest of public order" must also have a reasonable relation to the object to be achieved i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause*[75].

While deciding the scope of article 19 (4), it has to be borne in mind that the rule must be in the interests of public order and must amount to a

[73] *Id.* at 815
[74] *Supra* n. 11
[75] *Id.* at 640

reasonable restriction.[76] The indirect or far-fetched, or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interest of public order". This interpretation is strengthened by the other requirements of clause 4 that the restriction ought to be reasonable by itself.[77] The word public order has a broader meaning, and any tendency to breach of law, no matter how distant, will fall within the scope of this definition. Therefore, in every case, the court ensures a proximate and reasonable nexus between the speech and the public order established.

It may be summarised here based on the above judgments that the expression public order cannot take in every kind of disorder but only some of them. According to interpretations, public order is different from law and order because the latter has a broader meaning encompassing all kinds of disabilities. For example, when two drunkards quarrel and fight, there is a disorder but not a public disorder. They cannot be detained because they had not disturbed public order. The contravention of law always affects order, but before it can affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action on the ground of public order. It is then easy to see that an act may affect law and order but not public order, just as an act may affect public order but not the security of the state. The state infiltrates by justifying

[76] *Supra* n. 72 at 814
[77] *Id.* at 814-815

article 19 (4) of the Constitution on many associations such as social clubs, trade unions, co-operatives, universities, or corporations.

6.4. Morality.

Morality is a system of moral principles followed by a group of people concerning right and wrong or good and bad behaviour. It is a general rule of right living, such a rule or group of rules conceived as universal and unchanging and as having the sanction of God's will, conscience, man's moral nature, or natural justice as revealed to human reason.[78] The term morality is complicated to define because its meaning vary from society's value system. The term is not precisely defined anywhere in the Constitution, so the state often exercises extensive power to impose restrictions on associational rights. The term has variable content having no fixed meaning[79]. The term 'morality' in article 19 (4) is to be given a broad connotation as meaning not merely 'sexual morality' but 'public morality' as well in the broader sense as understood by the people as a whole[80]. Section 292 of the Indian Penal Code has been held constitutionally valid since the law against obscenity seeks to more than to promote public decency and morality[81].

[78] https://www.merriam-webster.com/dictionary/moral%20law , accessed on 06/20/2021
[79] M. P. Jain, *Indian Constitutional Law* 1048 (2014)
[80] *Manohar* v. *State of Maharashtra,* AIR 1984 Bom 47, *See also Brijgopal Denga* v. *State of Madhya Pradesh*, AIR 1979 MP 173
[81] *Ranjit Udeshi* v. *State of Maharashtra,* AIR 1965 SC 881

In Dr. *Ramesh Yeshwan Prabhoo v. Prabhakar Kashinath Kunte*[82], the Supreme Court has given somewhat wider meaning to morality. The court has maintained that 'decency and morality' is not confined to sexual morality alone. The ordinary dictionary definition of 'decency and morality' indicates that the action must conform to the current standards of behaviour or propriety. The morality principle seems to be used in two distinct broad senses: a descriptive sense and a normative sense. It can be used either: descriptively to refer to certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behaviour, or normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational people.[83]

It may be examined whether such restriction is meant to protect social welfare satisfying the need of prevailing social values.[84] The reasonableness has got to be tested both from the procedural and substantive aspects.[85] The restriction imposed on the fundamental rights guaranteed under article 19 of the Constitution must not be arbitrary, unbridled, uncanalised, excessive, and not unreasonably discriminatory. Therefore, a restriction to be reasonable must also be consistent with article 14 of the Constitution. In judging the reasonableness

[82] AIR 1996 SC 1113
[83] https://plato.stanford.edu/entries/morality-definition, accessed on 05/02/2021
[84] *Supra* n. 3. *See also Bachan Singh* v. *State of Punjab* (1971) 1 SCC 712; AIR 1971 SC 2164, *Pathuma* v. *State of Kerala*, (1978)2 SCC 1; AIR 1978 SC 771
[85] *See Fatehchand Himmatlal* v. *State of Maharashra* (1977) 2 SCC 670; AIR 1977 SC 1825, *Excel Wear* v. *Union of India*, (1978) 4 SCC 224; (1979) 1 SCR 1009

of the restriction under article 19, the court has to bear in mind the Directive Principles of State Policy.[86] Ordinarily, any restriction imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in the public interest.

In *State of A.P.* v. *McDowell & Co.*[87] the Supreme court held that violation of rights under article 19 (1) (a) & (g) must show as not saved by any of the clauses 19 (2) to (6). The court cannot sit in judgment over the wisdom of the legislature and, therefore, to strike down any Act it must be unjustified and mere allegations are not enough to strike down an enactment.

The division bench[88] of the Supreme Court in *Papnasam Labour Union* v. *Madura Coast Ltd.*[89] had summarised the test applied by various judgments hitherto. The principles and guidelines should be kept in mind while considering the constitutionality of a statutory provision. They are: No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case.[90] In appreciating such problems and the felt need of the society, the judicial approach must necessarily be

[86] *See Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461, *State of Kerala* v. *N.M.Thomas* (1976) 2 SCC 310; AIR 1976 SC 490, *Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

[87] (1996) 3 SCC 709, AIR 1996 SC 1627

[88] The Bench consists of G.N.Ray and B.L.Hansaria, JJ.

[89] *Supra* n. 9

[90] *Kavalappara Kottarathil Kochumi* v. *State of Madras & Kerala,* AIR 1960 SC 1080, (1960) 3 SCR 887; *Jyoti Pershad* v. *Administrator for Union Territory of Delhi,* AIR 1961 SCC 1602, (1962) 2 SCR 125; *Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

dynamic, pragmatic, and elastic.[91] It is imperative that for consideration of the reasonableness of restriction imposed by a statute, the court should examine whether the social control as envisaged in article 19 is being effectuated by the restriction imposed on the fundamental rights.[92] In interpreting constitutional provisions, courts should be alive to the felt need of the society and complex issues facing the people, which the legislature intends to solve through effective legislation.[93] The restriction sought to be imposed on the fundamental rights guaranteed by article 19 of the Constitution must not be arbitrary or of an excessive nature so as to go beyond the requirement of the felt need of the society and object sought to be achieved[94] There must be a direct and proximate nexus or a reasonable connection between the restriction imposed, and the object sought to be achieved.[95]

In determining reasonableness, the court cannot proceed based on the general understanding of what is reasonable in the abstract sense. The position is that the Court should not be rigid or adamant but should make a flexible, practical approach to the facts of the case and look at all the circumstances,

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[91] *Jyoti Pershad* v. *Administrator for Union Territory of Delhi,* AIR 1961 SCC 1602, (1962) 2 SCR 125; *Fatehchand Himmatlal* v. *State of Maharashra* (1977) 2 SCC 670; AIR 1977 SC 1825

[92] *State of Madras* v. *V.G.Row* AIR 1952 SC 196; 1952 SCR 597, *State of U P* v. *Kaushariliya* AIR 1964 SC 416; (1964) 4 SCR 1002, *Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

[93] *Supra* n. 91. *See also Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771

[94] *Chintaman Rao* v. *State of M.P,* AIR 1951 SC 118, 1950 SCR 759, *Dwarka Prasad Laxmi Narain* v. *State of U.P,* 1954 SCR 803; AIR 1954 SC 224, *Excel Wear v. Union of India,* (1978) 4 SCC 224; (1979) 1 SCR 1009

[95] *O.K.Ghosh i. E.X.Joseph,* AIR 1963 SC 813, *Pathuma* v. *State of Kerala,* (1978)2 SCC 1; AIR 1978 SC 771, *Workman* v. *Meenakshi Mills Ltd,* (1992) 3 SCC 336

factors, and issues facing the situation as a whole. It is left to the court to determine the rationale for the restrictions imposed by law in the event of a dispute.

6.5. Restrictions on the armed forces

Article 33 of the Constitution provides an exception to the freedom granted to citizens under Part III of the Constitution, including article 19 (1) (c). By virtue of article 33, Parliament is empowered to enact a law in determining to what extent any of the rights conferred by Part III shall, in their application, to the members of the armed forces or 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. This article thwarts the application of article 13 (2) of the Constitution that the state cannot enact any laws that take away or abridges the rights conferred by Part III of the Constitution.[96]

Article 33[97] provide the power of Parliament to modify the rights conferred by Part III in their application, etc. – Parliament may, by law,

[96] Article 13. Laws inconsistent with or in derogation of the fundamental rights.
(2) The State shall not made any law which takes away or abridges the rights conferred by this Part and nay law made in contravention of this clause shall, to the extent of the contravention, be void.

[97] Substitutes by the Constitution (50th Amendment) Act, 1984, s. 2. Before substitution it read:
Article 33. *Power to Parliament to modify the rights conferred by this Part in their application to Forces*. – 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

determine to what extent any of the rights conferred by Part III shall, in their application to -

(a) the members of the armed forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau, or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

According to this article, the Parliament is enabled to restrict fundamental rights to certain sections of forces and the forces charged with the maintenance of public order in order to ensure the proper discharge of their duties and the maintenance of discipline among them. The fundamental rights available to members of the armed forces are subject to restrictions imposed by laws enacted by the Parliament. In exercising power delivered by the Constitution, the Parliament enacted certain legislations, such as the Army Act, Air Force Act, and Navy Act etc. Therefore, provisions of these particular laws

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abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

cannot be questioned on the basis of violation of fundamental rights. Article 33 is an exception to the fundamental rights that applies to members of the armed forces and the forces charged with maintaining public order because a highly disciplined and efficient armed force is essential for the country's defense. Therefore, every effort has to be made to build up a strong and powerful army capable of guarding the frontiers of the country and protecting it from aggression.[98] To ensure proper discharge of their duties and maintenance of discipline, the following observations of the Supreme Court were very relevant.

> *The Constitution makers were obviously anxious that no more restrictions should be placed on the Fundamental Rights of the members of the Armed Forces and the Forces charged with the maintenance of public order than are absolutely necessary for ensuring proper discharge of their duties and the maintenance of discipline among them, and therefore they decided to introduce a certain amount of flexibility in the imposition of such restrictions and by Article 33, empowered Parliament to determine the permissible extent to which any of the Fundamental Rights in their application to the members of the Armed Forces and the Forces charged with the maintenance of public order may be restricted or abrogated, so that within such permissible extent determined by Parliament, any appropriate authority authorized by Parliament may restrict or abrogate any such Fundamental Rights.*[99]

Morale and discipline are certainly the soul of an armed force, and no other consideration can overcome the need to strengthen the morale of the

[98] *R. Viswan* v. *Union of India*, MANU/SC/0338/1983, para 10
[99] *Id.*

armed forces and maintain discipline among them. Any relaxation in morale and discipline will be disastrous and ultimately lead to trouble and destruction, affecting well-being and undermining the human rights of the entire people of the country.[100]

6.5.1. The Army Act

The Army Act, the Air Force Act and the Navy Act have the same provisions regarding the restrictions imposed by article 19 of the Constitution, so only the provisions of the Army Act are examined here. The Parliament enacted the Army Act with the intention to regulate practices and behaviours of the regular army personals of the government of India. Section 2 of the Act says about the persons under the subject of the Act as the regular army officers, persons who are enrolled under the Act, persons belonging to the Indian Reserve Force, and the Indian supplementary Reserve Forces normally come under the Act.[101] This Act gives the central government very extensive powers

[100] *Id.*

[101] Army Act s. 2. Persons subject to this Act.—(1) The following persons shall be subject to this Act wherever they may be, namely:—

(a) officers, junior commissioned officers and warrant officers of the regular Army;
(b) persons enrolled under this Act;
(c) persons belonging to the Indian Reserve Forces;
(d) persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test;
(e) officers of the Territorial Army, when doing duty as such officers, and enrolled persons of the said Army when called out or embodied or attached to any regular forces, subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section (1) of section 9 of the Territorial Army Act, 1948 (56 of 1948).
(f) persons holding commissions in the Army in India Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces;

that any force raised and maintained in India under the authority of central government may be brought into the Act by a notification with or without any modification of any provisions of the Act.[102] Under section 21, the central government has the right to regulate the fundamental rights of persons within the ambit of the law. According to this law, individuals are not allowed to join or work with trade unions or labour unions, or any society, institution or association, or any class of societies, institutions, or associations.[103] It restricts

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(g) officers appointed to the Indian Regular Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces;
(h) * * * (Omitted by the Adaptation of laws (No. 3) Order, 1956.)
(i) persons not otherwise subject to military law who, on active service, in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the regular Army.

(2) Every person subject to this Act under clauses (a) to (g) of sub-section (1) shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service.

[102] Army Act s. 4. Application of Act to certain forces under Central Government.—
(1) The Central Government may, by notification, apply, with or without modifications, all or any of the provisions of this Act to any force raised and maintained in India under the authority of that Government, and suspend the operation of any other enactment for the time being applicable to the said force.
(2) The provisions of this Act so applied shall have effect in respect of persons belonging to the said force as they have effect in respect of persons subject to this Act holding in the regular Army the same or equivalent rank as the aforesaid persons hold for the time being in the said force.

[103] Army Act s. 21. Power to modify certain fundamental rights in their application to persons subject to this Act.—Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may, by notification, make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act—
(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;
(b) to attend or address any meeting or to take part in any demonstration organised by any body of persons for any political or other purposes;
(c) to communicate with the press or to publish or cause to be published any book, letter or other document.

the persons to attend or address any meeting or participate in any demonstrations organized by any body of persons for any political or other purposes and do not have the right to communicate with the press or publish or cause to be published any book letter or other documents.

6.5.2. Employees attached to the defence forces

Section 2 of the Army Act prescribes the employees who are regulated the Act. According to the section they are the officers of the regular army, persons enrolled under this Act, persons belonging to the Indian Reserve forces, person belonging to the supplementary reserve forces when called out for service or when carrying out the annual test etc.[104] An important issue raised in the Supreme Court in *Ous Kutilingal Achudan Nair* v. *Union of India*[105] was

[104] Army Act, 1950 s. 2 Persons subject to this Act :-
1. The following persons shall be subject to this Act wherever they may be namely :-
(a) Officers, Junior Commissioned Officer and Warrant Officers of the regular Army.
(b) Persons enrolled under this Act.
(c) Persons belonging to the Indian reserve Forces.
(d) Persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test.
(e) Officers of the Territorial Army, when doing duty as such officers and enrolled persons of the said Army when called out or embodied or attached to any regular forces, subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section (1) of section 9 of the Territorial Army Act, 1948(LVI of 1948).
(f) Persons holding commissions in the Army in India Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces.
(g) Officers appointed to the Indian regular reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces.
(h) (Omitted)1.
(j) Persons not otherwise subject to military law who, on active service in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of the regular Army.

[105] 1976 SCR (2) 769

whether the civilian workers in defense organizations had the right to form trade unions under article 19 (1) (c) of the Constitution. Civilian workers here are the workers who are part of defense organizations, but they are not members of defense in the strict sense.

According to the case, the cooks, chowkidars, laskars, barbers, carpenters, mechanics, bootmakers, and tailors are not part of the defence force but are attached to the defence Establishments. Whether such workers have the right to form a trade union or do they come under the purview of article 33 read with article 19 (4) of the Constitution. The arguments brought before the Supreme Court were: the members of the appellants' unions are not subject to the Army Act as they do not fall under any of the categories enumerated in sub-clauses (a) to (i) of s. 2 of the Army Act, 1950, and that the impugned notifications are *ultra vires* the Army Act and are struck by articles 19(1) (c) and 33 of the Constitution.

The appellant further stated that they were governed by the Civil Service Regulations for discipline, leave, pay, etc., and were also eligible to serve up to the age of 60 years unlike that of the armed forces members. The Army Act, 1950 enumerates the categories of people who are subject to the operation of this Act including persons not otherwise subject to military law who, on active service, in camp, on the march or at any frontier post specified by the central

government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of the regular army[106].

The Supreme Court held that the cooks, chowkidars, laskars, barbers, carpenters, mechanics, boot makers, and tailors are attached to the defence establishment and therefore, they are an integral part of the armed force and upheld the competency of the Army Act under article 33 of the Constitution to restrict union rights of employees attached to the defence establishment. It observed that even though cooks, chowkidars, laskars, barbers, carpenters, mechanics, boot makers, and tailors attached to the defence establishments are non-combatants, they are in some matters governed by the Civil Service Regulations and their duty is to follow or accompany the armed personnel on active service, or in camp or on the march. The workers, therefore, fall into armed forces because of the nature of their duty. Hence, they are an integral part of the armed forces.[107] Further, the court pointed out three reasons to substantiate the conclusions:

Firstly, rule 19 (ii) of the Army Rules, 1954, imposes a restriction on the fundamental rights that no persons subject to the Act shall without the express sanction of the central government be a member of, or be associated in any way with, any trade union or labour union, or any class of trade or labour unions. Secondly, in exercise of its powers under section 4 of the Defence of

[106] *Id.*
[107] *Id.* at 771

India Act, Government of India has by notification dated 11-2-1972, provided that all persons not being members of the armed forces of the union, who are attached to or employed with or following the regular army shall be subject to the military law. The Army Act, 1950, has also been made applicable to them. Finally, the notification dated 23-2-1972, issued under rule 79, of the Army Rules, civilian employees of the training establishments and military hospitals have been taken out of the purview of the Industrial Disputes Act. Section 9 of the Army Act further empowers the central government to declare by notification, persons not covered by sub-section (i) of section 3 also as persons on active service.

The court ruled that the employees associated with the defense establishment were subject to army law because they were part of the army. It, therefore, could not claim fundamental rights under article 19 (1) (c) of the Constitution, so that the cooks, chowkidars, laskars, barbers, carpenters, mechanics, boot makers and tailors attached to the defence establishments could not organize for their rights.

In *R. Viswan* v. *Union of India*[108] the Supreme Court had discussed the constitutionality of section 21 of the Army Act 1950[109] against the scope of

[108] *Supra* n. 98

[109] Army Act, s. 21. Power to modify certain fundamental rights in their application to persons subject to this Act.—Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may, by notification,

article 33 of the Constitution. The central government has brought the General Reserve Engineering Force (GREF) under the purview of martial law through a notification under section 21 of the Act. The main issues involved in this case are the question of whether the employees under the GREF are subject to section 21 of Army Act. This question was very important since it affects the fundamental rights of a large number of persons belonging to the General Reserve Engineering Force, especially their trade union rights.

The GREF is an organization on army pattern in units and subunits with distinctive badges of rank and a rank structure equivalent to that in the army. The officers and other personnel of GREF are required to be in uniform right from class IV to Class I personnel. A ten percent quota is reserved for the recruitment of ex-servicemen. The officers and men are recruited through the Union Public Service Commission in case of officers and departmentally in case of other ranks.

Section 21 of the Act empowered the central government by notification to any person or force come under the Act's purview whereby it prevents any person from being a member of any trade union, addressing a political meeting,

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make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act—

(a) to be a member of, or to be associated in any way with, any trade union or labour union, or any class of trade or labour unions or any society, institution or association, or any class of societies, institutions or associations;

(b) to attend or address any meeting or to take part in any demonstration organised by any body of persons for any political or other purposes;

(c) to communicate with the press or to publish or cause to be published any book, letter or other document.

participating in any demonstration, or communicating with the media through a notification[110]. One of the arguments raised by the applicants was that the GREF was not an armed force but a civilian construction agency, and those GREF members could not be considered members of the armed forces and therefore did not fall within the ambit of article 33. According to section 21 of the Act, the central government is the only judge who considers what restrictions are required. The power vested in the central government to impose a restriction to clauses (a), (b), and (c) of article 19 (1) of the Constitution is broad and unrestricted. While examining the constitutionality of section 21 of the Act, the court observed as follows:

> *Now here we find that Section 21 does not itself impose any restrictions on the three categories of rights there specified. If Section 21 had itself imposed any such restrictions, it would have become necessary to examine whether such restrictions are justified under Clause (2), (3) or (4) of Article 19, as may be applicable. But Section 21 leaves it to the Central Government to impose restrictions on these three categories of rights without laying down any guidelines or indicating any limitations which would ensure that the restrictions imposed by the Central Government are in conformity with clause (2), (3) or (4) of Article 19, whichever be applicable.*[111]

Section 21 cannot be invalidated for this reason, as article 33 protected such restrictions. The court held that section 21 of the Act is constitutionally

[110] *Id.*
[111] *Supar* n. 98 at para. 10

valid as being within the power conferred under article 33 because it is clear from these facts and circumstances that GREF is an integral part of the Armed Forces and the members of GREF can legitimately be said to be members of the Armed Forces within the meaning of article 33.[112] The Supreme Court reiterated this settled position of law in *P. Chandra Mouly* v. *Union of India*[113] stating that the General Reserve Engineers Force is part and parcel of the armed forces to which the Army Act is applicable.

In *Gopal Upadhyaya* v. *Union of India*[114], the Army Medical Corps Civilian Employees Union, Lucknow was registered on January 27, 1964 with the Registrar of Trade Union, Uttar Pradesh under the provisions of the Trade Unions Act. The union members were carpenters, tailors, boot-makers, gardeners, sweepers, cooks, messengers, etc., who may be compendiously described as camp followers of the Army. The registration of the trade union had been ceased on the ground that such registration was against the decision of the Supreme Court in *Ous Kutilingal Achudan Nair* v. *Union of India*[115]. It was said that the registration was initially granted under a mistake and it was, therefore, canceled. This order of cancellation of registration of the union was challenged in this case under article 32 of the Constitution. The court held that

[112] *Id.* at para 13
[113] 1994 Supp (3) SCC 104, 107
[114] 1986 (Supp) SCC 501
[115] *Supra* n. 105

since the union members are subject to the Army Act and the Rules made thereunder, the union cannot be validly registered.

In this regard, the decision of the Supreme Court in *Delhi Polic Non-Gazetted Darmachari Sangh* v. *Union of India*[116] is very significant and needs to be discussed. The fact that the Non-Gazetted members of the Delhi Police Force wanted to form an organization of their own and for that purpose constituted the Karmachari Union in 1966 and applied for its registration under the Trade Union Act, 1926. Initially, the registration asked for was declined. Then the Police Force (Restriction of Rights) Act, 1966, was enacted. It came into force on December 2, 1966. An application for recognition was again made on December 9, 1966. The central government granted recognition on December 12, 1966. The Non-Gazetted members of the Delhi Police Force were permitted to become members of the Sangh. On December 12, 1966, the central government made rules under the Act, which was amended in December 1970. The circular in question was issued under these rules. The circular attempted to derecognize the Sangh. This occasioned the filing of the writ petition.

The contention was that whether the impugned statute, rules, and orders violated the rights of the appellants guaranteed under article 19 (1) (c) of the Constitution of India. Before considering the questions of law raised by the

[116] (1997) 1 SCC 115

appellants' counsel concerning the decided cases, the court observed that this association consisted of members of the police force who by virtue of this fact alone, stand on a different footing from other associations. Further, court held that article 33 read with article 19 (4) of the Constitution offers an effective reply to the contention raised by the appellants.[117] That the Sangh and its members come within the ambit of article 33 cannot be disputed.[118]

The validity of the impugned rules has been judged, keeping in mind the character of the employees it dealt with. The plain effect of the impugned rule was that the rules imposed a restriction on the right to form an association. It compelled a government servant to withdraw his membership of the association as soon as recognition accorded to the said association is withdrawn or if, after the association is formed, no recognition is accorded to it within six months. In other words, the right to form an association is conditioned by recognizing the said association by the government. If the association obtains recognition and continues to enjoy it, government servants can become members of the said association; if the association does not secure recognition from the government or recognition granted to it is withdrawn, government servants must cease to be members of the said association. These rules are protected by articles 33 and 19 (4) of the Constitution. Besides, it is a settled law that the right guaranteed

[117] *Id.* at 121
[118] *id*.

by article 19 (1) (c) to form associations does not involve a guaranteed right to recognition also.

Moreover, while dealing with a uniformed force, discipline is the most important prerequisite. Non-gazetted officers consist of men of all ranks, the lowest cadre, and superior officers. If all the non-gazetted officers are grouped irrespective of rank, it is bound to affect discipline.[119]

Naturally, these decisions may give rise to some suspicions about the right to form associations or unions for defence force and related services. Article 33 confers power on the Parliament to abridge or abrogate such rights in their application to the Armed Forces and other similar forces. The reasonable restrictions imposed on the employees of the Armed Forces are mainly in the interest of discipline and public order. Article 33 is inserted into the Constitution so as to maintain discipline. According to the article, the services mentioned under it could not be challenged before the court of law on the ground of violation of any of the fundamental right guaranteed by Part III. The article also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and the maintenance of discipline among them.

Members of a society or institution formed in the name of national importance have no constitutional right to claim the fundamental right to form

[119] *Id.*

associations or unions. The judgments of the Supreme Court are correct in view of the fact that the restrictions imposed on the Armed Forces of India under article 33 are just and reasonable and that to ensure the proper discharge of duties and the maintenance of discipline of the Armed Forces is paramount.

Chapter 7

Co-operative and other societies

7.1. Co-operative societies

Co-operative societies and their historic contributions to human progress are not new to mankind. Co-operative societies are universal organizations found in almost every country. It is a system in which poor and powerless people combine their resources to achieve common economic and social goals. The basic philosophy behind a co-operative is self-help through mutual-help, which fosters a feeling of fellowship amongst their members and inculcates moral values in them for better living. In literal terms, co-operatives are an autonomous association of persons who come together voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise[1]. Black's Law Dictionary defines it as a corporation or association organized for the purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it.[2] The very philosophy and concept of the cooperative movement

[1] https://www.lexquest.in/understanding-cooperatives-constitution-97th-amendment-act-2011/ (published in LexQuest foundation on April 18, 2018)
[2] Black's Law Dictionary, 302 (1979)

are impregnated with the public interest. As far as the scope of co-operative society is considered, the co-operative societies are different from other voluntary organized societies.

Thus, constituting cooperative societies is for the welfare of society in general and the welfare of members of society in particular. Moreover, all the co-operative associations are clubbed with two purposes, one for economic benefits of members of a society and the other for rendering service to the nation. In this point of view, such societies can claim two types of freedom as part of their associational rights: the right to form associations and freedom of profession, occupation, trade, or business. The promotion of the cooperative movement is the responsibility of the state, which is protected in the Directive Principles of State Policy.[3] These institutions have initiated fundamental reforms in the areas of autonomy, democratic functioning, and professional management to revive these institutions to ensure their contribution to the economic development of the country, to serve the interests of the members and the public at large and to ensure their commitment to overcome the persistent weakness of the co-operative societies. The cooperative sector is a partnership that has made significant contributions to various sectors of the national economy over the years and has achieved tremendous growth.

[3] Constitution of India, Art. 43: the State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

The Constitution of India guarantees the freedom to every Indian citizen to form a co-operative society and participate in society's activities by its rules. The scope of freedom to form associations is not extended to include co-operative associations since considering the interpretations given to article 19 (1) (c) of the Constitution. The Parliament decided to insert the term co-operative societies after 'or unions' in article 19 (1) (c) of the Constitution by 97th Constitutional Amendments to enable all the citizens to form co-operative societies by giving it the status of the fundamental right of citizens. The Constitution (97th Amendment) Act, 2011 came into force to ensure the unification of the co-operative societies laws and ensure their autonomy and democratic functioning.

The Constitution of India defines the term co-operative society as a society registered or deemed to be registered under any law relating to co-operative society for the time being in force in any state[4]. The co-operative society is a subject enumerated in entry 32 of the State List of the Seventh Schedule of the Constitution. The states legislatures have accordingly enacted legislation on co-operative societies within the framework of state Acts.

According to entry 32 of List II[5] of the Constitution of India the co-operative societies are concerned is entirely a matter for the state to legislate

[4] Constitution of India, art. 243ZH (c)
[5] Constitution of India, Seventh Schedule List II Entry 32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities;

upon it. In *Union of India* v. *Rajendra N. Shah*[6] The centre government argument that parliament has enough power to legislate on the subject of co-operative societies under entry 44 of List I[7] was dined by the Supreme Court in this case, however the court held that as far as multi state co-operative societies are concerned the Parliament has power to legislate since the subject is come under the purview of entry 44 of Union List. It observed as follows:

> *So far as co-operative societies are concerned, it can be seen that it is entirely a matter for the States to legislate upon, being the last subject matter mentioned in Entry 32 List II. At this stage, it is important to note that Entry 43 of List I, which deals with incorporation, regulation and winding up of trading corporations including banking, insurance and financial corporations expressly excludes co-operative societies from its ambit. Entry 44 List I, which is wider than Entry 43 in that it is not limited to trading corporations, speaks of corporations with objects not confined to one State. This Court has therefore held, on a reading of these entries, that when it comes to Multi State Co-operative Societies with objects not confined to one state, the legislative power would be that of the Union of India which is contained in Entry 44 List I.*[8]

Thus, it is clear from the constitutional provisions that the state governments have full power to legislate as matters relating to co-operative

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unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

[6] 2021 SCC OnLine SC 474

[7] Constitution of India, Seventh Schedule, List I, Entry 44. Incorporation, regulation and winding up of trading corporations, including banking, insurance and confined corporations but not including co-operative societies.

[8] *Union of India* v. *Rajendra N. Shah* 2021 SCC OnLine SC 474, para 23

societies are on the State List. The scope of operation of such co-operative societies should be limited to the states themselves.

7.2. Ninety Seventh Amendment of the Constitution

The Amendment of the Constitution brought about several significant changes in the Constitution regarding co-operative societies. The term co-operative societies were inserted in article 19 (1) (c) and article 43B and Part IXB of the Constitution for guarantying democratic control and professional management of the societies. A new Part IXB was inserted regarding the co-operatives working in India. The amendment aims to accelerate the progress of rural India and provide an effective way to overcome all the problems faced by the societies and promote the economic activities of the co-operative societies. In accordance with Part IX-B of the Constitution, two kinds of societies may be registered. They are multi-state co-operative societies[9] and state level co-operative societies[10]. A multi-state co-operative society means a society with objects not confined to one state and registered or deemed to be registered under any law for the time being in force relating to such co-operative. A state-level co-operative society means a co-operative society having its area of operation extending to the whole of a state and defined as such in any law made by the Legislature of a state. Article 43B under Part IV of the Constitution was inserted with the intention to promote voluntary formation, autonomous

[9] Constitution of India, art. 243ZH (d)
[10] *Id.* art. 243ZH (h)

functioning, democratic control, and professional management of co-operative societies[11].

7.2.1. Part IX B of the Constitution

This part contains provisions relating to the incorporation, board structure, election of members, and board directors to bring uniformity in the election of its members and board of directors. The constitutional amendments ensured the principles of voluntary formation of an association, the incorporation, regulation, and winding up of co-operative societies. It specifies the maximum number of directors of a co-operatives society to be not exceeding twenty-one members[12]. A term is fixed as five years from the election date in respect of the elected members of the board and its office bearers[13]. The amendment empowers the state governments to obtain periodic reports of activities and accounts of co-operatives societies. This part directs to state legislatures to ensure by law to reserve one seat for the scheduled castes or the scheduled tribes and two seats for women on board of every co-operative society consisting of individuals as members and having members from such class or category of persons[14]. Provision for an independent professional audit

[11] *Id.* art. 43-B – Promotion of co-operative societies. – The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.
[12] *Id.* art. 243ZJ (1)
[13] *Id.* art. 243ZJ (2)
[14] *Id.* Proviso of article 243Z

is incorporated[15]. The state legislatures can pass laws relating to co-operative societies in accordance with the Party IXB of the Constitution. Therefore, the principles of voluntary formation, democratic procedures governing membership, economic participation, and the termination of co-operative societies should be based on the provisions of the Constitution.[16]

The co-operative societies are created by statute controlled by statute, and hence, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association[17]. An interpretation of the Supreme Court in connection with rights of members in co-operative societies is that once a person becomes a member of a co-operative society, he loses his individuality qua the society and he has no independent rights except those given to him by the statute and the bye-laws.[18]

There can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association[19] In *Daman Singh* v. *State of Punjab*[20] case, Supreme Court tried to find answer to following questions such as whether the co-operative societies were different from the corporations or companies; and what the status of co-

[15] Constitution of India, art. 243ZM (1)
[16] Constitution of India, art. 243ZI
[17] *Daman Singh* v. *State of Punjab* 1985 SCR (3) 580; (1985) 2 SCC 670
[18] *Id.*
[19] *Id.*
[20] *Id.*

operative societies created by statute is and how the status of the members of that society is differentiated? Appellants, in this case, argued that the immunity guaranteed by articles 14 and 19 could be used against companies, including the amalgamation of companies and statutory corporations but not against co-operative societies. Here, a question that needs to be answered is that whether co-operative societies are corporations within the meaning of that expression in article 31-(A) (I) (c) of the Constitution[21]. Some arguments rose that the Constitution has made a scheme which separates co-operative societies from corporations and never the twain shall meet. Therefore, the appellant argued that the co-operative societies were different from corporations mentioned in article 31-(A) (I) (c). Moreover, in 1962, the Constitution Bench[22] of the Supreme Court held that a society could not be equated with a corporation as a society and cannot be incorporated as a corporation is.

The Court refused to accept such a narrow interpretation given to corporations occurring in article 31-A (1) (c). The court opined that the very requirement of public interest or proper management of the corporation mentioned in article 31-A (l) (c) requires the expression to be given a broad

[21] Constitution of India, art. 31 A (1) (c) provides that notwithstanding anything contained in Article 13, no law providing for – the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any o the corporations, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges nay of the rights conferred by article 14 or Article 19.

[22] *Board of Trustees, Ayurvedic and Unani Tibia College* v. *State of Delhi*, AIR 1962 SC 458

interpretation since there can be no higher interest than the public interest[23]. After taking a comprehensive reference to various authorities by the court, it was held that there was no doubt that a co-operative society is a corporation and the scheme of the Constitution makes no difference in this regard[24]. The court, further, observed that the word corporation doesn't mean companies only but extended to all corporations:

> *It was obviously thought by the Parliament that the protection should not be confirmed to companies only but should extend to all corporations which would naturally include Statutory Corporations. The more generic expression "corporations" was used so that all companies, statutory corporations and the like may be brought in. There is no indication that notwithstanding the use of the generic expression "corporations", the expression was intended to exclude corporations other than companies and statutory corporations Parliament apparently chose the broader expression not with a view to limit the protection of the legislation relating to amalgamation to any class of corporations but with a view to protect legislation pertaining to amalgamation of all classes of corporations*[25].

Further, the court observed that the co-operative movement, by its very nature, is a form of voluntary association where individuals unite for mutual benefit in the production and distribution of wealth upon principles of equity, reason and the common good. No doubt, when a co-operative society gets

[23] *Supra* n. 17 at 589
[24] *Id.* at 592
[25] *Id.* at 593

registered under the Cooperative Societies Act, it is governed by the provisions of the Cooperative Societies Act and the rules framed thereunder[26]. A corporation may be formed in any form like a government company or a company formed under the Companies Act, 1956 or a society registered under the Societies Registration Act, 1860, etc. Whatever is its genetic origin, if it is an instrumentality or agency of the government, it would be an authority within the meaning of article 12, and that would be decided on a proper assessment of the facts in the light of the relevant factors[27].

7.2.2. Part IX is unconstitutional except multi-state cooperative societies are concerned

The Supreme Court in *Union of India* v. *Rajendra N. Shah*[28] declared Part IX is unconstitutional because the 97th Amendment which inserts the chapter dealing with co-operative societies has not been so ratified. Unlike the 73rd and 74th Constitution Amendments Acts, which inserted Part IX dealing with panchayats and Part IXA dealing with municipalities, which amendments were also ratified by not less than one half of the state[29]. The court held:

> *It is now necessary to analyse Part IXB of the Constitution of India, as inserted by the Constitution 97th Amendment Act. As the Statement of Objects and Reasons of the Constitution 97th Amendment Act shows, it*

[26] *Infra* n. 55 at 649
[27] *See also A. P. Diary Development Corporation Federation* v. *B. Narasimha Reddy* (2011) 9 SCC 286 regarding nature and scope of cooperative societies.
[28] 2021 SCC OnLine SC 474
[29] *Id.* at para 32

> *is acknowledged that the subject 'co-operative societies' is exclusively allotted to the State legislature under Entry 32 of the State List, as a result of which, considering the need for reform in the Co-operative Societies Acts of the States, consultations with the State governments have been held. After this it is stated that the Central government is committed to ensure that co-operative societies in the country function in a democratic, professional, autonomous and economically sound manner. It is then stated that the new part to be inserted in the Constitution would contain provisions which would drastically curtail the powers of the State legislatures in that such legislations by the States would now have to conform to the newly inserted part.*[30]

From all the above, it is clear that the state to make laws with regard to the subject to the co-operative societies is exclusive legislative power that is contained in entry 32 List II has been significantly and substantially curtailed thereby directly impacting the quasi-federal principle contained therein. Quite clearly, therefore, Part IXB, insofar as it applies to co-operative societies which operate within a State, would therefore require ratification under both sub-clauses (b) and (c) of the proviso to article 368(2) of the Constitution of India.

Instead of the entire provisions in the Part IXB of the Constitution struck down, the principle of severability applied and the court declared that Parliament being empowered to legislate so far as multi-state cooperative

[30] *Id.* at para 62

societies is concerned. Therefore, Part IXB of the Constitution of India is operative insofar as multi-state co-operative societies are concerned[31].

7.3. Multi-state co-operative societies

Multi-state co-operative societies are a society whose activities are not confined to one state, but the activities of such societies are spread across multiple states. The Constitution makers were of the view that cooperative societies were of the same genus as other corporations and all were corporations. In fact the very express exclusion of cooperative societies from entry 43 of List I is indicative of the view that but for such exclusion, cooperative societies would be comprehended within the meaning of expression corporations.[32] A cooperative society with objects not confined to one state would fall within the term corporation, and thus a central legislation may be saved[33]. For cooperative societies working in more than one state, the Multi-State Cooperative Societies Act, 1984 was enacted by Parliament under Schedule VII List I entry 44 of the Constitution of India[34]. The position is clarified the court in *Union of India v. Rajendra N. Shah*[35] as follows:

[31] *Id.* at para 80
[32] *Supra* n. 17 at 679
[33] *Apex Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd.* v. *Maharashtra State Cooperative Bank Ltd*., (2003) 11 SCC 66, 82.
[34] *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*, (2013) 16 SCC 82, 102
[35] *Supra* n. 28

> *It may thus be seen that there is no overlap whatsoever so far as the subject 'co-operative societies' is concerned. Co-operative societies as a subject matter belongs wholly and exclusively to the State legislatures to legislate upon, whereas multi-State cooperative societies i.e., co-operative societies having objects not confined to one state alone, is exclusively within the ken of Parliament. This being the case, it may safely be concluded, on the facts of this case, that there is no overlap and hence, no need to apply the federal supremacy principle as laid down by the judgments of this court. What we are therefore left with is the exclusive power to make laws, so far as co-operative societies are concerned, with the State Legislatures, which is contained in Article 246(3) read with Entry 32 of List II.*[36]

7.4. Status of the individual in a co-operative society

Once a person becomes a member of a co-operative society, he loses his individuality in the society, and he has no independent rights except those given to him by the statute and the by-laws of that co-operative society. A member of society must act and speak through the society, or rather; the society alone can act and speak for him qua rights or duties of the society as a body. In deciding the status of an individual in a co-operative society, the *Daman Singh* v. *State of Punjab*[37] , which is a leading case, the court clearly stated that notice to society would be deemed as notice to its entire members. Therefore, the court rejected the argument that it violated natural justice if a provision did not mention notice issued to the members of concerned co-operative societies.

[36] *Id.* at para 26
[37] *Supra* n. 17

Further, the court observed that notice to individual members of a co-operative society is opposed to the very status of a co-operative society as a body corporate and is, therefore, unnecessary.[38] A leaned judge has scholarly briefed in *State of UP* v. *C.O.D. Chheoki Employees' Cooperative Society Ltd*.[39], referring to *Daman Singh case*[40]. The law in this regard is:

> *Thus, it is settled law that no citizen has a fundamental right under Article 19 (1) (c) to become a member of a co-operative society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfillment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the society has no independent right qua the society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and the bye-laws and is subject to its operation. The stream cannot rise higher than the source.*[41]

Thus, a citizen's right to form associations or unions merges with society, and governs the law and by-laws of society.[42] All groups or societies are governed by a statute that applies to those specific needs. So every citizen

[38] *Id.* at 595
[39] (1997) 3 SCC 681
[40] *Supra* n. 17
[41] *Id.* at 691
[42] *Infra* n. 55 at 657

has the right to form a group or unionize the kind of legal associations they want, but it will be governed by special laws if it becomes society or a company. Once a co-operative society is formed and registered, for the reason that co- operative society itself is a creature of the statute, the rights of the society and that of its members stand abridged by the provisions of the Act. The law controls the activities of society. Therefore, there cannot be any objection to statutory interference with their composition or functioning merely on the ground of contravention of an individual's right of freedom of association by statutory functionaries[43].

7.4.1. Merger, amalgamation, or liquidation of co-operative societies

Merger, amalgamation, or liquidation of co-operative societies could be done if the members of the societies desire so. Members of a voluntarily formed society have to decide whether they would admit other members of society or not. Some questions related to this are very important. Could the members of a society be forced against their will? Whether the forcible dumping of the members of the non-viable societies merged with other viable societies would violate the rights of members of the viable societies?

The amalgamation of societies was considered by the Constitution Bench[44] of Supreme Court in *Daman Singh* v. *State of Punjab*[45]. Several co-

[43] *Supra* n. 27 at 302
[44] The judgment was delivered by Chinnappa Reddy, J,. the other judges of the Bench consists Y.V.Chandrachud, C.J., Rangnath Misra, D.A.Desai, E.S.Venkataramaih, jj,.

operative societies of Punjab had chosen to appeal to the Supreme Court questioning the vires of section 13 (8) of the Punjab Cooperative Societies Act, which provides for the compulsory amalgamation of cooperative if it was necessary in the interests of the co-operative societies. Submission of learned counsel for the petitioners argued that any law providing for the amalgamation of co-operative societies directly contravened article 19 (1) (c), which guarantees all citizens the right to form associations or unions. According to the learned counsel, the right of a citizen to form a society or to be a member of a certain co-operative society interferes if the society of which he is a member is amalgamated with another society consisting of members with whom he may not be associated. The court observed that the co-operative societies are created by statute, controlled by statute. So, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association[46]. Further, it was held that the merger or liquidation of co-operative societies came under the purview of reasonable restrictions imposed on the business activity of the co-operative societies. It is an act of regulating trade or business of co-operative societies and not intended to regulate the right of the members to form associations[47].

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[45] *Supra* n. 17
[46] *Id.* at 594
[47] See also, *Seethapathi Nageswara Rao* v. *Govt. of A.P* AIR 1978 AP 121, The High Court drew a distinction between the right of a person to form an association and the right of such association to carry on a business activity. In *Harakh Bhagat* v. *Asstt. Registrar, Coop. Societies* AIR 1968 Pat 211, The Division Bench upheld the validity of a legislative provision

In another important case, the Supreme Court had considered the nature of the rights of the co-operative society members, but the fact of the case was different. In *Damyanti Naranga* v. *Union of India*,[48] an unregistered society was converted into a registered society by statute that bore no resemblance to the original society. New members could be admitted in large numbers to reduce the original members to an insignificant minority. The Act transformed the composition of the society itself, and the voluntary nature of the association of the members who formed the original society was totally destroyed. Therefore, the Act was struck down by the court as contravening the fundamental right guaranteed by article l9 (1) (c). Any reasonable attempt to interfere in a registered society by the provisions of a statute does not amount to a violation of the right to form associations or unions of any member, but a statutory intervention for altering a composition of a voluntary association would come under the purview of violation of the right to form associations or unions.

It is submitted that interference could be discussed or decided in the light of the nature of the association in question. If interference is made into a voluntarily formed association in the name of merger, amalgamation, or liquidation, it will violate the right to form associations or unions. But if the

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providing for compulsory amalgamation of cooperative societies in certain situations and held that the provision did not violate the fundamental right of the members of the societies under article 19 (1) (c) of the Constitution.

[48] AIR 1971 SC 966

association is constituted in accordance with a statute, the interference could be justified.

In *Mani Ram v State of Haryana*[49], a Co-operative Agricultural and Rural Development Bank Limited is a co-operative society within the meaning of Haryana Cooperative Societies Act, 1984. In 1992, elections of the Managing Committee were held in terms of the provisions of the Haryana Co-operative Societies Act, 1984. The term of the managing committee was three years. When the term expired, a new managing committee was elected, and a meeting the committee was held. After the first meeting of the newly constituted managing committee, the so-operative societies informed that the term of the former managing committee had been extended from 3 to 5 years, and the present managing committee has ceased to exist. This was in pursuance of the amendment of section 28 of the Haryana Co-operative Societies Act. The petitioner questioned the legality of the amendment. The most important question raised in the case was whether the vested rights of the newly formed managing committee members could be taken by legislation with retrospective effect.

The lifespan of the old non-existent committee was extended to 3 to 5 years, and thus the existing committees became non-existent. The court observed that the amendment was not the spirit of article 19(4) of the Constitution because it is not concerned with the interest of the sovereignty and

[49] AIR 1996 P H 92

integrity of India or public order. It cannot be termed as a reasonable restriction. As the managing committee of the co-operative society came into existence after the election by law, the said amendment to the law, therefore, precluded the right to continue a lawfully elected managing committee. The said amendment would be against the fundamental right conferred under article 19(1) (c) of the Constitution.[50] The Court here highlighted the principles of co-operation that the right to voluntary association, right to democratic control, and equality. So it was held that the amendment to the Co-operative Societies Act puts an end to the terms of the elected members of the committee was against the settled norms, and it was draconian. The court, therefore, in this case found that the amendment of the Act was illegal and violative of article 19 (1) (c) of the Constitution.

Members who formed a society that became a profit co-operative society cannot be forced to take any members from non-profit co-operative society against their will. The rights of individual shareholders are interfered by taking over the management of the society; when a non-profitable society is merged with a viable society, the share value in a viable society will drop down, and that way it would affect their fundamental rights not only under article 19 (1) (g) but also under article 31 of the Constitution[51].

[50] *Id.* at para 13
[51] *See Dwarakadas Shrinivas* v. *Sholapur Sinning & Weaving Co, R. C. Cooper* v *Union of India, and Bennett Coleman & Co.* v. *Union of India*

Any restrictions imposed by legislation to regulate the business activities of a co-operative society will not directly affect the freedom to form an association but may indirectly affect it. The Patna High Court had carefully examined this position in the light of merger, amalgamation, or liquidation of a co-operative society[52] in *Seethapathi Nageswara Rao* v. *Government of Andhra Pradesh*[53] .

There is a material difference between individuals claiming a right to form an association and the right of members of a co-operative society who formed an association to carry on business or trade under the provisions of the Act. It will be impossible to achieve the purpose and object of the society. According to the co-operative principles, it will promote its members'

[52] The constitutional validity of Section 15-A of the Andhra Pradesh Co-operative Societies Act, 1964 was questioned in court in this case.

> Section 15-A(1) Notwithstanding anything in this Act or the rules made thereunder or the bye-laws of the societies concerned if the Registrar is of the opinion that it is necessary to amalgamate or merge any society with any other such society or to liquidate it, for any of the following purposes, namely:-
> (a) for ensuring economic viability of any or all the societies concerned; or
> (b) for avoiding overlapping or conflict of jurisdictions of societies in any area; or
> (c) for securing proper management of any society; or
> (d) in the interest of the cooperative movement in general and of cooperative credit structure in particular in the State taken as a whole or
> (e) for any other reason in the public interest, he may identify the viable and the potentially viable societies which may be retained and the nonviable societies which may be merged or amalgamated or liquidated, as the case may be, and may, by a notice to be published in the district gazette, specify the area of operation of each such viable or potentially viable society to be retained and each such nonviable society or societies to be liquidated or to be merged or amalgamated with any viable or potentially viable society indicated in the said notice and invite objections or suggestions from the societies or any members, depositors, creditors, employees or other persons concerned with the affairs of each such society to be received within fifteen days from the date of publication of the notice in the district gazette.

[53] AIR 1978 AP 121

economic interests and make it economically sound unless its commercial or business activities are properly regulated or controlled. The merger or liquidation contemplated under section 15-A of the Andhra Pradesh Co-operative Societies Act is only for the purpose of achieving the underlying object of forming a co-operative society. In substance and effect, the provision relating to merger or liquidation is a reasonable restriction imposed on the business activity of the co-operative society regulating its trade or business activity. It is only for regulating the limited purpose of the business activity that section 15-A (1) may affect the composition of the members when there is a merger or amalgamation. It is a reasonable restriction that conforms to clause (6) of article 19. This restriction may incidentally appear to touch upon the right to form an association under article 19 (1) (c). When section 15-A (1) is examined in the above context, it would only establish that the rights of the members to form an association under article 19 (1) (c) are not affected and what is affected is the business activity of the society as such and not individual rights of members of the society. The impact on individual rights is only incidental and minimal, only to the extent necessary for effectuating the restrictions on business activity in the public interest[54].

[54] *Harakh Bhagat v. Asst. Registrar Cooperative Societies*, AIR 1968 Pat 211

7.4.2. Co-operative society based on residence, belief, or community

Co-operative societies are formed for the welfare of their members' financial and business interests, as discussed earlier in this chapter. The norm of religion and caste is considered irrelevant in doing business in the name of co-operative societies if the concern is outside the purview of public policy. The Supreme Court comprehensively examined this issue in *Zoroastrian Cooperative Housing Society* v. *District Registrar Cooperative Societies (urban*)[55]. A bye-law of a co-operative society says that the members of that society are confined only to a particular community. This was questioned in court as it was against the secular concept of the Constitution and public policy. Zoroastrian Cooperative Housing Society is a society registered in 1926, under the provisions of Bombay Cooperative Societies Act, 1925,[56] with the object of selling, hiring, letting, and developing land in accordance with co-operative principles and establish and carry on social, re-creative and educational work in connection with its tenets. The bye-law provided that new members shall be elected by the society committee, providing that all members shall belong to the Parsi community subject to satisfying other conditions in that bye-law. By-law 21 provided for the sale of a share held by a member only with the committee's previous sanction, which had full discretion in granting or withholding such sanction. In short, the qualification for becoming a member of the society was

[55] (2005) 5 SCC 632

[56] On the reorganisation of States, the Society became functional in the State of Gujarat and came within the purview of the Gujarat Cooperative Act, 1961.

that the person should be a parsi and that the transfer of a share to him had to have the previous sanction of the society's committee.

After the formation and registration of the society, the land was acquired under the Land Acquisition Act of 1894. Portions of the land were allotted to the members for putting up residential houses on the concerned plots. One member applied to the society for permission to demolish the bungalow and construct a commercial building in the place but demolishing the bungalow was rejected by the society, but later it was permitted on the condition that the proposed flats were to be sold only to the members of the Parsi community. However, on the contrary, after seven years, the respondent started negotiations with a builders association outside the Parsi communities. In that context, even though state cooperative societies tribunal issued an interim injunction against the respondent based on a petition filed by the society, the tribunal finally informed the society that the society could not restrict its membership only to the Parsi Community and further held that membership should remain open for every person. The society filed a writ petition before the high court against the order of the state cooperative societies tribunal of Gujarat. The court dismissed the petition and held that the restriction in bye-law to the effect that membership would be limited only to persons belonging to the Parsi community would be an unfair restriction and also held that such a bye-law would amount to a restraint on alienation and hence would be hit by section 10

of the Transfer of Property Act, 1882, Division Bench of the court also dismissed the appeal and upheld the reasoning and conclusions of the learned single judge of the high court. After that, the petitioners challenged the decision of the Division Bench by special leave in the Supreme Court.

The major contentions brought before the Supreme Court by the appellants were: under article 19 (1) (c) of the Constitution, Parsis had a fundamental right to form an association, and that fundamental right cannot be infringed by thrusting upon the association, members whom it does not want to admit or against the terms of its bye-laws; there was nothing in the Act or Rules which precluded a society from restricting its membership to persons of a particular persuasion, belief or tenet and the high court was in error in holding that membership could not be restricted to members of the Parsi community for whose benefit the very society got registered. However, the respondents aroused the contention before the court that the bye-law was opposed to public policy.

After referring to the history of co-operative movement, the court observed that the concept of confinement of membership based on residence, belief, or community does not contend. Some significant observations made by the court, in this case, were as follows: The bye-law of the society, as far as it was moral or did not offend public order, did not militate against any of the provisions of the Act and hence it cannot be held that it is opposed to public

policy[57]. The concept of public policy in the Co-operative Societies Act has to be looked at under the four corners of that Act.[58] Rule 12[59] of the Gujarat Co-operative Societies Rule, 1965 says that open membership is given only to persons who are not contrary to the provisions of the Act, Rule, and bye-laws of the society. There is no provision in the Act to prevent the persons of the Parsi community from forming a society.

Since the bye-law of the society stipulates that membership to the society is confined only to the members of the Parsi community, it would be appropriate to examine the sanctity of bye-laws of societies. Bye-laws are only the rules which govern the internal management or administration of society, and they are of the same nature as the article of association of a company incorporated under the Companies Act, 1956.[60] They may be binding between the persons affected by them, but they do not have the force of a statute.

[57] *Supra* n. at 660

[58] *Id.* at 656: see also *Renusagar Power Co. Ltd.* v. *General Electric Co.* 1994 Supp (1) SCC 644

[59] Rule 12 (2) No cooperative housing society shall without sufficient cause, refuse admission to its membership to any person, duly qualified therefore under the provisions of the Act, and its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house and no such society shall without sufficient cause, refuse to give permission to any existing member thereof to sell or transfer his plot of land or house to another person who is dully qualified as aforesaid to become its member.

[60] In *Cooperative Central Bank Ltd*. v. *Additional Industrial Tribunal* AIR 1970 SC 245, the Supreme Court examined the nature of bye-law of a cooperative society registered under the Cooperative Societies laws.

The court in *Zoroastrian Cooperative Housing Society* v. *District Registrar Cooperative Societies (urban)*[61] held after the detailed reference of the provisions of concerned Act and bye-law of the society that, by introducing a theory of what the court considers to be public policy, a society registered under the Cooperative Societies Act cannot be directed to admit a member who is not qualified to be a member in terms of its duly registered bye-laws[62]. Hence, a person who did not belong to the Parsi community was excluded from joining the society because there was no fundamental right to become a member of a co-operative society. Further, the court refused the contention that article 14 and 15 read in the light of the preamble to the Constitution reflected the thinking of our Constitution-makers and the same treatment in case of employment had to be applied in respect of a co-operative society. The court reasoned that according to the theory of area of operation of co-operative societies, membership could be denied to a citizen of this country who is located outside the area of operation of a co-operative society. Thus, a citizen could not claim it as a fundamental right to apply for membership in any co-operative society irrespective of the fact that he is a person hailing from an area outside the area of operation of the society.

[61] *Supra* n. 55
[62] *Id.* at 655

The decision of the court in *Zoroastrian Cooperative Housing Society* v. *District Registrar Cooperative Societies*[63] made some twist in this right. According to the judgment, a co-operative society may constitute only to confine to a group of members or followers of a particular religion, a particular mode of life, or a particular persuasion. It was questioned in court because it was against the Constitution's secular concept and public policy but was assessed much broader. It was observed that the formation of organizations for the socio-economic interest of a particular section was not contrary to the secular concept and public policy of the Constitution. Therefore, the constitutional development of this right is very dynamic, and at the same time, this development is reluctant to interpret all the purposes for which the associations were formed.

In the name of enforcing public policy, no registrar could permit such a member to be enforced. The 97th Amendment to the Constitution changed the status of co-operative societies. Government public policies, such as reservations, influence the formation of societies and their governing bodies[64].

7.4.3. Rights are restricted by statutes

The earlier settled law that no citizen has a fundamental right under article 19 (1) (c) to become a member of a co-operative Society is changed by 97th Amendment Act, 2011 in which the word co-operative is

[63] *Id.*
[64] The Constitution (97th Amendment) Act, 2011

inserted into article 19 (1) (c) of the Constitution. However members rights are not absolute, it may be governed by the provisions of co-operative legislations enacted by states. So, the right to become or to continue being a member of the society is a statutory right. On fulfilment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the society has no independent right qua the society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and bye-laws and is subject to its operation. The stream cannot rise higher than the source. So, the society having been formed is governed by the provisions of the Act. The individual members do not have any fundamental right to the management of the committee except in accordance with the provisions of the Act, rules and bye-laws. The management of the committee is regulated by the relevant provisions of statutes. The composition thereof is also regulated by the Act and has to be in accordance with the rules and the bye-laws. Reservation in the election of the committee or for nomination to the management committee of the members belonging to the weaker sections and women should be to effectuate socio-economic and political justice assured by the preamble, articles 38 and 46 of the Constitution. In *Toguru Sudhakar Reddy* v. *Government of*

A.P[65], the court considered the power of the government to nominate women to the co-operative societies under section 31 of the A.P. Co-operative Societies Act and the validity of the Act and the power of the government for nomination of them were upheld.

7.4.4. Reservation

Article 43 of the Constitution set the goal that the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. Marching towards economic independence, India was destined to be a co-operative commonwealth. Since independence, co-operative movement proliferated in all directions, its activities were diversified, more especially in the rural areas; every activity of a person devoted to agriculture in the rural area is considerably influenced by the co-operative movement, such as seed distribution, credit, disposal of agricultural produce, etc. The scheduled castes and scheduled tribes members predominantly in rural areas did not remain unaffected by the gigantic stride that the co-operative movement took. They were directly and substantially affected by it. In order to change this situation, the reservation was introduced in the governing bodies of co-operative societies.

Reservation to the board of directors of co-operative societies was considered in *Babaji Kondaji Garad etc.* v. *The Nasik Merchants Co-operative*

[65] 1993 Supp. (4) SCC 439

Bank Ltd., Nasik[66]. The provisions of the statute providing reservation of seats for scheduled castes, scheduled tribes, and weaker sections to the board were examined in the case. The Supreme Court heard two appeals that arose from the two decisions rendered by the Bombay high court. The decision of the Bombay high court that election to board of directors of the co-operative bank Ltd as per section 73 B[67] of the Maharashtra Cooperative Societies Act, 1960 was not illegal even though it did not comply with the reservation procedures. Section 73B mandates that two seats shall be reserved on the committee of such society or class of societies as the state government may, by general or special order, direct; one for the member who belong to the scheduled castes or scheduled tribes and one for the weaker section of the members who have been granted loans from the society. Section 73B further provides that if no such persons are elected or appointed, the committee shall co-opt the required number of members on the committee from amongst the persons entitled to such representation. According to the fact of the case, the election was conducted for electing the members of board of directors, but no election was conducted for

[66] AIR 1984 SC 192: 1984 SCR (1) 767

[67] Maharashtra Cooperative Societies Act, 1960, s. 73B of provides that:

> On the committee of such society or class of societies as the State Government may, by general or special order, direct, two seats shall be reserved, one for the members who belong to the Scheduled Castes or Scheduled tribes and one for the weaker section of the members who have been granted loans from the society of an amount not exceeding Rs. 200 during the year immediately preceding. If no such persons are elected or appointed, the committee shall co-opt the required number of members on the committee from amongst the persons entitled to such representation.

filling the reserved seats to the board of directors of cooperative bank ltd. Later, it was filled by co-option.

The court answered two questions regarding the reservation of seats in co-operative societies. One relates to the legislative power to prescribe reservation of seats, and the second relates to how the reserved seats are to be filled in. Regarding the first question, no controversy was raised on the authority of the legislative assembly to reserve seats for scheduled castes, scheduled tribes, and the weaker sections to co-operative societies. The other question was on how it was filled. The court stated that the section itself manifests the intention of the legislative assembly when it says that 'if no such persons are elected or appointed, the reserved seats may be filled in by co-option. When a statute requires a certain thing to be done in a certain manner, it can be done in that manner alone unless a contrary indication is to be found in the statute.[68]

Justice Desai explained very scholarly why reservation has to be given to weaker sections in co-operative societies. He observed as follows: The working of the Maharashtra Cooperative Societies Act, 1960 must have disclosed a sorry state of affairs that even though the co-operative movement was expanding by leaps and bounds, the members of scheduled castes and scheduled tribes or the weaker section of the members of the society were not

[68] *Supra* n.55 at 777

represented in the committee and had no opportunity to participate in the decision making process, laying down broad policies and management of the society[69]. The decision of the court pointed out that a provision like section 73B was introduced to ensure representation of underprivileged classes who, in the absence of reservation, may find it difficult to be elected to the committee in which the entire power of management vests.

The absence of representation coupled with subjection to the dictates of the society would be the antithesis of the democratic process reducing such persons to serfdom. A co-operative society is to be governed by a committee elected by the democratic process. One can draw light from the provisions contained in Part XVI of the Constitution and especially articles 330 and 332 provide for reservation of seats in the House of People and the Legislative Assembly of every state for the scheduled castes and the scheduled tribes. The felt necessities of the time and the historical perspective of class domination led to the constitutional guarantee of reservation so that India can truly be a sovereign socialist secular democratic republic. A republic is made up of men and institutions. That is why democratic institutions have to be set up by providing for the election and to make the democratic institutions truly representative, reservation of seats for those who on account, of their backwardness, exploitation, and unjust treatment, both social and economic,

[69] *Id.* at 774-775

cannot obtain representation because of the class domination. This is the genesis of reservation. Therefore, any provision making for reservation must receive such construction as would advance the purpose and intendment underlying the provision making a reservation and not thwart it[70].

Class dominations are prevailing in all democratic setups, including co-operative societies where the opportunity of weaker sections for participation is intentionally denied. co-operative movements, in all sense, have impact day-to-day life of weaker sections of society, and therefore, denying the opportunity to participate in its business amount to injustice to such people. Hence, democratic institutions should make necessary adjustments to elect such people by reserving seats, which is vital to a truly sovereign socialist secular democratic republic. Reservation of seats in co-operative societies ensures social justice and equality. It gives them an opportunity to participate in the decision-making process, policies, and participation in the management of societies. The opportunity for all sections of the people to participate in the decision-making process in democratic institutions is an integral part of civil liberties, which guarantees the freedom to form associations, unions, or co-operatives.

In *State of U.P v. C.O.D. Chheoki employees' Coop. Society Ltd*[71] the appeals raise an interesting questions of law relating to the validity of the Act and the rules providing reservation for or nomination of weaker sections into

[70] *Id.* at 774-775
[71] (1997) 3 SCC 681

the co-operative societies registered under the U.P. Co-operative Societies Act, 1965 and the U.P. Co-operative Societies Rules, 1968 as amended from time to time. Due to absence of representation of democratic character in the management of the co-operative societies on the basis of election by the general body of the society, the members of the weaker sections, namely, scheduled castes and scheduled tribes women and other backward classes do not find place. Consequently, the government introduced amendment to the Act. Whether such a power is violative of article 19(1) (c) of the Constitution?

It was contented that the government has no power to enact a law incorporating the reservation to the members of weaker sections and women thereof. The reservation provided to the weaker sections is unconstitutional. But the court rejected the contention and held that in the absence of elected members being there in the committee, necessarily, the government have the power to nominate the unfilled membership of the Committee.

Societies and co-operative societies are created and registered in India in accordance with the relevant statutes. Although relevant laws govern them, the freedom to form such societies and co-operative societies arises from article 19 (1) of the Constitution. Therefore, every Indian citizen has the freedom to form societies or co-operative societies as their fundamental right. This chapter deals with societies registered under the Societies Registration Act and co-operative societies registered under the Co-operative Societies Act. It examines their

scope and legitimacy with the constitutional provisions. Societies may be formed for any literary, scientific or charitable purpose which is protected under article 19 (1) (c) of the Constitution. However, co-operative societies formed by individuals to conduct business and welfare activities of its members would raise the doubt of whether this kind of society would come under the purview of article 19 (1) (c) of the Constitution. To avoid ambiguity, the Parliament of India inserted the term co-operative societies into the article by the 97th Constitutional Amendment Act, 2001. These two kinds of associations are discussed here.

The object of article 15 (4) is to lift the prohibition of general equality guaranteed in article 15 (2) and 29 (2) of the Constitution dealing with the right to admission into an educational institution maintained by the state or receiving aid from the state. Therefore, their object is distinct and different from article 19(1) (c). Though article 19(1) (c) gives freedom to form association, it is controlled by the provisions of the Act. Once a society has been registered under the Act, the management of the society is regulated by duly elected members. In the democratic set up, all eligible persons are entitled to contest the election, as held, according to the provisions of the Act and rules. In the absence of elected members belonging to the weaker sections and women elected, nomination of them by the Government is the alternative dispensation envisaged as one of the policies of the Act. Therefore, the Court cannot

interfere with the policy and declare it is unconstitutional violating article 19(1) (c) of the Constitution.

7.5. Society Registration Act, 1860

Societies are usually registered for the advancement of charitable activities like sports, music, culture, religion, art, education, etc[72]. Society Registration Act, 1860 is one of the oldest enactments that still exist in India as the basic law to register societies of literary, scientific, and charitable societies and operate legally. The meaning of charitable purposes in the statute could be grouped into four heads like the relief of poverty, education, advancement of religion, and other purposes beneficial to the community not coming under any of the preceding heads[73]. Several state governments have accepted the Society Registration Act, 1860 without or with further amendments. Section 20 of the Act describes in detail the purposes for which a society can be formed. According to section 20 of the Act, a society registration can be done for the following purposes: promotion of fine arts, diffusion of political education, grant of charitable assistance, promotion of science and literature, creation of military orphan funds, maintenance or foundation of galleries or public museum, maintenance or foundation of reading rooms or libraries, promotion or

[72] Constitution of India, Seventh Schedule, List III, Item 28 charities and charitable institutions, charitable and religious endowments and religious institution.

[73] *Hindu Public* v. *Rajdhani Puja Samithee* AIR 1999 S C 964, Charitable purposes which came within the language and spirit of the statute ould be grouped into four heads, (i) relief of poverty, (ii) education, (iii) advancement of religion and (iv) other purposes beneficial to the community not coming under any of the preceding heads. The words in Act are, therefore, to be understood as including religious purposes also.

diffusion or instruction of useful knowledge, collections of natural history, collections of mechanical and philosophical inventions, designs, or instruments etc.

As per the Act, societies may be formed by way of a memorandum of association. Any seven or more persons associated for any purposes as described in section 20 by subscribing their names to a memorandum of association and filing the same with the registrar of societies form themselves into a society under this Act[74]. Memorandum of association contains the name of the society and the object of the society. The names, addresses, and occupations of governing body members, a copy of the rule, and other regulations of the society are filed along with the memorandum of the association[75]. Once a society is registered, it becomes a legal person in the eyes of the law[76].

[74] Societies Regisgration Act, 1860 s. 1
[75] *Id.* s. 2
[76] *Id.* s. 6 Suits by and against societies. - Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion:
Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal, secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

Bye-law of a society is a contract between the parties and binds the parties[77]. Bye-law of a society is not a blind consent given to the society to take disciplinary actions against its members. In this connection, while dealing with a rule or by-law of an association, society, or club providing for the automatic suspension, without notice, a member who fails to pay his dues or assessments is generally considered valid and enforceable by the organization. But this principle has been limited to situations where relevant facts are not disputed, and has been held not to be applicable where the facts are in dispute or the accused denies the charges, or where the penalty for an offense admitted by him is not automatic and fixed by the rules, since in the latter case the member has a right to present mitigating evidence and to state other facts which have a bearing on the punishment to be imposed.[78]

If the court issues an order against a person as an officer of the society, the order may not be used to attach that person's personal property[79]. The

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[77] *See, The Co-operative Central Bank Ltd.*v. *The Additional Industrial Tribunal, Andhra Pradesh* MANU/SC/0611/1969 : (1969)IILLJ698SC , *Kulchhinder Singh* v. *Hardayal Singh Brar* MANU/SC/0507/1976 : (1976)IILLJ204SC and *Takraj Vasandi Alias K.L. Basandhi* v. *Union of India* MANU/SC/0154/1987

[78] *American jurisprudence* 2nd ed. Vol. 6 p.463 published by Jurisprudence Publishers. Inc. . chapter dealing with Associations and Clubs at page 463 in para 35 the topic of 'necessity and sufficiency of notice and hearing' is considered.

[79] Societies Regisgration Act, 1860 s.8 –

> If a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property, movable or immovable, or against the body of such person or officer, but against the property of the society.
>
> The application for execution shall set forth the judgment, the fact of the party against whom it shall have been recovered having sued or having been sued, as the case may

purpose for which an association is constituted may be altered or extended, or abridged only with the consent of the members of such associations[80]. If the majority of the members of an association want to dissolve the association, it can be done in accordance with section 13 of the Act[81]. If a society registered under the Act is dissolved, the members cannot claim the property of the society or claim a profit even if the debt is paid in full. However, this condition

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be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

[80] Societies Regisgration Act, 1860 s. 12

Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society either wholly or partially with any other society, such governing body may submit the proposition to the members of the society in a written or printed report, and may convene a special meeting for the consideration thereof according to the regulations of the society; but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

[81] Societies Regisgration Act, 1860 s.13

Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities according to the rules of the said society applicable thereto, if any, and if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite:

Assent required**.** - Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person or by proxy, at a general meeting convened for the purpose:

Government consent**.** - Provided that [whenever any Government] is a member of, or a contributor to, or otherwise interested in any society registered under this Act, such society shall not be dissolved [without the consent of the Government of the State of registration.

is not applied to joint-stock companies[82]. The Act defines a member of a society registered under the Act as follows:

> *For the purposes of this Act a member of a society shall be a person who, having been admitted therein according to the rules and regulations, thereof, shall have paid a subscription, or shall have signed the roll or list of members thereof, and shall not have resigned in accordance with such rules and regulations; but in all proceedings under this Act no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrear for a period exceeding three months*[83].

The terms set out here are the restrictions on an individual joining the association. From the reasons given above, it can be understood that a society is a very different institution from the individuals who are its members. From this, it can be seen that society does not have the fundamental rights available to a citizen under article 19 of the Constitution. It is a fundamental right of a citizen of India to form a society. Thus, once a society is formed, that society cannot claim the fundamental rights available to the citizen.

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[82] Societies Regisgration Act, 1860 s. 14

> "If upon the dissolution of any society registered under this Act there shall remain after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the said society or any of them, but shall be given to some other society, to be determined by the votes of not less than three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by such Court as aforesaid:
> Provided, however, that this clause shall not apply to any society which shall have been founded or established by the contributions of shareholders in the nature of a Joint-stock Company"

[83] Section 15 of the Act.

7.5.1. Status of registered society

In *Sabhajit Tewary* v. *Union of India*[84] the Supreme Court had examined the status of registered societies under the Societies Registration Act. The question raised, in this case, was whether the Council of Industrial and Scientific Research, which was only registered in the Societies Registration Act, 1898, would come within the definition of State under article 12 of the Constitution of India. It was held that the said body was not a state as it was registered under a statute and not performing essential state functions and was not functioning under the government's pervasive control. However, the position is different from a corporation created by an act that came under the purview of state under article 12. Corporations are created by a statute and have the statutory power to make binding rules and regulations and are subject to pervasive governmental control[85]. In *P.K. Ramachandra Iyer* v. *Union of India*,[86] the court held that a society registered under the Societies Registration Act is neither a state nor other authority within the contemplation of article 12 nor an instrumentality of the state. Suppose the association has an option or choice to get registered under a particular statute. In that case, if there is more than one statute operating in the field, the state

[84] AIR 1975 SC 1329
[85] *Sukhdev Singh* v. *Bhagatram* AIR 1975 SC 1331, *See also Rajasthan Electricity Board* v. *Mohan Lal,* AIR 1967 SC 185 Statutory corporations are agencies or instrumentalities of the state for carrying on trade or business which on the other hand would have been carried out by the state departments. Hence, it must be seen whether a body is acting as an agency or instrumentality of the state.
[86] AIR 1984 SC 541

cannot force the society to get it registered under a statute for which society has not applied[87].

In a democratic country like India, all independent as well as statutory associations ensure autonomy. In the case of statutory associations, certain restrictions are in place to achieve the purpose for which the association was formed, but such restrictions should not impede the citizen's freedom to form associations, unions, or co-operatives. By its very nature, the co-operative movement is a form of voluntary association where individuals unite for mutual benefit in producing and distributing wealth upon principles of equity, reason, and the common good. So, the basic purpose of forming a co-operative society remains to promote the economic interest of its members in accordance with the well recognized co-operative principles. Members of an association have the right to be associated only with those they consider eligible to be admitted and have the right to deny admission to those they do not want to associate with. The right to form an association cannot be infringed by the forced inclusion of unwarranted persons in a group. The constitutional right to freely associate with others encompasses associational ties designed to further the social, legal, and economic benefits of the members of the association. By statutory interventions, the state is not permitted to change the fundamental character of the association or alter the composition of the society itself. The significant

[87] *Supra* n. 27 at 307-08

encroachment upon associational freedom cannot be justified on the basis of any interest of the government. However, when the association gets registered under the Co-operative Societies Act, it is governed by the provisions of the Act and rules framed there. The co-operative society is essentially an association or an association of persons who have come together for a common purpose of economic development or for mutual help. Most of the states in India enacted their own Co-operative Societies Act with a view to provide for the orderly development of the cooperative sector in the state to achieve the objects of equity, social justice and economic development, as envisaged in the directive principles of state policy, enunciated in the Constitution of India[88].

[88] *Thalappalam Service Coop. Bank Ltd.* v. *State of Kerala*, (2013) 16 SCC 82, para 26.

Chapter 8

Trade union rights

Trade unions are the authorised agents of employees for representing them in collective bargaining to resolve industrial disputes and fix labour standards. However, in the context of the establishment of trade unions, the concept of collective bargaining and freedom of association is contrary to the common law notion of the sanctity of contracts, which allows employers to forbid union membership for the duration of the contract and fine or dismiss trade union employees. A well-organised and disciplined trade union is essential for industrial development in any system. On the employer's side, there is the usual need to have some responsible organisation with which to deal; on the employee's side, there is a need for the kind of protection a well-organised and well-managed union gives.

History passes through annals of slavery and similar serfdom against workers' rights, but there are no historical records in any presence of associations or trade unions for the welfare of such slaves. But there have always been many workers with independent master craftsmen, who occasionally collude against their rulers and governors. It is stated that these

combinations sometimes last for months or even years[1]. In 1538 the twenty-one journeymen shoemakers of Webech assembled on a hill and sent three of their members to summon all the master shoemakers to meet them to increase wages. The incident represents the embryo state of the trade union[2]. In considering journeymen fraternity or their company in the early period are not equated with the definition of trade union because they all were the associations existed with the support of their masters either through the funding or interfered through the appointment of office bears of the associations[3]. However, before the systematic study of the history of trade unions, there are several instances in which the manual workers have formed ephemeral combinations against their employers. A well-known trade union historian narrates trade unionism's forerunners only from the beginning of the eighteenth century onwards[4]. History evidences that whenever a trade union is formed independently by workers or skilled labourers, it was banned by states through legislation[5]. How associational right connects with trade union activities is one of the questions

[1] Sidney & Beatrice Webb, *The History of Trade Unionism* 2, 1894.
[2] *Id.* at 3
[3] *Id.* at 5
[4] *See also* Sidney & Beatrice Webb, *The History of Trade Unionism* 1894. before the beginning of the eighteenth century they have been unable to discover the existence in the British Isles of anything falling precisely within their definition of trade union. Moreover, although it is suggested that analogous associations may have existed during the Middle Ages in various parts of the Continent of Europe, we have no reason to suppose that such institutions exercised any influence whatever upon the rise and development of the Trade Union Movement in this country.
[5] For example the masons had long had their yearly congregations and confederacies made in their general chapters assembled which were expressly prohibited by Act of Parliament in 1425. *See* Sidney & Beatrice Webb, *The History of Trade Unionism*, 1894.

posed here. In this chapter, the history and development of trade unions are examined in the context of important legal systems, especially Indian trade union law and the exclusive powers of trade unions in the context of the right to form associations or unions.

8.1. Marxist views on trade unionism

The rise of capitalism brought an increasingly greater concentration of industrial production in factories and mills, with ownership concentrated in the hands of a small class of capitalists. Workers were forced to compete against each other, thereby enabling profit-hungry capitalists to drive down wages and force long hours and inhuman conditions on the masses of people. Communist views on trade unionism are not favourable to the trade union under capitalist society. They believed that the early trade unions were forged in the fight against wage slavery. The capitalist class succeeded in turning the union movement into a reserve to defend the very system of exploitation. Lenin, the communist leader, wrote that trade unionism means the political enslavement of the workers by the bourgeoisie[6]. Marxist thinkers believed that when class violence failed to stop the powerful workers' movement, the acceptance of capitalism shifted the trade union movement to the path of reformism. At the heart of trade, unionist ideology separates workers' economic struggles from revolutionary political struggles. The rationale was that labour was an economic

[6] https://www.marxists.org/history/erol/ncm-8/ol-tu/politics.htm

organisation, and political questions should be left to the politicians in bourgeois political parties. Lenin stressed that in carrying out the trade unionist struggle alone, the working class had lost its independence and became tied to the bourgeoisie and its political parties. In short, the purpose of trade unionism is to control and paralyse the working-class movement and turn it into a slave of imperialism[7].

An employer may get uncontrolled freedom to set contract terms of employment unanimously in the absence of collective bargaining and trade unions. So, one reason for the formation of a trade union is that workers unrestrictedly seek to resolve long-term inequalities between employer and employee through collective bargaining theory. Coordinated collective action, by its scale, has a much more significant effect than action taken solo, as Hayek and others have observed[8]. As an organised movement, trade unionism originated in the 19th century in Great Britain, continental Europe, and the United States. In many countries, it is synonymous with the term labour movement. Smaller associations of workers started appearing in Britain in the 18th century, but they remained sporadic and short-lived through most of the 19th century, in part because of the hostility they encountered from employers and government groups that resented this new form of political and economic

[7] Lenin: *What Is To Be Done*? - Marxists Internet Archive, 20/01/2021
[8] Tonia Novits, *Workers'Freedom of Association* 123, 126 (2009) in Human Right in Labour and Employment Relations: International and Domestic Perspectives, edited by James A. Gross and Lance Compa.

activism. At those times, unions and unionists were regularly prosecuted under various restraint-of-trade and conspiracy statutes in Britain and the United States[9].

Small associations of workers began to emerge in the 18th century, but they remained sparse and short-lived, as opposed to political-economic protest because of the hostility they faced from employers and government groups. At that time, the union and the unionists were regularly prosecuted under various anti-labour rules and conspiracy laws in Britain[10]. The British movement favoured political activism, which led to the formation of the Labour Party in 1906. The Trade Union Act of 1871, the old legislation, provided a legal basis for British unionism. The Trade Union and Labour Relations Consolidation Act, 1992[11] defines most trade union rights, including the right of workers to form and join trade unions of their choice. The Employment Relations Act (ERA) 1999 also contains provisions governing trade union rights. In 2004, a further Employment Relations Act was introduced which, strengthened existing legislation and created new protections[12]. Unions or organisations for unskilled workers were rejected in the trade union movement after the industrial revolution. The idea of unionism was to focus only on the workers in the

[9] https://www.britannica.com/topic/trade-union accessed on September 3, 2019
[10] *Id.*
[11] Trade Union and Labour Relations (Consolidation) Act 1992 is a UK Act of Parliament which regulates United Kingdom labour law.
[12] International Trade Union Confederation, *2007 Annual Survey of violations of trade union rights - United Kingdom*, 9 June 2007, available at:https://www.refworld.org/docid/4c52ca0432.html accessed on 13 August 2020

industry. At the time, the leaders of the labour movement believed that unskilled workers were not suitable for union organisations. The trade union movement in Great Britain later became the basis of the Labour Party in Britain.

Recently, two cases in Europe and Canada brought significant changes in jurisprudential aspects of the right to form an association and collective bargaining. The scope of collective action by workers and unions protected by constitutional guarantees of freedom of association is highly contested in Canada and Europe. In a path-breaking decision in 2007 *Facilities subsector Bargaining Association* v. *British Columbia*[13], the guarantee of freedom of association in the Canadian Charter of Rights and Freedom protected the capacity of members of a labour union to engage in collective bargaining on workplace issues. The following year, the European Court of Human Rights released a remarkably similar decision in *Demir and Baykara v. Turkey*[14]. Both decisions overturned long-established authority that collective bargaining was not protected by freedom of association, invoking international labour norms, especially as articulated by the International Labour Organisation and its supervisory bodies as supported. Thus, constitutional courts were much more

[13] (2007) 2 SCR 391
[14] Application No. 34503/97, 12 Nov. 2008

open to interpreting freedom of association to include critical collective activities for workers and their unions as collective bargaining and strikes[15].

The major conflict between labour and capital was over the right to organise and to bargain collectively. Throughout history before the 1930s, the U.S. labour movement operated in a social and economic environment that was generally unfavourable to the recognition of trade unions. The government and the courts were on the employer's side, and refusals to bargain were common and frequently supported by the full power of the state[16]. Trade unions and their activities were initially thought to be illegal under criminal and civil law[17].

Samuel Gompers[18] was the first exponent of trade unionism in the United States of America. He saw the unions pure and simple as the natural organisation of workers to represent them in their struggles with the bosses and serve as their lobby to influence political legislation and affairs outside the workplace. Workers needed no other organisation besides the unions, Gompers insisted[19]. The trade union is an association for collective bargaining that the capitalist system has nurtured for its survival. It is explained as follow:

[15] Judy Fudge, *Constitutional rights, Collective Bargaining and the Supreme Court of Canada: Retrat and reversal in the Fraser case*, International Law Journal 212, (2020)
[16] Philop Taft, *A Labour Historian Views Changes in the Trade Union Movement*, 92 Monthly Lab. Rev. 8, 8 (1969)
[17] Geoffrey England, *Some thought on Constitutionalizing the Right to Strike, Queen's Law Journal* 168, 188 (1988)
[18] Samuel Gompers was the leader of American Labour Union in 1880s.
[19] https://www.marxists.org/history/erol/ncm-8/ol-tu/politics.htm accessed on January 2, 2020

> *The American trade union movement is part and parcel of American society, which is capitalism. We have no quarrel with this system at all, anyone who knows the history of American labour and American workers will understand this . . . The only thing on which we disagree with the capitalist is, how much do we get? That is the only thing*[20].

Like in England, trade unions were banned in the United States, and members of a trade union were punished similarly to the offence of criminal conspiracy[21]. In 1921, as a result of the Clayton Act 1914, the Supreme Court in *Duplex Printing Press Co* v. *Deering*[22] concluded that although trade unions could harm the economy because of their monopoly, union membership was no longer considered a criminal offence[23]. In the United States, the Constitution did not expressly guarantee the right to unionise but was protected by Section 7 of the National Labour Relations Act of 1935 as amended in 1982. It was considered a serious disincentive to workers' rights, and the sole source of the rights of the organised workers' is the right of association, speech, press and petition[24].

[20]The position explained by George Meany, president of the American Federation of Labour, https://www.marxists.org/history/erol/ncm-8/ol-tu/politics.htm
[21] Gerrit Pienaar, *Freedom of association in the United States and South Africa — a comparative analysis*, 26 The Comparative and International Law Journal of Southern Africa, 147, 159 (1993).
[22] 254 US 443 (1921)
[23] *Duplex Printing Press Co* v *Deering* 254 US 443 (1921); See also David L. Gregory, *The right to unionize as a fundamental human and civil right* 9 Mississippi College Law Review, 141(1988)
[24] *Supra* n. 21 at 160

8.2. Trade union rights in China

Workers in China are not free to form or join trade unions of their own choice. The All-China Federation of Trade Unions (ACFTU) is the only recognised labour organisation in law[25] and the first trade union law was adopted in 1950; it was amended in 1992 and 2001. Workers are prevented by law from organising outside the All-China Federation of Trade Unions (ACFTU), which is bound by its Constitution to accept the leadership of the Chinese Communist Party (CCP). The trade union Law bans workers from organising independently. Among their basic duties and functions, trade unions shall coordinate labour relations through consultation, mobilise workers to strive to fulfil their tasks in production and educate them in the ideological, ethical, professional, scientific, cultural and other areas, as well as self-discipline and moral integrity. The law also gives trade unions ample prerogatives in various areas such as democratic management and supervision. The right to strike was removed from China's Constitution in 1982 because the political system had eradicated problems between the proletariat and enterprise owners[26].

[25] International Trade Union Confederation, 2008 Annual Survey of violations of trade union rights – China, 20 November 2008, available at www.refword.org/doad/4c52ca9bc.html accessed on12 August 2020.
[26] *Id.*

8.3. Trade union movement in India

The trade union movement in India does not have a long history as it is associated with industrial development in India. The need for an organised trade union was first realised in 1875 by various philanthropists and social workers[27] whose constant efforts resulted in the formation of trade unions. The first attempt to establish a trade union in India was made by the Bombay Mill-Hands Association, founded in 1890 by N. M. Lokhande[28]. Other associations formed at the outset of the movement were the Amalgamated Society of Railway Servants in 1897, the Printers' Union of Calcutta in 1905, the Madras and Calcutta Postal Unions in 1907. The collective bargaining system had disappeared entirely, so in the real sense, no trade unions have been formed but social organisations. The main objectives of these organisations were to promote welfare activities and to spread literacy among the workers. The growth of the trade union movement accelerated after the first world war, and many factors contributed to this change, such as the rising cost of living, the tide of nationalism, and the emergence of union leadership, the grave economic difficulties of the workers gave a strong impulse toward the organisation[29]. Therefore, the trade unions in India are essentially the product of modern large-scale industrialisation and did not grow out of any existing institutions in

[27] Shri Sorabji Shapaji Bengali and Shri N.M. Lokhandey
[28] Shri. N.M. Lokhanday was a factory worker drew attention of the Government towards the unhappy working conditions of the workers and demanded legislations to protect workers interests.
[29] Trade Union Movement in India, 33 Monthly Lab. Rev. 92, 93 (1931)

society. At the same time, some of the thinkers pointed out the barriers to developing the trade union movement in India. They believed that most obstacles to the growth of the trade union movement are found in the character of Indian workers. For the most part, they are migratory, which renders permanent organisation difficult. Their wages are low and their hours long, so that few have either leisure or energy for serious effort beyond their daily toil, and the question of dues presented almost insuperable obstacles. More fundamental still is the absence of a democratic spirit and the inability to take a long view due to lack of experience and education[30].

The British Parliament passed the first Factories Act of 1881 because of the conditions of the workers employed in the factory. Children were recruited without any restrictions; there were no rest days, no limitations in working hours, and forced labours were the usual threat of that time. The first Act had only applied to factories employing more than 100 workers[31]. Since the first world war, many ideas and movements have influenced the working class in India and those involved in organising and leading them. Two thoughts and movements are very relevant in them, they are the trade union movements and the teachings of Karl Marx and Lenin[32], and the other is the thoughts and

[30] *Id.*
[31] The Act of 1891 extended coverage to factories employing more than 50 persons.
[32] Marxist model of struggle was based on the theories of class conflict and the role of the working class and its organization in ending bourgeois capitalism and establishing the dictatorship of the working class and socialism.

struggles of Mahatma Gandhi. The national movement for Independence also contributed to the growth of the trade union movement in India.

8.3.1. Influence of Mahatma Gandhi on trade union movement

In 1917, Mahatma Gandhi began his political carrier in India with a struggle in Champaran to liberate Indian peasants and workers from the regime of exploitation from British planters in North Bihar[33]. Immediately after that, in 1918, Gandhi led a great strike of textile workers in Ahmedabad, where he began to practice satyagraha as a kind of strike. He said that the strike was a Dharamyudh or righteous struggle. The textile strike that he led in Ahmedabad demonstrated the dynamics and strategies of struggle that he visualised for the working class.[34] He also developed the concept of non-cooperation that workers had the right to non-cooperate in their exploitation. This non-co-operation could take the form of a strike. Satyagraha and non-cooperation often took the form of hartals or strikes, or boycotts. Therefore, the roots of the non-cooperation, hartals and boycott struggles can be traced back to Gandhiji's experiments on non-violence and his philosophy.

He wanted a continuing association of workers engaged in industrial undertakings; however, it did not mean that a trade union should not get

[33] The Champaran Satyagraha of 1917 was the first Satyagraha movement led by Gandhi in India and is considered a historically important revolt in the Indian Independence Movement. It was a farmer's uprising that took place in Champaran district of Bihar, India, during the British colonial period.
[34] Report of the Second National Commission on Labour 108, 2002

involved in day-to-day political activity or be exploited by its leaders for their political interests. A trade union should be an organisation that leads the workers to a particular struggle and continuously serves the workers' overall interests. He, therefore, held the view that trade unions were not merely instruments of combat. They also had to play a constructive role in promoting the welfare of the working class. They had to protect the working class's rights and interests and promote their welfare[35]. Mahatma Gandhi's view of the trade union movement in India should function as a pressure group for the immediate relief of employees and as a comprehensive association that promotes the holistic development of workers, including cultural, economic, and economic spiritual advancement.

8.3.2. Trade union in India

Trade unions are the most suitable organisations for balancing and improving the relations between employees and employers. They are formed to cater to the workers' demands and impart discipline and inculcate a sense of responsibility. The origin of trade unionism in India may be traced back to 1890, when workers of Bombay organised a union called the Bombay Millhands Association. In England, trade unionism existed under the Common Law, but it existed under several handicaps and had to be developed by continuous legislation. In 1921, the Madras High Court granted an injunction

[35] *Id.* at 109

restraining the Madras textile labour union officials from influencing labourers in the Buckingham and Carnatic Mills from breaking their contract with their employers using a strike to obtain increased wages. This led to intensive agitation and resulted in the passing of the Indian Trade Unions Act 1926, which came into force on 1st June 1927[36]. The main object of the Act was to give registered trade unions a legal and corporate status and their executive and members immunity from civil and criminal liability in respect of strikes. It was amended in 1947 by the Indian Trade Unions (Amendment) Act 1947, which primarily deal with the recognition of trade unions, but the provisions have not yet come into force as the central government has not to this day issued the requisite notification.

The Indian trade union movements and the formation of trade unions are directly related to the Indian freedom struggles and the political, economic and social philosophies they espoused. Therefore, the formation of trade unions had a political dimension. It was also a reflection of the human rights movements that developed in the world social order after the first world war. Trade unions were accorded special status based on the socio-political and economic context of the Indian independence movement, and the right to trade union was recognised as a privilege and placed on the list of fundamental rights in the Constitution of India. 1926 was a very important year for the Indian trade union

[36] *Jay Engineering Works Ltd*. v. *State of West Bengal,* AIR 1968 Cal 407 para 24

movement because until then, trade unions were treated as unorganised and illegal entities but after that year the trade unions were recognised as legal entities with the enactment of the Trade Union Act and their registration allowed, subject to certain conditions. The most important of these was that they would provide audited accounts and that most of their executive officers would be real workers. Registration provides some protection for unions and their members from civil suits and criminal prosecution.

8.3.3. Trade union formations

In its comprehensive sense, the first trade union in India was established in Chennai in 1918 under the leadership of B.P. Wadia, a political and social worker. The period from 1918 to 1928 can be described as a landmark in the history of the Indian trade union movement[37]. The first central federation of trade unions came into existence with the All India Trade Union Congress (AITUC) in 1920[38]. In 1921, Shri N.M. Joshi, a trade union leader, who was also a member of the central legislative assembly, spearheaded the demand for

[37] In 1919, ten new unions were formed. The most important among them were the MSM Railway Employees Union in Madras and the Seamen's Union in Bombay. In succeeding years, unions sprang up among railway men, dockworkers, textile workers, engineering workers and others.

[38] Lala Lajpatrai, a well-known leader of the Congress movement was the first President of the AITUC. Other leaders of the Congress like Pandit Jawaharlal Nehru, C. R. Das and Subhash Chandra Bose also held office as Presidents of the AITUC. The AITUC came into existence with over 107 affiliated unions and a claimed membership of over 1,40,000.

legislation on the registration and protection of trade unions. This led to the assembly passing the Trade Unions Act in 1926[39].

The trade union movements in India and the ensuing divisions result from world politics scenarios and the political stance on Indian independence, which does not appear to have directly impacted the struggles for workers' welfare[40]. There was no Communist Party in India before 1920, but sometime after 1923, communists began to play an active role in the trade union movement, and after 1926 some trade unions came to be led by communists[41].

8.4. Trade union legislations

The statutory definition of the term' trade union in India is borrowed from the British Trade Union Acts of 1871, 1875 and 1913. A trade union is a continuous and voluntary association of the salary or wage-earners and is formed for safeguarding the interest of its members by maintaining and improving the conditions of their living and working lives and secure better relations between them and their employers through a method called collective

[39] Report of the Second National Commission on Labour, *Supra n.* at 109
[40] *See* Report of the Second National Commission on Labour, 2002
[41] Leaders like Dhundiraj Thengdi, S.V. Ghate, S.A. Dange were elected to high offices in the AITUC. At the time of India's independence, only two Central Federation of Trade Unions were in the country, namely AITUC and ITUC. In the course of time, with the intention of political parties to create labour unions in accordance with their own political and philosophical interest, the working class and the trade union movement led to the formation of new trade unions such as the Hind Mazdoor Sabha (HMS) and the United Trade Union Congress (UTUC). Soon after in 1955, the Bhartiya Mazdoor Sangh (BMS) was also formed. The Trade Union Act of 1926 changed the status of the trade union and recognised it as a legal entity, allowing representatives of workers to participate in lectures on labour matters.

bargaining. The Trade Unions Act, 1926 gave legal status to trade unions to provide for their registration and provide protection to their officers and members from criminal liability for their legitimate trade union activities. Before 1946, there was no provision in any state regarding the grant of recognition to the trade unions. The Bombay Industrial Relations Act, 1946, made provisions for the first time for the recognition of the representative unions in the local area. Recognition is granted to a union for an entire industry in a given local area. The registrar grants this recognition under the said Act to a union fulfilling certain conditions[42].

The existence and status of a trade union in an industrial undertaking cannot be under-estimated. Trade unions are no longer now concerned only with the wages and allowances of workers but are widely concerned with the lives of the citizens as consumers of the production. They thus play a vital role in the national problems and the socio-economic activities in the country. Since the recognition and de-recognition of trade unions have been vitally linked with the question of industrial peace and harmony, we shall have to examine this question bearing in mind its importance[43]. The Trade Union Act was amended several times to reduce the multiplicity of the trade unions, promoting internal democracy and facilitate the ordinary growth and regulation of trade unions. In

[42] *Fashion Production Mazdoor Sabha v. Smt. Smita Prabhakar Dalvi*, 1985 (51) FLR 542, (1994) IIILLJ 814 Bom
[43] *Id*

September 2020, the Industrial Relations Code was passed by the India Parliament, which consolidates and amends the law relating to the trade union, industrial disputes and the industrial employment standing orders.

Certain legislations do not apply to the registered trade unions, namely (a) the Societies Registration Act, 1860; (b) the Co-operative Societies Act, 1912; (c) the Multi-State Co-operative Societies Act, 2002; (d) the Companies Act, 2013; and (e) any other corresponding law relating to co-operative societies for the time being in force in any State.[44]

8.5. Definitions

Sidney and Beatrice Webb defined a trade union as an association of wage-earners to maintain or improve the conditions of their employment[45]. Webb's definition of a trade union does not include employers' association, but in the popular sense of the term, Webbs' definition of a trade union is still valid. Encyclopaedia Britannica defined a trade union as an association of workers in a particular trade, industry, or company created to secure

[44] Section 13 of the Industrial Relations Code, 2020, the provisions of the following Acts, namely: —
(a) the Societies Registration Act, 1860;
(b) the Co-operative Societies Act, 1912;
(c) the Multi-State Co-operative Societies Act, 2002;
(d) the Companies Act, 2013; and
(e) any other corresponding law relating to co-operative societies for the time being in force in any State, shall not apply to any registered Trade Union and the registration of any such Trade Union under any of the aforementioned Acts shall be void.

[45] *Supra* n. at 1

improvements in pay, benefits, working conditions, or social and political status through collective bargaining[46].

Trade union means any combination, whether temporary or permanent, formed primarily to regulate the relations between the workmen and employers or between workmen and workmen or between employers and employers or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more trade unions. The word ‘trade’ or ‘industry’ has not been defined in the Act. There is no independent definition of the word 'workmen' except as contained in the definition of the expression trade dispute. The whole object of the Trade Unions Act, 1926 was to register trade unions. The formation of a trade union may be made without the help of the Act, but it can only be registered if it complies with the provisions contained therein[47].

The term trade union defined under section 2 (zl) of the Industrial Relations Code, 2020 is as follows:

> *Trade Union means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:*

[46] https://www.britannica.com/topic/trade-union, accessed on 13/08/2020
[47] *Registrar of Trade Unions* v *Mihir Kumar Gooha,* AIR 1963 Cal 56

Provided that this Act shall not affect—

(i) any agreement between partners as to their own business;

(ii) any agreement between an employer and those employed by him as to such employment; or

(iii) any agreement in consideration of the sale of the goodwill of a business or instruction in any profession, trade or handicraft.

A trade union is a combination of workmen of either temporary or permanent formed with an objective of two main purposes to regulate the relationships between:

a) between workmen and employers; or

b) between workmen and workmen; or

c) between employers and employers;

Or, for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions.

The definition of a trade union clarifies that the rationale of a trade union is to maintain balance and unity about individuals engaged in an industrial activity such as process and production. The goal of the trade union is not only to ensure unity between employers and workers but also to improve the peaceful relationship between employers and employees. Section 2 (zm) of the Code define trade union dispute means any dispute relating to trade union arising between two or more trade unions or between the members of a trade union inter se.

8.6. Industrial Relations Code, 2020

The Code of Industrial Relations, 2020 is passed by Parliament to protect the right to form trade unions in the industries, to reduce conflicts between employers and workers, and to ensure industrial development through the amicable settlements of industrial disputes. The power of the government to regulate trade unions is very clearly drawn up. The central government can regulate trade unions that are not confined to one state, while the state governments have the power to regulate other trade unions[48]. The most obvious way of encouraging union is by recognising them; this should be more than a mere superficial gesture[49]. The workers have the right to choose their leaders, and in many cases, the risk of victimisation would keep an employee from presenting their case vigorously[50]. Section 27 of the Code provides for the recognition of trade union federations as central trade unions by the central government and as state trade unions by the state government. Chapter III of the Code that is sections 5 to 27 are dealing with the regulations of trade unions in an industrial establishment.

8.6.1. Works committee

In any industrial enterprise employing 100 or more workers, the appropriate government may, by a general or special order, request the

[48] Ins. by the A.O. 1937
[49] *Supra* n. 29 at 93
[50] *Id.* at 94

employer to form a working committee consisting of equal representatives of the employer and the workers engaged in the establishment[51]. The representatives of the workers shall be chosen from among the workers engaged in the establishment and in consultation with their trade union, if any, registered in accordance with the provisions of section 9[52]. It shall be the duty of the works committee to promote measures for securing and preserving amity and good relations between the employer and workers and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters[53].

8.6.2. Grievance redressal committee

The Code stipulates that every industrial establishment employing twenty or more workers must have one or more grievance redressal committees to resolve individual grievances and related disputes[54]. The grievance redressal committee shall consist of equal number of members representing the employer and the workers.[55] The chairperson of the grievance redressal committee shall be selected from among persons representing the employer and the workers alternatively on rotational basis every year.[56] The total number of members of the grievance redressal committee shall not exceed ten. Provided that there shall

[51] Industrial Relations Code, 2020, s. 3 (1)
[52] *Id*, s. 3 (2)
[53] *Id*. s. 3 (3)
[54] *Id.* s. 4 (1)
[55] *Id*. s. 4 (2)
[56] *Id*. s. 4 (3)

be adequate representation of women workers in the Grievance Redressal Committee and such representation shall not is less than the proportion of women workers to the total workers employed in the industrial establishment.[57] The grievance redressal committee may complete its proceedings within thirty days of receipt of the application.[58] The decision of the grievance redressal committee shall be made on the basis of majority view of the committee in which more than half of the members representing the workers have agreed to such decision; otherwise it shall be deemed that no decision could be arrived at by the committee.[59] If the workers are not satisfied the decision of the grievance redressal committee may file an application for conciliation before the conciliation officer through the trade union within sixty days from the decision of the grievance redressal committee.[60]

8.6.3. Concept of check-off

The role that bilateral communication, dialogue and interaction can play in promoting harmonious industrial relations is crucial. In a sense, bipartisanship recognises the potential and success of viability for workers and management. The viability that exists in the workplace will further strengthen the trade union movement and institution. Similarly, the divided trade unions need to unite for workers' welfare and industrial growth. One way to enhance

[57] *Id*. s. 4 (4)
[58] *Id*. s. 4 (6)
[59] *Id*. s.4 (7)
[60] *Id*, s. (8)

incentives for integration is in registration and recognition, and the eligibility criteria can be upgraded or at least proportionally upgraded. The negotiating agent should be selected for recognition based on the check-off system, with 66% entitling the union to be accepted as the single negotiating agent. If no union has 66% support, then unions that have the support of more than 25% should be given proportionate representation in the college. A check-off system in an establishment employing 300 or more workers must be compulsory for all registered trade unions members.

A check-off system in an establishment employs more workers compulsory for all registered trade unions and strengthens trade unions in industries. The Second National Commission of Labour considered the issues seriously and made the following recommendations:

> *Though the check off system will be preferred in the case of establishments employing less than 300 persons too, the mode of identifying the negotiating agent in these establishments may be determined by the LRCs (Labour Relations Commissions). Any union in such smaller enterprises may approach the LRCs for conducting a secret ballot. We are recommending a slightly different dispensation for units employing less than 300 as we feel that it is in such units that the possibility of victimisation has to be provided against*[61].

[61] *Supra n.* 34

8.6.4. Negotiating union and Negotiating Council

The Industrial Relations Code, 2020 has introduced a new concept for granting recognition to negotiating unions and councils concerning registered trade unions by an industrial establishment for negotiations. If only one registered trade union of workers is functioning in an industrial establishment, then the industrial establishment will, subject to such criteria as may be prescribed, recognise such a trade union as the negotiating union.

Suppose more than one registered trade union of workers are functioning in an industrial establishment. In that case, the trade union having fifty-one per cent or more workers on the muster roll of that industrial establishment will be recognised by the industrial establishment as the negotiating union[62]. In case the criteria described above are not fulfilled, then the employer is required to constitute a negotiating council comprising of the representatives of such registered trade unions, which have the support of not less than twenty per cent of the total workers on the muster rolls. One representative shall be included for each such trade union. Under the previous Industrial Relations Bill, the threshold for representation was one representative each on behalf of a trade union with the support of at least one per cent of the total workers on the muster rolls[63]. Recognition of a negotiating union or negotiating council will be valid

[62] Under the Previous in Industrial Relations Bill, trade unions having seventy-five per cent or more workers were recognised as the sole negotiating union.
[63] https://www.prsindia.org/billtrack/overview-labour-law-reforms, accessed on 10/02/2021

for three years from the date of recognition or Constitution but will not exceed five years.

8.6.5. Registration of trade unions

Section 6 of the Industrial Relations Code, 2020 deals with the registration criteria for trade unions, appointments of registrars and other related issues. Any seven or more members of a trade union may, by subscribing their names to the rules of the trade union and by otherwise complying with the provisions of this Code with respect to registration, apply for registration of the trade union under this Code[64]. At least 100 or 10 per cent of the workers whichever is less in an industry must register a trade union[65].

Any person who has attained the age of fourteen years and is employed in a nonhazardous industry may be a member of a registered trade union and enjoy all the rights of a member and execute all instruments and given all acquaintances necessary to be executed or given under the rules.[66] However, the minor is not able to become a member of the executive or any other office-bearer of a registered trade union[67]. Application for the registration being submitted along with a copy of rules of trade union and particular statements regarding[68]: names, occupations and addresses of the members making the

[64] Industrial Relations Code, 2020, S. 6 (1)
[65] *Id*. s. 6 (2)
[66] *Id*. s. 20
[67] *Id*. s. 21 (1) (i)
[68] *Id*. s. 5

application; name of the trade union and address of its head office; and names, occupations and designations of office bearers of the trade union. The right of collective bargaining is provided only to those trade unions which are registered in accordance with the Code. The registrar of trade unions is not a court subject to the superintendence of the high court[69].

8.6.6. Minimum requirement of membership for registration

A registered trade union shall at all times continue to have not less than ten per cent or one hundred of the workmen, whichever is less, subject to a minimum of seven, engaged or employed in an establishment or industry with which it is connected, as its members[70]. In the principle Act under section 4, any seven members are needed for making registration applications[71]. Whereas under amendment act 2001, the seven persons applying for registration must be workmen engaged or employed in establishing an industry. A proviso added to this section by the amendment in 2001 is that no trade union of workmen shall be registered unless at least ten per cent or one hundred of the workmen,

[69] *National Sewing Thread Co. Ltd. Chidambaram* v. *James Chadwick and Bros, Ltd*. AIR 1953 SC 357

[70] Industrial Relations Code, S. 9A

[71] Trade Union Act, 1926, S. 4 (1): Mode of registration. — (1) Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act.

Provided that no Trade Union of workmen shall be registered unless at least ten establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration:

Provided further that no Trade Union of workmen shall be registered unless it has on the date of making application not less than seven persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.

whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such trade union on the date of making of an application for registration[72].

8.6.7. Immunity and privileges of members

Section 15 of the Code states about the general funds of the trade union is to be spent. A mandatory provision that general funds be spent only on the prescribed matters. A registered trade union may constitute a separate fund from contributions separately for the promotion of its members' civic and political interests in furtherance of any of the objects specified in the Act[73]. No member shall be compelled to contribute to the fund constituted, and also, a member who does not contribute to the said fund shall not be excluded from any benefits of the trade union. Contribution to the said fund shall not be made a condition for admission to the trade union.[74]

The Act confers civil and criminal immunities to the workers under sections 16 and 17 of the Industrial Relations Code, 2020. Any suit or other legal proceedings shall not be maintained in any civil court against any registered trade unions or any office-bearer or member of such unions in respect of any act done in contemplation or furtherance of an industrial dispute

[72] The Provisos ins. by Act 31 of 2001, s. 2 (w.e.f. 9-1-2002).
[73] Industrial Relations Code, S. 15 (2)
[74] *Id*. s. 15 (3)

to which a member of the trade union is a party[75]. A registered trade union shall not be liable in any suit or other legal proceeding in any civil court in respect of any tortuous act done in contemplation or furtherance of an industrial dispute by an agent of the trade union if it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the trade union.[76] No office-bearer or member of a registered trade union shall be liable to punishment under sub-section (2) of section 120B of the Indian Penal Code in respect of any agreement made between the members for the purpose of furthering any such object of the trade union as is specified in section 15, unless such agreement is an agreement to commit an offence.[77]

As a general rule not less than one-half of the total number of the office-bearers of every registered trade union in an unorganised sector shall be persons actually engaged or employed in an establishment or industry with which the trade union is connected. However, the provided that the appropriate government may, by special or general order, declare that the provisions of this section shall not apply to any trade union or class of trade unions specified in the order.[78] The law itself says about disqualifying members of a trade union

[75] *Id*. s. 16 (1)
[76] *Id*. s. 16 (2)
[77] *Id*. s. 17
[78] *Id*. s. 23 (1)

becoming an office-bearer of the union unless such a person must be eighteen years of age.[79]

8.7. Amalgamation and dissolution of trade unions

The amalgamation of any two or more registered trade unions is permissible under the provisions of the Code. At least half of the concerned unions should have voted, and at least sixty per cent of the registered voters favour the proposal to amalgamation[80]. Trade unions may be dissolved under the Act on notice of dissolution. The notice of dismissal signed by the seven members and the secretary shall be sent to the registrar of trade unions, who, if the requirements for dismissal are met, shall register, and the termination shall take effect from the date of such registration[81].

8.8. Policy decisions of government and trade union rights

A very important decision of the Supreme Court in this regards is *BALCO Employees Union* v. *Union of India*[82] in which BALCO employees union contended that by reason of 51% of BALCO shares disinvest the workmen have lost their right and protection under articles 14 and 16 of the Constitution. This is an adverse civil consequence and, therefore, they had a right to be heard before and during the process of disinvestments.

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[79] *Id*. s. 21 (1) (i)
[80] *Id*. s. 24 (3)
[81] *Id*. s. 25 (1)
[82] (2002) 2 SCC 333; MANU/SC/0779/2001

Process of disinvestments is a policy decision involving complex economic factors. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law[83]. In taking of a policy decision in economic matters at length, the principles of natural justice have no role to play. While it is expected of a responsible employer to take all aspects into consideration including welfare of the labour before taking any policy decision that, by itself, will not entitle the employees to demand a right of hearing or consultation prior to the taking of the decision.[84] The court observed that:

> *Even though the employees of the company may have an interest in seeing as to how the company is managed, it will not be possible to accept the contentions that in the process of disinvestments, the principles of natural justice would be applicable and that the workers, or for that matter any other party having an interest therein, would have a right of being heard. As a matter of good governance and administration whenever such policy decisions are taken, it is desirable that there should be wide range of consultations including considering any representations which may have been filed, but there is no provision*

[83] *Id.* at para 47
[84] *Id*

> *in law which would require a hearing to be granted before taking a policy decision.*[85]

Merely because the workmen may have protection of articles 14 and 16 of the Constitution, by regarding BALCO as a State, it does not mean that the erstwhile sole shareholder viz., government had to give the workers prior notice of hearing before deciding to disinvest.

In the *National Textile Workers' Union* v. *P.R. Ramakrishnan*[86] the court had observed that in deciding whether the court should wind up a company or change its management, the court must take into consideration not only the interests of the shareholders and creditors but also amongst other things, the interests of the workers[87]. The workers must have an opportunity of being heard for projecting and safeguarding their interests before winding up order is passed by the court. There can be no doubt that in judicial proceedings where rights are likely to be affected, principles of natural justice would require the court to give a hearing to the party against whom an adverse or unfavourable order may be passed. The position in BALCO Employees Association case is different. No judicial or quasi-judicial functions are exercised by the government when it decides, as a matter of policy, to disinvest shares in a Public Sector Undertaking.

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[85] *Id,* at *para 57*
[86] (1983) 1 SCC 228
[87] *Id.* at 245

8.9. Trade Union rights of contract labourers

A trade union is a permanent and closed association of specific individuals engaged in any trade or industry. Therefore, in general, contract workers from the contractor's immigration business cannot become members of a trade union that operates only for ordinary workers in the principal employer's establishment[88].

Contract labour[89] generally refers to workers engaged by a contractor for user enterprises. So, they do not find representation in a union formed to negotiate with the employer. The Contract Labour (Regulation and Abolition) Act, 1970, was enacted to protect and safeguard the interests of these workers. It applies to every establishment or contractor in which 20 or more workmen are employed. It also applies to establishments of the government and local authorities. Every establishment and contractor falling under this category has to register it or obtain a license for the execution of the contract work. The interests of contract workers are protected in terms of wages, hours of work, welfare, health and social security. The amenities to be provided to contract labourers include canteen, restrooms, first aid facilities and other basic necessities at the workplace like drinking water etc. The responsibility to ensure payment of wages and other benefits is primarily that of the contractor, and, in

[88] G. Sampath, the Hindu, November 03, 2016

[89] These workers are millions in number and are engaged primarily in agricultural operations, plantations, construction industry, ports and docks, oil fields, factories, railways, shipping, airlines, road transport etc.

case of default, that of the principal employer. The extent of unionisation in construction has been very low[90]. Only a low level of unionisation in the construction industry is possible due to the migratory and seasonal nature of work, scattered workplaces and fear that contractors will be victimised.

Industrial Relations Code, 2020 s. 2 (zr) defines workers in general terms.[91] However, those clearly stated in the clause do not fall within the scope of the definition. They are the employee who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or who is employed in the police service or as an officer or other employee of a prison; or who is

[90] *See* the Report of the Second National Commission on Labour, 2002. Trade Unionism in the construction industry started in the Government Sector with the formation of the CPWD Workers Union in 1934.

[91] Industrial Relations Code, 2020 s. 2 (zr) worker means any person (except an apprentice as defined under clause (aa) of section 2 of the Apprentices Act, 1961) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes working journalists as defined in clause (f) of section 2 of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous
Provisions Act, 1955 and sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976, and for the purposes of any proceeding under this Code in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched or otherwise terminated in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or
(ii) who is employed in the police service or as an officer or other employee of a prison; or
(iii) who is employed mainly in a managerial or administrative capacity; or
(iv) who is employed in a supervisory capacity drawing wages exceeding eighteen thousand rupees per month or an amount as may be notified by the Central Government from time to time:

Provided that for the purposes of Chapter III, "worker"—
(a) means all persons employed in trade or industry; and
(b) includes the worker as defined in clause (m) of section 2 of the Unorganised Workers' Social Security Act, 2008

employed mainly in a managerial or administrative capacity; or who is employed in a supervisory capacity drawing wages exceeding eighteen thousand rupees per month or an amount as may be notified by the Central Government from time to time. Section 2 (g) of the Trade Union Act, 1926 defines workmen, for a trade union, as all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.

The Industrial Relations Code, 2020 has introduced a new term fixed term employment which means a workers engagement for a fixed period based on a written contract. A worker employed for a fixed term would be (a) entitled to the same benefits available to a permanent worker doing the same or similar work; (b) eligible for statutory benefits available to a permanent worker proportionate to the service period rendered and irrespective of whether the employment period does not fulfil the qualifying period under the statute, and (c) eligible for gratuity if service is rendered for one year.

8.10. Government role on selection of trade unions

The free choice of union membership by an individual is an integral part of collective bargaining and an individual's right to form associations or unions. Protection of individual freedom within the definite area would be the concern of a trade union. So, the basic principle behind the trade union is to protect the individual freedom of members belonging to the trade union. If any

dispute occurs between collective action and individual choice, the question may arise as to whether individual interest is valued within the framework of trade unionism. The sanctity of trade union as an entitlement of association of members would seem to be meaningless if the union cannot lawfully pursue the interests of its members. There would seem to be a care for achieving a balance between the effectiveness of trade union representation and individual freedom, but there is little consensus as to where that balance should lie[92].

A government must maintain a balance between the interests of employers and employees, social needs and development. On the one hand, the Government promotes and protects workers' interests, facilitates collective bargaining and, on the other hand, encourages employers to bring about economic development in the country. So, the government is effectively working with a few disciplined and regulated trade unions to reduce the abundance of trade unions to create a peaceful and efficient business environment in the country. The state enforces restrictions on the fundamental right of workers to join trade unions through law. So, the provisions for trade unions in the Code do not give workers the right to join trade unions as unlimited rights.

[92] *Supra n.* 8 at 124

8.11. Multi-unionism

The freedom of association allows multi-unionism at all levels, from the individual industry to the national level. If any law prohibits establishing a second union in an industry, it would be a direct or indirect violation of a fundamental right. In some cases, legislations may define the minimum number of members required to form a union, but if the minimum number is too high, the right of workers to freely choose unions will be meaningless. Legislation allowing only one union in a given occupational, geographical, or economic category is considered a violation of ILO Convention No. 87 Freedom of Association and Protection of the Right to Organise Convention, 1948, as the freedom of association interprets as the ability to form trade unions, so national legislation should not prioritise unions[93]. Workers must freely choose to voluntarily join together without being given any compulsion or incentive from the government. Although the legislature's attempt to reduce the majority of trade unions was a step towards promoting domestic democracy, it is submitted that it would adversely affect the right of workers to choose trade unions at will.

8.12. Trade unions rights in unorganised sector

Unions or organisations for unskilled, unorganised workers were rejected during the trade union movements as an industrial revolution. The

[93] Teri L. Caraway, *Freedom of Association: Bettering Ram or Trojan Horse?*, 13 Review of International Political Economy, 210, 219 (2006)

concept of unionism in the initial stage only focused on labours in Industries. Leaders of labour movements during that period believed that unskilled labours were unsuitable for union organisations. India is home to the vast majority of unorganised workers. Given the peculiarity of India's socio-geographical phenomenon, it is very difficult to empower the scattered, unorganised workers in India. In terms of statistics, the maximum number of unorganised workers available in the agricultural sector is comparable to that of domestic workers, workers in various factory, building and construction industries[94]. Many of them are victims of invisibility[95]. Some common reasons have been identified as reasons for not being able to organise informal sectors.[96] They cannot express their feelings or disagreements against the attitude of the employers to protect their interests. The employment sector plays a crucial role in the economy, but a large workforce section is neglected.

Nearly 90% of the country's workforce is in the informal sector with no minimum wages or social security[97]. The First National Commission on

[94] Prof. (Dr.) Subhasish Chatterjee, *Labourers of Unorganized Sectors and their Problems,* 3 IJETST 4397, 4398 (2016)

[95] The First National Commission on Labour, 1969 under the Chairmanship of Justice Gajendragadkar, defined the unorganised sectors and listed illustrative categories of unorganised labour: These are: (i) contract labour including construction workers; (ii) casual labour; (iii) labour employed in small scale industry; (iv) handloom/power-loom workers; (v) beedi and cigar workers (vi) employees in shops and commercial establishments; (vii) sweepers and scavengers; (viii) workers in tanneries; (ix) tribal labour; and (x) 'other unprotected labour' (p.417).

[96] Casual nature of employment; ignorance and illiteracy; small size of establishments with low capital investment per person employed; scattered nature of establishments and superior strength of the employer operating singly or in combination.

[97] India government has classified unorganized workforce exclusively in four categories 1. In terms occupation like leather workers, waiver, fisheries, bidi maker, construction workers,

Labour, under the chairmanship of Justice Gajendragadkar, defined the unorganised sector as follows:

> *Part of the workforce who have not been able to organise in pursuit of a common objective because of constraints such as (a) casual nature of employment, (b) ignorance and illiteracy, (c) small size of establishments with low capital investment per person employed, (d) scattered nature of establishments and (e) superior strength of the employer operating singly or in combination. The Commission listed illustrative categories of unorganised labour: These are: (i) contract labour including construction workers; (ii) casual labour; (iii) labour employed in small scale industry; (iv) handloom/ power-loom workers; (v) beedi and cigar workers (vi) employees in shops and commercial establishments; (vii) sweepers and scavengers; (viii) workers in tanneries; (ix) tribal labour; and (x) other unprotected labour.*[98]

The report points out that the inability to organise a union or association in the unorganised sector is due to the nature of the work involved.

The term unorganised sector is used commonly in all official records and analyses. It is defined as the residual of the organised sector. The term 'organised' is generally used when referring to enterprises or employees in

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workers of different industry like oil mill, paper mill, saw mill etc. bricks maker, landless agricultural labour. 2. Nature of employment, Contract, Casual and bonded labour 3.Special distressed categories Head and shoulder loaders, Scavengers, variety of labour works. 4. Service categories – Hotel boy, Midwives, Air hostesses, barbar, masseur etc. Apart from aforesaid category handicraft artisans, Cobblers, Handloom weavers, physically handicapped self employed persons, Lady tailors Rikshaw pullers, Carpenters, Tannery labour, Power loom workers and urban poor, Truck and Auto drivers also come under the unorganized labour class. *See also* Yogima Seth Sharma, National database of workers in informal sector in the works, the Economic Times, Jan19, 2020, As per a survey carried out by the National Sample Survey Organisation in the year 2011-12, the total employment in both organised and unorganised sectors in the country was of the order of 47 crores.

[98] *Supra* n. 34 at 417

which ten or more employees work together[99]. Section 2(1) of the Unorganised Workers' Social Security Act, 2008 defined unorganised sector as an enterprise owned by individuals or self-employed workers engaged in the production or sale of goods or providing service of any kind whatsoever, andf where the enterprise employs workers, the number of such workers is less than ten. The unorganised sector is also known as the informal sector or unregulated sector because the sector is largely outside the regulatory framework or legislation passed by the legislators.

In this sector where it is difficult to identify an 'employer' and therefore an employer-employee relationship is not established, for example, a woman who spins or weaves, or tends livestock at home, to sell surplus milk to a co-operative or to a consumer who is her neighbour. Due to long working hours, social isolation of migrant workers, high unemployment, illiteracy and lack of awareness are significant barriers to form an organisation for getting power of collective bargaining. Another disadvantage of effective collective bargaining and unionisation is the lack of employer-employee relationships. Most enterprises are invisible because workers work in their homes and do not have a designated workplace. Another difficulty is that contractors employ many domestic workers.

[99] *Id.*

In cases where trade union or such organisations do not raise their concerns and negotiate with the employers, the laws or welfare schemes prescribed by the government for them will not be effectively implemented. To overcome this difficulty, a specific provision may be made to enable workers in the unorganised sector to form trade unions and get them registered even where an employer-employee relationship does not exist or is difficult to establish.

Conventions 87[100] and 98[101] of the International Labour Organisation provide that workers have the right to establish and join unions of their own choice without the interference or permission of any state authority or employer. Unions also have the right to accept constitutions, elect representatives, and join in national and international labour confederations. The exercise of the right is not extended to forcible membership of labour unions.

As the labour force is fragmented in the largest unorganised sector in India, there are many limitations to bringing in a trade union. Therefore, the principle of collective bargaining cannot be applied in such areas of employment. Another reason is that the majority of workers in the unorganised sector are illiterate and do not know enough about trade unions or labour rights.

[100] The Freedom of Association and Protection of the Right to Organise Convention (1948)
[101] Right to Organise and Collective Bargaining Convention, 1949

Although there is no effective trade union for migrant workers, the law covers all employee welfare measures.

The Second National Labour Commission pointed out that an ideological definition is not possible due to the nature and characteristics of the unorganised sector. It was held that "in a sense, all workers, who are not covered by the existing social security laws like Employees State Insurance Act, Employees Provident Fund and Miscellaneous Provisions Act, Payment of Gratuity Act and Maternity Benefit Act, can be considered as part of the unorganised sector"[102]. But many legislations apply, directly or indirectly, to the welfare of workers[103]. The Unorganised Workers Social Security Act, 2008 was enacted for unorganised workers social security and welfare and other matters connected therewith or incidental thereto.

8.13. Migrant workers

According to the 2011 census, 45 crore persons have changed their place of residence within the country and out of this; 4.6 crore or 10.22% left their place for work. The Inter-State Migrant Workmen (Regulation of Employment

[102] Report of the Second National Labour Commission 603 (2002)

[103] The unorganised workers suffer from cycles of excessive seasonality of employment, lack of a formal employer-employee relationship and absence of social security protection. However, several legislations such as the Employee's Compensation Act, 1923; the Minimum Wages Act, 1948; the Maternity Benefit Act, 1961; the Contract Labour (Abolition and Prohibition) Act, 1970; Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996; and the Building and Other Construction Workers Welfare (Cess) Act, 1996 etc. are directly or indirectly applicable to the workers in the unorganised sector also.

and Conditions of Service) Act, 1979, was enacted to protect the rights and safeguard the interests of migrant workers. The Act regulates the employment of interstate migrant workers and provides for their conditions of service. It applies to every establishment, and to contractors, who employ five or more inter-state migrant workers. The Act has provision for issue of Pass-Book to every interstate migrant workmen with full details, payment of displacement allowance equivalent to 50% of monthly wages, payment of journey allowance including payment of wage during the period of the journey, suitable residential accommodation, medical facilities and protective clothing, payment of wages, equal pay for equal work etc[104]. The primary responsibility for enforcement of the provision of the Act lies with the central and the state governments or union territories in the establishment falling in the central and state spheres, respectively.

8.14. Personal right versus social right

As far as the fundamental rights in India are concerned, the freedom to join a trade union is not a social or collective right, but this freedom falls within the scope of an individual's right to form associations or unions. The first issue is whether freedom of association encompasses the positive entitlement to associate with others and the negative entitlement to refuse to do so. Will the freedom of individual association surrender to the trade union once the worker

[104] Government of India, Ministry of Labour and Employment, Annual Report 75 (2019-20)

joins the trade union? If the trade union cannot legally pursue the interests of its members, their right to freedom to join a trade union seems meaningless[105]. In some cases, workers' rights do not correspond to the interests of the trade union because the two rights differ in their nature and application. Sometimes, the choice of workers is a struggle with the interests of the association. While there seems to be a point to achieving a balance between trade union representation and individual freedom, there is no consensus on where that balances lies[106]. In such cases, the Government will intervene through laws to resolve disputes through democratic means.

Assessing the position of a trade union in a social system will be based on the quality of the state system in which it is represented. The Second Labour Commission points out that Trade union face a variety of limitations in taking effective action on workers issues, such as being weakened by fragmentation, disenchantment, poor unionisation and the pressures of globalisation[107]. But a democratic government must strengthen collective bargaining and ensure healthy employment. Since it is not practical to enforce the same standards by law in different industries, working hours, leave, and working conditions in the workplace can be determined through negotiations between the employer and the employee.

[105] *Supra* n 8 at 124
[106] *Id.* at 124
[107] *See* the recommendations of the Second National Commission on Labour, 2002.

Chapter 9

Right to strike: statutory safeguards and limitations

The term strike usually refers to the struggle for workers' rights. But the lessons of history teach the struggles for workers' rights and the struggle against slavery, the struggle for the right to life, the struggle for human rights, and the struggle against those in power to uphold democratic rights. Strike a weapon available to workers to gain favourable working conditions and decent wages against their employers. An analysis of the fundamental rights shows that workers have the same right to form an association or join trade unions as any other citizen. One of the challenges that governance has always faced in a democracy is regulating the right to strike in the workplace and selecting statutory criteria for it. This chapter examines the right of trade unions and other organizations to strike within the framework of Constitution of India and labour laws. Strike conducted by labour unions, freedom of association and trade union rights, and workers' right to strike are discussed in this chapter.

The labour movement is a movement of struggle through which workers are given minimum social security rights like the right to negotiate, collective bargaining, right to strike, etc. This was not achieved on a single day, but the

movement was spread over three centuries, from the late 18th century when the industrial revolution started.[1] During the industrial revolution, when large-scale labour was required in factories and mines, strikes became more popular as a tool for workers to free themselves from labour exploitation and slavery. More trade unions went on strike on the principle of collective bargaining. Collective bargaining and the right to form an association are recognized by industrial jurisprudence and supported by social justice. Striking and collective bargaining existed as a matter of social reality from the early days of industrial capitalism in the nineteenth century[2]. Justice Bhagwati, therefore, opined that the right to strike is integral of collective bargaining[3]. The right to strike has now been accepted as an indispensable component of a democratic society and a fundamental human right. Collective action is found a useful solution to settle controversial issues of employment conditions. Workers have been able to coordinate their demands and strategies.

The right to strike has now been accepted as an indispensable component of a fundamental human right as part of democratic procedure. The argument that the struggle of the workers is a political struggle can be validated because these struggles support their desire to be recognized as a society in a democratic political order, seeing their labour rights as part of their political

[1] A. Krishnaswamy, Calling Attention (Rule-197) on 18 August, 2004 at Lok Sabha
[2]Geoffrey England some thought on Constitutionalizing the Right to Strike, Queen's Law Journal 168, 188 (1988)
[3]*Gujarat Steel Tubes* v. *Gujarat Steel Tubes Mazdoor Sabha* AIR 1980 SC 1896

rights. There are several definitions available to the term 'strike'. Encyclopaedia of Britannica has defined labour strike as more comprehensive as follows:

> *Strike, collective refusal by employees to work under the conditions required by employers. Strikes arise for a number of reasons, though principally in response to economic conditions (defined as an economic strike and meant to improve wages and benefits) or Labour practices (intended to improve work conditions). Other strikes can stem from sympathy with other striking unions or from jurisdictional disputes between two unions. Illegal strikes include sit-down strikes, wildcat strikes, and partial strikes (such as slowdowns or sick-ins). Strikes may also be called for purely political reasons (as in the general strike)*[4].

This definition is simple and detailed as it first defines the meaning of the strike, which is the collective refusal of the workers to work and states the circumstances under which the strike may occur, which may be due to economic circumstances, working conditions, or sympathy for the other striking union. This definition does not rule out a strike for political reasons.

Lord Denning has defined the term strike in *Tram Shipping Corporation* v. *Greenwich Marine Incorp*[5]case as follows:

> *Strike is a concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a*

[4]https://www.britannica.com/topic/strike-industrial-relations, accessed on 16/08/2020
[5] (1975) ICR 261, at 276. See also *Miles V. Wakefield Metropolitan District Council* (1987)2 ALL E.R 1081, at 1097.

> *grievance or making a protest about something or sympathising with other workmen in such endeavour. It is distinct from stoppage brought by an external even such as a bomb scare or by apprehension of danger.*[6]

According to above definitions strike is a collective refusal of wok by workers in connection with rights of workers in their workplace. Strike is some kind of struggle, collective retention of workers to achieve a specific economic or political goal. The major reasons for conducting strike by workers in their workplace are improving wages; demanding for favourable conditions in workplace; giving vent to a grievance; protest about something; sympathising with other workmen in such endeavour; due to dispute between unions and other political reasons.

However, demand for increasing wages and favourable labour conditions in workplaces are the major cause for the strike in an industry. Three elements in the definition of a strike are deemed to be essential. One is the element of concerted action. The second is the stoppage of work. The third is that that the purpose of the cessation must be in connection with a dispute involving the terms of improving wages, working conditions, paving the way for grievances, as a protest, sympathising with other workmen etc.

[6] *Id.* at. 276.

Observations made by HANNEN, J,. in *Farrer* v. *Close*[7] is very relevant in this discussion.

> *A strike is properly defined as a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend on the means by which it is enforced and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of Hilton v. Eckersley (1855) 6 E B 47 ; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employed, or any other lawful purpose*[8].

Strikes are not necessarily illegal, and by this definition strikes can be classified into different categories based on the manner in which they are carried out and its object. A strike is an offense if it is part of a conspiracy to injure or harass employers or men. Some struggles may become illegal as a result of the employment contract, if such struggles deprive them of their freedom of action. Legal protection is available for peaceful struggles in which workers themselves participate by raising the wages of employees and other related benefits or any other legal purposes.

[7] (1869) 4 QB 602
[8] *Id.*

9.1. Right to strike – a conceptual basis

According to Tonia Novitz, the issues surrounding legal responses to strikes can be linked to current debates over governance, which continue to excite at national, regional, and global levels.[9] The content of good governance is controversial. At the very least, it may be said to be the rule of law which allows for law-making to be accessible, transparent, coherent, and effective. Beyond this, it is often claimed that democracy is becoming a universal standard. The basic precepts of international human rights law such as the statement in article 21 (1) of the Universal Declaration of Human Rights that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.[10] This trend raises important questions relating to the appropriate content of democracy, which are three models, i.e., representative, participatory, and deliberative forms of democracy.

The representative electoral system to be effective, subsidiary human rights should be protected. These are commonly said to be civil liberties, such as freedom of speech and rights to form associations and political rights of participation. Socio-economic rights such as health care and social security became established as prerequisites of legitimate democracy. Indeed, representative democracies can be seen as forming a continuum, which may be labeled libertarian at one extreme and socialist on the other, depending on the

[9] Tonia Novitz, *International and European Protection of the Right to Strike*, 14 (2003)
[10] *Id.*

kinds of socio-economic rights they respect and the extent to which these impinge on contractual freedoms and property rights exercised through markets[11]. Therefore, an effective government should appreciate the particular expertise of different interest groups and grant them representation in decision-making. The result has been advocacy of the corporatist inclusion of worker and employer representation in government in order to create a balance of power between the vested interests of capital and the collective power of labour.

9.1.1. Collective bargaining

Collective bargaining is an ongoing process of negotiation between representatives of workers and employer or employers association to establish the condition of employment. All agreement in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organization, or, in the absence of such organizations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.[12]

The collectively determined agreement may cover wages, hiring practices, layoffs, promotions, job functions, working conditions and hours,

[11] *Id.* at 17
[12] Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33, 35 (2000)

worker discipline and termination, and benefit programs[13]. Thus, collective bargaining is a process or activity leading up to the conclusion of a collective agreement. All agreement regarding working conditions and terms of employment shaped up from the process has to be put down in writing. The binding nature of collective agreement can be established either by legislature means or by the collective agreement itself, according to the method followed in each country.

Sydney and Beatrice Webb presented a classical model of collective bargaining in their famous book '*Industrial Democracy*'[14] as an economic model during the 19th century[15]. They did not define collective bargaining but produced many examples, such as the one below:

> *In unorganized trades, the individual workman, applying for a job, accepts or refuses the terms offered by the employer without communication with his fellow-workmen, and without any consideration other than the exigencies of his own position for the sale of his labour he makes, with the employer, a strictly individual bargain. But if a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position is at once changed. Instead of employer making a series of separate contracts with isolated individuals, he meets with collective will, and settles, in a single*

[13] https://www.britannica.com/topic/collective-bargaining (May 26, 2020, 12:29 PM).
[14] Sidney & Beatrice Webb, *Industrial Democracy*, Longmans, 538 (1902), *See also,* Bernad Germigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33, 35 (2000)
[15]Syed M. A. Hameed, *A Theory of Collective Bargaining,* Industrial Relations, 25 (3) Industrial Relations 531, 551 (1970)

agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged[16].

The above thought overlooked the role of employer and their associations and denied any possibility of individual contract in the absence of collective agreement. Therefore, it is considered an alternative model against individual contracting and is as exclusive a trade union method which substituted collective will for an individual bargain.

To facilitate the operation of the process of collective bargaining, a favourable political system with high growth opportunities and economic freedoms, a process to support pressure groups, in which the lobbying and decision-making pluralism and legal framework to protect various interest groups etc., are the preconditions for the better functioning of collective bargaining[17]. But it is not the same as selling a product, where both the seller and the buyer enter into an agreement about the eventual purchase. In collective bargaining, both parties force the other party to accept the conditions of one party in the form of socio-economic sanctions like strike and lockout. The primary purpose of collective bargaining is to determine the terms and conditions of employment, including wages. Therefore, three dimensions are required for it: one, the union as the certified bargaining agent of employees negotiating with an employer or their associations, second, the process backed

[16] Sidney & Beatrice Webb, *Industrial Democracy*, Longmans, 538 (1902)
[17] *Supra* n. 15 at 551

legal sanctions in the form of permissive strike or lockout, and finally, resolving the grievances of the parties[18].

Collective bargaining is not always an end-to-end solution to all disputes in industrial sectors to promote and maintain industrial unity. The bargaining depends upon the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations, it requires the minimum level of interference from the government. The state intervened through statutes facilitating certain mechanisms, such as conciliation, arbitration, courts, boards, and national industrial tribunals, to resolve disputes between employer and employee. In the presence of the government, the bilateral negotiations become a tripartite negotiation which the ILO promotes[19]. However, the government cannot intervene in the conclusions of collective bargaining unless it is contrary to public policy. Moreover, the government considers this process as an internal mechanism for determining the working conditions of an industry. Therefore, the state promotes collective bargaining to reduce its involvement in the determination of wages and other working conditions of workers.

9.1.2. Negotiations

Open warfare between employer and employees or their union will cause the industrial stoppage, which can be costly and disastrous for both parties. An

[18] *Id* at 538
[19] Bernad Germigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33, 34 (2000)

employer, on his business interests, buys cheap labour from the market; on the contrary, an employee always seeks wage increase and favourable working conditions. The question, then, is about the bargaining power of both parties. However, the parties try to find a solution through negotiations. The conflicts of interests of both parties can be settled through discussions to reach finally to an agreement. Negotiations may occur at the national, regional, or local level, depending on the structure of industry within a country. The voluntary nature of collective bargaining is explicitly laid down in the Convention No. 98[20] as it is a fundamental aspect of the principle of freedom of association[21]. Collective bargaining is effective only if both parties have done it in good faith, but since good faith cannot be imposed by law, it can only be the result of voluntary and persistent efforts by both parties.

The parties behind the collective agreement must ensure that the agreement is always legal and does not conflict with the existing laws of the country. For example, a union and an employer cannot use collective bargaining to deprive employees' rights they would otherwise enjoy under laws such as the civil rights statutes[22]. The binding nature of collective agreement can be established either by legislature means or by the collective agreement itself, according to the method followed in each country. The agreement is not

[20] Right to Organize and the Collective Bargaining Convention, 1949, art. 4
[21] Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva. Para 844
[22] *Alexander* v. *Gardner-Denver Co*, 415 U.S. 36, 94 (1974)

purely voluntary since employees and employers can resort to different types of legal tactics such as strikes and lockouts to pressure and force another party to accept the bargaining conditions.

9.1.3. Subjects of bargaining

Not all issues in a bargaining unit are negotiated or resolved by the parties. Some issues are designated as compulsory matters of bargaining in which the parties negotiate and reach an agreement. Mandatory issues are either prescribed by legislations or agreed upon by the parties on compulsory matters. Non-compulsory matters may be subject to bargaining, but it should not force another party to bargain. While most decisions made by an employer can affect employees, not all are compulsory issues of bargaining. However, it may be an unfair labour practice if one party refuse to bargain over a mandatory topic. The employer and the union are not required to reach agreement but must bargain in good faith over mandatory subjects of bargaining until they reach an impasse[23]. Arbitrary changes will be considered unfair work practices[24]. The employer should not refuse to bargain with the employee's representatives if they have the majority support of the employees in the bargaining unit. Once a valid representative has been selected, even workers who do not belong to the union are bound by the collective bargaining agreement and cannot negotiate

[23] *Louisiana Dock Co. v. NLRB*, 909 F.2d 281 [7th Cir. 1990]
[24]https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/labor/collective-bargaining (May 26, 2020, 12:29 PM).

individual contracts with the employer[25]. In some cases, trade unions may not have enough membership to represent workers before the forum, in which case the most representative union may have the opportunity to represent the entire workforce. The free election should be done to select a majority union unless it would be hampering right to free choice of the union of employees. The ILO instruments expressly authorize collective bargaining with the representatives of the workers concerned if there is no trade union to represent the workers in the area[26]. However, it warned that the existence of elected representatives is not used to undermine the positions of the trade unions concerned or their representations[27]

9.2. Right to strike in Indian context

According to the labour jurisprudence right to strike is an essential element of the principle of collective bargaining. The Bombay High Court explained it in the following words that the rationale behind the right to strike would be the inevitable process of collective bargaining.

> *The power of a management to shut down the plant which is inherent in the right of property would not be matched by corresponding power on the side of labour. If the workers could not as the last resort collectively refuse to work they could not bargain collectively. Strike and lock-out therefore constitute the essential elements of bargaining power of the*

[25] *J. I. Case Co.* v. *NLRB*, 321 U.S. 332
[26] *Supra* n.19 at 36
[27] Convention No. 135, article 5

> *two sides. There can be no equality with the bargaining power of the management without the freedom to strike. In protecting their freedom the law recognises the legitimate expectation of the workers, that they can make use of their collective powers. It corresponds to protection of the legitimate expectation of management that it can use the right of property for the same purpose on its side by declaring a lock out*[28].

The right to strike as an essential component of collective bargaining is equivalent to the employer's property rights over the industry. Right to strike, therefore, has been recognised by law consequent to organisation of labour and the process of collective bargaining[29]. It establishes a link between the right to strike and the freedom to form trade unions.

Section 2 (zk) of the Industrial Relations Code, 2020 defines strikes more comprehensively.

> *"strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment and includes the concerted casual leave on a given day by fifty per cent. or more workers employed in an industry*

Mere stoppage of work does not come within the meaning of strike unless it can be shown that such stoppage of work was a concerted action for

[28] *Bharat Petroleum Corporation v. Petroleum Employees Union* 2001 (2) Bom CR 447, (2001) 1 BOMLR 112
[29] *Id.*

the enforcement of an industrial demand. The strike is a temporary in nature that is the workers intended the withdrawal of their labour to temporary. They do not want to lose their jobs entirely, but merely to use the short-term withdrawal of their labour as a bargaining tool[30]. Organisers of strike will often place pressure upon others to join or support the action. Sometimes this is achieved through the mechanism of union rules, which oblige trade union members to abide by a majority decision in favour of a strike[31]. The Industrial Relations Code, 2020 has expanded the definition of strike by including the concerted casual leave on a given day by fifty per cent. or more workers employed in an industry.

9.2.1. Purpose of strike in an industry

The weapon of strike may be used by the organised employees for several purposes. To bring their own employer to take favourable decisions; to influence to other employers or business institutions to realise the issues which are faced by the employees; it may to influence government policy or prompt legislative reform on the basis of pro-labour movements.

[30]Contrary to this the employers who may wish to replace striking workers with more pliable employees.

[31]See Tonia Novitz, *International and European Protection of the Right to Strike*, (2003).The desire of striking workers to avoid conferring benefits on others who are unwilling to join them. This is known as 'free-rider problem.

Right to strike is recognised in industrial jurisprudence and supported by the concept of social justice. The observations made by Mr. Justice Krishna Iyer in this regard are very relevant in terms of progressive legal thought[32].

> *A selective study of the case law is proper at this place. Before we do this, a few words on the basis of the right to strike and progressive legal thinking led by constitutional guide lines is necessitated. The right to unionize, the right to strike as part of collective bargaining and, subject to the legality and humanity of the situation, the right of the weaker group, viz., labour, to pressure the stronger Party, viz., capital, to negotiate and render justice, are processes recognized by industrial jurisprudence and supported by social justice. While society itself, in its basic needs of existence, may not be held to ransom in the name of the right to bargain and strikers must obey civilized norms in the battle and not be vulgar or violent hoodlums, Industry, represented by intransigent Managements, may well be made to reel into reason by the strike weapon and cannot then squeal or wail and complain of loss of profits or other ill effects but must negotiate or get a reference made. The broad basis is that workers are weaker although they are the producers and their struggle to better their lot has the sanction of the rule of law. Unions and strikes are no more conspiracies than professions and political parties are, and, being for weaker, need succor. Part IV of the Constitution, read with Art 19, sows the seeds of this bargaining jurisprudence. The Gandhian quote at the beginning of this judgment sets the tone of economic equity in Industry. Of course, adventurist, extremist extraneously inspired and puerile Strikes, absurdly insane persistence and violent or scorched earth policies boomerang and are*

[32] *Supra* n. 3 AIR 1980 SC 1896

anathema for the law. Within these parameters the right to strike is integral to collective bargaining.[33]

In accordance with this observations right to strike is integral and concomitant right to collective bargaining accepted as the necessary legal right in the field of industrial jurisprudence subject to legality and humanity of the situation. This right is, therefore, a legal weapon of weaker group to pressure the stronger capitalists in the industrial relations. At the same time workers obey the norms of the society and not to be vulgar for pressuring their demands before the employers. The right to strike is fundamental to workers because the right to collective bargaining is enshrined in Part IV of the Constitution read with article 19. The Supreme Court had denied the right to fundamental rights under any provisions of Part III of the Constitution to workers' strike in an industry. The position that workers' strikes are protected in labour legislation is very clear, so it is a legal right rather than a fundamental right of workers.

9.2.2. Right to strike is not a fundamental right

Since the enactment of the Constitution in India, there has been much controversy over whether the right to strike is a fundamental right available to citizens under the scheme of the Constitution. The argument is based on the philosophical and historical experience of workers' struggles, from peace struggles and fasting led by Mahatma Gandhi to the armed efforts of extremists. Article 19 (1) (c) of the Constitution ensures right to form associations or

[33] *Id* page ----

unions or co-operative societies to citizens in India. The right to go on strike, however, is different in character. It is not joint or collective expression of views but is joint or collective action. It is believed that the term 'union' in the article 19 (1) (c) refers to the rights of workers to form trade unions and participate in trade union activities. It was thought that the right to strike was a fundamental right available to trade union activities by article 19 (1) (c).

The Constitutional Bench of the Supreme Court, however, in the *All India Bank Association* v. *National Tribunal*[34] rejected the argument that workers' unions have the right to strike as concomitant right to the associational right. One of the leading contentions of the *All India Bank Employee's Association* v. *National Industrial Tribunal*[35] was that the right to form an association guaranteed by article 19 (1) (c) of the Constitution carried with it the concomitant right to strike and otherwise the right to form association would be rendered illusory. The petitioners arguments were based on two reasons in this case. One is that the expression 'union' in addition to the word 'association' found in the article refers to associations formed by workmen for trade union purposes; the word union being specially chosen to designate labour or trade unions. The second was that the right guaranteed to form a union carries with it a concomitant right that the achievement of the object for which the union is formed shall not be restricted by legislation unless such

[34]AIR 1962 SC 171
[35] *Id.*

restriction were imposed in the interest of public order or morality[36].The court rightly observed as follows:

> *It is not controverted that workmen have a right to form "associations or unions" and that any legal impediment in the way of the formation of such unions imposed directly or indirectly which does not satisfy the tests laid down in clause (4) would be unconstitutional as contravening a right guaranteed by part III of the Constitution."*[37]

The court accepted that workers, like all citizens of India, have the fundamental right to form associations or unions particularly for formation of trade union. However, the court was afraid to grant a liberal interpretation to article 19 (1) (c) so as to prevent the right to strike for workers to get a status of fundamental right, because it would be absurd if the employers' union were to be given similar freedom. The court pointed out that the theory of learned counsel that a right to form unions guaranteed by sub-clause (c) of clause (1) of article 19 carries with it a fundamental right in the union so formed to achieve every object for which it was formed with the legal consequence that any legislation not falling within clause (4) of article 19 which might in any way hamper the fulfilment of those objects, should be declared unconstitutional and void under article 13 of the Constitution, is not a proposition which could be accepted as correct.[38]

[36] *Id.*
[37] *Id.* at para 18
[38] *Id.* at para 23

The court, therefore, rejected the doctrine of collective bargaining as part of workers' associational rights and stated that even a very liberal interpretation of sub-clause (c) of clause (1) of article 19 cannot lead to a conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise[39]. The theory of concomitant right that right to strike is a natural deduction from the right to form unions guaranteed by sub-clause (c) of clause (1) of article 19 was rejected by the court.

Is it right to approach the right to strike with the presumption that strikes will lead to violence? The law only supports peaceful strikes, otherwise protesters will be prosecuted. Since all struggles result in aggression, the approach of taking away the right to strike is not democratic. For example, the non-cooperation struggles and the satyagrahas led by Gandhiji were not only non-violent struggles but in fact the struggles gained world acclaim as peaceful struggles. Neither the common law nor the Fourteenth Amendment to the American Federal Constitution confers right to strike but in Indian Constitution deliberately incorporated right to form associations or unions as fundamental right to its citizens.

[39] *Id.* at para 24

The Mumbai High Court rightly explained the link between trade union right and freedom to form associations or unions under article 19 (1) (c) of the Constitution of India.

> *A complete denial or severe restriction of the freedom to strike in any country would indicate that the pretence of freedom of organization exists only on paper. Under the Indian Constitution, Article 19(l) (c) confers a right to form associations or Unions. This right to form associations or unions is subject to reasonable restrictions that may be imposed by law. Our Constitution guarantees the right to form association, not for gregarious pleasure, but to fight effectively for the redressal of grievances. Our Constitution is sensitive to workers' rights. Our story of freedom and social emancipation led by the Father of the Nation has evolved, from the highest of motives, combined action to resist evil and to right wrong even if it meant loss of business profits.*[40]

The observation of Bombay high court is relevant to determine the nature of right to strike in a legal system particularly connected it with the constitutional values. Workers must go on strike if they exercise the power of collective bargaining properly.

The right to strike is not a fundamental right as such, it is open to a citizen to go on strike or withhold his labour. But it is the necessary safety valve when the strike is properly applied in relation to industrial relations. It is a legitimate weapon in the matter of industrial relation. Every strike is not

[40] *Bharat Petroleum Corporation* v. *Petroleum Employees Union* 2001 (2) Bom CR 447, (2001) 1 BOMLR 112 page n.

illegal and the workers in any democratic state have the right to resort to strike whenever they are so pleased in order to express their grievances or to make certain demands.

9.3. Labour Legislations on right to strike

All major labour laws in India were created during the British period. British labour legislations and its practices greatly influenced and shaped Indian labour laws and the rights of workers in industrial relations. The inspiration and strength from the views expressed by the national leaders during the days of the freedom struggle and the influence of the Renaissance ideas brought about the necessary changes in the labour laws of independent India. Leaders have been influenced by international conventions and recommendations that are reflected in Indian labour laws. It has echoed in the debates of the constituent assembly debates and made necessary provisions in the Constitution. Labour laws have also been influenced by Conventions and human rights instruments emanating from the United Nations[41].

According to the Constitution of India, labour is a subject on the concurrent list where both the central and state legislatures are competent to

[41] http://nclcil.in/infobank/act/planning_commission.pdf, Labour legislations have also been shaped and influenced by the recommendations of the various National Committees and Commissions such as First National Commission on Labour (1969) under the Chairmanship of Justice Gajendragadkar, National Commission on Rural Labour (1991), Second National Commission on Labour (2002) under the Chairmanship of Shri Ravindra Varma etc. and judicial pronouncements on labour related matters specifically pertaining to minimum wages, bonded labour, child labour, contract labour etc

enact laws. As a result, a number of labour laws have been enacted by the Parliament of India to meet various aspects of workers and ensure their rights. Labour laws in India covers issues such as union certification, labour-management relations, collective bargaining and unfair employment practices; workplace health and safety; employment criteria, including public holidays, annual leave, working hours, unfair dismissal, minimum wage, dismissal procedures, and pay etc. Labour laws, therefore, not only regulate the employment relationship between the employee and the employer but also ensure the dignity of human workers and the need to protect and defend the interests of workers as human beings insured in Part III and IV of the Constitution.

Erstwhile Industrial Dispute Act, 1947, The Trade Union Act, 1926, Industrial Employment (Standing Orders) Act, 1946, Sales Promotion Employees (Conditions of Service) Act, 1976 were the major labour laws which ensures union activities and regulate them. There are state level legislations too on the subject. The Industrial Disputes Act 1947 and the Trade Unions Act 1926 were the primary pieces of Central legislations regulating right to strike in India. The Second National Commission of Labour has recommended that the provisions of all these laws be judiciously consolidated into a single law called the labour management relations law or law on labour management relations. Finally the Parliament consolidated three important

labour legislations namely Industrial Dispute Act, 1947, the Trade Union Act, 1926, Industrial Employment (Standing Orders) Act, 1947 into one Code known as Industrial Relations Code, 2020. The Industrial Relations Code, 2020 protects the activities of registered trade unions by providing that a trade union, office bearer or member of a registered trade union, shall not be subject to a suit or claim in a civil court alleging conspiracy or interference in trade or business[42].

9.3.1. The Industrial Relations Code, 2020

The Industrial Relations Code, 2020 (IRC) is a social welfare legislation enacted by Parliament to resolve industrial disputes and maintain a conducive industrial environment. If an employer denies or refuses to give its workmen some benefit or emoluments to which they are entitled to under the law or under the contract of service with the employer, the Act gives the concerned employees a weapon to force the employer to accede to their demands and give them their legitimate dues and vice versa. The Code ensures and protects union rights, collective bargaining and legal strikes.

The IR Code has introduced new conditions for carrying out a legal strike. Chapter VIII deals with strike and lock-out in an industry. The IR code has expanded to cover all industrial establishments for the required notice period and other conditions for a legal strike. Sixty days notice before the strike

[42] Industrial Relations Act, 2020, s. 16 and 17

is made mandatory in all industrial establishments, regardless of public utility services.

Strike done by employees in an industrial establishment is restricted under the provision of section 62 (1) of the Industrial Relations Code, 2020, therefore, no person employed in an industry shall go on strike in breach of contract. Sixty days notice given to employer is compulsory for lawful strike in an industry. The restrictions are strike is not be conducted within fourteen days of giving such notice; before the expiry of the date of strike specified in any such notice; during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings; during the pendency of proceedings before a Tribunal or a National Industrial Tribunal and sixty days, after the conclusion of such proceedings; during the pendency of arbitration proceedings before an arbitrator and sixty days after the conclusion of such proceedings, where a notification has been issued under sub-section (5) of section 42; during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award[43].

[43] The same restrictions are also applicable to conduct lock-out by employer.

9.3.1.1. Illegal strike

Determining factor of legality of strike under industrial jurisprudence is a question of fact,[44] therefore, it is judged in accordance with the facts and circumstances of every incident. If the strike is illegal, workers also suffer because they are not paid during the strike, so the trade unions try to avoid illegal strikes in the industry, so they will ensure that workers' strikes comply with the provisions of the law. It is submitted that the Supreme Court observations on this regard are very relevant to the point.

> *It is well settled that in order to entitle the workmen to wages for the period of strike, the strike should be legal as well as justified. A strike is legal if it does not violate any provisions of the statute. Again, a strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike was justified or not is a question of fact which has to be judged in the light of the facts and circumstances of each case. It is also well settled that the use of force or violence or acts of sabotage resorted to by the workmen during a strike disentitles them to wages for the strike period*.[45]

The essence of the court's observation is that a decision can only be made by examining the facts and possibilities of the strike to see if it can be justified. Calcutta High Court has a different opinion that a determination of legality of strike is not purely a question of fact which cannot go into the court

[44] *LIC* v. *Amalendugupta* (1988) II LLJ 495 Cal, MANU/WB/0387/1988, In this case the Division Bench of the High Court of Calcutta upheld the decision of the Single Bench in *Amelendu Gupta v. LIC* on 25th Aug, 1982

[45] *Crompton Greaves Ltd.* v.*The Workmen,* 1978 IIL.L.J, 80

of law.[46] Workmen are not entitled to any wages if they went on unjustified, illegal strikes.

9.3.1.2. Strike is a lawful weapon

According to the basic principle of trade unions, the right to strike is the last legal weapon that workers can use to gain employment rights when all avenues for resolving labour disputes are closed. This is an essential element of the principle of collective bargaining and as stated by an eminent English Judge, the right to strike is an implication read into the contract by the modern law as to trade disputes.[47]The 'right to strike' is a set of rights, defences and protections that allow a group of workers to cessation their employment without ending their employment relationship with their employer and without leading to civil liability for their actions. Thus, it is a protection while taking an industrial action within the legal framework.[48]

9.3.1.3. Last resort

A number of provisions have been added to the law to prevent disputes from escalating into strikes. The law requires that every industry that employs more than 100 workers form a working committee, which requires an equal

[46]*Amalendu Gupta And Ors. vs Life Insurance Corporation* (1982) IILLJ 332 Cal
[47]AndhraPradesh High Court in the case of *Andhra Pradesh State Road Transport Corporation Employees' Union* v. *The Andhra Pradesh State Road Transport Corporation*., (1970) Lab. I.C. 1225,
[48] Human Rights Features , voice of Asia Pacific Human Rights Network, HRF 121/05, 24 June 2005

number of representatives from both sides[49]. The selection of labour representatives should be made in consultation with the registered trade unions and then from the workers of the respective industries[50]. The main functions of the work committee are to promote measures to secure and protect the friendly and cordial relationship between employer and employee, to express their views on matters of public interest or concern, and to try to resolve differences between employer and employees in the industry[51]. The law stipulates that there should be a grievance committee in industrial establishments employing 20 or more workers.[52] The grievance redressal committee will have equal members representing the employer and the workers to be selected. The Chairperson of the Committee shall be elected on a rotational basis each year from among the persons representing the employer and the workers[53].

In *Syndicate Bank* v. *K. Umesh Nayak*[54], Justice Sawant opined that strike, as a weapon, was evolved by the workers as a form of direct action during their long struggle with the employer, it is essentially a weapon of last resort being an abnormal aspect of employer-employee relationship and involves withdrawal of labour disrupting production, services and the running of enterprise. Only under extreme situations when the alternative mechanisms

[49] Industrial Relations Code, 2020, s. 3 (1)
[50] *Id* at s. 3 (2)
[51] *Id* at s. 3 (3)
[52] *Id* at s. 4 (1)
[53] *Id* at s. 4 (2) and (3)
[54] 1994 (5) SCC 572

have totally failed to provide any amicable settlement, can they resort to a strike as a last resort.

As strikes, however, produce economic dislocation of varying intensity of magnitude, a system has been devised by which compulsory industrial adjudication is substituted for the right to strike. This is the ratio underlying the provisions of the Industrial Code 2020 under which government is empowered in the event of an industrial dispute which may ultimately lead to a strike or lock-out or when such strikes or lock-outs occur, to refer the dispute to an impartial Tribunal for adjudication with a provision banning and making illegal strikes or lock-outs during the pendency of adjudication proceedings. The provision of an alternative to a strike in the shape of industrial adjudication is a restriction on the fundamental right to strike and it would be reasonable and valid only if it were an effective substitute.

9.3.1.4. Lock-out

Labour law jurisprudence widely accepts the weapon of lock-out used by employers against their employees as the use of strikes by employees. A lock-out takes place when an employer deliberately excludes workers from their workplace, and refuses to pay them for the availability of their labour. This may be done as an offensive strategy to keep wage and other claims to a minimum, especially when bargaining is due to commence at the expiry of a collective

agreement. It may even be used as a method by which unilaterally to change terms and conditions of employment[55].

9.3.1.5. Public utility services

Public utilities are organizations, companies, or corporations that provide essential services to the public. Institutions that provide basic services such as electricity, water, gas, electricity and transportation are covered by public utility services. Employees of such establishments have the right to association for their benefits, but they do not have any right to conduct or participate in strikes. The general view is that restrictions are necessary for the right to strike in public utility services, but the main question here is whether it is possible to ban strikes altogether.

In *All Indian Central Government* v. *Union of India*[56] an important question raised before the Delhi High Court about the nature of the All India

[55] Industrial Relations Code, 2020, s. 63 (2) says:
No employer of an industrial establishment shall lock-out any of his workers—
(a) without giving them notice of lock-out as hereinafter provided, within sixty days before locking-out; or
(b) within fourteen days of giving such notice; or
(c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or
(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings; or
(e) during the pendency of proceedings before a Tribunal or a National Industrial Tribunal and sixty days, after the conclusion of such proceedings; or
(f) during the pendency of arbitration proceedings before an arbitrator and sixty days after the conclusion of such proceedings, where a notification has been issued under sub-section (5) of section 42; or
(g) during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award.

Central Government Health Scheme (CGHS) is whether it is an industry or a government? The Employees Association of Health Scheme appealed against the tribunal's decision, arguing in court that the strike was not illegal because the association had followed legal procedures prior to the strike. The tribunal in this case relied on the judgment of Supreme Court in *T.K.Rangarajan* v. *State of TN*[57] case. The court ruled that since CGHS was a public utility service, the Employees Association's strike cannot be justified even if the Employees Association gives notice of strike.

The Industrial Relations Code prohibits unannounced strikes and lock outs in all industrial establishments. No employee or workers shall breach the contract 60 days prior to the strike, or within 14 days of giving such notice, or before the expiration of any date given in the strike notice. In addition, there shall be no strike within seven days of the conclusion of any conciliation proceedings or such proceedings before an industrial tribunal or 60 days after the conclusion or in proceedings. The Industrial Disputes Act, 1947, imposed such restrictions on strikes only in public utility services. However, the current code extends it to all establishments.

The classification of public utility services and other industrial entities is no longer relevant as the Industrial Relations Code removes public utility

[56] Decided on May 4, 2009 reported in https://indiankanoon.org/doc/196027402/ accessed on 03/0/2019
[57] AIR 2003 SC 3032

services. The IRC makes the exercise of the right to strike difficult by extending the mandatory requirement of advance notice to all industrial workers.

The right to life enshrined under article 21 of the Constitution of India, would include the right against denial of treatment or even from being prevented from availing the services of any doctor or any other member of the staff from attending to patients and rendering medical assistance to them[58]. Delhi high court in *Motion* v. *All India Institute of Medical Sciences*[59] case held that the court was fully aware of ordinary right of the employees to agitate their grievances by way of peaceful action, including resorting to strikes. However, the court struck a different note in so far as hospitals, which are of public utility service, are concerned and concluded that in such public utilities there should not be any activity in the nature of strike, dharna or demonstration, etc. Since the all important facilities for life savings being located close to the entrance it would be appropriate and in the interest of justice and also in public interest, that there should be no activity in the nature of strike, dharna or demonstration or gherao at, or in, or around the AIIMS at all.

The impact of a strike on a hospital is quite different from that of a factory or business. Hospital activity is not the same as the lifeless functioning of machines in a factory, or movement of trading material or other forms of

[58] *Surjeet Singh* v. *State of Punjab* 1996 (2) SC 11
[59] 2002 (64) DRJ 418, 2002 (94) FLR 408, (2002) IIILLJ 424 Del

commerce[60]. Unlike financial losses, the loss of life or limb cannot be recouped. Hospitals are also public utility service within the meaning of Industrial Disputes Act. The 1982 Amendment to the Industrial Disputes Act exempted hospitals from the definition of 'industry'. This reinforces the view that hospitals have to be treated as a class apart from industry.

The primary goal of forming a trade union is collective bargaining, a powerful weapon for that purpose. But strikes everywhere are not necessarily a powerful weapon. In such circumstances trade unions mostly prefer to settle the dispute by means of negotiations with employer. In essential services trade union right is not been denied since the right to form associations or union is fundamental right, so, collective bargaining can be exercised by the employees union by the means of peaceful negotiations or means of other than to going on strike. The right to strike is not an integral part of the right to form associations and unions in essential services[61]. Therefore the court observed that issues may be settled by means of peaceful negotiation or means other than that of going on strike.

9.4. International Approach on right to strike

The International Labour Organisation (ILO) is an international organization committed to protecting labour rights. The right of workers in the

[60]*Supra* n.56 at para 9
[61]*Nagar Singh* v. *The State* 1962 CriLJ 78

labour sector to organize and the right to collective bargaining were guaranteed by its fundamental treaties. Examining the sources of the right to strike under international law will help to formulate a framework for assessing the situation in India.

9.4.1. ILO Conventions and right to strike

The ILO does not expressly deal with the right to strike; however, the various instruments of ILO have recognised it as an extent of freedom of association and collective bargaining. Tonia Novitz puts it:

> *In the sphere of industrial relations, the ILO is the most obvious source of guidance. There is no ILO instrument which deals specifically with the appropriate scope of a right to strike. Nevertheless, the jurisprudence developed under ILO auspices on the subject of 'freedom of association' indicates that workers have a civil, political, and socio-economic entitlement to defend their interests through collective action.*[62]

The absence of explicit provisions does not mean that the ILO disregards the right to strike or refuses to deal with the appropriate means of safeguarding its protection[63]. Significantly, two resolutions of the International Labour Conference which provided guidelines for ILO policy emphasise recognition of the right to strike in member states. The first resolution, Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the

[62] *Supra* n. 9 at 3
[63] *See* ILC, 30th Session, 1947, Report VII, Freedom of Association and Industrial Relations.

International Labour Organisation called for the adoption of laws to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers. The second resolution, resolution concerning trade union rights and their relation to civil liberties called for action in a number of ways with a view to considering further measures to ensure full and universal respect for trade union right in their broadest sense, paying particular attention, *inter alia*, to the right to strike.[64]

The ILO acknowledges the existence of workers' rights to industrial action. There is abundant evidence that the ILO acknowledges the existence of workers' rights to industrial action. This can be seen from the decisions of the ILO Supervisory bodies, especially those of the Committee on the Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CFA has ruled that strikes are part and parcel of trade union activities. The Committee proclaims the right to strike as one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests[65]. The ILO supervisory bodies have always referred to the right to

[64] B. Gernigon, A. Odero, and H. Guido, *ILO Principles Concerning the Right to Strike*,1, 137(4*)* International Labour Review (1996); *see* also J. Hodges-Aeberhard, and O. Odero, *Principles of the Committee on Freedom of Association Concerning Strikes*, 543- 545, 126(5) International Labour Review, (1987)

[65] ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session, 1994, Geneva , Report 111

strike when they have considered applications of Articles 3[66] and 8[67] of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87) by the various member states. The ILO does not consider the right to strike as an absolute right. Therefore, the ILO Supervisory Bodies emphasized the principle of the right to strike subject to legitimate and reasonable restrictions.

The general prohibition or restriction of the right to strike is, therefore, contrary to international labour law. Examination of records reveals that the ILO made three main concerns against the right to strike. The first concern is about the members of police and armed forces to strike. The ILO agrees with the principle that the police and the armed forces should not strike that they are excluded from the ambit of Convention No. 87 that is Freedom of Association and Protection of the Right to Organise Convention, 1948. The second concern is that certain employees in the public service may be barred or restricted from exercising their right to strike provided this only covers those public servants 'exercising authority in the name of the state'. Third concern is relates to employees in 'essential services', which are restrictively defined as services

[66]Freedom of Association and Protection of the Right to Organise Convention 1948, Art. 3 lays down the right of workers' organisations to organise their activities and to formulate their programmes freely and states that the public authorities shall "refrain from any interference which would restrict this right or impede the lawful exercise thereof."

[67] Freedom of Association and Protection of the Right to Organise Convention 1948, Art. 8 provides that the law of the land which organisations and their members must respect, must not "be such as to impede, nor shall it be applied as to impair, the guarantees provided for in this Convention."

whose interruption would endanger the life, personal safety or health of the whole or part of the population[68].

9.4.2. Other international and regional instruments

The International Covenant on Economic, Social and Cultural Rights of 1996 is the major international human rights instrument which explicitly recognises the right to strike in article 8(1) (d) of the Covenant to the effect that the States parties to the present Covenant undertake to ensure, *inter alia*, the right to strike, provided that it is exercised in conformity with the laws of the particular country. article 2 (1) of the Covenant provides that each State party to the present Covenant undertakes to take steps, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including the adoption of legislative measures.

At the regional level, article 6 (4) of the European Social Charter of 1961 (revised 1996) expressly recognizes the right to strike in the event of a conflict of interests, subject to the obligations resulting from collective agreements in force. The Community Charter of Fundamental Social Rights of Workers of 1989 provides another explicit source where the importance of the right to strike is clearly acknowledged by the European Union. The right to

[68] ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session, 1994, Geneva , Report 111

strike is also affirmed by the European Union of Charter of Fundamental Rights of 2000. Article 27 of the Inter-American Charter of Social Guarantees of 1948 stipulates that 'Workers have the right to strike. The law shall regulate the conditions and exercise of that right.' The right to strike is also recognized in article 8(1) (b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[69]. The African Charter of Human Rights, 1981, even though it does not specifically provided the right, refers to the right of employees to strike from reading articles 5, 10 and 15, which support the basis of the right to strike[70]. These provisions give impetus to trade unions to perform their activities in the protection of the legitimate interests of workers, including the right to strike.

[69] Additional Protocol to the American Convention on Human Rights, art. 8

1. The States Parties shall ensure:
   a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
   b. The right to strike.
2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
3. No one may be compelled to belong to a trade union.

[70] African Charter of Human Rights, art. 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status … all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. Article 10 provides that "Every individual shall have the right to associate provided he abides by the law" Article 15 Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work..

The right to strike has been recognised as crucial in the process of collective bargaining. Individual contracts of employment allow little scope for employees to influence to employer to bring consensus on better employment conditions. While the right to strike is not explicitly included in the list of fundamental rights in the Constitution of India, article 19 enumerates the right to freedom of speech and expression, to assemble peaceably without arms, and to form associations or unions under article 19(1) (a) to (c). Therefore, in the general sense, the right to strike is a combination of these rights so clearly stated.

Chapter 10

Associational rights: government employees and other public employees

As the role of the state increased, and the concept of the welfare state became stronger, all spheres of human beings came under the influence of the state. The transformation to the welfare state required its missionaries to intervene in the day-to-day activities of the subjects. Schools and health centres were established and maintained, and even public transport services were taken over. The management of all these welfare activities required many workers under the direct control of the government, and the state became one of the largest employers in the welfare state. The state had to impose restrictions on workers engaged in government emergency services, especially in services that maintain official secrets of the government. Moreover, government employees' political opinions and activities can be detrimental to the implementation of government policies. In order to maintain professional integrity and efficiency in public employment, certain restrictions are required on freedom of political opinion, the right to form an association, etc. Naturally, there may be conflicts between employees and the government over the violation of the fundamental rights of public servants. Therefore, the following questions are relevant: Does

a citizen have to surrender his fundamental rights while entering government service? If restrictions are necessary for government employees, what kind of restrictions are to be imposed? Are all services subject to restrictions? This chapter mainly discusses these questions.

A constitutional or non-constitutional independent body carries out recruitment to government services in accordance with constitutional principles to select people for public services[1]. The agencies for recruitment publish notifications inviting applications for selection to various posts in government

[1] Constitution of India, art. 315. Public Service Commissions for the Union and for the States –

(1) Subject to the provisions of this article, there shall be a Public Service commission for the Union and a Public Service Commission for each State.
(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint Commission to serve the needs of those States.
(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.
(4) The Public Service Commission for the Union, if requested so to do by the Governor of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.
(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

Staff Selection Commission - The Government of India, in the Department of Personnel and Administrative Reforms vide its Resolution No. 46/1(S)/74-Estt.(B) dated the 4th November, 1975 constituted a Commission called the Subordinate Services Commission which has subsequently been re-designated as Staff Selection Commission effective from the 26th September, 1977 to make recruitment to various Class III (now Group "C") (non-technical) posts in the various Ministries/Departments of the Govt. of India and in Subordinate Offices. The functions of the Staff Selection Commission have been enlarged from time to time and now it carries out the recruitment also to all Group "B" posts in the pay scale of Rs 9300 to 34800 with a grade pay of Rs 42000 The functions of the Staff Selection Commission were redefined by the Government of India, Ministry of Personnel, Public Grievances and Pensions vide its Resolution No.39018/1/98-Estt.(B) dated 21st May 1999 (may be seen under the heading Resolution). The new constitution and functions of the Staff Selection Commission came into effect from 1st June 1999.

services, conduct written test and or practical, or physical efficiency test and interview, publish ranked lists based on the performance of the candidates and advise qualified candidates for appointment strictly based on their merit and observing the rules of reservation. Civil servants have no special constitutional status separate from the minister they serve and have no right to reveal confidential information in the public interest[2].

As per Rule 2(h) of Central Civil Services (Classification, Control, and Appeal) Rules, 1965[3] 'government servant' means a person who is a member of a Service or holds a civil post under the union, and includes any such person on foreign service or whose services are temporarily placed at the disposal of a state government, or local or other authority; a person who is a member of a service or holds a civil post under a state government and whose services are temporarily placed at the disposal of the central government; and finally a person who is in the service of a local or other authority and whose services are temporarily placed at the disposal of the central government.

In the absence of any restrictive definition, the expression employee includes within its ambit, permanent, temporary, regular, short-term, *ad hoc*,

[2] Collins Dictionary of Law (2006)
[3] Central Civil Services (Classification, Control and Appeal) Rules, 1965 promulgated by the President of Indian in exercise of the powers conferred by proviso to Article 309 and Clause (5) of Article 148 of the Constitution and after consultation with the Comptroller and Auditor-General in relation to persons serving in the Indian Audit and Accounts Department.

and contractual employees[4]. A public servant is an expression of wide amplitude. It covers the employees mentioned and appointed by the Public Service Commissions and other government agencies and those covered by certain statutes, e.g., the Prevention of Corruption Act, 1988, and the Indian Penal Code[5]. However, in many decisions, the Supreme Court has given restrictive interpretations to the term public servants[6]. But the purpose of this chapter discusses the right to form associations or unions for permanent employees under governments.

10.1. Restrictions of associational freedoms to armed forces

All citizens can enjoy fundamental rights in India. Some of them are applicable even for foreigners, artificial persons, etc., but certain groups of people are restricted to enjoy the rights considering their nature of works and duties. By virtue of article 33, Parliament is empowered to enact a law in determining as to what extent any of the rights conferred by Part III shall, in their application, to the members of the armed forces or forces charged with the maintenance of public order, be restricted or abolished to ensure the proper

[4] Sararaditya Pal, *Law Relating to Public Service*, 3 (2011)
[5] Section 2 (c) of the Prevention of Corruption Act, 1988 has define public servants.
In *Central Bureau of Investigation* v *Ramesh Gelli* (2016) 3 SCC 788 the Supreme Court expands the definition of public servant. The managing director and chair of a private banking company were held to be public servants for the purposes of prosecution under the Prevention of Corruption Act 1988. In *State of Maharashtra* v. *Prabhakar Rao*, (2002) 7 SCC 636, the Supreme Court held that the definition of Public Servant under section 21 of IPC is of no relevance under the Prevention of Corruption Act, 1988.
[6] *UPSC* v. *Girish Jayantilal*, AIR 2006 SC 1165, the Supreme Court held that the term "government servant" did not include contractual employee.

discharge of their duties and the maintenance of discipline among them[7]. The provision directs that Parliament may, by law, determine to what extent any of the rights conferred by Part III of the Constitution shall, in their application to, (a) the members of the armed forces; or (b) the members of the forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organization established by the state for purposes of intelligence or counterintelligence; or (d) persons employed in, or in connection with, the telecommunication systems set up for any force, bureau, or organization referred to in clauses (a) to (e) be restricted or abrogated to ensure the proper discharge of their duties and the maintenance of discipline among them.[8]

Under article 19 (1) (c) of the Constitution, the fundamental right of members of the Army to form associations or unions enjoyed by every citizen is revoked due to the nature of the duties performed by members of the army and the importance of discipline among them.

In *Ous Kutilingal Achudan Nair* v. *Union of India*,[9] the Supreme Court interpreted article 33 of the Constitution. It held that the employees who are even not the defense members in a strict sense but part of the defence establishment are to be considered the members of the defence. Therefore, the

[7] Fiftieth Amendment to curtailment of fundamental rights as per Part III of the Constitution as prescribed in article 33 to cover Security Personnel protecting property and communication infrastructure.
[8] Detailed discussion on this see chapter VI – Restrictions and Exceptions
[9] AIR 1976 SC 1179, 1976 SCR (2) 769

right to form a trade union under article 19 (1) (c) does not apply to them. In *Gopal Upadhyaya* v. *Union of India*[10], The registration of the trade union had ceased given the decision of the Supreme Court in *Ous Kutilingal Achudan Nair* v. *Union of India*[11] and pointed out that the registration was initially granted under a mistake and, therefore, was cancelled. This order of cancellation of registration of the union was challenged before the Supreme Court under article 32 of the Constitution. The court held that since union members are subject to the Army Act and the Rules made thereunder, the union cannot be validly registered.

Both of these important decisions of the Supreme Court upheld the strict restrictions enshrined in article 33 of the Constitution. They declared that these restrictions apply to other members who are not part of the armed forces. So, it is clear that civilian members of defence organizations should not be part of any associations or trade unions and they cannot claim the protection of article 19 (1) (c) of the Constitution.

10.2. Government employees

Article 309[12] of the Constitution is the source of the power to enact service laws. It enables the legislature to legislate on the appointment and terms

[10] 1986 (Supp) SCC 501
[11] *Supra* n. 9
[12] Constitution of India, art. 309 : Recruitment and conditions of service of persons serving the Union or a State – Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of

of service of persons appointed to public services and posts in connection with the affairs of the union or states. The executive authorities shall make rules in the matters of the union and the respective states until appropriate legislation is enacted on these matters[13]. Once the appropriate legislature has exercised its powers, the executive is exempted from exercising its legislative power unless the legislature authorizes it. So it may continue to have the rule-making power in the hands of executive authorities in areas that the legislation has not covered[14].

Service rules of conduct indicate that government employees should always maintain complete integrity and devotion to duty, trust, and responsibility[15]. He must be honest and impartial in carrying out his official duties. Those in positions of responsibility should ensure that all individuals are

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persons appointed, to public services and posts in connection with the affairs of the Union or of any State:
Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.

[13] Proviso of art. 309 of the Constitution

[14] *A.B. Krishna* v *State of Karnataka,* AIR 1998 SC 1050

[15] In exercise of the powers conferred by the proviso to article 309 and clause (5) of article 148 of the Constitution and after consultation with the Comptroller and Auditor General in relation to persons serving in the Indian Audit and Accounts Department, the President hereby makes the following rules, namely: All India Services (Conduct) Rules, 1954, the Central Civil Services (Conduct) Rules, 1964

treated equally and that no one is given special treatment[16]. Governments have no doubt that their officials fully appreciate the need to maintain a high level of neutrality and ensure that their behavior lies in their power that their behaviour gives no room for any possible suggestions to the contrary[17].

On many occasions, the courts had doubts about the true nature of the workers working under the state, as the state was engaged in several activities and maintained law and order in the society. In such cases, they were interpreted at the behest of industrial law, but here the Supreme Court considered various decisions[18] to find out the true nature of the work under the State. The Bombay High Court summarised the rule as follows:

> *The important test for deciding whether any business, trade, or a calling of an employer, service, employment a vocation or occupation of an employee constitutes an industry within the meaning of the Act is not only the character of the activities indicated by the works included in the definition but their form and organization in relation to the employed labour force as an active and creative agent for achieving the fruits of the activity. It should be an activity that is predominantly carried on by the employment of an organized labour force for the production or*

[16] Constitution of India, arts. 14 and 16 guarantee equal treatment of all persons in India when making appointments to the public services.
[17] MHA OM No. 41/2/55, dated 23.04.1955
[18] *See State of Bombay* v *Hospital Mazdoor Sabha* AIR 1960 SC 610, *Coprn of City of Nagpur* v *Its Employees* AIR 1960 SC 675

distribution of goods or rendering of material services to the community at large or a part of such a community.[19]

The nature of the activities performed by the workers and the actual nature of the relationship between the employer and the employee are the factors that determine the true nature of the workers working under the state. Therefore, the most important thing is to check whether the employees are government employees or not. If employees are found to be government employees, it can check what kinds of restrictions are imposed on them. The next step is to examine how the laws govern the freedom of associations or unions as guaranteed by the Constitution.

10.2.1. All India Services (Conduct) Rules, 1968

Article 312 of the Constitution of India empowers Parliament to create all Indian services common to the Union and the States. All India services are defined under the All India Service Act, 1951, which includes the Indian Administrative Service (IAS)[20], the Indian Police Service (IPS), any other service of the central government by notification. Indian Service of Engineers (Irrigation, Electricity, Buildings, Roads), Indian Forest Service, Indian Medical Service, and Health Services[21] are all India services. These three services comply with the All India Services Rules relating to pay, conduct,

[19] *Vasudevan* v. *S.D.Mittal* AIR 1962 Bom 53, para 68
[20] All India Services Act, 1951, s. 2
[21] *Id.* s. 2 (A)

leave, various allowances, etc. The all India service is governed by the All India Service (Conduct) Rules, 1968[22], which defines the Code of Conduct for Civil Service.

Political affiliation or political activities of employees under all India services is banned under rule 5 of the All India Services (Conduct) Rules, 1968[23]. He cannot exercise his associational rights to become members of or affiliate with any political party or organization associated with any political party or movement[24]. The rule barred him from becoming a member of any political party and barred family members from joining a political party. If an employee is unable to prevent his or her family member from attending a political party, the employee will submit a report to the government[25]. The rule prevents civil servants from making any criticism, statement or communication through medias or in any document published anonymously, pseudonymously which effect an adverse criticism of any current or recent policy or action of the

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[22] The Government of India, in consultation with the concerned State Governments, has enacted the All India Service (Code of Conduct) Rules, 1968, in exercising the powers prescribed by subsection (1) of section 3 of the All India Service Act.

[23] All India Services (Conduct) Rules, 1968, rule 5. Taking part in politics and elections.—5(1) No member of the Service shall be a member of, or be otherwise associated with, any political party or any organization which takes part in politics, nor shall he take part in, or subscribe in aid of, or assist in any other manner, any political movement or political activity.

[24] *Id.* rule 5 (1)

[25] *Id.* rule 5 (2) It shall be the duty of every member of the Service to endeavour to prevent any member

> of his family from taking part in or subscribing in aid of or assisting in any other manner, any movement of, activity which is, or tends directly or indirectly to be subversive of the Government as by law established, and where a member of the Service is unable to prevent member of his family from taking part in or subscribing in aid of, or assisting in any other manner, any such movement of activity, he shall make a report to that effect to the Government.

central government or a state government or which is capable of embarrassing the relations between the central government and any state government or which is capable of embarrassing the relations between the central government and the government of any foreign state[26].

10.2.2. Central Civil Service (Conduct) Rules 1964

A government servant is defined as any person appointed by the government to any civil service or post in connection with the affairs of the union and includes a civilian in a defence service[27]. An explanation was given to the rule that a government servant whose services are placed at the disposal of a company, corporation, organization or a local authority by the government

[26] *Id.* rule 7 Criticism of Government.— No member of the Service shall, in any radio broadcast 16or
own name or in the name of any other person or in any communication to the press or in any public utterance, make any statement of fact or opinion,—
i. Which has the effect of an adverse criticism of any current or recent policy or action of the Central Government or a State Government; or
ii. which is capable of embarrassing the relations between the Central Government and any State Government; or
iii. which is capable of embarrassing the relations between the Central Government and the Government of any Foreign State:
Provided that nothing in this rule shall apply to any statement made or views expressed by a member of the Service in his official capacity and in the due performance of the duties assigned to him. (GOI Instructions: D.P. & A.R. letter No. 11017/9/75-AIS(III), dated the 2nd March, 1976, reproduced under Miscellaneous Executive Instructions at the end of these Rules)

[27] Central Civil Service (Conduct) Rules 1964, rule 2 (b) Government servant" means any person appointed by Government to any civil service
or post in connection with the affairs of the Union and includes a civilian in a Defence Service;
EXPLANATION.–A Government servant whose services are placed at the disposal of a company, corporation, organisation or a local authority by the Government shall, for the purpose of these rules, be deemed to be a Government servant serving under the Government notwithstanding that his salary is drawn from sources other than the Consolidated Fund of India.

shall, for the purpose of these rules, be deemed to be a government servant serving under the government notwithstanding that his salary is drawn from sources other than the consolidated fund of India[28]. The rules apply to any person assigned to the civil service or a post in the defence service, including a civilian, in connection with the affairs of the union; however, certain posts do not fall within the scope of this rule. They are the railway servant as defined in section 3 of the Indian Railways Act, 1890 and relevant posts under Railway Board, member of all India service and a holder of any post in respect of which the president has, by a general or special order, directed that these rules shall not apply[29].

Every government servant shall at all times maintain political neutrality[30]. rules 5 to 9 of the Central Civil Service (Conduct) Rule deal with associational freedom and its restrictions to government employees. The servants should in no way be part of any political party or organization participating in politics or support such movements. Government employees must try to prevent any member of his family from participating or helping in politics[31]. The rule also prevents public servants to become a member of any

[28] *Id.* rule 2 (b)
[29] *Id.* rule 1 (3)
[30] *Id.* rule 3 (1) (vii)
[31] *Id.* rule 5.Taking part in politics and elections
(1) No Government servant shall be a member of, or be otherwise associated with, any political party or any organisation which takes part in politics nor shall he take part in, subscribe in aid of, or assist in any other manner, any political movement or activity.

association or to remain a member of an association that acts prejudicial to the interests of the sovereignty and integrity of India or for the common order or morality[32]. The rule prevents government employees from engaging themselves or participates in any demonstration involving any issue of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or contempt of court or demotion or incitement to an offense[33]. No government employee should criticize the policy

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(2) It shall be the duty of every Government servant to endeavour to prevent any member of his family from taking part in, subscribing in aid of, or assisting in any other manner any movement or activity which is, or tends directly or indirectly to be, subversive of the Government as by law established and where a Government servant is unable to prevent a member of his family from taking part in, or subscribing in aid of , or assisting in any other manner, any such movement or activity, he shall make a report to that effect to the Government.

(3) If any question arises whether a party is a political party or whether any organisation takes part in politics or whether any movement or activity falls within the scope of sub-rule (2), the decision of the Government thereon shall be final.

(4) No Government servant shall canvass or otherwise interfere with, or use his influence in connection with or take part in an election to any legislature or local authority:

Provided that –

(i) a Government servant qualified to vote at such election may exercise his right to vote, but where he does so, he shall give no indication of the manner in which he proposes to vote or has voted;

(ii) a Government servant shall not be deemed to have contravened the provisions of this sub-rule by reason only that he assists in the conduct of an election in the due performance of a duty imposed on him by or under any law for the time being in force.

EXPLANATION.- The display by a Government servant on his person, vehicle or residence of any electoral symbol shall amount to using his influence in connection with an election within the meaning of this sub-rule.

[32] *Id.* rule 6. Joining of associations by Government servants No Government servant shall join or continue to be a member of, an association the objects or activities of which are prejudicial to the interests of the sovereignty and integrity of India, or public order or morality.

[33] *Id.* rule 7. Demonstration and strikes No Government servant shall –

(i) engage himself or participate in any demonstration which is prejudicial to the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality, or which involves contempt of court, defamation or incitement to an offence, or

and programs of the government. But the office-bearer of a trade union or the government employees' associations can criticize the government for ensuring the service conditions of government employees or its improvement[34].

The rule granted the rights of the association of government employees for the welfare of employees and the improvement of working conditions. It also allows service associations and trade unions to engage in and participate in peaceful demonstrations, but the law does not allow strikes in any form. The court had in many cases examined the validity of service laws that prohibit the political activities of government employees and their association with political parties. One view is that the right to form an association or union includes joining a political party that is an integral part of citizenship. Therefore no law

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(ii) resort to or in any way abet any form of strike 10or coercion or physical duress in connection with any matter pertaining to his service or the service of any other Government servant.

[34] rule 9. Criticism of Government – No Government servant shall, in any radio broadcast, telecast through any electronic media or in any document published in his own name or anonymously, pseudonymously or in the name of any other person or in any communication to the press or in any public utterance, make any statement of fact or opinion –

(i) which has the effect of an adverse criticism of any current or recent policy or action of the Central Government or a State Government:
Provided that in the case of any Government servant included in any category of Government servants specified in the second proviso to sub-rule (3) of rule 1, nothing contained in this clause shall apply to bonafide expression of views by him as an office-bearer of a trade union or association of Government servants for the purpose of safeguarding the conditions of service of such Government servants or for securing an improvement thereof; or

(ii) which is capable of embarrassing the relations between the Central Government and the Government of any State; or

(iii) which is capable of embarrassing the relations between the Central Government and the Government of any foreign State;
Provided that nothing in this rule shall apply to any statements made or views expressed by a Government servant in his official capacity or in the due performance of the duties assigned to him.

or regulation can curtail the fundamental right unless it is protected by the reasonable restrictions contained in article 19 (4). The Supreme Court in *State of Madhya Pradesh* v. *Ramashanker Raghuvanshi*[35] observed as follows:

> *We are not for a moment suggesting that even after entry into government service, a person may engage in political activities. All that we say is that he cannot be turned back at the very threshold on the ground of his past political activities. Once he becomes a government servant, he becomes subject to the various rules regulating his conduct and his activities and must naturally be subject to all rules made in conformity with the Constitution.*[36]

Rule 5 of the Central Civil Services (Conduct) Rules, 1964 that imposed a total ban on government servants from participation in any form of political activities came up for consideration before the Supreme Court in *Ravindra Kumar Dutta* v. *Union of India*[37]. The judgment opposed the right of a government employee in engaging in political activities and observed that if the contention is accepted it will lead to a complete revision of the accepted civil service philosophy. The court, however, referred the matter to the Constitution bench of the court. However, the Constitution bench to which the case was referred held by an order that in view of the long lapse of time, the

[35] (1983) 2 SCC 145
[36] *Id.* at 153
[37] (1986) 3 SCC 587

individual notices issued to each one of the petitioners had outlived their utility, and the case had become stale[38].

Although, at one point in the case of *Ravindra Kumar Dutta* v. *Union of India*[39], the Supreme Court felt that the service rule prohibiting government employees from participating in any form of political activity was very relevant. Therefore, before entering any service, a particular candidate may not lose his job in the government service if he was in politics, but at the same time, once he becomes such a government servant, enjoy the fundamental rights guaranteed by article 19 (1) (a), (c) of the Constitution, subject to the restrictions imposed by the service rules.

10.2.3. Government Servants Conduct Rules, 1960

All state governments have brought in rules of conduct to regulate the employees under them. As it is not possible to check the statutes and code of conduct of all the states, only the law of the state of Kerala is examined here. The Kerala Public Services Act, passed by the Kerala legislative assembly in 1968, governs employees under the government of Kerala. Section 3 of this Act delegates enormous powers to the state government to issue a relevant rule to conduct service disciple and other related matters. Accordingly, in 1960, the government of Kerala promulgated the Code of Conduct for government

[38] *See M.Mani* v. *Tamil Nadu Civil Supplies*, decided by Madras High Court on 14 September, 2010
[39] *Supra* n. 37

employees known as Government Servants Conduct Rules 1960. Every government employee is free to form associations or unions for government employees' welfare and participate in activities for more favourable working conditions subject to certain restrictions. The relevant rules are quoted below:

rule 76, membership of association:-

> *No Government servant shall join or continue to be a member of an association the objects or activities of which are prejudicial to the interests of the sovereignty and integrity of India or public order or morality.*

rule 77 (a) conditions for recognition:-

> *No association of Government servants or association purporting to represent Government servants or any class thereof shall be recognized unless it satisfies the following conditions.*

The conditions are that the association should consist of a specific class of government employees and represent 25 percent of the total strength of that class or 50 persons, whichever is higher[40]. This means that class I and class II officers will not be allowed to become members of the class III officers association and vice versa. Every government employee of the same class must be eligible for membership in the association[41]. Persons who are not in the service of government shall not be office-bearers of the association[42]. The

[40] Government Servants Conduct Rules, 1960, rule 77 (a) (1) (i)
[41] *Id.* rule 77 (a) (1) (ii)
[42] *Id.* rule 77 (a) (1) (iii)

association must not be formed on a territorial or communal basis[43]. The association shall not be, in any way, connected with any political party or organization[44].

Any government employee who wishes to organize himself in an association to protect the welfare and argued for favourable terms and conditions of service and to represent the government in service matters shall apply to the government through the Head of Department for the approval of the association along with the copy of draft rules. The draft service rule must comply with the provisions of the Act and service rules and specifically stipulate that the association shall not adopt any strike or other action that would amount to paralyze or embarrass government[45]. Recognition granted by the government shall be revoked if it violates any of the conditions prescribed for the recognition of any association or adopts any strike or action intended to discourage or embarrass the government[46]. Rule 77 (b) empowers the government to revoke the approval of any association if it violates any of the following rules. The association shall not seek the assistance of any political party or organization to represent the grievances of its members or indulge in any seditious propaganda or expression of disloyal sentiments[47]; The association shall not resort to any strike or threat of a strike as a means of

[43] *Id.* rule 77 (a) (1) (iv)
[44] *Id.* rule 77 (a) (2)
[45] *Id.* rule 78
[46] *Id.* rule 79
[47] *Id.* rule 77 (b) (1)

achieving any of its purposes or for any other reason[48]; The association shall not publish periodicals without the previous permission of the government. No publication issued by the association should contain commercial advertisements[49]; The association shall not engage in any political activity[50].

According to rule 60 (a) (i), a government servant has the right to participate in a private meeting of government employees only or a discussion of a recognized association of government employees and expressing his views on matters that affect the personal interests of such employees personally or in public. He shall exercise his association rights for the welfare of the employees he represents. The rule strictly prohibits a government employee from engaging in any form of political activity[51]. It requires that not only government employees but also his family members obey the rule. If he is unable to stop them, he should inform the government[52]. No government servant shall canvas or otherwise interfere with or participate in any election to an assembly in the state of Kerala or elsewhere[53]. Suppose any question arises as to whether there is any movement or activity within the ambit of political activity in accordance with the Act. In that case, the decision of the government shall be final[54]. Government employees should not have any personal relationship with any

[48] *Id.* rule 77 (b) (2)
[49] *Id.* rule 77 (b) (4)
[50] *Id.* rule 77 (b) (5)
[51] *Id.* rule 67 (1)
[52] *Id.* rule 67 (2)
[53] *Id.* rule 69
[54] *Id.* rule 67 (3)

member or office bearer or any political organization or religious organization. The rule also stipulates that no government employee may be in charge of any community or religious organization[55]. Suppose any government official holds an office of any scientific, literary or charitable society or of such trust or organization that seems to be against the public interest. In that case, he should resign from such positions[56].

They not only do have the right to form organizations and work together to protect their rights, but they also have the right to submit their grievances to the authorities, to join the associations, and to make demonstrations. Government employees should refrain from any demonstration that could affect the sovereignty and integrity of India or any other restrictions imposed by the Constitution against the freedom of association[57]. The rules prohibit shouting slogans or performing irregular demonstrations while on duty or office premises[58].

In *Balakotaiah v. Union of India*[59], the Supreme Court ruled that government servants could not claim the right to form an association or union if they were members of a communist party-sponsored trade union. The appellants were railway servants who were terminated from the service for reasons of national security under section 3 of the Railway Services

[55] *Id.* rule 67A (1)
[56] *Id.* rule 67A (2)
[57] *Id.* rule 60 (b)
[58] *Id.* rule 60 (c)
[59] AIR 1958 SC 232

(Safeguarding of National Security) Rules, 1949. Notices served on them under the section to show cause charged them that they were reasonably suspected to be a member and office secretary of communist party sponsored trade union engaged in subversive activities, and carried on agitation amongst the railway workers for a general strike from November 1948 to January 1949. Order of suspension was issued to them, and a committee of advisers was constituted by the authority to conduct an enquiry into the matter. The committee refused the representation of petitioners against the suspension order and concluded that the charges against them were accurate. The general manager dismissed the workers upon the report of the committee. The appellants moved the high court under article 226 of the Constitution and contended that the impugned rules contravened article 14, 19 (1) (c) and 311 of the Constitution. The court, however, dismissed the petition on other grounds that action was taken against the appellants not because they were communists or trade unionists but because they were engaged in subversive activities.

Although the appellants were members of the trade union, the court did not consider the legal validity of government employees joining the trade unions for the welfare of the employees. The court observed that the employees were dismissed because they were members of a communist party-sponsored trade union. They could enjoy their association rights but not the right to remain an employee. The court observed as follows:

> *We do not see how any right of the appellants under Article 19 (1) (c) has been infringed. The orders do not prevent them from continuing to be Communists or trade unionists. Their rights in that behalf remain after the impugned orders precisely what they were before. The real complaint of the appellants is that their services have been terminated; but that involves, apart from Art. 311, no infringement of any of their Constitutional rights. The appellants have no doubt a fundamental right to form associations under Article 19 (1) (c), but they have no fundamental right to continue in the employment by the State, and when their services are terminated by the State they cannot complain of the infringement of any of their Constitutional rights when no question of violation of Art. 311 arise*[60].

The court echoed the words of Justice Holmes that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[61]. Although the decision was made in defiance of a decision of the U. S. Supreme Court, there was a factual difference between the two. The law is intended to impose restrictions on government employees, not police officers. The second objection is that the passage quoted above by Justice Holmes was about the political speech and activities of the police person, but here government employees were participating in demonstrations for the welfare of their services. They were not a part of political activities or had any affiliation with political parties.

[60] *Id.* at para 17
[61] *Mc Auliffe v. New Bedford* (1892)

Another case heard by the Supreme Court in this regard was *Kameshwar Prasad* v. *State of Bihar*[62] in 1966. One of the questions that arose before the Supreme Court Constitution bench[63] was whether government officials could claim all the fundamental rights guaranteed by Part III of the Constitution, which was of considerable public importance and great constitutional significance[64] . The constitutional validity of rule 4-A of Bihar Government Servants' Conduct Rules, 1956 was challenged. Rule 4-A says that no government servant shall participate in any demonstration or resort to any form of strike in connection with any matter about his conditions of service. According to this rule, government employees do not have any right to participate in a demonstration or resort to any form of strike for matters pertaining to their service conditions. The demonstrations or strikes were not for any political purpose or any attempt from the employees against the functions of the government or the policy of the government. So a relevant question was whether this prohibition interferes with the right guaranteed to the government employees by article 19 (1) (a), (b), and (c).

The Supreme Court has previously ruled that the right to strike is not protected under article 19 (1) (c) of the Constitution in *All India Bank*

[62] AIR 1962 SC 1166
[63] A.K. Sarkar, K.C. Das Gupta, K.N. Wanchoo, N. Rajagopala Ayyangar and P.B. Gajendragadkar, JJ.
[64] AIR1962SC1166

Employees' Association v. *National Industrial Tribunal*[65]. High court of Patna heard the petition and opined that the freedom guaranteed under article 19 (1) (a) and 19 (1) (c) of the Constitution did not include a right to resort to a strike or the right to demonstrate so far as servants of government were concerned.

Some relevant questions that need to be answered at this point are: Can a citizen be denied the right to freedom guaranteed by the Constitution upon entering government service? Whether a ban under rule 4-A is a blanket that prohibits all forms of demonstration, including a government official wearing a badge or a peaceful order such as a silent assembly outside office hours? Are reasonable restrictions imposed on service conditions invoking article 309 outside the scope of test of reasonableness, and is it not possible to test such restrictions only by referring to the criteria laid down in (2), (3), or (4) of article 19? Does the Constitution exclude government employees as a class from protecting the many rights guaranteed by the numerous articles in Part III?

The court outlines precisely how fundamental rights are available to government officials in the following words.

> *In our opinion, this argument even if otherwise possible has to be repelled in view of the terms of Article 33. That Article select two of the Services under the State; members of the armed forces charged with the maintenance of public order and saves the rules prescribing the conditions of service in regard to them - from invalidity on the ground of*

[65] AIR 1962 SC 171

> *violation of any of the fundamental rights guaranteed by Part III and also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and the maintenance of discipline among them. The Article having thus selected the Services members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, we consider that other classes of servants of Government in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being Government servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restrictions of certain freedoms as we have pointed out in relation to Art. 19(1)(e) and (g)*[66].

A demonstration may be defined as an expression of one's feelings by outward signs by way of a most innocent type without any kind of violation of public order. It may be wearing a badge and conducted outside the working house. So the court pointed out that all kind of demonstration is not protected. It necessarily follows that there are forms of demonstration which would fall within the freedoms guaranteed by articles 19(1) (a) and 19(1) (b). It is needless to add that from the very nature of things a demonstration may take various forms; It may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within articles 19(1) (a) or (b). It can equally be

[66] *Supra* n. 65 at para 14

peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances. It was observed that violent demonstrations under article 19 could not hide the umbrella of freedom but peaceful demonstrations by government employees would be protected. The court declared that the peaceful demonstration of government employees is their fundamental right and that the law prohibiting it is unconstitutional.

O.K Ghosh v. *E.X.Joseph*[67] case was considered by the Constitution bench[68] of the Supreme Court of India. The respondent was a civil servant in the Audit and Accounts Department at Bombay. He was the Secretary of the Civil Accounts Association, consisting of non-gazetted employees of the Accountant-General's Office. The association was initially approved by the government of India but later withdrew approval. But the appellant refused to sever ties with the association, remained secretary, and continued participating in activities. As a result, the government of India served a charge-sheet for having deliberately committed breach of rule 4(b) of the Central Civil Services (Conduct) Rules, 1955. The Government sent him a memo for intentionally violating rule 4 (A). He had actively participated in various demonstrations and preparations organized in connection with the Central Government employees' strike.

[67] AIR 1963 SC 812
[68] *B.P. Sinha, C.J., J.C. Shah, K.C. Das Gupta, K.N. Wanchoo and P.B. Gajendragadkar, JJ.*

Rule 4-A prohibits demonstrations or strikes of any kind in connection with the terms of service of government employees. Rule 4-B prohibits government servants to join or continue to be a member of any service association of government servants if such organization has not obtained recognition from the government within the period of six months from its formation; recognition in respect of which has been refused or withdrawn by the government under the said rules. The court observed as follows:

> *It is clear that Rule 4-B imposes a restriction on this right. It virtually compels a Government servant to withdraw his membership of the Service Association of Government Servants as soon as recognition accorded to the said Association is withdrawn or if, after the Association is formed, no recognition is accorded to it within six months. In other words, the right to form an Association is conditioned by the existence of the recognition of the said Association by the Government. If the Association obtains the recognition and continues to enjoy it, Government servants can become members of the said Association*[69].

It suggests that government employees should only work in government-recognized associations. In *M. H. Devendrappa v. Karnataka State Small Industries Development Corporation*[70], the appellant was the assistant manager of the Karnataka State Small Industries Development Corporation (KSSIDC), Bangalore. He was also the President of the Karnataka State Small Industries Development Corporation Employees' Welfare Association. He had

[69] *Supra* n. 67 at para 10
[70] AIR 1998 SC 1064

sent a letter to the governor on behalf of the association stating that the corporation was incurring huge losses due to the abuse of power by the management and requested that the corporation be terminated. The corporation asked him for confirmation of the letter's authorship and asked for an explanation as to why no disciplinary action should be taken against him. He was fired after an unsatisfactory reply to the show-cause notice. The action taken against him was in accordance with rule 22 of the service rules of the corporation. The rule stated that an employee who knowingly does anything detrimental to the interests or prestige of the corporation or in conflict with official instructions or guilty of any acts of misconduct or misbehavior should be liable to penalties prescribed by the rule[71]. Rule 19 prohibits employees from participating in politics or assist in any political movement or activity[72]. The appellant contended that he exercised his fundamental right to freedom of association or union under article 19 (1) (c) of the Constitution. He could not be dismissed from service when he had exercised his fundamental rights.

Court, however, observed that rule 22 of the service rules is not meant to curtail freedom of speech or expression or the freedom to form associations or unions. It is clearly meant to maintain discipline within the service, ensure

[71] *Supra* n. 40, rule 22 of the Service Rules of the Corporation "An employee, who commits a breach of these rules or displays negligence, inefficiency or in-subordination, who knowing does anything detrimental to the interests or prestige of the Corporation or in conflict with official instructions or is quality of any instructions or is guilty of any activity of misconduct or misbehavior shall be liable to one or more of the following penalties".

[72] *Id.* rule 19. Participation in Politics: "No employee shall be a member of or otherwise associate with any political party in politics nor shall he take part in, subscribe in aid of, or assist in any political movement or activity".

efficient performance of duty by the corporation's employees, and protect the interests and prestige of the corporation.

In this case, the appellant had made a direct public attack on the head of his organization. In the letter to the Governor, he also had made allegations against various officers of the corporation with whom he had to work. His conduct was detrimental to the proper functioning of the organization or its internal discipline. Making public statements against the head of the organization on a political issue also lowered the prestige of the organization he worked. Therefore, on the proper balancing of individual freedom of the appellant and proper functioning of the government organization which had employed him, this was a fit case where the employer was entitled to take disciplinary action under rule 22[73].

The two judgments of the court mentioned above held that the action against the employees was not due to any trade union or association, but was the result of specific disciplinary action that was not in accordance with the terms of service. Hence, it is submitted that both these decisions directly affected their fundamental right to freedom of association or union[74] . Both employees were fired for performing certain functions in the capacity of service association or trade union members. When a person enters the public service,

[73] *M. H. Devendrappa v. Karnataka State Small Industries Development Corporation,* AIR 1998 SC 1064

[74] *See P. Balakotaiah vs. The Union of India*, AIR 1958 SC 232; *M. H. Devendrappa v. Karnataka State Small Industries Development Corporation,* AIR 1998 SC 1064

he must give up all his political activities and politically affiliated service associational activities and relationships.

10.3. Strike of government servants

Government employees' strike is not new in India and has a long history since the service was established[75]. The right to strike is a statutory right that has been granted to industrial workers in India but not to government employees in India. A departmental code of conduct governs strikes by government employees. Until 1957, there was no special ban on government employees' strikes, even in the Code of Conduct. In the absence of special prohibitions, strikes were treated as an unauthorized absence from duty, subject to disciplinary action by the relevant authority[76]. The government, however, recognized the need to ban the strike of government employees as large-scale strikes were crippling the economic life of the country. In August 1957, the central government amended the Central Civil Services (Conduct) Rules to ban strikes and demonstrations by government employees. Rule 7 of the Civil Services (Conduct) Rules provide that: no government servant shall engage himself or participate in any demonstration which is prejudicial to the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality, or which

[75] *See* Arjun P. Aggarwal, *Strike by Government Employees: Law and Public Policy,* 358, 14 (3) JILI (1972)
[76] *Id.* at 361

involves contempt of court, defamation, or incitement to an offence; or resort to or in any way abet any form of strike or coercion or physical duress in connection with any matter pertaining to his service or the service of any other government servant.

Although the central government has amended the conduct rules to prohibit strikes by government employees, it has not sought to define strikes for the conduct rules. The scope of the strike was considered from the definition of strike given in the Industrial Relations Code, 2020[77].

Central Civil Services (Conduct) Rules, rule 86 of Government Servants Conduct Rules, 1960 prohibit strike by government servants as follows:

> *No Government servant shall engage himself in any strike or incitement thereto or in any similar activities. Government servants should not engage themselves in any concerted or organized slowing down or attempt at slowing down Government work or in any act which has the tendency to impede the reasonably efficient and speedy transaction of Government work. Concerted or organized refusal on the part of Government servants to receive their pay will entail severe disciplinary action.*

By the rule, government employees are not allowed to take part in any strike. Suppose they take part in or attempt to take part in any strike or obstruct

[77] *Id.* at 369

the activities of the government with such activities. In that case, they will be subjected to severe disciplinary action.

According to two important decisions of the Supreme Court, namely, *All India Bank Employees' Association* v. *National Industrial Tribunal*[78] and *Kameswar Prasad* v. *State of Bihar*[79], government employees were not entitled to participate in any strike against the government.

10.4. Moral right to go on strike

Much discussed Supreme Court decision in *T. K. Rangarajan* v *State of Tamil Nadu*[80] attracts criticism from the government employees associations and trade unions in India. Unprecedented action of the Tamil Nadu government was to terminate all employees who had resorted to strike for their demands without conducting any enquiry invoking relevant provisions of the Tamil Nadu Essential Services Maintenance Act 2002 also the Tamil Nadu Ordinance No. 3 of 2003. The Supreme Court made it clear without a doubt that there is no statutory provision empowering the employees to go on strike[81]. The court held that there is no moral or equitable justification to go on strike and observed the reasons as follow:

> *Apart from statutory rights, Government employees cannot claim that they can take society at ransom by going on strike. Even if there is an*

[78] *Supra* n. 65
[79] *Supra* n. 62
[80] AIR 2003 SC 3032
[81] *Id.* at para 19

> *injustice to some extent as presumed by such employees, in a democratic welfare state, they have to resort to the machinery provided under different statutory provisions for redressal of their grievances. Strike as a weapon is mostly misused which results in chaos and total maladministration. Strike affects the society as a whole and particularly when two lakh employees go on strike en masse, the entire administration comes to a grinding halt. In the case of a strike by a teacher, the entire educational system suffers; many students are prevented from appearing in their exams which ultimately affects their whole career. In case of strike by Doctors, innocent patients suffer; in case of strike by employees of transport services, the entire movement of the society comes to a standstill; business is adversely affected and a number of persons find it difficult to attend to their work, to move from one place to another or one city to another. On occasions, public properties are destroyed or damaged and finally, this creates bitterness among the public against those who are on strike*[82].

There was widespread resentment among the government employees in 2003 against the judgment of the Supreme Court in *Rangarajan*[83] case regarding it as arbitrary and without considering the relevant factors on the right to organize and strike by government employees. Finally, it was observed that the strike by government employees is neither statutory nor fundamental nor equitable nor ethical. The recent judgment of the Supreme Court in the right to strike case is against the spirit of the times and modern trends in the law,

[82] *Id.* at para 21
[83] *Id.*

including India's international obligations. A writer on Constitutional Law severely criticized the judgment as follows:

> *Awareness of the need for self-restraint is not conspicuous in the judgment pronounced by Justice M.B. Shah for himself and Justice A.R. Lakshmanan of the Supreme Court, on August 6, in the now famous "right to strike" case. Every rule in the book was broken. Justice Shah made observations which it was not necessary for him to make in order to decide the case; they were sweeping and inappropriate; they were made not only against the spirit of the times but in apparent unawareness of modern trends in the law, including India's international obligations; they were made, it would seem from the judgment, without argument from the Bar on the right to strike since the case for the right is not stated in the judgment as it would have been in fairness to the employees; and it is, with respect, not for a Division Bench of two Judges to pronounce as it did "on an issue of such importance*[84].

The court held that when it comes to right of government employees to strike, there is no fundamental, statutory, equitable or moral right exists with the government employees. The court can say that the strike is not a fundamental right by quoting existing laws and court judgments, but can it say that there is no moral right to strike? In this sense, the observation of the need for the court to exercise self-restraint becomes relevant. The court cannot say that workers do not have a moral right to strike because they do not consider the mass of literature on the subject. In any case, this verdict has left some questions in

[84] A.G.Noorani, *A Legitimate Right*, Frontline, Oct, 10, 2003.

society. Should a government employee be fired for participating in a strike? Does this justify the principle of proportionality? Is there any legitimacy for the dismissal of government employees without due process? The legality of the strike should have been examined before the court, as well as the legitimacy of the mass dismissal of workers without any investigation. It can be assumed that the court considered certain factors instead of rules and precedents.

Supreme Court in *Pickering* v. *Board of Education*[85], established the principle that free speech claims of public employees were to be evaluated by balancing the worker's expressive rights against the employer's reasons for the retaliatory personnel decision that is, in light of the employer's legitimate interest in workplace efficiency. In this view, the findings of the Supreme Court of India regarding exercising freedom of association for public employees are wrong. According to the decision of the Supreme Court, once a citizen enters the public service, he must surrender his freedom of speech and associational rights to a certain extent. A public servant may exercise his or her fundamental rights as a citizen even if his or her political freedom is curtailed to some extent for the sake of the administrative discipline. However, it is well-known that employees involved in the confidential affairs or ministerial posts of the

[85] 391 U.S. 563 (1968)

Government can be exempted from exercising their fundamental freedom as a citizen[86].

10.5. Essential Services Maintenance Act, 1968

The Act is to provide for the maintenance of certain essential services and the normal life of the community. Each state has a separate Essential Services Maintenance Act (ESMA) with slight variations from the central law in its provisions. The Essential Services Maintenance Act, 1968 (ESMA) is imposed to prevent unnecessary strikes. The ESMA is a law made by the Parliament of India under List No. 33 in Concurrent List of Seventh Schedule of Constitution of India. The central government is empowered by law to declare any public service as an essential service for the Act, subject to the powers of Parliament to make laws. The central government has banned strikes in certain employments under section 3 (1)[87]. Strikes on any of the essential services specified in the order shall be prohibited if the central government feels it necessary and considering the public interest.

In *Kameswar Prasad* v. *State of Bihar*[88] the court observed that the rule prohibiting strikes could not be struck down as the right to strike was not a fundamental right. Even a very liberal interpretation of sub-clause (c) of clause

[86] For detailed discussions *see* chapter III entitled *International Instruments*.

[87] Section 3 Power to prohibit strikes in certain employments

(1) If the central government is satisfied that in the public interest it is necessary or expedient so to do, it may, by general or special Order , prohibit strikes in any essential service specified in the order.

[88] *Supra* n. 62

(1) of article 19 cannot lead to the conclusion that trade unions have a guaranteed right to effective collective bargaining or to strike, either as part of collective bargaining or otherwise. Thus, there is a guaranteed fundamental right to form an association of Labour unions, but there is no fundamental right to strike[89]**.** None of the existing laws provide the right of government employees to strike[90]. Since the Supreme Court had ruled from the outset that government servants have neither constitutional nor legal right to strike[91]

10.6. Membership in subversive organizations by public servants

Any membership in a banned organization is a sufficient cause for abolishing public employment since membership of an unlawful association is a crime, and there are no constitutional provisions to protect those who are part of such associations[92]. As the Communist Party's policy and program aim to oust the democratic government, judging all its members guilty of treason was often questioned. However, the membership in such an organization alone was not

[89] *Supra* n. 65
See Meghraj v State of Rajasthan AIR 1956 Raj 28
[90] *See All India Bank Employees' Association v. National Industrial Tribunal,* AIR 1962 SC 171
[91] *Supra* n. 80
[92] *Dennis* v *United States*, 34l US 494 (1951). The constitutionality of the Alien Registration Act (Smith Act) of 1940 was tested and upheld that eleven leaders of the Communist Party were convicted of conspiring to organise the party to advocate the overthrow and destruction of the government by force and violence. Subsequently the Supreme Court decided in *Scales v United States* [367 US 203 (1961).] that membership of a subversive organisation was a federal crime and that the First Amendment would not protect any person against conviction in circumstances set out in the Smith Act.

enough to prove such a fact[93]. The court has consistently disapproved governmental action imposing criminal sanctions or denying rights solely because of a citizen's association with an unpopular organisation[94]. Knowledge of the illegal aims of such an organization is not sufficient to terminate an employee from public services, but that knowledge had to be coupled with a specific intent to further the illegal aims of the organization[95]. Membership in a subversive organization is a crime. There are no constitutional provisions to protect those who are part of such associations because they are deliberately destroying the peace of society and trying to overthrow the government by force and violence.

Public employees should not be dismissed solely based on the membership of an organization aiming to overthrow the democratic political system with force or violence. Knowledge of the illegal aims of such an organization is not sufficient to terminate an employee from public services. Still, that knowledge had to be coupled with a specific intent to further the illegal aims of the organization[96].

[93] Four justices dissented from the decision by the court and wrote strongly worded dissenting opinions. This led to the decision in *United States v Robel* [389 US 258 (1967).] where it was held that it must be proved that a member of the Communist Party knowingly and wilfully took part in subversive activities and that membership of the Communist Party alone was not enough to prove such a fact. Special reference to the right of association as a First Amendment right was made in this decision.72 In *Healy v James* [408 US 169] the Supreme Court found

[94] *United States* v *Robel* 389 US 258 (1967).

[95] *Elfbrandt* v *Russel,* 384 US 11 (1966)

[96] *Id.*

American Supreme Court in *United States* v. *Robel*[97] clarifies the subject by saying that a member of the Communist Party remained an employee at a shipyard after the Secretary of Defence had designated it a defence facility under the Subversive Activities Control Act, 1950. It was held that the relevant section of the Act[98] is invalid since it is precisely because that statute sweeps indiscriminately across all types of association with communist action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment[99]. Further, the court held that the statute establishes guilt by association alone, without any need to show that an individual's association poses the threat of sabotage and espionage in defence plants at which the legislation is directed[100]. In exercising its power to safeguard the national defense, Congress cannot exceed constitutional bounds, particularly where First Amendment rights are at stake[101].

Therefore, according to the opinion submitted above, an employee can only be punished or lose his or her public employment if he or she is an active member of a subversive organization, and such membership must be fully aware of the organization's illegal intentions. In addition, the organization must have a specific goal of pursuing illegal goals. Mere membership of a subversive organization is not sufficient ground for the punishment of such a person.

[97] 389 U.S. 258 (1967)
[98] Subversive Activities Control Act, 1950, s. 5(a)(1)(D)
[99] *Supra* n. 97
[100] *Id.*
[101] *Id. See also Aptheker v. Secretary of State,* 378 U. S. 500 (1964)

10.7. Labour Relations (Public Service) Convention, 1978

The Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organize and Collective Bargaining Convention, 1949, are the conventions that guaranteed freedom to form associations. However, the ILO understands that these conventions do not cover specific categories of employees under public authority. As a result, the Labour Relations (Public Service) Convention, 1978 was passed by the ILO, which guarantees government workers the right to organize and negotiate collectively. The Convention provides that disputes related to the determination of the terms and conditions of employment should be resolved through negotiations or impartial and independent machinery.

This Convention applies to all persons employed by the public authorities[102], however, it is up to the respective national laws or regulations to determine whether this Convention applies to high-level employees considered to be policymakers and engage in confidential matters[103]. The Convention guaranteed the right of a public servant to participate in the activities of an organization to protect the interests of public servants. Article 4 provides adequate protection to public employees against acts of anti-union discrimination in respect of their employment. No public employer may impose conditions such as not joining a service association or relinquishing

[102] Labour Relations (Public Service) Convention, 1978. art. 1 (1)
[103] *Id.* at art. 1 (2)

membership in such an organization to obtain employment. Public authorities do not interfere with the freedom of association and activities of public servants and are provided with adequate protection against such interference. Any form of financial assistance aimed at bringing the employee organization under the control of a public authority will be considered an intervention measure[104].

The outcome of Indian cases relating to the right to the government employees to form associations for their welfare and dismissal of a public servant from the government service due to his political connections can be questioned here with the help of the established principles and the ILO Convention on Labour Relations (Public Service) Convention. Government employees can be divided into two categories to use their freedom of association and political affiliation. In 1976, in *Elrod* v *Burns*[105]the American Supreme Court pointed out that dismissal of a non-policy-making and non-confidential government employee on the ground of his political affiliation was declared unconstitutional. However, confidential or policy-making government employees may be dismissed because of their political beliefs or affiliation when the following circumstances are present: the need to ensure effective government; the need for political loyalty of policy-making or confidential employees assure the implementation of a new administration's policies; and the preservation of the democratic process and the continued vitality of party

[104] *Id.* at art. 5
[105] 427 US 347 (1976)

politics. This decision was reaffirmed in *Branti* v *Finkel*[106] where it was stated that the proper test to determine whether political affiliation is a legitimate factor to be considered in the dismissal of an employee is not whether the label policymaker or confidential fits a particular position. Rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

A well-known jurisprudence had long recognized that a public employee could not be fired or otherwise retaliated against him for exercising his or her constitutional rights of freedom of association[107]. The government has a legitimate interest in controlling employees' speech to maintain workplace discipline, unity, and productivity goals. Once a person enters into civil service, he is subject to some restrictions which are promulgated by the President of India and other authorities to ensure efficiency and maintain discipline in service. Government servants are restricted from adversely criticizing the government on any matters relating to any current or recent policy or action of central government or a state government. A person, however, does not cease to be a citizen for the enjoyment of associational freedom nor is disentitled to claim the freedoms guaranteed under article 19 (1) (c) of the Constitution for

[106] 445 US 507 (1980)
[107] Mark Strauss, *Public Employee's Freedom of Association: Should Connick v. Myers' Speech-Based Public-Concern Rule Apply,* 61 Fordham L. Rev. 473 (1992).

the reason that he has entered government services.[108] In many instances, the Apex Court had undoubtedly held that the fundamental rights guaranteed by article 19 can be claimed by government servants. Government employees cannot form a special class to usurp the fundamental rights guaranteed by article 19 of the Constitution of India except the members of the armed forces and other services as described in article 33 of the Constitution of India. The article imposes certain restrictions on fundamental rights only to the armed forces, which means that all citizens, except the armed forces, are entitled to fundamental rights.

Government employees, as a group, have the right to organize themselves and to organize welfare activities for their members but they do not have the freedom to organize politically or politically backing activities against the government and its policies. The right to form an association for the welfare of government employees is a fundamental right and therefore bargains effectively with the employer for better working conditions and welfare. Government servants have the right to exercise their political views as citizens of India. The interpretations of civil liberties in the post-independence era must uphold and respect a different political outlook.

[108] Constitution of India, art. 33 says that the Parliament may, by law, determine to what extent any of the rights conferred by Part III of Constitution shall, in their application to the members of force charged with the maintenance of public order, person employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or persons employed in , or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization as above mentioned, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Chapter 11

Conclusion and suggestions

Association rights and other political freedoms are essential as they enable people to lead independent lives. Personal autonomy refers to a model of self-directed activity in which individuals are the authors of their own lives. Civil liberties enjoyed by the people without any unreasonable restriction are the soul of a democratic governing system. According to human rights jurisprudence, civil and political rights, including the right to form associations or unions, are inalienable rights of human beings. Therefore, the right to organize is an inherent right to the fundamental freedom to live and interact in a democratic system. Freedom to form associations or unions is essentially a political right, taking into account participation in political activities and the electoral process to form a democratic government.

Moreover, this freedom describes all kinds of associations in a society, not against the law and legal procedures. All the rights which are listed in article 19 have varying dimensions and underlying philosophies. Freedom under article 19 of the Constitution has been developed through many struggles

and declarations of rights. Hence, all peaceful and lawful opposition must be protected. Suppression of lawful and peaceful oppositions leads to dictatorship. There are different forms of associations; associations may be formal or informal. They may be inscriptive or voluntary, incorporated or unincorporated[1] , public or private, or mixed.

The protection of article 19 does not extend to associations but to a group of citizens who form associations or unions. The meaning of group rights is quite different from that of individual rights. Therefore, the group must step into the individual's shoes, and the group must have the same character and status as an individual. Under settled law, this right is the right of individuals to form and operate associations or unions. The constitutional right to freedom of association is a vehicle for an individual's civil, political, cultural, and economic rights.

[1]Some commentators have asserted, without argument, that 'associations must have some sort of constitution, or at least a structure of decision-making before they will be protected.' Johan De Waal, Iain Currie and Gerhard Erasmus 'Association' in *The Bill of Rights Handbook* 341, 343 (2001). With respect, neither the grounds for protecting associational freedom nor the variety of South African associations that deserve protection warrant such a cramped understanding. (Likewise the author's unjustified asymmetrical treatment of the freedom to associate and the freedom to dissociate — the former must satisfy some set of formal requirements, the latter need not — underscores the need for analysis and not mere assertion.) Of course, associations may need a constitution in order to satisfy statutory requirements for tax benefits or public funding. See, eg, the Nonprofit Organizations Act 71 of 1997, the Lotteries Act 57 of 1997, the National Development Agency Act 108 of 1998 and the Taxation Laws Amendment Act 30 of 2000. But that descriptive fact about statutory recognition has no bearing on the prescriptive character of constitutional protection.

Supreme Court of the U.S established the relationship between the right to association and privacy of its members.[2] Therefore, it can be seen that there is no difference between intimate associations and express associations. The right of association is closely related to the right to believe as one chooses and to the right of privacy in those beliefs.

The concept of liberty confirmed civil and political rights and economic and cultural rights, which are essential to the enjoyment of group rights. It must take into consideration the changing trends of economic thought, the temper of the times, and the living aspirations and feelings of the people[3]. International human rights instruments affirm that freedom of association is a collection of civil, political, and economic rights. The traditional concept of separating civil and economic rights of an individual in a civil society is not considered in contemporary interpretations of fundamental rights, especially freedoms, under article 19 (1) of the Constitution of India.

In a democracy, water compartment rights are not amenable to modern democratic values. In the *National Association for the Advancement of Colored People* v. *Alabama* case[4], the U.S. Supreme Court recognized for the first time that the freedom of association was an integral part of the First Amendment of

[2] *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449 (1958)
[3] *Pathumma v State of Kerala*, AIR 1978 SC 771
[4] *Supra* n. 3

the Constitution and established a close link between freedom of association and other freedoms.

A rational blend of civil, political, and economic rights can be seen in the systematic interpretation of human rights. Many court decisions remind us that instead of traditional interpretations, the new style of interpretations of fundamental rights should be applied to the changing circumstances of contemporary society and its values. Freedom of association has been expressly recognized by the Indian Constitution even before the Supreme Court of America interpreted it as part of the Constitution's First Amendment. However, the Supreme Court rejected this notion in its interpretation of article 19 (1) (c) of the Constitution. They considered only the civil and political rights in interpreting article 19 (1) (c) of the Constitution and totally neglected the economic aspects of the right. One of the significant observations made by the Supreme Court of India is that the court must interpret the Constitution to enable the citizens to enjoy the rights guaranteed by it in the whole measure. The court relinquished the narrow interpretation of fundamental rights through the landmark judgment in *Maneka Gandhi* v. *Union of India*[5] and accepted the expansive interpretation of a fundamental right[6].

Subsequent court rulings show that the interpretations given by the court to article 19 (1) (c) are not appropriate for the interpretation of freedoms in a

[5] (1978) 1 SCC 248
[6] *Sakal Papers (P) Ltd. v. Union of India,* AIR 1967 SC 305

democratic system. Since man is a social person, he has made his history by forming numerous organizations and groups to fight for his existence. Political activities or religious propaganda cannot exist without the freedom of association, so freedom with the democratic system is essential. Freedoms mentioned in article 19 (1) are interconnected and do not exclude one from another. All these freedoms are mutually inclusive and inseparable, and therefore, they may be interpreted in a single canvas of liberty in a democracy.

The right to form an association necessarily implies that the persons forming the association also have the right to continue being associated with only those they voluntarily admit in the association. Any law by which members are introduced in the voluntary association without any option being given to the members to keep them out, or any law that takes away the membership of those who have voluntarily joined it, will violate the right to form an association. In the context of the principles underlying the Constitution, the guarantees contained in Part III must be interpreted in a liberal manner to give meaningful expression that is not based on any trivial or narrow meaning on ideological considerations.

The term ‘unions’ refers to the citizens’ exclusive right to form trade unions and employees associations. Therefore, the term ‘unions’ is used exclusively to promote workers’ trade union rights. It is equally important not to encourage indiscriminate and hasty use of this weapon because if it is

abused, it will cause economic loss to the industry, and the country's economic growth will be affected. Industrial law gives workers the freedom to strike, but it must be legal and justified. An analysis of various situations reveals that the right to strike is an inevitable part of the right to form associations or unions.

Freedom of association, including the right to join trade unions, is recognized under international human rights instruments, domestic constitutions, and labor legislation[7]. Freedom of association can be linked to freedom of speech as it is important for the democratic process as collective protest is an effective way to voice opinions. More often, the term has come to be associated with trade unions and their activities[8]. There is no doubt that the idea of freedom of association is originated in assertions of individual conscience in the context of organizations established for charitable, religious, and scientific purposes. It was only gradually that this freedom was extended to the industrial sphere[9]. However, worker's purpose in forming these organizations was notably different from those claiming the freedom to associate for other purposes. In joining trade unions, workers sought to address long-standing inequalities of bargaining power between employer and worker. Through trade unions, workers could appoint representatives to give their opinions, argue for improving terms and conditions in collective bargaining,

[7] Tonia Novits, *Workers'Freedom of Association, in Human Right in Labour and Employment Relations: International and Domestic Perspectives* 123 (Edited Book by James A. Gross and Lance Compa) p 123
[8] *Id.*
[9] *Id.* at 125

and organize industrial action if necessary[10]. The intention of the workers to form trade unions was different from those who claimed the freedom to the association for other purposes. There is considerable controversy about the nature and extent of association freedom as to what types of associations are protected under article 19 (1) (c)[11]. Since collective protest is an effective way to express opinions and is important to the democratic process, freedom of association can be linked to freedom of speech. Most often, the term is associated with trade unions and their activities.

According to the judgment of the *Zoroastrian Cooperative Housing Society* v. *District Registrar Cooperative Societies*[12] case of 2005, a citizen has no fundamental right to join a co-operative society. Therefore, a society registered under the Co-operative Society Act cannot propose to recognize a member who is not eligible to become a member on the basis of a registered by-law. The 2011 constitutional amendment[13] almost invalidates the principle put forward by the Supreme Court in this case.

The 97th amendment to the Constitution inserted the word co-operative societies after unions in article 19 (1) (c) of the Constitution clarified that every citizen in India has the fundamental right to form co-operative societies. The

[10] *Id.*
[11] *See* case laws on article 19 (1) (c).
[12] (2005) 5 SCC 632
[13] The Constitution (97th Amendment) Act, 2011

Supreme Court approved this of India in *Union of India* v. *Rajendra N*[14]. The court then denounced their early view that freedom to form co-operative societies is not fundamental right under article 19 (1) (c) of the Constitution. Then, it was impliedly accepted that a group or society formed for the purpose of economic interest of members of such group or society fall within the protection zone of article 19 (1) (c) of the Constitution. The freedom to form an association is also protecting the business right of a citizen of India. Through co-operative societies, an individual can participate in business activities and thereby earn profit and participate in the country's economic growth.

The Parliament had lacked the power to enact the law incorporating the society and inducting outside members against the wishes of the founder members of the society registered under the Societies Registration Act. Although article 19 (1) (c) gives citizens the freedom to form associations, unions, or co-operative associations, it is governed by the provisions of the law once a society is registered under the Act. Co-operative societies are therefore bound to implement the policies laid down by law where the law stipulates that reservation or nomination should be implemented to ensure the representation of backward classes, it cannot be denied in the name of freedom to form associations.

[14] 2021 SCC OnLine SC 474

These rights, therefore, should not be restricted so much, and all opposition that is peaceful and not seditious should get the full opportunity because the opposition is a vital part of every democratic government. Instead of common restrictions imposed on the freedoms, the restrictions are to be mentioned in clauses (2) to (6) of article 19. The common thread throughout the restrictions is its reasonableness. So restriction is inevitable in every freedom, but such restrictions should not be destroying the true spirit of freedom. The only limitations to freedom of associations, union or co-operative societies under article 19 (1) (c) permitted to be imposed by law are those set out in clause (4) of article 19 and unless, therefore, either the objects of the association or the manner of achieving them are contrary to or transgress public order or morality. For this reason alone, reasonable restrictions might be imposed upon the guaranteed right.

The state shall not interfere with the internal liberties of any voluntarily formed society except on the grounds mentioned in the provisions of article 19 (4) of the Constitution. However, if the activities of societies are of national importance and the state deems it appropriate, a statutory society may be constituted to carry out activities of national importance, and if any of the societies have acquired any property for the above purposes with the assistance of the government, the property may be taken over by the government.

A merger, amalgamation, and liquidation of co-operative societies is an activity to regulate the trade or business of the society as it is directly related to the business interests of the society and does not include the rights or control of the members to form associations. The court, therefore, held that the merger, amalgamation, or liquidation of co-operatives falls within the scope of the reasonable restrictions imposed on the business activities of co-operatives societies. Inclusive interpretations are accepted as the rights of members of a co-operative society fall within the scope of articles 19 (1) (c) and (g) of the Constitution[15].

Workplaces can be divided into two with regard to the provision of fundamental rights guaranteed by the Constitution to public servants. Members of the armed forces charged with the maintenance of public order might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, and the second categories are the other classes of servants of government cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being government servants and the nature and incidents of the duties which they have to discharge in that capacity.

[15] *Daman Singh v. State of Punjab,* AIR 1985 SC 973

As far as the right of government servants is concerned, a very remarkable observation was made by the court that the citizens have the fundamental right to form an association under article 19 (1) (c), but they have no fundamental right to continue in employment by the state. But contrary to this, the decision of the Supreme Court in *Kameshwar Prasad* v. *State of Bihar*[16] was in line with the development of labour law and based on constitutional democratic values. Initially, some judgments were issued against the associational activities of the government employees, but later decisions and the service rules allow the union activities of the government employees subject to some restrictions.

The reasoning of the *All India Bank Employees Association case*[17] is not equated with the new interpretations given to the fundamental rights and needs to revisit the ratio because of the following grounds.

The Constitution Bench of the Supreme Court in *Damyanti Naranga* v. *The Union of India*[18] has clarified the position by holding that the right to form an association includes the right to its continuance. Any law altering the composition of the association compulsorily will be a breach of the right to form the association. Therefore, the word 'form' must refer to the initial

[16] AIR 1962 SC 1166
[17] *All India Bank Employees Association* v. *National Industrial Tribunal* AIR 1962 SC 171
[18] AIR 1971 SC 966

commencement of the association and the continuance of the association as such[19].

Fundamental rights guarantee protection to citizens from unnecessary encroachments of state on the active involvement of citizens in a democracy. Therefore, associations can only function independently or remain viable if they have the protection of fundamental rights in order to achieve the legal objectives of an association or union. However, the policy of exclusive interpretations of liberty under article 19 would undermine the effective enjoyment of such liberties. Therefore particular liberty should be interpreted in relation to the liberty concerned if possible.

American decisions in two cases are very relevant that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the fourteenth amendment. That it is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious, or cultural matters.[20] This statement of the U.S. Supreme Court contradicts what the Supreme Court of India has said in the *AII India Bank Employees Association*[21] and embodies the broader meaning of individual freedom.

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[19] *Id.*

[20] In a unanimous decision delivered by Mr. Justice Harlan, the Court confirmed the implication of Sweezy v. New Hampshire and held expressly that [*NAACP v. Alabama*, at 460.]

[21] *Supra* n. 18

The court relinquished the narrow interpretation of fundamental rights through the landmark judgment in *Maneka Gandhi* v. *Union of India*[22] and accepted the expansive interpretation of a fundamental right[23]. Although the Supreme Court took a very progressive decision in the Damayanti case, it did not have the capacity to overturn the *All India Bank Association* case verdict.

The discussions in this thesis show that the right to form associations or unions falls within the scope of the freedom of a citizen living in a politically democratic system to maintain and protect his or her existence in a democratic system. The use of the word union in the article guarantees the political and economic freedom of a citizen.

It is submitted that the hypothesis tested in this thesis was found to be partially correct. The study found that the ratio of the *All India Bank Employees Association* v. *National Industrial Tribunal*[24] to the fact that the right to strike is not a fundamental right enshrined in article 19 (1) (c) is correct. But the justification that led to this conclusion is not satisfactory. It can be reasonably suspected that the judgment of the larger Constitutional Bench of the Supreme Court in the *All India Bank Employees Association case*[25] was an impediment to a free and broad interpretation of the Constitution. Fundamental rights are not water tight compartments but complement each other. Many Supreme Court

[22] *Supra* n. 6
[23] *Supra* n. 7
[24] *Supra* n. 18
[25] *Supra* n. 18

decisions have pointed out that complementary rights must be read together to realize fundamental rights properly. Therefore, the ratio of the Supreme Court regarding concomitant rights in the *All India Bank Employees association* case should be reconsidered by a higher bench.

Although the Constitutional Bench denied the arguments raised by the Bank Employees' Association which are very pertinent to the scope of article 19 (1) (c) of the Constitution, need to be tried on the basis of new interpretations of unprecedented changes to the fundamental rights of the Constitution in general and freedoms under article 19 in particular. The rulings mentioned above of both the Supreme Courts of the United States and India have made it clear that in a democratic society, civil rights cannot be separated. One freedom is complementary to the other and does not exist without a mutual function. Articles 14, 19, and 21 of the Constitution represent fundamental values underlying the rule of law. Freedom of association is an independent right and the right as a vehicle for the advocacy of political, economic, cultural, and religious freedom of every citizen in India.

Suggestions

The freedom under article 19 (1) (c) of the Constitution of India is protected only for citizens to form an association, unions, or co-operative associations under the fundamental rights framework. It does not protect the pursuit of all the objectives of such associations or unions. The very idea of

protecting to achieve all the goals of the association or union is contrary to the fundamental principle of fundamental rights enshrined in Part III of the Constitution. The association is formed for different purposes, and the legality of the restrictions imposed on them should be examined based on what kind of objectives the association intends to achieve. Only the lawful and reasonable objects of any association, union, or co-operative society are protected under the scheme of article 19 (1) (c) of the Constitution of India.

By virtue of article 33 of the Constitution, the members of Armed Forces, the members of other forces charged with the maintenance of public order, the person employed in any bureau or other organization established by the state for intelligence or counterintelligence, the persons employed in or in connection with the telecommunication systems set up for any Force, bureau or other similar organization cannot claim of violation of their fundamental rights since their nature of work was to ensure the proper discharge of duties and the maintenance of discipline. Other government servants in common can exercise fundamental rights enumerated in Part III of the Constitution.

The right to form associations or unions under article 19 (1) (c) is generally reserved for citizens and especially for workers. The term ‘unions’ refer to the citizens’ exclusive right to form trade unions and employees associations and for the purpose of promoting workers’ trade union activities.

Concomitant rights are guaranteed to the associations or unions to achieve the object for which they formed the associations or unions. If this concomitant right were not conceded, the right guaranteed to form a union would be idle, an empty shadow lacking all substance. The right to dissent and the right to demonstrate is recognized in the spirit of liberty under article 19 of the Constitution. Still, to date, the right to strike has not been considered a fundamental right by any court decision. Instead, the right to strike is a statutory right available to the collective working class under the relevant provisions of the Industrial Relations Code, 2020.

The Supreme Court of India, thus, clarified that the right to strike is not a fundamental right, and no association or unions can claim strike as the concomitant right of the article.[26] But the right to strike is recognized as a legal right under the provisions of the Industrial Labour Code, 2020. There is no law denying the association rights of government employees; employees may have the right to participate in demonstrations against government decisions in employment matters. They have no statutory or constitutional right to strike or participate against the government.

The *All India Bank Employees Association* case ratio that concomitant right of freedom of association is outside protection under article 19 (1) (c). Further held that even a very liberal interpretation of article 19 (1) (c) cannot

[26] *Supra* n. 18

conclude that unions have a guaranteed right to effective collective bargaining. However, the freedom to form an association is essential for an employment right, allowing workers to negotiate with employers through collective bargaining. The concept of collective bargaining has not been accepted by the Supreme Court of India in the interpretation of article 19 (1) (c) of the Constitution. This is contrary to the international conventions of ILO on the right to form associations and the right to strike. The right to strike and dissent is a natural consequence of the democratic values of the Constitution but subject to reasonable restrictions of labour laws in India. There is a wide gap in the interpretation of associational rights in India with the international understanding.

The Supreme Court puts forward contradictory views in this regard, and some argue that the right of citizens of India to form associations or unions applies only at the initial stage of the association, while some other judgments point out that this right protects not only the initial formation of an association but also the continuation of associations[27]. The protection of freedom of association must be provided not only for starting an organization but also for achieving its goal if it is lawful. A narrow interpretation of fundamental rights is a thing of the past.

[27] *See Smt. Damyanti Naranga v. the Union of India*, 1971 (1) SCC 678

Over time, interpreters have been adding more and more freedoms to the contents of liberty in accordance with the changing circumstances of society and human life. Individuals believed that the decision to join others in pursuit of a common goal is a fundamental component of their liberty. Fundamental rights under Part III of the Constitution be interpreted inclusively, and therefore, mutually exclusive interpretations are not par with the contemporary jurisprudential aspects.

Freedoms mentioned in article 19 (1) are interconnected and do not exclude one from another. All these freedoms are mutually inclusive and inseparable. Over time, the Supreme Court of India increased the scope of freedoms under article 19 of the Constitution and accepted the view that freedoms are interrelated and cannot be interpreted separately.

The state shall not interfere in the internal affairs of any association or union by compulsory affiliation of association or by the acquisition of the association by law. The settled law is that acquisitions of societies or institutions in the national interest did not mean acquiring the right of members to form associations or unions. However, introducing new members or changing the composition of voluntary associations through the rule, regulation or statute is measured as interference of associational rights of members. In such cases, the voluntary nature of the association of the members who formed the original society was totally destroyed. So any interference to the

composition of association in the name of regulation would be considered a violation of article 19(1) (c) of the Constitution[28]. Hence, the court declared that such an act of interference might hinder the effective exercising of the right to continue the association with its composition as voluntarily agreed upon by the persons forming it.

As co-operative societies are the subject of state lists, the central government has no power to interfere in the activities of co-operative societies by enforcing any law. However, if the co-operative societies have inter-state activities, their activities can be regulated by law to the central government.

There is no classification in India as private associations or public associations to justify state intervention in the application of the principle of equality. An institution established in the name of national importance is different from other societies, associations, or institutions. A society cannot itself declare as an institution of national importance.

Interpretations given to article 19 (1) (c) by the Supreme Court of India have not reflected the principles inherent in international treaties. Service rules and the decisions of the Supreme Court of India in this regard are against the well known principles of civil rights. The principle states that employees involved in the government's confidential affairs or ministerial posts can be exempted from exercising their fundamental freedom as a citizen. India has not

[28] *Supra* n. 19

ratified the fundamental Conventions of ILO, namely Freedom of Association and Protection of the Right to Organise Convention, 1948 and Right to Organise and Collective Bargaining Convention, 1949. Conventions of ILO relating to public service, namely the Labour Relations (Public Service Convention 1978 and Workers' Representative Convention, 1971 are not ratified by India. Indian has to ratify various Conventions which guarantee fundamental freedoms to citizens.

BIBLIOGRAPHY

STATUTES

Air Force Act, 1950

All India Service (Code of Conduct) Rules, 1968

All India Services Act, 1951

Andhra Pradesh Co-operative Societies Act, 1964

Asom Rashtrabhasha Prachar Samiti (taking over of Management and Control) Act, 1984.

Bihar Private Educational Institutions (Taking Over) Act, 1987

Bombay Cooperative Societies Act, 1925

Bombay Industrial Relations Act, 1946

Central Civil Service (Conduct) Rules 1964

Central Civil Services (Classification, Control and Appeal) Rules, 1965

Central Civil Services (Conduct) Rules, 1955

Companies Act, 1956

Companies Act, 2013

Contract Labour (Regulation and Abolition) Act, 1970

Co-operative Societies Act, 1912

Defence of India Act, 1962

Employees Provident Fund and Miscellaneous Provisions Act, 1952

Employees State Insurance Act, 1948

Employment Relations Act, 1999

Essential Services Maintenance Act, 1968

Forward Contracts (Regulation) Act, 1952

Government Servants Conduct Rules, 1960

Gujarat Co-operative Societies Rule, 1965

Haryana Cooperative Societies Act, 1984

Indian Army Rule, 1954

Indian Council of World Affairs Act, 2001

Indian Navy Act, 1957

Indian Army Act, 1950

Industrial Employment Standing Orders Act, 1946

Information Technology Act, 2000

Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

Kerala Public Services Act, 1968

Labour Relations (Public Service) Convention, 1978

Land Acquisition Act of 1894

Maharashtra Cooperative Societies Act, 1960

Maternity Benefit Act, 1961

Multi-State Co-operative Societies Act, 2002

National Labour Relations Act of 1935

Payment of Gratuity Act, 1972

Prevention of Corruption Act, 1988

Promotion Employees (Conditions of Service) Act, 1976

Societies Registration Act, 1860

Subversive Activities Control Act, 1950

Tamil Nadu Essential Services Maintenance Act 2002

Tamil Nadu Ordinance, 2003

Terrorist and Disruptive Activities (Prevention) Act, 1987

The Contract Labour (Regulation and Abolition) Act, 1970

Trade Union and Labour Relations (Consolidation) Act 1992 (UK Act)

Trade Unions Act, 1926

Transfer of Property Act, 1882

Unlawful Activities (Prevention) Act, 1967

Unorganised Workers Social Security Act, 2008

TREATIES AND CONVENTIONS

African Charter on Human and Peoples' Rights (ACHPR), 1981

Charter of Fundamental Rights of the European Union, 2000

Declaration of Philadelphia, 1948

European Social Charter, 1961

Freedom of Association and Protection of the Right to Organise Convention, 1948

International Covenant on Civil and Political Rights, 1966

Labour Relations (Public Service) Convention, 1978

Magna Carta, 1215

Right to Organize and Collective Bargaining Convention, 1949

Rural Workers' Organizations Convention, 1975

Universal Declaration of Human Rights, 1948

Workers' Representative Convention, 1971

REPORTS

The First National Commission on Labour, 1969

The First National Commission on Labour, 2002

BOOKS

Alexis de Toqueville, *Democracy in America* (1835)

Amy Gutmann, *Freedom of Association: An Introductory Essay* (1998)

Aristotle, *Nicomachean Ethics* (2009)

Black's Law Dictionary (1979)

Collins Dictionary of Law (2006)

De Tocqueville, *Democracy in America* (1966)

H.M.Seervai, *Constitutional Law of India* (2008)

John Rawls, *Political Liberalism* (2010)

John Rawls, *A Theory of Justice* (1971)

John Stuart Mill, *On Liberty* (1859)

K.S.Verma, Kusum , *Fifty years of the Supreme Court of India: Its Grosp and Reach* (2000)

Larry Alexander, *What Is Freedom of Association, and What Is Its Denial?*, *Social Philosophy and Policy* 25(2) (2008)

M. P. Jain, *Indian Constitutional Law* (2014)

Prof. G. Manoher Rao, *Constitutional Development through Judicial Process* (2012)

Prof. G. Manoher Rao, *Constitutional Value Jurisprudence* (2012)

Ram Jethmalani & D. S. Chopra, *Media Law* 1(2014)

Randall G. Holcombe, *Constitutions and Democracy* (2001)

Robert J. Sampson, *Great American City: Chicago and the Enduring Eeighbourhood Effect* (2011)

Ronald Dworkin, *Taking Rights Seriously* (2013)

Sararaditya Pal, *Law Relating to Public Service* (2011)

Sidney & Beatrice Webb, *Industrial Democracy*, Longmans, 538 (1902)

James A. Gross and Lance Compa , *Human Right in Labour and Employment Relations: International and Domestic Perspectives* (2009)

Tonia Novitz, *International and European Protection of the Right to Strike* (2003)

V.N.Shukla, *Constitution of India* (2013)

ARTICLES

A.G.Noorani, *A Legitimate Right*, Frontline, Oct, 10 (2003)

Arjun P. Aggarwal, *Strike by Government Employees: Law and Public Policy*, 358, (14 (3) JILI (1972)

Ashutosh Bhagwat, *Associational Speech*, 120 Yale L.J. 978 (2011)

Eddy Lee, *The Declaration of Philadelphia: Retrospect and Prospect*, 133 Int'l Lab. Rev. (1994).

Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C Davis L. Rev. 821 (2002)

Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harvard Journal of Law and Public Policy 91 (1987)

Geraldo von Potobsky, *Freedom of Association: The Impact of Convention No. 87 and ILO Actio*n, 137 Int'l Lab. Rev. 195 (1998)

Gerrit Pienaar, *Freedom of Association in the United States and South Africa — A Comparative Analysis*, 26. The Comparative and International Law Journal of Southern Africa, 147 (1993)

Gerrit Pienaar, *Freedom of association in the United States and South Africa — a comparative analysis*, 26 (2) The Comparative and International Law Journal of Southern Africa, 147 (1993)

Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33 (2000)

J. P. Duda, *Fundamental Rights and Personal Liberty under our Constitution Some Observations* 37, 11 (4) the Indian Journal of Political Science (1950)

Jean-Michel Servais, *ILO Standards of Freedom of Association and Their Implementation*, 123 Int'l Lab. Rev. 765 (1984)

Jean-Michel Servais, *ILO Standards of Freedom of Association and Their Implementation*, 123 Int'l Lab. Rev. 765, (1984)

Jed Rubenfeld *The Right of Privacy*, 102 Harvard LR 737 (1989)

John D. Inasu, *The Unsettling Well Settled Law of Freedom of Association*, 43 Conn. L. Rev. 149 (2010)

Kenneth Karst, *The Freedom of Intimate Association* 89 YALE L.J. 624 (1980)

Lee Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, 137 Int'l Lab. Rev. 169 (1998)

Lee Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, 137 Int'l Lab. Rev. 169 (1998)

K.S.Verma, Kusum, *Fifty years of the Supreme Court of India: Its Grosp and Reach*, (2000)

Prof. (Dr.) Subhasish Chatterjee, *Labourers of Unorganized Sectors and their Problems*, 3 IJETST 4397 (2016)

Reena Raggi, *An Independent Right to Freedom of Association*, 12 Harv. C.R.-C.L. L. Rev. 1 (1977)

Richard C. Sinopoli, *Associational Freedom, Equality, and Rights against the State*, 47 Political Research Quarterly, 891(1994)

Syed M. A. Hameed, *A Theory of Collective Bargaining,* Industrial Relations, 25 (3) Industrial Relations 531 (1970)

William O. Douglas, *Right of Association*, 63 Colum. L. Rev. 1361 (1963)

Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916-1917).

ONLINE MATERIALS

http://classics.mit.edu//Aristotle/nicomachaen.html, accessed on 12/06/2020

Aristotle, *Politics*, http://classics.mit.edu/Aristotle/politics.1.one.html , accessed on 23/02/2021

http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Intro/acknowledgements.htm/ accessed on 15/08/2021

https://plato.stanford.edu/entries/freedom-association/ accessed on 26/05/2020

https://plato.stanford.edu/entries/morality-definition accessed on 05/02/2021

https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm accessed on 06/07/2020

https://www.lexquest.in/understanding-cooperatives-constitution-97th-amendment-act-2011/ published in LexQuest foundation on April 18, 2018

https://www.merriam-webster.com/dictionary/moral%20law, accessed on 06/20/2021

Zvonimir Mataga, 'The Right to Freedom of Association under the European Convention on the Protection of Human Rights and Fundamental Freedoms' (Strasbourg, October 2006) 5 accessed 28/12/2017.

LIST OF PUBLISHED WORKS

Appendix I

Freedom of Association and its Relevance in a Democracy, 367(ed, 2020), ISBN: 978-81-945680-1-8, published by Centre for Parliamentary Studies and Law Reforms, NUALS.

Appendix II

The Relevance of Collective Bargaining and the International Labour Organisation in Determining Labour Standard, 80, (ed. 2020) ISBN: 978-81-945680-2-5, published by Centre for Competition Law & Policy, NUALS.

Appendix I

Freedom of Association and its Relevance in a Democracy

Abhayachandran K.*

Abstract

A fundamental principle of a democratic society is that a government is structured on the premise that every citizen shall have the right to engage in political expression and association. Association means a voluntary group joined together for a common purpose which enjoys civil and political rights. Formation and lawful activities of such associations is fundamental to the principle of liberty. In all democratic systems, freedom to establish associations is incorporated in their constitutions. However, in certain countries, including India, the Right to Association is exclusively interpreted. The Right is to be viewed in a broader spectrum since all the freedoms are vital components of the Liberty. For example, the right to travel is nowhere expressly mentioned in the Constitution of India, but it is inevitable for enjoying all other Constitutional rights. Such interconnection of freedoms has been established by the Supreme Court of India on several occasions while interpreting fundamental rights. The Court, however, had expressly denied this interconnection in certain cases particularly relating to freedom of association.

The purpose of this Article is to solve this issue with a comparative analysis of associational rights with the aid of foreign jurisprudence. The Article examines the concept of freedom of association in a wider canvas of liberty which is lifeblood of any democratic government. The author critically analyzes the narrow view of the Supreme Court in Damayanti Naranga v Union of India case (AIR 1971 SC 966) on interpretations of associational right under Article 19 (1) (a) and finds that freedom of peaceful association is a right cognate to those of liberty in the democratic framework of the Constitution. Methodology used for the study is doctrinal as well as analytical and interpreted legal terms in accordance with the principle of interpretation of Constitutional provisions.

Keywords: Freedom of Association, Labour Rights, Articles 19(1)(c) and 19(4), Constitution of India

Introduction

Every creature in nature lives as a group or is associated with the creatures of the same character. Associational activities of men are as old as the history of human being, all ages of men, all situations in life, and all types of dispositions are forever

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forming association of a thousand different types[1]. History tells us that an association can help restore a person's self-esteem and confidence and that human fellowship can restore the companionship. To maintain normal family, religion, economic, political and social relations, man relies on others in various spheres of life. Group formation is natural to humans. This phenomenon has been recognized by many different legal systems from ancient times to the present day, especially family, religious and economic relationships[2]. All historians and legal scholars have commented on the journey of the coexistence and social life of human being. De Tocqueville viewed freedom of association as so fundamental as to have a source in natural law:

"The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore, the right of association seems to me by nature almost as inalienable as individual liberty. No legislator can attack it without impairing the foundations of society".[3]

There can be no democracy without freedom. Individuals should have the freedom to make public decisions, to communicate and associate with each other, to receive accurate information, to express different opinions, to enjoy the freedom of travel, and to be free[4]. These kinds of inclusive freedoms are the essential components of liberty in a democracy. Associations, therefore, formed by men are not only for getting together or for entertainment but also for different purposes at every point in the course of human life like commercial, industrial purposes "religious, moral, serious, futile, very general, very limited, immensely large, and very minute"[5].

Prior to the establishment of the ILO, there were early attempts to negotiate international agreements on workers' rights including right to organize through

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[1] De Tocqueville, *Democracy in America* 485 (1966). Religious, moral, serious, futile, very general and very limited, immensely large and very minute are created by men in his walk of life.

[2] Gerrit Pienaar, *Freedom of Association in the United States and South Africa – A Comparative Analysis*, 26. The Comparative and International Law Journal of Southern Africa, 147, 147 (1993)

[3] Tocqueville, *supra*, n. 1 at 178

[4] David Beetham, *The quality of democracy: freedom as the foundation,* 15. Journal of Democracy, 61, 61(2004)

[5] De Tocqueville has described so many associations in his book like Churches, synagogues, and mosques, colleges, universities, and museums, corporations, trade unions, and lobbying groups, sports leagues, literary societies, sororal and fraternal orders, environmental groups, national and international charitable organizations, and self-help groups, parent-teachers associations, residential associations etc

negotiations between the States, but they were not successful[6]. At the end of World War I, in 1919, the League of Nations and the International Labour Organization were established. The ILO is responsible for the adoption of international conventions on working conditions. ILO convention in its Treaty of Versailles[7] proclaimed that the High Contracting Parties considered the right of association for all lawful purposes as its primary object of the Organisation. This right reiterated in 1944 when the ILO adopted the Declaration of Philadelphia that freedom of association as one of the fundamental principles on which association was based, and characterized it as essential to sustain progress. However, the ILO instruments denote associational rights only to employees and employers for the purpose of exercising the process of collective bargaining.

Associational rights and equality

Freedom of association has received little attention among political philosophers. They are more concerned on freedom of speech and expression and freedom of assembly etc [8] . There are some writers who explore two perspectives of associational freedom on the basis of intrinsic value: Liberal and Egalitarian perspectives. According to liberal perfectionist, associational right is not an individual right but is a concrete form of fundamental right to liberty. Associational rights and other political liberties are important as they enable people to lead autonomous lives. Personal autonomy refers to an ideal of self-directed action, of persons being authors of their own lives that allow individuals to live autonomous lives with others[9]. State intervention, therefore, in a liberal society is relatively low. Egalitarians argued that the first and foremost concern of society is that every person should treat others with equal treatment and respect. They believed that if people were unjustly denied access to associations, it would be ruled by force rather than consent. Contemporary revisionist liberal theorists, particularly John Rawls[10] and Ronald Dworkin[11] have given too much weight to egalitarian concerns than a

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[6] Lee Swepston, *Human Rights Law and Freedom of Association: Development through ILO Supervision,* 137 Int'l Lab. Rev. 169 (1998).

[7] The Treaty of Peace of Versailles was signed on 28 June 1919. Its Part XIII (Labour) was also incorporated.

[8] Amy Gutmann, *Freedom of Association: An Introductory Essay*, 3 (Amy Gutmann, 1998)

[9] *See* Richard C. Sinopoli, *Associational Freedom, Equality, and Rights against the State*, 47 Political Research Quarterly, 891(1994)

[10] John Rawls was an American political philosopher in the liberal tradition. His theory of *justice as fairness* describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system.

[11] Ronald Myles Dworkin was an American philosopher and jurist. His theory of law interprets the law in terms of moral principles especially justice and fairness.

libertarian concept on the question of State intervention of associations[12]. They have strongly supported State intervention into the internal matters of associations to maintain equality among members in a liberal democracy. Ronald Dworkin opined that fundamental rights are trump cards which protect individuals from being treated as unequal and the ultimate justification of these rights is that they are necessary to protect equal concern and respect. Fundamental rights are derived from an egalitarian concern regarding how it is morally permissible to treat others[13]. On the contrary, the Liberal Perfectionist's view is that a person joins an association for pleasure and participates in activities from within the framework of the association in order to advance his own idea of good with others.

Although associating with like-minded individuals is one of the basic characteristics of humanity, the freedom of association, in certain modern constitutions, neither find a place in the list of fundamental rights along with freedom of expression and assembly and religious beliefs, nor is the right treated with equal importance. The formation of commercial groups and ecclesiastical groups was permissible but political freedom of association did not exist[14]. In the course of time, as a result of the protracted struggle for human rights and political freedoms, it has been incorporated into modern constitutions, but not expressly incorporated. While many religious, political and economic associations recognize that they are essential elements of civil society, many constitutional makers have not sought to include freedom of association in the list of fundamental rights of their constitutions or the right of association is not specifically delegated. In this context, it is appropriate to examine the role of the freedom of association in the US Constitution because the Constitutional decisions of the US Supreme Court have exercised a profound influence on the election of Indian Fundamental Rights and its exponential growth.

Until 1958, it remained a controversial question as to whether the associational rights were a part of American Constitutional jurisprudence[15]. Finally the U.S. Supreme Court in *NAACP* v. *Alabama*[16] case observed that even though associational right is not expressly mentioned any provision or amendments, it can

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[12] *Supra* n. 9 at 893

[13] *Id* at 898

[14] *Supra* n.2 at. 148. During the middle ages, the feudal system prevented the formation of groups in the constitutional sense. However, the formation of gild and religious institutions like Roman Catholic was permitted at that time.

[15] The year in which the American Supreme Court delivered the judgment in *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958).

[16] 357 U.S. 449 (1958)

be deducted from the entire concept of liberty represent in constitutional values[17]. The US Supreme Court has, by its most exclusive interpretation, found two constitutional sources of freedom of association classifying them as 'instrumental' and 'intrinsic'. The source of the instrumental is the First Amendment, which protects the right to engage in expressive activities, while intrinsic is inherent in the Fourteenth Amendment to the Constitution to protect the privacy rights of members of an association[18]. The First Amendment has three collective rights: the freedom of the press; the freedom of assembly; and the free exercise of religion. The freedom of association is inherent in these three rights. Any more general right of association must come through the Due Process Clauses of the Fifth and Fourteenth Amendments[19]. Association is liberty; liberty may not be reduced except by due process[20]. Otherwise it may be said that liberty includes association to run a farm or corporation and to drink whiskey in a club as much as it includes association to engage in sexual activities of one's choice[21].

The tension between associational freedom and equality is one aspect of the larger tension between the concept of equality and liberty, which assumes that each individual has personal interests and goals. State has the duty to ensure and protect right to equality of its citizens. At the same time, State also needs to ensure that it does not disturb the privacy of citizens who come together for some lawful purposes. This issue elaborately discussed in *Roberts* v. *United States Jaycees*[22] in which members of an association claim freedom of association as a shield against outsiders. United States Jaycees is a non-profit national membership corporation whose objective, as stated in its bylaws, is to pursue such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations. Members of the association raised the objections against the application of Minnesota Human Rights Act on the ground that the Act violated the First and Fourteenth Amendment rights of the organization's members. The Court addressed the issue of the tension between associational freedom and equality principle propounded by the State in a fundamental way. If an association

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[17]Similar view was expressed by the Supreme Court of India in *M. Nagaraj v. Union of India*, (2006) 8 SCC 212 that the Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.

[18] Justice Brennan identified these two sources in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

[19] Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harvard Journal of Law and Public Policy 91, 91 (1987)

[20] *Id*

[21] *Id*

[22] *Roberts v. United States Jaycees* 468 U.S. 609 (1984)

exists solely for the benefit of male members, a woman may be denied her right to enter the association, on the contrary, if women members permitted to become full members of such organisation that would be violated the existing members' freedom of association. The Court, however, has consistently rejected the members' claim on association rights because the anti-discrimination law must be applied in areas such as employment, education and access to commercial enterprises[23]. The Court held that application of the Minnesota Human Rights Act to compel the Jaycees to accept women as regular members did not abridge either male members' freedom of intimate association or their freedom of expressive association. This decision sparked a big debate on the implementation of ant-discriminatory law to private associations and whether it amount to interference of associational right of members of the association. The debate is still going on at the academic level.

The significance of the Jaycees decision is that even private associations are not free from the State's obligation to apply anti-discrimination laws. Access to opportunities and equal access to public institutions as a compelling State interest would be the highest order. However, the State has the responsibility to ensure the freedom of association in the name of equality but it shall not compromise the right of privacy and personal liberty of individuals. A need for a balancing approach is an inevitable solution to tackle the issue. In a liberal society, the distinction between purely public and private associations is increasingly becoming faint. The State has in many ways intervened in the domestic affairs of many organizations, such as clubs, corporations and universities, in the name of tax breaks and subsidies. However, responding to the question of establishing rights of member in an association, the court held that not all associations can be treated equally. A family as an association of intimate relatives and blood ties can only be interpreted based on the privacy of family members.[24] Therefore, associations are divided into two groups based on a State's ability to interfere with the internal affairs of an association such as freedom of intimate association and freedom of expressive association. State legislation cannot compel any association to accept the members whom the association does not to wish to become members of the intimate association[25].

Freedom of association means freedom to choose organisations. Can a private association unilaterally select its members by exercising associational freedom? Are private organizations outside the scope of legislation that aims to meet the principle

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[23] See also *Railway Mail Assn. v. Corsi,* 326 U.S. 88 (1945)
[24] *Supra* n. 19.
[25] *Id*. at. 617

of anti-discrimination? A person's privacy may include selecting an association that maintains his personal interests. One aspect of constitutionally protected liberty is that a person can choose an 'intimate association' or be a member of that organization on the basis of his privacy rights[26]. A strong argument against the State intervention on the fundamental nature of the right to select one's intimate associates is derived from the concept of "zone of privacy" which was established in *Griswold* case[27] and constitutional protection of due process clause. Right to privacy of a person denotes a deep attachment and commitment of intensively personal intimacy, but in certain associations, members share not only ideas and experiences but also the distinctively personal and unique aspects of one's life. Family is a type of association where no one can enter the family without the consent of the family members. The right to privacy of the family is protected by keeping the family as a private organization. The State does not have any opportunity for the enforcement of the anti-discrimination law on family ties because it is a unique group. Marriage is an association of two individuals. The State should not infringe on the privacy rights of those individuals because the practice of contraception is part of the privacy of a marriage institution[28]. Like all human rights, the unrestricted use of the freedom of association may jeopardize the rights of others, particularly the right to privacy.

A commercial association will get only minimal constitutional protection[29]. But how to differentiate it from the expressive association is a challenge before the court of law. An association formed to engage in civil rights activities is likely to engage in a number of economic activities such as dues to be collected, office equipment to be purchased, coffee to be served and halls to be rented. Commercial associations may also engage in accidental activities such as advertising, discussions and negotiating that are not subject to commercial freedom but may be subject to freedom of speech and expression.

Liberty

Liberty of an Individual is something broader than the mere narrated fundamental rights in the Constitutions. In the course of time, the constitutional interpreter has been adding more and more freedoms to the meaning of liberty in accordance with the changing circumstances of society and human life. Individuals believed that the decision to join others in pursuit of a common goal is a fundamental component

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[26] *Bell v. Maryland*, 378 U.S. 226, 313 (1964)
[27] *Griswold v. Connecticut*, 381 U.S. 479 (1965)
[28] *Id*
[29] *Id,* (O'Connor J.)

of their liberty[30]. Liberty is the sum of the political, economic, and social rights that man has to live in dignity in a democratic political system. In 1943, in the *Board of Education v. Barnette*[31], the US Supreme Court ended the controversy over the sanctity and importance of fundamental rights and clarified the position of fundamental rights in a Constitution. The Court stated that,

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[32]

When it comes to restrictions on liberty, the State must carefully circumcise, especially in areas that are highly sensitive freedoms, such as freedom of speech and freedom of political associations.[33] Freedom of political association of individuals is equally important in a democratic society because the government is built on the right of every citizen to engage in political expression and association[34]. The U.S. Supreme Court has affirmatively answered the question that whether the liberty of associations guaranteed by the Fourteenth Amendment would protect from the unnecessary interference by the State through legislation. In a unanimous decision in *Sweezy v. the New Hampshire*[35], Justice Harlan clarified that freedom to associate for the advancement of beliefs and ideas is an inseparable part of liberty and further held that the beliefs sought to be advanced by the association pertain to political, economic, religious, or cultural matters is immaterial. The court held in *NAACP v. Alabama*[36] case that any order from the State authorities to produce the membership list was unnecessary for the State.

Inter-connections of freedoms

International human rights instruments affirm that freedom of association is a collection of civil, political and economic right. The traditional concept of separating civil and economic rights of an individual in a civil society is not considered in new interpretations of fundamental rights. The concept of liberty not

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[30] Reena Raggi, *An Independent Right to Freedom of Association*, 12 Harv. C.R.-C.L. L. Rev. 1 (1977).
[31] 319 US 624 (1943)
[32] 319 US 624, 638 (1943)
[33] *NAACP v. Alabama*, 357 U.S. 449 (1958) (Warren C.J.)
[34] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)
[35] *Id.*
[36] *Supra* n. 16

only confirmed civil and political right but also economic and cultural rights which are very essential to the enjoyment of group rights. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people[37]. In a democracy, water compartment rights are not amenable to modern democratic values. In the NAACP case, the US Supreme Court recognized for the first time that the freedom of association was an integral part of the First Amendment of the Constitution and established a close link between freedom of association and other freedoms.

"This court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the 14th Amendment, which embraces freedom of speech.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny".[38]

A rational blend of civil, political and economic rights can be seen in the systematic interpretation of human rights. Many court decisions remind us that instead of traditional interpretations, new style of interpretations of fundamental rights should be applied with the changing circumstances of contemporary society and its values. Freedom of association has been expressly recognised by Indian Constitution even before the Supreme Court of America interpreted it as a part of the First Amendment of the Constitution.[39] However, the Supreme Court rejected this notion in its interpretation of Article 19 (1) (c) of the Constitution. They considered only the civil and political rights in interpreting Article 19 (1) (c) of the Constitution, and totally neglected the economic aspects of the right. One of the significant observations made by the Supreme Court of India that court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. The Court relinquished the narrow interpretation of fundamental rights through the landmark judgement in *Maneka Gandhi v. Union of India* [40] and accepted the expansive interpretation of a fundamental right[41].

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[37] *Pathumma v. State of Kerala,* AIR 1978 SC 771
[38] *Supra* n. 27 at 460-61 (Harlan J., wrote for the majority)
[39] *Id.*
[40] (1978) 1 SCC 248
[41] *Sakal Papers (P) Ltd. v. Union of India,* AIR 1967 SC 305

Associations may be constituted for different purposes, viz, political, trade unions, religious, charitable, non-governmental organisations and to conduct economic purposes like partnership firm and company etc. The protection of freedom of association must be provided not only for starting an organization but also for achieving its goal if it is lawful. For example, if an organization is formed to carry out a partnership business, the protections of Article 19 (1) (c) and Article (1) (g) is interpreted as mutually inclusive. A controversy came up on the scope of associational rights coupled with the right to carry on trade or business. Several cases have been brought before the Supreme Court. For example, co-operatives and companies are formed to carry out business activities for their own welfare or financial interests. In *Tata Engg.and Locomotive Co.Ltd.* v. *State of Bihar*[42] the Constitution Bench of the Supreme Court has clarified this issue as follows:

"Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation, and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing alone and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. When an organization starts business activities, it would be treated differentially and would come under the purview of Article 19 (1) (g) of the Constitution."

The statement of the Court that "when an organization starts its business, it will be treated differently and covered by Article 19 (1) (g) of the Constitution" is wrong because only a citizen is eligible for the protection of Article 19 (1) (g), companies are not eligible for the protection since they are the artificial persons. Therefore, the company is eligible neither for protection of Article 19 (1) (c) nor Article 19 (1) (g) of the Constitution.

The Constitution Bench of the Supreme Court in *Damyanti Naranga v. The Union of India*[43] has cleared the position by holding that "the right to form an Association includes the right to its continuance and any law altering the composition of the Association compulsorily will be a breach of the right to form the Association. The word 'form' therefore, must refer not only to the initial commencement of the association, but also to the continuance of the association as such"[44]. But the court in several cases rejected the coverage of protection of Article 19 (1) (c) to concomitant right of associational rights.

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[42] AIR 1965 SC 40
[43] AIR 1971 SC 966
[44] *Id.*

It can be drawn from the above discussion that the Supreme Court has issued two rulings that do not fit interpretation of Liberty in a democratic system. Since man is a social person, he has made his history by forming numerous organizations and groups to fight for his existence. Political activities or religious propaganda cannot exist without the freedom of association, so the freedom with the democratic system is essential. Freedoms mentioned in the Article 19 (1) is interconnected and does not exclude one from another. All these freedoms are mutually inclusive and inseparable and therefore, it may be interpreted in a single canvas of Liberty in a democracy.

It was the verdict of the *All India Bank Employees Association*[45] case that Concomitant Right of freedom of association is outside Protection under Article 19 (1) (c) and further held that even very liberal interpretation of Article 19 (1) (c) cannot lead to the conclusion that unions have a guaranteed right to effective collective bargaining. The relevant questions are:

1. The right to form associations or unions under Article 19 (1) (c) is generally reserved for citizens and especially for workers. The term 'unions' refer to the citizens' exclusive right to form trade unions. Therefore, the term 'unions' is used exclusively for the purpose of promoting workers' trade union rights.

2. Concomitant rights are guaranteed to the members of associations or unions to achieve the object for which they formed the associations or unions. If this concomitant right were not conceded, the right guaranteed to form a union would be an idle right, an empty shadow lacking all substance.

3. Right to strike and dissent are natural consequences of the democratic values of the Constitution which guaranteed its citizens through under Article 19(1) (c).

4. The only limitations permitted to be imposed by law are those set out in clause (4) of Article 19 and unless, therefore, either the objects of the association or the manner of achieving them are contrary to, or transgress public order or morality, for which reason alone reasonable restrictions might be imposed upon the guaranteed right.

Although the Constitutional Bench has denied these disputes, questions raised by the Bank Employees' Association which are very pertinent to the scope of Article 19 (1) (c) of the Constitution need to be tried on the basis of new interpretations of unprecedented changes to the fundamental rights of the Constitution in general and freedoms under Article 19 in particular. The above-mentioned judgements of both the Supreme Courts of the United States and India have made it clear that in

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[45] *All India Bank Employees v. National Industrial Tribunal,* AIR 1962 SC 171

a democratic society, civil rights cannot be separated and also clear that one freedom is complementary to other and does not exist without mutual function of it. Articles 14, 19, 21 represent foundational value which form the basis of the rule of law. Principles of Constitution protect the democratic principles. Freedom of association is not only an independent right but also the right as a vehicle for the advocacy of political, economic, cultural, and religious freedom of an individual.

Conclusion

The right of the people to assemble peacefully and form association for lawful purposes existed long before the Constitutions. Freedom of association, therefore, is inalienable individual liberty but there is no uniformity in liberal democracies about the recognition of this right. Freedom of association is not enumerated in most of the constitutions in the world but it is a cognate liberty in the wider sense. Individual liberty cannot happen without the associational freedom which requires the right to organise, strike and collective bargaining. Violation of these components of associational freedom denies not only freedom of associations but also right to live and enjoy a dignified life. However, the State must take care not to allow these rights to harm the enjoyment of the freedom of others. The freedom of association is essential to gaining and maintaining other rights. People tried to form associations to grab the attention of rulers to the issues of common people who were not rich or elite class in a system. Freedom of speech and expression is worthless without freedom of association. A narrow interpretation of fundamental rights is a thing of the past.

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Appendix II

LABOUR RIGHTS IN THE NEW MILLENNIUM

THE RELEVANCE OF COLLECTIVE BARGAINING AND THE INTERNATIONAL LABOUR ORGANIZATION IN DETERMINING LABOUR STANDARDS

Abhayachandran K.

Short Editorial Analysis

The following article deals with the evolution and contemporary significance of independent and voluntary collective bargaining in the area of public and private employment. It also highlights the role of trade unions in securing equivalent bargaining power between the employers and the employees.

Abstract

In the light of drastic changes in the international labour standards, the purpose of this seminar paper is to review the impact of the principle of collective bargaining in the international labour market to establish labour standards through a democratic process and to establish social justice. The ILO is an international organization responsible for the creation and implementation of international labour standards, promoting social justice, urging national governments to recognize labour rights. The organization also framed a number of important international conventions, established key rights for workers and helped to abolish unfair trade practices. The principle of collective bargaining is conceptualized in the Right to Organise and Collective Bargaining Convention, No. 98, which was adopted five years later in 1949, was ratified by 145 member states till date. However, India has not yet ratified the convention. The Convention injected democratic values into the relations of employer and employees and promotes and protects their associational rights in the labour market.

The seminar paper analyses the role of collective bargaining in an extremely competitive market where the price of labour is determined by the demand and supply conundrum. There are differences of opinion regarding applying the principle of collective

bargaining in trade relations or industry. There are views which underlines that collective agreement would be replaced by individual contract in the context of globalization and liberalization era. The paper discusses the questions upon the principle of social justice which is one of the primary objects of the International Labour Organization. It is surmised that collective bargaining is a democratic process by which negotiate voluntarily by the parties and finally conclude a collective agreement in terms of employment conditions. Collective bargaining, however, would not be denied the scope of individual contracts if it is more favourable to the workers. The methodology used for the study is doctrinal as well as analytical. Since this study critically analyses international labour laws, it is hoped that this will help to revise India's labour laws in a timely manner.

"Among a democratic people, where there is no hereditary wealth, every man works to earn a living. Labour is held in honour, the prejudice is not against, but in its favour"

– Alexis de Tocqueville

Introduction

International Labour standard aims to end the exploitation of workplaces and provide decent wages to workers. Child labour and workplace inequality have long been a curse. The emergences of labour unions and collective bargaining have greatly contributed to maintaining human rights and employment in the workplace. Although the labour organizations grew in the early stages under the shadow of the employers, the emergence of the ILO provided a regulatory framework for labour organizations and their activities. Employers are forced to determine wages and other benefits for employee based on labour market forces. This is mainly done in two ways. One, as economists point out, is the way in which the worker is seen as a product and the workers' wages are determined by their demand and supply.

The second is the method of collective bargaining in which workers collectively negotiate for wage increase and favourable working conditions and they have more bargaining power than individuals. They usually do this through the

system of a trade union. This process existed in England even before the end of the 18th century and later it spread in Europe and the United States of America. In the 19th century, collective bargaining theory considered only the process of negotiation as the core of the theory and ignored key factors such as trade unions, employers' associations, and legal sanctioned strikes or lock-outs.[1] Freedom of association and collective bargaining are the fundamental rights declared by ILO in the beginning of the twentieth century through its Convention, namely, Right to Organise and Collective Bargaining Convention. It was ratified by 167 countries indicating the importance of collective bargaining and its application for setting labour standards in respective states.

Collective bargaining

The ILO Collective Agreement Recommendation 1982, paragraph 2 defines collective bargaining as:

All agreement in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organization, or, in the absence of such organizations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.[2]

It is an ongoing process of negotiation between representatives of workers and employer or employers association to establish the conditions of employment. The collectively determined agreement may cover wages, hiring practices, layoffs, promotions, job functions, working conditions and hours, worker discipline and termination, and benefit programs.[3] Thus, collective bargaining is a process or activity leading up to the conclusion of a collective agreement. All agreement regarding working conditions and terms of employment shaped

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[1] Sidney & Beatrice Webb, *Industrial Democracy*, Longmans, 538 (1902).

[2] Bernad Germigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 Int'l Lab. Rev. 33, 35 (2000).

[3] https://www.britannica.com/topic/collective-bargaining (May 26, 2020, 12:29 PM).

up from the process have to be put down in writing. The binding nature of collective agreement can be established either by legislature means or by the collective agreement itself, according to the method followed in each country.

Sydney and Beatrice Webb presented a classical model of Collective Bargaining in their famous book '*Industrial Democracy*'[4] as an economic model during the 19th century.[5] They did not define collective bargaining but produced many examples, such as the one below:

In unorganized trades the individual workman, applying for a job, accepts or refuses the terms offered by the employer without communication with his fellow-workmen, and without any consideration other than the exigencies of his own position for the sale of his labour he makes, with the employer, a strictly individual bargain. But if a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position is at once changed. Instead of employer making a series of separate contracts with isolated individuals, he meets with collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged.[6]

The above thought overlooked the role of employer and their associations and denied any possibility of individual contract in the absence of collective agreement. Therefore, it is considered an alternative model against individual contracting and is as exclusive a trade union method which substituted collective will for individual bargain.

To facilitate the operation of the process of collective bargaining, a favourable political system with high growth opportunities and economic freedoms, a process to support pressure groups, in which the lobbying and decision-making pluralism and legal framework to protect various interest groups etc., are the

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[4] *Supra* n. 2.

[5] Syed M. A. Hameed, *A Theory of Collective Bargaining,* Industrial Relations, 25 Industrial Relations (No. 3) 531, 551 (1970).

[6] *Supra* n. 1.

preconditions for the better functioning of collective bargaining.[7] But it is not the same as selling a product, where both the seller and the buyer enter into an agreement about the eventual purchase. In collective bargaining, both parties force the other party to accept the conditions of one party in the form of socio-economic sanctions like strike and lockout. The primary purpose of collective bargaining is to determine the terms and conditions of employment, including wages. Therefore, some authors point to its three dimensions, (i) the union as the certified bargaining agent of employees negotiating with an employer or their associations, (ii) the process backed legal sanctions in the form of permissive strike or lockout,

(iii) resolving the grievances of the parties.[8]

Collective bargaining is not always an end-to-end solution to all disputes in industrial sectors in order to promote and maintain industrial unity. The bargaining is depending upon the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations, it requires the minimum level of interference from the government. State intervened through statutes facilitating certain mechanisms, such as conciliation, arbitration, courts, boards, and national industrial tribunals, to resolve disputes between employer and employee. In the presence of the government, the bilateral negotiations become a tripartite negotiation which the ILO promotes.[9] However, the government cannot intervene in the conclusions of collective bargaining unless it is contrary to public policy. Moreover, the government considers this process as an internal mechanism for determining the working conditions of an industry. Therefore, the state promotes collective bargaining to reduce its involvement in the determination of wages and other working conditions of workers.

Negotiations

An open warfare between employer and employees or their union will cause the

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[7] *Supra* n. 5 at 53.

[8] *Id* at 538.

[9] *Supra* n. 2 at 34.

industrial stoppage, which can be costly and disastrous for both parties. An employer, on his business interests, buys cheap labour from the market; on the contrary, an employee always seeks wage increase and favourable working conditions. The question, then, is about the bargaining power of both parties. However, the parties try to find solution through negotiations. The conflicts of interests of both parties can be settled through discussions and to finally reach an agreement. Negotiations may occur at the national, regional, or local level, depending on the structure of industry within a country. The voluntary nature of collective bargaining is explicitly laid down in the Convention No. 98[10] as it is a fundamental aspect of the principle of freedom of association.[11] Collective bargaining is effective only if both parties have done it in good faith, but since good faith cannot be imposed by law, it can only be the result of voluntary and persistent efforts by both parties.

The parties behind the collective agreement must ensure that the agreement is always legal and does not conflict with the existing laws of the country. For example, a union and an employer cannot use collective bargaining to deprive employees' rights they would otherwise enjoy under laws such as the civil rights statutes.[12] The binding nature of collective agreement can be established either by legislature means or by the collective agreement itself, according to the method followed in each country. The agreement is not purely voluntary since employees and employers can resort to different types of legal tactics such as strikes and lockouts to pressure and force other party to accept the bargaining conditions.

Subjects of bargaining

Not all issues in a bargaining unit are negotiated or resolved by the parties. Some issues are designated as compulsory matters of bargaining in which the parties negotiate and reach an agreement. Mandatory issues are either prescribed by state legislation or agreed upon by the parties on compulsory matters. Non-

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[10] Article 4 of the Right to Organize and the Collective Bargaining Convention, 1949.

[11] Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva. Para 844.

[12] *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 94 (1974).

compulsory matters may be subject to bargaining, but it should not force other party to bargain. While most decisions made by an employer can affect employees, not all are compulsory issues of bargaining. However, it may be unfair labour practice if one party refuse to bargain over a mandatory topic. The employer and the union are not required to reach agreement but must bargain in good faith over mandatory subjects of bargaining until they reach an impasse.[13] Arbitrary changes will be considered unfair work practices.[14] The employer should not refuse to bargain with the employee's representatives if they have the majority support of the employees in the bargaining unit. Once a valid representative has been selected, even workers who do not belong to the union are bound by the collective bargaining agreement and cannot negotiate individual contracts with the employer.[15] In some cases, trade unions may not have enough membership to represent workers before the forum, in which case the most representative union may have the opportunity to represent the entire workforce. Free election should be done to select majority union unless it would be hampering right to free choice of union of employees. The ILO instruments expressly authorize collective bargaining with the representatives of the workers concerned if there is no trade union to represent the workers in the area.[16] However it warned that "the existence of elected representatives is not used to undermine the positions of the trade unions concerned or their representations".[17]

Trade Union

Two questions need to be answered on the authority of a trade union to represent the workers. Does the trade union represent all members regardless of membership? Or does it just represent its members in the collective bargaining

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[13] *Louisiana Dock Co. v. NLRB*, 909 F.2d 281 [7th Cir. 1990].

[14] https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/labor/collective-bargaining (May 26, 2020, 12:29 PM).

[15] *J. I. Case Co. v. NLRB*, 321 U.S. 332.

[16] *Supra* n. 2 at 36.

[17] Article 5 of Convention No. 135.

process? The initial stages of collective bargaining, labour organizations were controlled by the employers, in which the representatives of both parties were loyal to the employer. Collective bargaining in such circumstances does not make sense. In the 1930s, the US Supreme Court addressed the issue and held that collective bargaining cannot be done where the employer controls representatives on both sides of the table.[18] Industry, in general, has accepted the view that collective bargaining can be carried on only with unions. But theoretically, it is still possible for unorganized workers to select representative to bargain collectively with their employer without forming any sort of a union, but actually they seldom, if ever, do so. Employers may bargain collectively with them, provided they represent a majority of employers and are completely free from employer interference.[19]

Trade unions are formed to protect the position of employees against employers and thereby to introduce some parity between these groups. Right of the worker to join a trade union is essential for collective bargaining. A worker can, through his union, negotiate with his employer on an equal footing and reach a reasonable conclusion. This is illustrated by the ILO.

"Freedom of association ensures that workers and employers can associate to negotiate work relations effectively. Combined with strong freedom of association, sound collective bargaining practices ensure that employers and workers have an equal voice in negotiations and that the outcome is fair and equitable. Collective bargaining allows both sides to negotiate a fair employment relationship and prevents costly labour disputes. Indeed, some research has indicated that countries with highly coordinated collective bargaining tend to have less inequality in wages, lower and less persistent unemployment, and fewer and shorter strikes than countries where collective bargaining is less established. Good collective bargaining practices have sometimes been an element that has allowed certain countries to overcome

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[18] *Texas and New Orleans v. Brotherhood of Railway Clerks,* 281 U.S. 548 (1930).

[19] Edwin E. Witte, *Collective Bargaining and the Democratic Process*, The Annals of the American Academy of Political and Social Science, Vol. 274, Labor in the American Economy 85; 93 (1951) www.jstor.org/stable/1027077 Accessed 19/08/2019.

passing financial crises."[20]

The process enables the workers to negotiate between equal parties. In many of its documents, the ILO makes it clear that a just and fair agreement can only be reached through negotiation between equal parties with the help of the principle of collective bargaining. The presence of a trade union may not be possible in all areas of collective bargaining. In such cases, workers' representatives can participate in the process.[21] However, it warned that employees' representatives would not be used to weaken the status of trade unions in collective bargaining.[22] After noting that the principle of collective bargaining is not applicable effectively the ILO through its Convention of collective bargaining provides that "appropriate measures shall be taken, whenever of these (workers') representatives is not used to undermine the position of the workers' organisations concerned".[23]

Some countries provide trade unions with an exclusive bargaining agent representing all workers regardless of their own members and offer special benefits to trade unions through their legislation, which can have some negative effects on both parties.[24] From the employee's point of view, each 'organization clause' (privileges) violates the freedom to choose which union to join. From the employers' point of view, these provisions violate the freedom to choose which workers he will hire or retain. For example, under the closed shop agreement, the employer only appoints union members, in which the union has greater control over the selection of employees. In other words, anyone wishing to take employment must join the relevant union. As the privileges available to trade

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[20]https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/collective-bargaining/lang--en/index.htm May 28, (2020, 04.08 PM).

[21] *Supra* n.2 at 36.

[22] This standard is set out in Paragraph 2 of Recommendation No. 91 and is confined in Convention No. 135, which provide in Article 5 that "the existence of elected representatives is not used to undermine the positions of the trade unions concerned or their representations" (ILO, 1996c, p. 496).

[23] Convention No. 154, Article 3, Paragraph 2.

[24] "Union security" clauses in the United States and as "organization" clauses in Sweden.

unions are more likely to be misused, the ILO advises states to follow certain safeguards to ensure fair play. They are:

(a) Certification of the recognition of unions as an exclusive agent shall be carried out by an independent body established for this purpose; (b) The representative union must be elected by a majority of votes; (c) If the former trade union fails to garner enough votes to represent the workers, a request for fresh election after a certain period of time would be conducted; (d) Any new organization, except a certified organization, has the right to request a fresh election after a reasonable period of time; (d) If no union comprises more than 50% of the workforce, all unions in this unit must be granted collective bargaining rights.[25]

Public employees

Public employees who are employed with government departments or its agency are special categories of employees. Normally, they are not subject to collective bargaining since they are part of public administration. The wages and other benefits of public servants have financial implications, which must be reflected in public budgets, which are recognized by parliaments and municipalities after taking into account the economic situation and public interest of the country.[26] Therefore, as an employer, the government has been directly involved in the process of bargaining through Government-appointed commissions or committees which are responsible for determining the wages or salaries of public employees after consultations with stakeholders. As far as India is concerned, there are respective commissions at the central and state levels to deal with the salaries and other benefits of public sector employees. The recommendations of both the Commissions are not mandatory. Bargaining in its fullest sense is not possible in cases where the government is the employer. This shows that the government is not a qualified employer to be the party of collective bargaining.

According to the documents of ILO, public employees have right to organise by

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[25] Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, page 240-241.

[26] *Supra* n. 2 at 48.

which they can take part in collective bargaining with government as their employer. Labour Relations (Public Service) Convention, 1978, therefore, provides that "public employees' organizations shall enjoy complete independence from public authorities".[27] Due to the nature of the job in which they are involved, this freedom is not applicable to all public employees. The Right to Organize and the Collective Bargaining Convention, 1949 exclude certain categories of public employees from the scope of collective bargaining. They are the armed forces, police, and the civil servants engaged in the administration of the state.[28] All employees under public authority are not excluded from the scope of collective bargaining. Only the public employees who are directly involved in the administration of the state are excluded from the scope of bargaining.

Labour Standards

International labour standards respond to a growing number of needs and challenges faced by workers and employers in the global economy.[29] The standards are a comprehensive legal tool that establishes basic principles and rights in the workplace with the aim of improving the work environment globally. The traditional idea of labour standards has changed over time. Issues like promotion, transfer, dismissal without notice was also added to the existing list. On account of pressure from international labour community, more rights were added such as human rights to attain social justice and decent work, occupational safety and health, wages, working time, employment policy, vocational guidance and training, skills development, specific categories of workers, labour administration and inspection, maternity protection and social security. Indigenous and tribal people and migrant workers[30] were added to the labour standards recently. The ILO has adopted these standards through various

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[27] Article 5.

[28] Articles 4-6.

[29] https://www.ilo.org/global/standards/subjects-covered-by-international-labour- standards/lang--en/index.htm, 02/06/2020; 03:52 PM.

[30] https://www.ioe-emp.org/en/policy-priorities/international-labour-standards/31/05/2020: 01:32 PM.

conventions and other documents.[31] Accordingly the standards are legal instruments drawn up by ILO' tripartite constituents (Government employer and workers) that lay down principles, rights and minimum standards related to work and workplace. These standards can be either Conventions, which are binding international treaties or recommendations which are non-binding.

Since its inception in 1919, the ILO has developed a unique monitoring system to monitor the implementation of international labour standards. ILO supervisory mechanism established under the article of ILO Constitution is responsible for creating and implementing those standards. In 1998, the ILO adopted the Declaration of Fundamental Principle and the Right to Work, recognizing the right to work as a fundamental right and to be part of the international labour standard. It proposed to all countries, irrespective of the ratification of the Convention, to respect, promote, and in good faith the right to work as a basis for promoting labour standards. The right to collective bargaining, freedom of association, the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation are the fundamental conventions of ILO[32] which constitute basic international labour standards across the world. Conventions of ILO and its recommendations and documents of supervisory mechanism[33] are responsible to maintain international labour standards.

Role of ILO to maintain labour standards

International Labour Organization is a specialised agency of the United Nations with the mandate to promote social justice. It is an internationally recognised body for fixing labour rights and setting labour standards. Its main objectives are promoting workplace rights and decent employment, enhancing social security and strengthening dialogue on work-related issues and to promote collective bargaining across the world. The principle of collective bargaining

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[31] By the end of June 2018, the ILO had adopted 189 Conventions, 205 Recommendations and 6 Protocols covering a broad range of work issues.

[32] *Supra* n. 2 at 34.

[33] The ILO's Conventions are international treaties, subject to ratification by ILO member States. Its Recommendations are non-binding instruments.

conceptualized in the Right to Organise and Collective Bargaining Convention, No. 98, was adopted in 1949. This task was already laid down in the Declaration of Philadelphia, 1944.[34] To date, 164 member states have ratified it.

The Organization and its instruments have always made efforts to dominate collective bargaining over any other contract between the employer and the employee.[35] Under Article 19 of ILO Constitution, the member States are required to report at appropriate intervals on non-ratified Conventions and under Article 22, reports are periodically requested from States which have ratified ILO Conventions. The Committee on Freedom of Association has repeatedly stated that collective agreements are preferred over individual contracts and are opposed to equal treatment of individual contracts or to the detriment of workers from a union. In a case concerning the United Kingdom, the Committee on Freedom of Association indicated that avoiding a representative organization and entering into a direct individual negotiation with employees is contrary to the promotion of collective bargaining.[36]

The Governing Body of the ILO identified the following eight conventions as fundamental subjects that are considered as fundamental principles and right at work:

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[34] *Supra* n.2 at 34.

[35] The ILO has adopted a number or instruments dealing directly or indirectly with collective bargaining and related issues: the Collective Agreements Recommendation, 1952 (No. 91), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), the Rural Workers' Organisations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Convention, 1978 (No. 151), the Labour Relations (Public Service) Recommendation, 1978 (No. 159), the Collective Bargaining Convention, 1981 (No. 154), and the Collective Bargaining Recommendation, 1981 (No. 163).

[36] ILO, 1998e, Case No. 1853, para. 337.

No:	Convention	Adoption	Number of ratifications	Position of India
C08 7	Freedom of Association and Protection of the Right to Organise Convention, 1948	San Francisco, 31st ILC session (09 Jul 1948)	155 ratifications	Not ratified
C09 8	Right to Organise and Collective Bargaining Convention, 1949	Geneva,32nd ILC session (01 Jul 1949)	167 ratifications	Not ratified
C02 9	Forced Labour Convention, 1930	Geneva, 14th ILC session (28 Jun 1930)	178 ratifications	30 November, 1954
C10 5	Abolition of Forced Labour Convention, 1957	Geneva, 40th ILC session (25 Jun 1957)	175 ratifications	18 May, 2000
C13 8	Minimum Age Convention, 1973	Geneva,58th ILC session (26 Jun 1973)	173 ratifications	13 June, 2017
C18 2	Worst Forms of Child Labour Convention, 1999	Geneva, 87th ILC session (17 Jun 1999)	186 ratifications	13 June, 2017

C10 0	Equal Remuneration Convention, 1951	Geneva,34th ILC session (29 Jun 1951)	173 ratifications	25 September, 1958
C11 1	Discriminatio n Employment and occupation) Convention, 1958	Geneva, 2nd ILC session (25 June 1958)	175 ratifications	03 June, 1960

India has ratified six out of the eight fundamental Conventions and not ratified Freedom of Associations and Protection of the Right to Organise Convention, 1948 and Right to Organise and Collective Bargaining Convention, 1949. The main reason for non-ratification of ILO Conventions No.87 & 98 is due to certain restrictions imposed on the Government servants. The ratification of these conventions would involve granting of certain rights that are prohibited under the statutory rules, for the Government employees, namely, to strike, to openly criticize Government policies, to freely accept financial contribution, to freely join foreign organizations.[37] Once an ILO Convention is ratified, it becomes legally binding. The State is obliged to provide periodic report regarding the application of the conventions under Article 22 of ILO Constitution. A ratifying country is subject to international supervisory procedures.

Right to work is not a fundamental right in India. However, it is placed in Part IV of the Constitution along with education and public assistance in case of unemployment, old age, sickness and disablement.[38] Social welfare and industrial legislations are passed by the mandate of this provision. It may be observed that under certain circumstances, it is the duty of the state government

[37] This information was given by Shri Bandaru Dattatreya the Minister of State (IC) for Labour and Employment, in a written reply to a question in Lok Sabha, on 25 July, 2017.

[38] Article 41 provides Right to work, to education and to public assistance in certain cases

to find and secure work for all persons in the State.[39] This provision can be read along with other relevant provisions in Part IV of the Constitution, such as, provision for just and humane conditions of work and maternity relief,[40] living wage and decent standard of life etc.[41] According to the principle of collective bargaining, right to strike and lock-out is considered as the last weapon in the armoury of workers and employers. In the absence of these rights, collective bargaining has little significance. Substantial restrictions have been imposed while exercising the right to strike under the Industrial Dispute Act, State Industrial Relations Laws, and also occasionally, enforced Essential Services Maintenance Act. The two National Commissions on Labour had proposed mandatory recognition of labour unions as a bargaining agent for workers and prescribed the minimum membership required.

In India, only a small percentage of workers have been organized on a regular basis. Available figures show less than 15 percentage workers in India are organised, as against about 40% in the USA and around 50% in Great Britain, France and many other European Countries.[42]

Summary

The concept of collective bargaining may be summarized here on the basis of principles evolving from ILO conventions and other instruments. Collective bargaining is a fundamental right endorsed by member states of ILO. The right is applicable not only to employees but also to employers. The purpose of collective bargaining is to enter into a collective agreement for constructing terms and conditions of employment in an industrial unit. Collective bargaining applies to both private and public sector industries, however, the armed forces,

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[39] V. Hemalatha Devi, Sayed Maswood and B. Yuvakumar Reddy, *Right to Work as Fundamental Right: Illusion or Reality*?, 44, No. 2 JILI 269, 272 (2002).

[40] Article 42.

[41] Article 43.

[42] V. Vijaya Durga Prasad, *Collective Bargaining – Its Relationship to Stakeholders,* 45, No. 2 Indian Journal of Industrial Relations, 195, 202 (2009), www. Jstor.org/stable/20788259 accessed 10/08/2019.

police forces, and civil servants involved in state administration are excluded from the scope of this process. Collective agreement is binding on both parties. The terms and conditions of the contract are more favourable to the workers than the law establishes. However, in some cases, an individual contract may be preferred if that contract contains more favourable terms. Only in the absence of a trade union can representatives of workers participate in the negotiations. Labour organizations must be independent and not under the control of the employer. The power of collective bargaining must continue without undue interference bythe authorities. In the initial stages of collective bargaining, the employer nominated the union's office bearers and financed them. Representative bodies should work in good faith and avoid unreasonable delay in negotiations. Independent and voluntary process of collective bargaining is one of the basic components of freedom of association. Law or state authorities should not impose any terms and conditions unilaterally. It must be facilitated for bargaining to take place at any level. The involvement of the state legislature or administrative authorities in a freely concluded agreement cancels or modifies the existing contract. This is contrary to the principle of collective bargaining.

Conclusion

Collective bargaining cannot be applied in the same standard in all industries. It needs to be tailor-made to suite each industry. The collective bargaining process is ideal for industries that require a lot of labour. The employer can easily communicate with labour representatives instead of individually communicating to prepare the collective agreement for the entire group of workers. Industries that require a diverse and high-tech workforce need individualized discussions about specific employment terms and conditions. Collective bargaining is not sufficient in such cases. In modern industries, the employer is free to negotiate with individuals to find more capable employees, so the terms and conditions can be set on the basis of such objectives. Thus, different contracts may be executed for different individuals, even if they are workers in the same category or position.

India is one of the founding members of the organisation. Out of 190 Conventions India has ratified only 47 Conventions and one Protocol of ILO which include six fundamental Conventions, three Governance Convections and

38 technical Convections. The ILO criticized India's weak labour laws as a major obstacle to achieving the International Labour Standards. But the Indian ruling class and their philosophies believe the opposite. According to them, foreign investment and foreign companies are reluctant to come to India because of labour laws. These two conflicting opinions should be evaluated based on productivity and equality, the two objectives set forth by the ILO. International Labour Standards in India will play a major role in creating a productive and equitable labour market and in shaping national policy and development initiatives. It may be submitted that the statutory requirements on labour standards and conditions should be replaced by collective bargaining. The stringent provisions imposed by the law for the benefit of the worker are not conducive to the development of the industry, which may cause stagnation of development. Therefore, flexibility across labour standards through collective bargaining in accordance with changing circumstances may be more appropriate in a country's industrial development.

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