TKR

BEFORE THE HON'BLE SUPREME COURT OF INDIA

In

Diary No. 34629 of 2017

IN THE MATTER OF

JOSEPH SHINE: PETITIONER

v.

CHIEF MINISTER OF KERALA & OTHERS: RESPONDENTS

MEMORANDUM OF ADDITIONAL WRITTEN SUBMISSIONS BY ADV.KALEESWARAM RAJ, COUNSEL FOR THE PETITIONER

Compiled and prepared by Adv.Thulasi K.Raj, Adv.Aruna A. & Adv. Maitreyi S. Hegde

settled by Adv. Kaleeswaram Raj

INDEX

INTRODUCTION

1. Nehru wrote on the relationship between the Congress working committee and the new Government of India formed by the party, as one involving "the general question of the freedom of the government to shape policies and act up to them within the larger ambit of the general policies laid down in Congress resolutions."[1] He added that "the Government though predominantly a Congress Government and therefore subject to general Congress policy, will not be entirely a Government of Congressmen.[2] The first prime minister was drawing a distinction between the political face and the executive face of the elected government. The ministers could not act solely as partymen once they take a birth in the cabinet. This metamorphosis needs to be reflected in their function which should show civility in their personal and public conduct. As remarked by Andre Béteille, "The virtue of civility is an important component of constitutional morality. It calls for tolerance, restraint and mutual accommodation in public life. Civility is a moderating influence which acts against the extremes of ideological politics."[3]

2. This note attempts to strike a balance between the political interest of those who form the Government and the constitutional requirement of good governance. The issues involved in the cases pertain to the need to assimilate constitutional values in good governance. The highly objectionable comments made by the public men at the helm of affairs need to be addressed as challenges to the praxis of responsible governance. The point, however, is that this needs to be materialised without creating a chilling effect on persons who would require functional independence and autonomy, subject to the constitutional limitations. The petitioner has put forward a concrete suggestion in this regard by way of voluntary code of conduct for Ministers (See the written submission dated placed on 14.11.2019 on behalf of the petitioner herein.) In addition to the same, and supplementing the same, the following submissions are made with specific reference to the five issues formulated by the Constitution Bench of this Hon'ble Court.

---

[1] Secret note by Nehru to the working committee, 15 July 1947, AICC (I), File no 71 of 1946-47. Kripalani's note to the working committee as quoted by Suhit K Sen,' The Political Constitution of India: Party and Government, 1946-1957' , Economic and Political Weekly, Vol. 45, No. 33 (AUGUST 14-20, 2010), pp. 44-52

[2] *Ibid.*

[3] Andre Béteille, 'Constitutional Morality' , Economic and Political Weekly, Vol. 43, No. 40 (Oct. 4 - 10, 2008), pp. 35-42.

ADDITIONAL SUBMISSIONS

I. **QUESTION NO. 1 : "ARE THE GROUNDS SPECIFIED IN ARTICLE 19(2) IN RELATION TO WHICH REASONABLE RESTRICTIONS ON THE RIGHT TO FREE SPEECH CAN BE IMPOSED BY LAW, EXHAUSTIVE, OR CAN RESTRICTIONS ON THE RIGHT TO FREE SPEECH BE IMPOSED ON GROUNDS NOT FOUND IN ARTICLE 19(2) BY INVOKING OTHER FUNDAMENTAL RIGHTS?":**

3. The restrictions imposed by the Article 19(2) on the freedom guaranteed under Article 19 (1) are exhaustive. Article 19 (2) of the Constitution of India was criticized in its original form as disproportionately and indefinitely restrictive. A scrutiny of the discussions in the Constituent Assembly Debates is helpful.

4. Some of the opinions from the Constituent Assembly debates arguing against imposing additional restrictions on freedom of speech are worth perusing:

a) Sardar Bhopinder Singh (2nd December, 1948)[4]

"I regard freedom of speech and expression as the very life of civil liberty and I regard it fundamental. ….. For attaining these rights the country had to make so many struggles and after a grim battle succeeded in getting these rights recognised. But now, when the time for their enforcement has come, the Government feels hesitant; what was deemed as undesirable is now being paraded as desirable. What is given by one hand is being taken away by the other. Every clause is being hemmed with so many provisos. .....Mr. Vice - President, I want these rights should not be restricted so much and all opposition that is peaceful and not seditious should get full opportunity, because opposition is a vital part of every democratic government. To my mind, suppression of lawful and peaceful opposition means heading towards fascism."

b) Damodar S. Seth (1st December, 1948)[5]

".....the guarantee of freedom of speech and expression which has been given in this article is actually not to affect the operation of any existing law or prevent the State from making any law relating to libel, slander, defamation, sedition and other matters which offend the decency or morality of the State or undermine the authority or foundation of the State. It is therefore clear. Sir, that the rights guaranteed in Article 13 are cancelled by that very section and placed at the mercy of the high – handedness of the legislature. These guarantees are also cancelled. .....If

[4] CAD, Vol VII, Page 749.
[5] CAD, Vol VII, Page 712

whatever fundamental rights we get from this Draft Constitution are tempered here and there and if full civil liberties are not allowed to the people, then I submit, Sir, that the boon of fundamental rights is still beyond our reach and the making of this Constitution will prove to be of little value to this country"

c) Sardar Hukum Singh (2nd December, 1948)[6]

"The very object of a Bill of Rights is to place these rights out of the influence of the ordinary legislature, and if, as under clauses (2) to (6) of article 13, we leave it to this very body, which in a democracy, is nothing beyond one political party, to finally judge when these rights, so sacred on paper and glorified as Fundamentals, are to be extinguished, we are certainly making these freedoms illusory."

5. In the Assembly, some other members spoke of the limitations on free speech in the following words:

a) Shibban Lal Saksena (2nd December, 1948)[7]

"As was pointed out yesterday, even in America where the courts are given absolute power, the Supreme Court has been obliged to limit it. What we are doing is that instead of the Supreme Court we ourselves are limiting this thing. This limitation in the present form is less wide than it originally was. I think this should satisfy the House ."

b) T.T. Krishnamachari (2nd December, 1948)[8]

"I do not say that this article is perfectly worded; nor can I maintain that the exceptions to parts of this article provided by clauses (2), (3), (4), (5) and (6) do not curtail the liberty and the right conceded to individual citizens in clause (1). But, as a student of politics, I have to realise that there can be no absolute right and every right has got to be abridged in some manner or other under certain circumstances, as it is possible that no right could be used absolutely and to the fullest extent that the words conveying that right indicate. It is merely a matter of compromise between two extreme views. Having got our freedom only recently, it is possible that we want all the rights that are possible for the individual to exercise, unfettered. That is one point of view. The other view is that having got our freedom, the State that has been brought into existence is an infant State which has to pass through various kinds of travail, and what we could do to ensure that the State continues to function un-impaired should be assured even if it entails an abridgment of the rights conferred by this article. I have no doubt in my mind that, though I have had to say something perhaps harsh on

---

[6] CAD, Vol VII, Page 732, 733
[7] CAD, Vol II, Page 763
[8] CAD, Vol VII, Page 771

certain occasions in regard to what the Drafting Committee has done generally, in this article, the Drafting Committee has chosen the golden mean of providing a proper enumeration of those rights that are considered essential for the individual, and at the same time, putting such checks on them as will ensure that the State and the Constitution which we are trying to bring into being today will continue unhampered and flourish ."

c) Algu Rai Shastri (2nd December, 1948)[9]

"I submit that those who would sit in the legislatures would be representatives of the people and they will impose only those restrictions which they consider proper. Such restrictions would be in the interest of the people. Only those restrictions will be imposed which would be necessary in the interest of public health, unavoidably necessary for the maintenance of public peace and desirable from the viewpoint of public safety. No restriction will be imposed merely to destroy the liberties of the people."

d) Dr. B. R. Ambedkar (2nd December, 1948)[10]

"With regard to the general attack on article 13 which has centred on the sub-clauses to clause (1), I think I may say that the House now will be in a position to feel that the article with the amendments introduced therein has emerged in a form which is generally satisfactory. My explanation as to the importance of article 8, my amendment to the phrase "existing laws" and the introduction of the word "reasonable" remove, in my judgment, the faults which were pointed out by honourable members when they spoke on this article, and I think the speeches made by my friends Professor Shibban Lal Saksena and Mr. T. T. Krishnamachari and Mr. Algu Rai Shastri, will convince the House that the article as it now stands with the amendments should find no difficulty in being accepted and therefore I do not want to add anything to what my friends have said in support of this article. In fact, I find considerable difficulty to improve upon the arguments used in their speeches in support of this article."

e) K. Hanumanthaiya (2nd December, 1948)[11]

"....we are faced, within our own society, with elements who want to take advantage of those rights in order to do violence to men, society and laws. Hence it is that the Drafting Committee as well as the Governments in the various provinces and the Centre, are hard put to safeguard these rights in their pristine purity. No man who believes in violence and who wants to upset the State and society by violent methods should be allowed to have his way under the colour of these

[9] CAD, Vol VII, Page 767
[10] CAD, Vol VII, Page 780
[11] CAD, Vol VII, Page 754

rights. It is for that purpose that the Drafting Committee has thought it fit to limit the operation of these fundamental rights."

6. As seen from the above, the Constitution Assembly debated rigorously on restrictions to be imposed on the freedoms guaranteed under Article 19 (1) of the Constitution of India. Gautam Bhatia in his book 'Offend, Shock or Disturb' says:

"Notwithstanding the robust speech guarantees in pre-Independence nationalist bills of rights, the free expression clause that finally emerged out of the birth-pangs of the original Constitution had endured a tumultuous drafting history. The Fundamental Rights Sub-Committee's strategy of declaring a broadly worded right (Article 19 (1) (a)) and curtailing it with almost equally broad restrictions (Article 19 (2)) was vehemently opposed at every stage of the Constituent Assembly Debates: at the presentation of the fundamental rights draft in the early days of 1947, and at both the first and the second readings of the Draft Constitution of 1948 . Opponents repeatedly raised the fear of an overbearing State riding roughshod over the liberties guaranteed in Article 19 (1) (a) and 19 (2) appear to be reasonably similar to the original Clause 8 of the 1947 Sub-Committee draft, despite passing through three rounds of fractious debate, is probably testament to the influence of Patel, Ambedkar, Nehru and Alladi Krishnaswami Iyer, each of whom rose to assure the Assembly that the State would not misuse its 19 (2) powers. Ultimately their libertarian opponents on the left and the right lost heavily, failing both to get a last –minute insertion of 'contempt of court' removed, and to have a reasonableness requirement inserted into 19 (2). Perhaps their only notable victory was the removal of 'sedition' from the list of permissible restrictions on free speech, although judicial history has long nullified that achievement as well."[12]

A. PATHOLOGICAL PERSPECTIVE

7. Bhatia refers to 'pathological perspective' on free speech law advocated by scholar Vincent Blasi, in his book. In his article titled "The Pathological Perspective and the First Amendment",[13] Blasi explains the term pathology as "a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas". He adds "What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe." He had concluded his arguments as four points;

---

[12] Gautam Bhatia, *'Offend, Shock, or Disturb Free Speech under the Indian Constitution'*, Oxford University Press, 2016, P.50

[13] Vincent Blasi, *"The Pathological Perspective and the First Amendment"*, Columbia Law Review, April 1985, Vol. 85, No. 4.

"(1) The protection and full realization of the core commitments of the first amendment is an objective that deserves especially high priority in constitutional adjudication.

(2) The core commitments of the first amendment tend to be jeopardized most seriously during certain periods that may be regarded as pathological due to their unusual social dynamics regarding the tolerance of dissent.

(3) The adjudicative methodologies and doctrines that can best protect the core commitments of the first amendment in pathological periods are those that are consciously designed to counteract the unusual social dynamics that characterize such periods.

(4) The strategy of targeting first amendment doctrine for the worst of times in the manner suggested by my thesis does not generate unacceptable costs to the quality of adjudication in periods that are not pathological."

8. George Washington famously said "If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter." Without freedom of speech, there cannot be a healthy democracy. Democracy can flourish only in a country where people are free to share their ideas and thoughts without fear of sanction from the government. This is the reason why the four points put forth by Blasi become relevant. That is why adding more restrictions to Article 19 (1) (a) becomes extremely dangerous and palpably unconstitutional. A restriction imposed on the freedom of speech during peaceful times may become a tool for annihilation of right itself during the reign of an autocrat or even during an illiberal democracy or during "The State of Exception" as conceived by Giorgio Agamben (For example: during national emergency). To protect the society from such a possible future catastrophe, it is important that court should show restraints now.
9. Even the present Article 19 (2) is broad and to an extent, vague. Adding more restrictions to Article 19 (1) by way of other fundamental rights will, thus, be destructive and counterproductive. Imposing additional restrictions on Article 19(1)(a), over and above what is permitted under Article 19(2), runs the risk of turning draconian under an illiberal state. Even the other fundamental rights in part III, which are broad and inclusive of a wide variety of human rights (For example, Article 21) might be used as tools to curtail the freedom of speech. That is a situation which even Article 19(2) intends to prevent. Thus, Article 19(2), though on the face of it is restrictive, it is also protective.
10. In pre-independence era, the British East India Company, promulgated a Press Ordinance to prohibit publication of newspapers of periodical without obtaining prior permission from the Governor-General in- Council. However, they had to finally

recognise the freedom of press in India when a memorandum submitted by Raja Ram Mohan Roy successfully convinced the authorities about the importance of press freedom.[14] As such it follows that any restrictive measure was found to be undemocratic even in the pre-constitutional era.

B. FURTHER RESTRICTIONS OTHER THAN SPECIFIED IN ARTICLE 19 (2) ARE NOT CONTEMPLATED

11. The second limb of the issue is, 'can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?'. The answer to this question can only be in the negative. The scheme of our Constitution does not contemplate any restrictions over what is incorporated in Article 19 (2).

12. It is crucial to understand that, fundamental rights like Article 19 (1) or Article 21 are not mutually exclusive. The issue itself, presupposes an erroneous notion that the rights under Article 19 (1) and other Articles like Article 21 are mutually exclusive. In real, Article 21 and Article 19 (1) are not mutually exclusive, rather they overlap and interplay. Thus, in Maneka Gandhi v. Union of India[15], it was held:

"Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human have a synthesis. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

This Hon'ble Court has elaborately explained the inter connections among fundamental rights;

"5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words "personal liberty" as used in this article? This question incidentally came up for discussion in some of the judgments in A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] and the observations made by PatanjaliSastri, J., Mukherjea, J., and S.R. Das, J., seemed to place a narrow interpretation on

the words "personal liberty" so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words "personal liberty" as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329] that the question as to the proper scope and meaning of the expression "personal liberty" came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that "personal liberty" is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue. The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India [(1970) 2 SCC 298 : (1971) 1 SCR 512] the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the Full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in A.K. Gopalan case [AIR 1950

Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] that certain articles in the Constitution exclusively deal with specific matters — cannot be accepted as correct". It was held in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] — and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., PatanjaliSastri, J., Mahajan, J., Mukherjea, J., and S.R. Das, J., in A.K. Gopalan case — that even where a person is. detained in accordance with the procedure prescribed by law, as mandated be Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of "personal liberty" in the narrowest sense, namely, freedom from detention and thus falls indisputably within Article 22 would not require to be tested on the touchstone of clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges of this Court in ShambhuNath Sarkar v. State of West Bengal [(1973) 1 SCC 856 : 1973 SCC (Cri) 618 : AIR 1973 SC 1425] that such a law would have to satisfy the requirement inter alia of Article 19(1), clause (d) and in HaradhanSaha v. State of West Bengal [(1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778] which was a decision given by a Bench of five Judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression "personal liberty" as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] and our approach in the interpretation of the fundamental rights must now be in tune with this wavelength. We may point out even at the cost of repetition that this Court has said in

so many terms in R.C. Cooper case [(1970) 2 SCC 298 : (1971) 1 SCR 512] that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression "personal liberty" in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] that "personal liberty" within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh case [AIR 1967 SC 1836 : (1967) 3 SCR 525 : (1968) 1 SCJ 178] was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means "enacted law" or "state law" (vide A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383]). Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney-General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazl Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis' book on Constitutional Law, namely, notice, opportunity to be heard,

impartial tribunal and ordinary course of procedure. PatanjaliSastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in A.K. Gopalan case [AIR 1950 SC 27 : 1950 SCR 88 : 51 Cri LJ 1383] which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21."

13. The above discussion makes it abundantly clear that the fundamental rights under Article 21 and Article 19 are not exclusive. The minority view in *Kharak Singh* that *"The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned"* which was held to be correct in *R.C. Cooper*, was affirmed in *Maneka Gandhi*. It was further held that *"Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1)."* Thus, it is evident that, when there is an allegation of violation of a right which falls under Article 21 or Article 22, if that particular right finds a place in Article 19 (1), and if that act passes the test of Article 19, only then it can be treated as valid. To put it otherwise, the only grounds on which the rights under Article 19 (1) (a) can be restricted are the ones enumerated in Article 19 (2). Any aberration from the above position, would do tremendous violence to the intent and content of the constitutional scheme.

C. CONFLICT OF RIGHTS

14. The issue of conflict of rights (of two individuals) is considered in K.S. Puttaswamy (Aadhaar-5) v. Union of India[16]. It was held that, when there is a conflict between two sets of fundamental rights, the court will have to strike a balance. Thus, it was held in *Puttaswamy,*:

between rights arise when the assertion of a fundamental human right by an individual impacts upon the exercise of distinct freedoms by others. The freedom of one individual to speak and to express may affect the dignity of another. A person may be aggrieved when the free exercise of the right to speak by someone impinges upon his or her reputation, which is integral to the right to life under Article 21. A conflict will, in such a situation, arise between a right which is asserted under Article 19(1)(a) by one citizen and the sense of injury of another who claims protection of the right to dignity under Article 21. Conflicts also arise when the exercise of rights is perceived to impact upon the collective identity of another group of persons. Conflicts may arise when an activity or conduct of an individual, in pursuit of a freedom recognised by the Constitution, impinges upon the protection afforded to another individual under the rubric of the same human right. Such a situation involves a conflict arising from a freedom which is relatable to the same constitutional guarantee. Privacy is an assertion of the right to life under Article 21. The right to a dignified existence is also protected by the same Article. A conflict within Article 21 may involve a situation when two freedoms are asserted as political rights. A conflict may also envisage a situation where an assertion of a political right under the umbrella of the right to life stands in conflict with the assertion of an economic right which is also comprehended by the protection of life under the Constitution.

1269. Such conflicts require the court to embark on a process of judicial interpretation. The task is to achieve a sense of balance. An ideal situation would be one which would preserve the core of the right for both sets of citizens whose entitlements to freedom appear to be in conflict. Realistically, drawing balances is not a simple task. Balances involve sacrifices and the foregoing of entitlements. In making those decisions, a certain degree of value judgment is inevitable. The balance which the court draws may be open to criticism in regard to its value judgment on the relative importance ascribed to the conflicting rights in judicial decision-making. In making those fine balances, the court can pursue an objective formulation by relying upon those values which the Constitution puts forth as part of its endeavour for a just society. Our Constitution has in Part III recognised the importance of political freedom. In Part IV, the Constitution has recognised our social histories of discrimination and prejudice which have led to poverty, deprivation and the absence of a dignified existence to major segments of society. Holding Part III in balance with Part IV is integral to the vision of social and economic justice which the

Constitution has sought to achieve consistent with political democracy. Difficult as this area is, a balancing of rights is inevitable, when rights asserted by individuals are in conflict."

After referring to PUCL v. Union of India[17], Thalappalam Service Coop. Bank Ltd. v. State of Kerala[18], G. Sundarrajan v. Union of India[19], Subramanian Swamy v. Union of India[20] and Asha Ranjan v. State of Bihar[21] this Hon'ble Court held:

"1275. These decisions indicate that the process of resolving conflicts arising out of the assertion of different fundamental rights and conflicts within the same fundamental right, necessarily involves judicial balancing. In finding a just balance this Court has applied norms such as the "paramount public interest". In seeking to draw the balance between political freedoms and economic freedoms, the Court must preserve the euphony between fundamental rights and directive principles. It is on their co-existence that the edifice of the Constitution is founded. Neither can exist without the other. Democracy rejects the totalitarian option of recognising economic entitlements without political liberty. Economic rights have become justiciable because of the constitutional guarantees founded on freedom and the Rule of Law. The Constitution is founded on democratic governance and is based on the protection of individual freedom. Freedom comprehends both fundamental political freedoms as well as basic human rights. A just balance between the two is integral to the fulfilment of India's constitutional commitment to realise human liberty in a social context which is cognizant of the histories of discrimination and prejudice suffered by large segments of our society. Where the question is related to the limiting of the right to privacy, Puttaswamy [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1] requires the test of proportionality. It has, therefore, to be tested whether the Aadhaar Scheme fulfils the test of proportionality."

15. It is significant and even foundational to underline that in *Puttaswamy* and other decisions referred above, quoted in *Puttaswamy*, what is actually conceived is not the 'conflict of rights' in *abstractum*, at a doctrinal level (which is a myth) but the conflict in the notion/ invocation/ practice of rights. At the same time, the issue posed herein is doctrinal and in *abstractum* which can only have a doctrinal answer. i.e. there can be no conflict between the rights under Article 19 (1)(a) and Article 21 and as such rights under Article 19 (1)(a) cannot be further restricted invoking rights under Article 21. Either one has a right or no right and at any rate, there is no conflict of rights.

16. Laws made under Article 19 (2) may have traits or flavours of other fundamental rights. For example, while defamation is penalised under Indian Penal Code, the intention is to protect the dignity of a person, which forms part of the right to life under Article 21. The same again is a restriction made to Article 19 (1) (a) by virtue of Article 19 (2). Therefore, it can be deciphered that law under Article 19 (2) is enacted not only to regulate the rights protected under Article 19(1)(a), but also to protect the fundamental rights guaranteed under other articles including the rights under Article 21. Therefore, there is no question of conflicting rights under the two articles.

17. It is relevant to note that, Article 19 (2) is not only a restriction to Article 19 (1) (a), but also a protection to see that, the right to freedom of speech and expression is not restricted in any other manner, than as specified in Article 19(2). The very wording of Article 19 (2) makes this clear.

18. S. Khushboo vs. Kanniammal[22] is often taken as a case of conflict of rights. But a deeper reading will show that parties, at the least, in contentions, felt that the provisions in the IPC on decency have the traits of rights under Article 21 and were intended to protect the same.

II. QUESTION NO 2: "CAN A FUNDAMENTAL RIGHT UNDER ARTICLE 19 OR 21 OF THE CONSTITUTION OF INDIA BE CLAIMED OTHER THAN AGAINST THE 'STATE' OR ITS INSTRUMENTALITIES?"

19. The fundamental rights are claimed and enforced against the non-state actors for a number of times under the writ jurisdiction of the High Courts and the Supreme Court vide Articles 226 and 32 respectively. Article 32 provides: *"(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."* Article 226, begins with the words: *"226. (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of habeas corpus, mandamus, prohibition, quo*

---

[22] (2010) 5 SCC 600

warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

20. In Article 226, it is clearly stated that the High court will have powers to issue writs not only to government and its instrumentalities but also to 'any person or authority'. In Praga Tools Corpn. v. C.A. Imanual[23], it is held:

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (Cf. Halsbury's Laws of England, 3rd Edn., Vol. II, p. 52 and onwards.)"

Referring to the specific provision of Article 226, in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani,[24] it was held:

"20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

This is a well settled position that under Article 226, now writs can be issued to the authorities performing public functions.

21. Under Article 32 also, this Hon'ble Court, has issued writs to non-state actors in a number of cases. For example, in M. C. Mehta v. Union of India[25], this Hon'ble Court directed Delhi Legal Aid and Advice Board to take complaints against Shriram Fertilizers on account of leakage of oleum gas, examine those complaints and direct the

---

[23] (1969) 1 SCC 585
[24] (1989) 2 SCC 691
[25] AIR 1987 SC 1086

company to pay the compensation accordingly. Nevertheless, the precedents go to show that broadly there are two situations wherein this Hon'ble Court and other high courts have brought non-state actors to the writ jurisdiction under Articles 32 and 226. The first situation is that the private players performing public duties. In such cases, irrespective of the nature of the body, the public element in the function was given primacy and the private institutions were held amenable to writ jurisdiction. In Binny Ltd. v. V. Sadasivan,[26] it is held:

"11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and

[26] (2005) 6 SCC 657

administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognise the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government."

With the above test, in *Binny*, this Hon'ble Court declined to exercise the writ jurisdiction, on finding that in termination of employees, there was no public element and the petitioners had to opt for remedies under the labour law to put forth the grievances.

22. Relying on the above test, in several cases, the jurisdiction of writ has been declined against the private bodies. In Society for Unaided Private Schools of Rajasthan v. Union of India[27], it is held:

"162. I have referred to the rulings of India and other countries to impress upon the fact that even in the jurisdictions where socio-economic rights have been given the status of constitutional rights, those rights are available only against State and not against private State actors, like the private schools, private hospitals, etc. unless they get aid, grant or other concession from the State. Equally important principle is that in enjoyment of those socio-economic rights, the beneficiaries should not make an inroad into the rights guaranteed to other citizens."

In K.K. Saksena v. International Commission on Irrigation & Drainage[28], it is held:

"48. We are in agreement with the aforesaid analysis by the High Court and it answers all the arguments raised by the learned Senior Counsel appearing for the appellant. The learned counsel argued that once the society is registered in India it cannot be treated as international body. This argument is hardly of any relevance in determining the character of ICID. The focus has to be on the function discharged by ICID, namely, whether it is discharging any public duties. Though much mileage was sought to be drawn from the function incorporated in the MoA of ICID, namely, to encourage progress in design, construction, maintenance and operation of large and small irrigation works and canals, etc. that by itself would not make it a public duty cast on ICID. We cannot lose sight of the fact that ICID is a private body which has no State funding. Further, no liability under any statute is cast upon ICID to discharge the aforesaid function. The

---

[27] (2012) 6 SCC 1
[28] (2015) 4 SCC 670

High Court is right in its observation that even when object of ICID is to promote the development and application of certain aspects, the same are voluntarily undertaken and there is no obligation to discharge certain activities which are statutory or of public character."

Thus, two parameters to test the amenability of an individual or body are: (i) the function of the body which is sought to be brought within the ambit of writ jurisdiction. (ii) the public element in the specific action against which the writ is sought. Though in the present case, the Ministers can be considered as the individual undertaking public functions, the statements made by them are in their personal capacity. There may or may not be a public element in the individual statements made by the Ministers, exercising their fundamental right under Article 19 (1)(a). The statement of a minister, the content and the context thereof will have to be assessed based on the basic fact that he holds a public office, even, when speaking as an individual. This imposes adherence to certain values which should be in tune with the spirit of the oath which he or she has undertaken. Since this is a question of values and since even the ministers are to be treated as persons with a sense of moral autonomy, what is required is not an outside imposition of law with a chilling effect on his or her public conduct but a self-imposed regulation which should remain in public domain. This should, in turn, enable the public to form an informed and sensible judgement about persons holding high portfolios.

23. In few cases, this Hon'ble Court has brought private individuals and the entities having no public functions or public elements in their action under the purview of the writ jurisdiction. A brief survey of such cases would be beneficial.

a) Bandhua Mukti Morcha v. Union of India & Others[29]:-

Facts of the case: The Petitioner (organisation dedicated to the cause of release of bonded labourers in the country) addressed a letter to Hon'ble Justice Bhagwati alleging that there were a number of labourers (among which a large number of them were bonded labourers) from different parts of the country working in private stone quarries situated in Faridabad District, Haryana under 'inhuman and intolerable conditions'. It was alleged that the constitutional mandates were violated and various other social welfare acts passed for their benefit were not implemented.

Conclusion: It was declared that the right to live includes right to have a dignified life. The writ petition was allowed and the Central Government and the State Government of Haryana were directed to ensure the payment of minimum wages.

---

[29] AIR 1984 SC 802

Note: A clear prohibition of bonded labour practices under Article 23 and the enactment of Bonded Labour System (Abolition) Act, 1976 were noted. Violations of the provisions of the said Act, along with other welfare enactments were noted and the failures on the part of the State in implementing those provisions were writ large.

b) M. C. Mehta v. Union of India[30]:

Facts of the case: The petitioner filed a writ petition under Article 32 seeking a direction for closure of various units of Shriram Foods & Fertilizers (an enterprise of Delhi Cloth Mills Limited, a public limited company) on the ground that they were hazardous to the community. During the pendency of the petition, oleum gas escaped from one of the units of Shriram. An application was filed for award of compensation to the victims. A Bench of three Hon'ble Judges permitted the restart of its power plants subject to certain conditions and referred the application for the award of compensation to a larger bench because issues of great constitutional importance were involved.

Conclusion: Doctrine of absolute liability was evolved and Shriram Fertilizers was directed to pay the compensation to those persons who suffered on account of oleum gas leakage. The direction was for the Delhi Legal Board to receive the complaint, examine and to ensure the payment of the compensation amount to victims.

Note: Taking note of the item no. 18 and 19 of the First Schedule and Section 2 of the Policy Resolution the Industries (Development and Regulation) Act of 1951, this Hon'ble Court found that production of fertilisers and chemicals are of vital public interest and so the field had to be supervised by the State and the State had to take active role in regulating the field.

c) M. C. Mehta v. Kamal Nath[31]:

Facts of the case: The court took notice of a news item that appeared in the Indian Express which made allegations about a respondent's (a former Minister of Environment and Forest) family who had direct links with a private company, Span Motels Pvt Ltd. 'Span Club', a venture by the same company was built after encroaching upon 27.12 bighas of land including protected forest land owned by the state government. The land was regularised when the respondent was acting as the Minister. The article appeared when Span Resorts was trying to turn the course of Beas for the second time. (Three private companies were engaged in the same). Alleging that there was potential threat of the river eating into mountains leading to landslides which are occasional occurrences in the area, the news article was published.

---

[30] AIR 1987 SC 1086

[31] AIR 2000 SC 1997

Conclusion: Doctrine of public trust was held as the law of land. This Hon'ble Court found fault with the government for regularising the encroachment. The resort was directed to pay the expenses towards the restoration of the pollution caused as the compensation for the illegal acts.

Note: The government was found fault with granting prior approval and lease deed. The order granting prior approval and the lease deed between the government and the resort were quashed.

d) Vishaka v. State of Rajasthan[32]:

Facts of the case: A writ petition was filed by the social activists and NGOs (working towards women empowerment) alleging rampant sexual harassment and violence taking place against women in workplaces. It was alleged that those harassment and violence violated the principle of gender equality and the fundamental rights guaranteed to women under Articles 14, 19 and 21 of the Constitution.

Conclusion: It was held that the sexual harassment at workplace amounted to violation of fundamental rights guaranteed. It was also held that in view of legislative vacuum, the guidelines were issued, which were applicable to all workplaces, including government and private entities.

Note: The definition of 'human rights' under Section 2(d) of the Protection of Human Rights Act, 1993 vide which included the rights guaranteed under International Covenants was taken note of. Several provisions of International covenants to which India was a party, imposing positive obligations on the State to ensure safeguards for the women at workplaces were relied on.

e) Jeeja Ghosh v. Union of India[33]:

Facts of the case: The petitioner, with the support of NGO, who is an activist by herself and also suffering from a disability called 'cerebral palsy' filed a writ petition before this Hon'ble Court. The writ petition was filed aggrieved by the action of a private aviation which de-boarded her causing her trauma and humiliation. She also could not participate in the conference on disability rights held in Goa. The writ petition sought extensive guidelines in the area and impleaded the private aviation agency, i.e. SpiceJet Limited as respondent no.3. It was argued that the action of the airline deboarding the petitioner amounted to violation of her fundamental rights and the government had to take sufficient measures preventing such actions.

---

[32] AIR 1997 SC 3011

[33] (2016) 7 SCC 761

Conclusion: The action of the SpiceJet was found to be violative of fundamental rights of the petitioner. The guidelines governing the area was found adequate. The respondent no.3 was imposed with an amount of Rs.10,00,000 as compensation to the petitioner.

Note: There was a clear finding that the private respondent did not follow the procedure prescribed under 'Civil Aviation Requirements, 2008' which encompassed the government and private aviation companies.

24. The presence of a statutory duty either on the private entities or government authorities to prevent the violation of rights by the action of private actors is a common factor among all the above cases. The presence of this duty and the actions of the private entities breaching the said duty violating the cardinal fundamental rights of others and resulting in severe injustice, is apparent in all these cases. This factor is a determining one and pulls the non-state players into the ambit of the writ jurisdiction. In the present case, neither such duty is imposed on individual ministers nor such duty is imposed on any government machinery to regulate the conduct of individual ministers warranting judicial intervention. Therefore, no breach of public duty can be said to have taken place when statements are made by people in power so as to impose additional restrictions on speech. This in turn, postulates the desirability to have a voluntary code of conduct in the better interest of the government as well as the governed. This also shows that the only permissible course of action is a voluntary code of conduct.

A. ABSENCE OF A DUTY OR OBLIGATION ON THE STATE TO REGULATE THE INDIVIDUAL CONDUCTS OF THE MINISTERS CANNOT BE CONSIDERED AS LEGISLATIVE VACUUM:

25. Whether the state should regulate the conduct of the ministers is not a question which falls within the domain of this Hon'ble Court. There is a need to stick on to the foundational principles (core values) relating to separation of powers as seminally conceived by Montesquieu which was reiterated by the founding fathers of the Constitution in clear terms. It again is a constitutional scheme. The failure of the state to regulate the conduct of public men at the helm of governmental affairs is a matter to be left to the government. The government can choose to be a body consisting of persons of high moral integrity and thereby choose to dispense with any strict law for the purpose of governing those who are in the government. The government can also choose to dispense with a rigour of law for preserving the functional independence and intellectual freedom of the individual ministers. However, what is ideal does not always transform into ground realities. The illustrative instances in the case on hand

build up a strong case for introspection at the executive and legislative level. Dr. Ambedkar conceived the said idea against the background of institutions of democracy and therefore there is a need to underline its significance at the cabinet level. What occurs is not legislative vacuum as understood in the normal sense but a deterioration which needs democratic rectification. The [illegible] constitutional court has an advisory and not a directory role in such situations, which, however, is extremely fundamental. This is why the petitioner moots the idea of a voluntary code of conduct which the government should be persuaded to promulgate.

III. ON QUESTION NO.3 : REGARDING AFFIRMATIVE DUTY IMPOSED ON THE STATE TO PROTECT THE RIGHTS OF THE CITIZENS UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA AGAINST THE ACTION OF OTHER PRIVATE CITIZENS ":

26. Article 21 of the Constitution of India has undergone sweeping changes in its interpretation, scope and impact over the years. New rights have been recognised as part of the 'right to life and liberty', by judicial precedents. This, however, does not and cannot mean that always an affirmative duty is imposed upon the State to protect all those rights as against the private actors as well. The text of Article 21 reads:

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

This is worded in negative terms, guaranteed to the citizen. This means that the Government should protect the said rights by not interfering with it except according to the procedure established by law. The article imposes limits on State action in abridging or taking away the right to life and personal liberty of all the persons. The difference in the text of Articles 21 and 19 is noteworthy. Article 19 starts with *"19. (1) All citizens shall have the right—....."* Article 19 confers a positive right on all the citizens whereas, Article 21 restricts the State to interfere with the right to life and liberty of all the persons with an exception provided. Hence, directly and textually, the Article does not impose any positive obligation on the state to ensure protection of all the rights coming under Article 21 of all the persons from any personal/verbal attacks against them, to the extent sought in the instant case.

27. Through judicial interpretation, several rights are interpreted as rights coming within the ambit of Article 21 of the Constitution of India. For example, in *Maneka Gandhi* right to movement was considered as a fundamental right covered under Article 21. In Olga

Tellis and Others v. Bombay Municipal Corporation and Others[34], right to shelter has been recognised. In *Bandhu Mukti Morcha* it was held that the right to live a dignified life is within the ambit of Article 21. In Consumer Education & Research Centre and Others v. Union of India and others[35], the right to healthcare was recognised stating that the right to have a meaningful life is not possible without it. In Paschim Banga Khet Majdoor Samity and Others v. State of West Bengal and Another[36], this Hon'ble Court declared the right to health as a fundamental right.

28. These rights, which are recognised through judicial interpretation, can be considered only as the rights which are protected in negative terms. In other words, if by any state action or by action of a private citizen carrying out public duty or of any private citizen who had a statutory duty, the said rights are affected, those will be enforced through judicial intervention. This has been clearly explained in *Olga Tellis*. It is held:

"33. Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."(Emphasis added)

29. The social security rights, which are often called as second-generation rights like right to livelihood, right to dignified life, right to shelter, right to privacy, and similar rights are supposed to be protected by the State by its laws and policies. Those laws and policies are to be guided by the Directive Principles of State Policies, which are non-enforceable as stated in Article 37 of the Constitution of India. Among these principles,

---

[34] (1985) 3 SCC 545
[35] (1995) 3 SCC 42
[36] (1996) 4 SCC 37

some of the principles have been taken to the status of fundamental rights as already explained. This cannot, however, mean that the State has a positive duty to ensure all the rights of the private citizens are protected to such an extent sought here. If such a proposition is laid down, it will lead to opening of a pandora's box.

30. The second limb of the third question tries to examine the impact of the potential threat to a right under Article 21 emanating from a private citizen. Firstly, going by the scheme of the Constitution of India, a private citizen cannot threaten the fundamental rights of the other citizens except in some situations carved out by judicial interpretation. Secondly, assuming a private citizen affects the rights of other citizens covered under Article 21, those situations are already addressed by existing legislations. In the given case, the conflict is portrayed between the rights under Article 19 with the rights under Article 21. As already explained in Submissions with respect to question No.1, the presumption that the rights under Articles 19 and 21 are mutually exclusive and can limit each other is erroneous one. If at all, when the rights of two classes of citizens are competing under Articles 19 and 21 or under the larger canvass of Article 21 itself are competing , the laws enacted under Article 19 (2), are sufficient to address the situation. It is pertinent to note that as rightly noted in *Maneka Gandhi* though the laws are enacted under the enabling provision like Article 19(2), the same are enacted 'to protect the rights guaranteed under other Articles of the Constitution and regulate the freedom guaranteed under Article 19(1). (Please see para 13 of this submission) In other words, the existing legislations are adequate to strike the balance between several rights, especially the rights under Articles 19 and 21.

IV. ON QUESTION NO. 4 : "CAN A STATEMENT MADE BY A MINISTER, TRACEABLE TO ANY AFFAIRS OF STATE OR FOR PROTECTING THE GOVERNMENT, BE ATTRIBUTED VICARIOUSLY TO THE GOVERNMENT ITSELF, ESPECIALLY IN VIEW OF THE PRINCIPLE OF COLLECTIVE RESPONSIBILITY?":

31. The word "traceable" used in the above issue, is of vide connotation, that anything and everything said by a minister can in one way or another be linked with the Government. Therefore, traceability of a statement made by a minister regarding any affairs of State or Protecting the Government, to the Government itself is problematic and it needs case to case and a contextual examination.

32. As per Article 75 (3) of the Constitution "The Council of Ministers shall be collectively responsible to the House of the People." As Article 164 (2), "The Council of Ministers

shall be collectively responsible to the Legislative Assembly of the State." Thus, in a nutshell, ministers have a collective responsibility towards legislature.

33. Dr. B. R. Ambedkar explained the idea of collective responsibility before the Constituent Assembly in the following terms (30th December, 1948):

"I want to tell my friend Prof K.T. Shah that his amendment would be absolutely fatal to the other principle which we want to enact, namely, collective responsibility. All Members of the House are very keen that the Cabinet should work on the basis of collective responsibility and all agree that it is a very sound principle. But I do not know how many Members of the House realise what exactly is the machinery by which collective responsibility is enforced. Obviously, there cannot be a statutory remedy. Supposing a Minister differed from other Members of the Cabinet and gave expression to his views which were opposed to the views of the Cabinet, it would be hardly possible for the law to come in and to prosecute him for having committed a breach of what might be called collective responsibility. Obviously, there cannot be a legal sanction for collective responsibility. The only sanction through which collective responsibility can be enforced is through the Prime Minister. In my judgment collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a Member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when Members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility. I do not see any other means or any other way of giving effect to that principle.

Supposing you have no Prime Minister; what would really happen? What would happen is this, that every Minister will be subject to the control or influence of the President. It would be perfectly possible for the President who is not ad idem with a particular Cabinet, to deal with each Minister separately, singly, influence them and thereby cause disruption in the Cabinet. Such a thing is not impossible to imagine. Before collective responsibility was introduced in the British Parliament you remember how the English King used to disrupt the British Cabinet. He had what was called a Party of King's Friends both in the Cabinet as well as in Parliament. That sort of thing was put a stop to by collective responsibility. As I said, collective responsibility can be achieved only through the instrumentality of the Prime Minister. Therefore, the Prime Minister is really the keystone of the arch of the Cabinet and unless and until we create that

office and endow that office with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."[37] (Emphasis added)

34. The portion emphasised applies to the Prime Minister, in the context of Article 75 and it applies equally to the Chief Minister in the context of Article 164. Though, on the face of it, it is a responsibility to the legislature, it, in turn, is a responsibility to the people at large. Therefore, collective responsibility is to be taken as a facet of good governance. The role of the Prime Minister/Chief Minister is therefore pivotal. This is exactly the point urged by the writ petitioner where a request was made to the Chief Minister to look into the matter and to act upon it. The Hon'ble High Court rejected those prayers. It is not as if every utterance by any Minister will have a direct bearing on the policy of the Government. But such utterances, even when unconnected with the Government policy, will have a repercussion on the quality of the Government in terms of constitutional values. Therefore, it is the task of the Government also to ensure that the Ministers, (who may be essentially politicians) behave in public in tune with the constitutional ethos relating to values like equality, dignity, secularism etc. This needs to be achieved without an outside restrictive force, in breach of doctrine of separation of power. On the other hand, this needs a conscious effort from within, which in turn, should be capable of ensuring democratic accountability in clear terms. This is the reason why the need for a voluntary code of conduct is emphatically asserted in the writ petition and in the instant SLP, by the petitioner. It is in this context that the idea of constitutional morality is relevant in situations involved in the case on hand.

35. In Common Cause v. Union of India[38], this Hon'ble Court, while explaining the concept of collective responsibility, stated that;

"31. The concept of "collective responsibility" is essentially a political concept. The country is governed by the party in power on the basis of the policies adopted and laid down by it in the Cabinet meeting. "Collective Responsibility" has two meanings: The first meaning which can legitimately be ascribed to it is that all Members of a Government are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure."

36. A policy or decision taken in the Cabinet meeting may be amenable to writ jurisdiction. The Ministers have a collective responsibility to portray all policies taken by the

[37] CAD Vol. 7, pp. 1159-60
[38] (1999) 6 SCC 667

Government collectively or unanimously. The Ministers are also supposed to "exhibit" "unanimity on public occasion". That does not mean that, every statement made by a Minister will be straight away attributable to the Cabinet. But such statements need to follow the principles of good governance, which again is an issue relating to constitutional values. This is especially so, when the Minister is able to effectively use his position as Minister, while making such a statement and when it attains significance for that reason.

37. In State of Karnataka v. Union of India[39], this Hon'ble Court considered the contention that, *"Ministerial accountability to Parliament has two aspects: the collective responsibility of Ministers for the policies of the Government and their individual responsibility for the work of their departments. Both forms of responsibility are embodied in conventions which cannot be legally enforced."* At the same time, the individual aberrations by the Minister are serious threats to constitutional governance and as such the head of the Cabinet has a duty of ensure that such breaches do not happen. The vicarious liability of the Cabinet is also to be understood only in this line. This is qualitatively different from tortious vicarious liability understood in the conventional sense.

38. If a statement made by any Minister is part of a decision taken or policy formulated in the Cabinet, and if such a decision or policy formulated by the cabinet is violates fundamental rights of any person/citizen, remedy is already available under Article 32 and Article 226 of the Constitution of India.

39. In State (NCT of Delhi) v. Union of India[40], where the Constitution Bench of this Hon'ble Court was concerned with the task of interpreting Article 239-AA of the Constitution, Justice Dr. D.Y. Chandrachud, in his concurring judgment observed:

"333. The decision in Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] theorises that collective responsibility may be enforced only politically, thereby making its legal implications unclear. In this case, a Minister was charged with committing grave irregularities in the grant of telecom licences. The appellant had provided documents to the Prime Minister's Office (PMO) for the grant of sanction to prosecute under the Prevention of Corruption Act, 1988. This Court held: (SCC p. 97, paras 54 & 55)

"54. ... In our view, the officers in the PMO and the Ministry of Law and Justice, were duty-bound to apprise Respondent 1 [Prime Minister] about seriousness of allegations made by the appellant....

---

[39] (1977) 4 SCC 608
[40] (2018) 8 SCC 501

55. By the very nature of the office held by him, Respondent 1 is not expected to personally look into the minute details of each and every case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to Respondent 1 and place full facts and legal position before him failed to do so. We have no doubt that if Respondent 1 had been apprised of the true factual and legal position regarding the representation made by the appellant, he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year."

The decision implied that "individual ministerial decisions ... do not always generate collective legal responsibilities"[41] Thus, what is found lacking is "collective legal responsibility". However, it does not mean that a Minister can make any kind of statement in violation of his oath and thereby share his/her moral responsibility that has a nexus with the notion of collective responsibility. Therefore, any statement made by a Minister is not sufficient to make the Government itself vicariously liable under the principle of collective responsibility.

40. The petitioner in the SLP approached this Hon'ble Court, due to scant regard given by the Minister M.M. Mani to the Constitutional values and Constitutional Oath. A Minister who has taken "Oath of allegiance to the Constitution", cannot act in a manner subverting "the Constitutional norms of equality and social justice"[42]. Since the same was an aberration from the policy of the Government, it is for the Chief Minister to take action. But no action was taken. It is in the said context that the writ petition was filed.

41. A code of conduct to self-regulate the speeches and actions of Ministers is constitutionally justifiable and this Hon'ble Court can definitely examine its requirement. Ideally, a Minister is not supposed to breach his collective responsibility towards the Cabinet and the Legislature and hence, is advisable to have a cogent code of context as occurring in advanced democracies.

V. ON QUESTION NO. 5: "WHETHER A STATEMENT BY A MINISTER, INCONSISTENT WITH THE RIGHTS OF A CITIZEN UNDER PART THREE OF THE CONSTITUTION, CONSTITUTES A VIOLATION OF SUCH CONSTITUTIONAL RIGHTS AND IS ACTIONABLE AS 'CONSTITUTIONAL TORT"?

42. A Minster also has the freedom of speech and expression as every other citizen as guaranteed under Article 19 (1) (a) of the Constitution of India, which of course is subject to his constitutional position and role.

---

[41] Shubhankar Dam, "Executive" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (Eds.), The Oxford Handbook of the Indian Constitution, Oxford University Press (2016), at p. 320.
[42] (2011) 1 SCC 577

as already elaborated while dealing with Question no. 1, the judgment in *Puttaswamy* (2019) 1 SCC 1 in detail discusses about the issue, and reaches a conclusion that balancing of rights has to be done. When one right of a person is covered under Article 19 (1) (a), and there is a conflict of right under Part III claimed by another, Article 19(2) is still the test to determine the scope of Article 19(1)(a) rights.

44. However, Constitutional torts cannot be invoked to settle the conflict between two individual rights. The very notion of awarding compensation to A on finding that B violated the fundamental rights of A, while B was exercising his own fundamental right, in the current context, will go against the very concept of balancing and harmonising of rights. It will amount to restricting one fundamental right using another fundamental right. This is not permissible in our constitutional scheme (please see the answer to Question no.1).

45. The concern of the court ends with resolving the conflict. It can be said that the concept of conflict between two fundamental rights itself is a legal fiction. Though, generally we use the word conflict, in the constitution itself the limitations of each fundamental rights are defined. So, viewing from the angle of limitations prescribed by the constitution, it will be clear as to where one individual's right ends and where another person's right begins. To put it otherwise, conflict is not between the rights, since rights themselves are limited by specific provisions, but it is between the individual notions with respect to the extent of their rights. This can be resolved by balancing and harmonising the rights in tune with the express restrictions provided to each right in the constitution itself. As stated in answer to Question no. 1, fundamental rights are not mutually exclusive and when they overlap, the resolution is expressly provided in the Constitution itself. One fundamental right cannot be imposed as a restriction on another. It would be like prioritising the fundamental rights in the order of its importance, when the constitution envisages equal importance to all the rights as limited by the Constitution alone. While balancing, peripherally, it might look like one right is given more importance over the other, but actually, it is only an exercise of finding the limit of one right in tune with the restrictions to that right expressly provided in the constitution.

46. In *Puttaswamy*, this Hon'ble Court referred to the judgment in *Subramanian Swamy* and observed as follows;

Subramanian Swamy v. Union of India (2016) 7 SCC 221, the learned Chief Justice, speaking for a Bench of two Judges emphasised the need for a sense of balance when the assertion of fundamental rights by two citizens is in conflict: (SCC p. 319, para 137)

"137. ... One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests."

Noting that the "balancing of fundamental rights is a constitutional necessity", the Court has attempted to harmonise reputation as an intrinsic element of the right to life under Article 21 with criminal defamation as a restriction under Article 19(2)."

Thus the balancing process is essentially a process of harmonising rights. Therefore, while balancing the same if an individual has violated another person's right, which is also part of that individuals fundamental right, the remedy available is under personal law. This will be evident from the judgment in K.S. Puttaswamy v. Union of India[43].

47. In *K.S. Puttaswamy* (2017), this Hon'ble Court has clearly held as follows:

"397. Once we have arrived at this understanding of the nature of fundamental rights, we can dismantle a core assumption of the Union's argument: that a right must either be a common law right or a fundamental right. The only material distinctions between the two classes of right—of which the nature and content may be the same—lie in the incidence of the duty to respect the right and in the forum in which a failure to do so can be redressed. Common law rights are horizontal in their operation when they are violated by one's fellow man, he can be named and proceeded against in an ordinary court of law. Constitutional and fundamental rights, on the other hand, provide remedy against the violation of a valued interest by the "State", as an abstract entity, whether through legislation or otherwise, as well as by identifiable public officials, being individuals clothed with the powers of the State. It is perfectly possible for an interest to simultaneously be recognised as a common law right and a fundamental right. Where the interference with a recognised interest is by the State or any other like entity recognised by Article 12, a claim for the violation of a fundamental right would lie. Where the author of an identical interference is a non-State actor, an action at common law would lie in an ordinary court.

398. Privacy has the nature of being both a common law right as well as a fundamental right. Its content, in both forms, is identical. All that differs is the incidence of burden and the forum for enforcement for each form." (Emphasis added)

[43] (2017) 10 SCC 1 (*Puttaswamy I*)

Rudul Sah v. State of Bihar And Another[44], this Hon'ble Supreme Court considered an issue of a serious administrative lapse. The petitioner therein was acquitted by the Court of Sessions, Muzaffarpur, Bihar, on June 3, 1968, but he was released from jail only on October 16, 1982, more than 14 years after his acquittal. Considering the peculiar facts involved in the case this Hon'ble Court held as follows;

"The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers." (emphasis added)

A reading of above judgment would show that, State can be imposed with civil liability in cases involving violation of Constitutional Rights as well.

49. In Common Cause v. Union of India[45], this Hon'ble Court had considered the issue of power of judicial review , when there is a private law remedy available. This Hon'ble Court after a detailed discussion regarding the same from paragraph 36 onwards , observed in paragraph 62 of the judgment as follows;

[44] 1983 AIR 1086
[45] (1999) 6 SCC 667

Thus, judicial review would lie against persons and bodies carrying out public functions, but it would not lie against a person or body carrying out private law and not public law functions. In such cases, the proper remedy is by way of action for a declaration and, if necessary, an injunction."

In the above case, this Hon'ble Supreme Court was dealing with the allegations of corruption in allotment of petrol pump. Thus, when a person or a body while carrying out public function, violates any of the fundamental rights of any person, then only an aggrieved person can seek remedy under the principle of Constitutional Tort under Article 226 or Article 32 of the Constitution of India. In all other cases, proper remedy is by way of an action for a declaration or injunction in appropriate cases. Thus, even though a person has the remedy under public law to seek compensation for violation of fundamental rights, it can only be invoked in the situations as narrated above.

50. A joint reading of *Rudul Shah* and *Common Cause* would show that, Constitutional Torts are not intended for the purpose of compensating when there is a conflict between individuals. When a statement of the Minister is a simple reiteration of any government decision or policy, they are amenable to writ jurisdiction and an aggrieved person is already provided with a remedy of moving the High Court or Supreme Court challenging such decision or policy. The important aspect to be kept in mind is, it is not the statement of Minister which gives cause of action for invoking writ jurisdiction, but the unconstitutional decision or policy decision by the Government, which would have been amenable to writ jurisdiction even in the absence any statement by any Minister.

51. A statement by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, may not always give rise to constitutional tort. Nevertheless, it is a serious obstacle to the idea of good governance and therefore it warrants the check and balance by an effective self-regulatory mechanism.

VI. SELF REGULATION

52. In Sahara India Real Estate Corpn. Ltd. v. SEBI[46], the court emphasised on not framing guidelines "across the Board" to restrict the freedom of Press.

"51. As stated above, in the present case, we heard various stakeholders as an important question of public importance arose for determination. Broadly, on maintainability the following contentions were raised:

[46] (2012) 10 SCC 603

(i) The proceedings were not maintainable as there is no lis;

(ii) There is a difference between law-making and framing of guidelines. That, law can be made only by Parliament. That, guidelines to be framed by the Court, therefore, should be self-regulatory or at the most advisory;

(iii) Under Article 142, this Court cannot invest courts or any other authority with jurisdiction, adjudicatory or otherwise, which they do not possess.

52. Article 141 uses the phrase "law declared by the Supreme Court". It means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further under Article 141, law-making through interpretation and expansion of the meanings of open-textured expressions such as "law in relation to contempt of court" in Article 19(2), "equal protection of law", "freedom of speech and expression" and "administration of justice" is a legitimate judicial function. According to Ronald Dworkin, "arguments of principle are arguments intended to establish an individual right. Principles are propositions that describe rights." (See Taking Rights Seriously by Ronald Dworkin, 5th Reprint 2010, p. 90.) In this case, this Court is only declaring under Article 141, the constitutional limitations on free speech under Article 19(1)(a), in the context of Article 21. The exercise undertaken by this Court is an exercise of exposition of constitutional limitations under Article 141 read with Article 129/Article 215 in the light of the contentions and a large number of authorities referred to by the counsel on Article 19(1)(a), Article 19(2), Article 21, Article 129 and Article 215 as also the "law of contempt" insofar as interference with administration of justice under the common law as well as under Section 2(c) of the 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on case-to-case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of "law of contempt" hangs over our jurisprudence. This Court is duty-bound to clear that shadow under Article 141. The phrase "in relation to contempt of court" under Article 19(2) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impending and perverting the course of justice. That is all which is done by this judgment.

53. We have exhaustively referred to the contents of the IAs filed by Sahara and SEBI. As stated above, the right to negotiate and settle in confidence is a right of a citizen and has been equated to a right of the accused to defend himself in a criminal trial. In this case, Sahara has complained to this Court on the basis of breach of confidentiality by the media. In the circumstances, it cannot be contended that there was no lis. Sahara, therefore, contended that this Court should frame guidelines or give directions which are advisory or self-regulatory whereas SEBI contended that the guidelines/directions should be given by this Court which do not have to be coercive. In the circumstances, constitutional adjudication on the above points was required and it cannot be

and there was no lis between the parties. We reiterate that the exposition of constitutional questions has been done under Article 141 read with Article 129/Article 215. When the content of rights is considered by this Court, the Court has also to consider the enforcement of the rights as well as the remedies available for such enforcement. In the circumstances, we have expounded the constitutional limitations on free speech under Article 19(1)(a) in the context of Article 21 and under Article 141 read with Article 129/Article 215 which preserves the inherent jurisdiction of the courts of record in relation to contempt law. We do not wish to enumerate categories of publication amounting to contempt as the court(s) has to examine the content and the context on case-to-case basis."

This Hon'ble Court refrained from framing guidelines to regulate press and said "What constitutes an offending publication would depend on the decision of the court on case-to-case basis." In the case on hand as well, the decision as to violation of Constitutional values or oath needs a case to case evaluation.

CONCLUSION

53. In view of the submissions based on the above said questions, it follows that the executive governments and the legislatures need to be directed to consider formulation of a voluntary code of conduct with respect to the personal and public lives of the ministers and to publish it after finalising the same based on due deliberation. Various facets of the conduct of public functionaries should be considered while formulating the code. It is desirable to take lessons from such voluntary self-impositions and disciplinary regulations prevailing in other jurisdictions. (Please see the Ministerial Code by the government of U.K. and The Statement of Ministerial Standards by the government of Australia) . The present code of the government of India requires a thorough revision and modification by encompassing the speech, behaviour, financial activities and personal and public conducts of the ministers. Attempts should be made to mitigate the conflict of interests which could happen when persons take up the dual role of being a party leader and a cabinet member. Even when such dual role is permitted, strict dividing line needs to be drawn between one's activities as a cabinet minister on the one hand and as a political leader on the other hand. These are all matters requiring further deliberation inside and outside the Houses of Parliament. Therefore, this Hon'ble Court may direct the government to consider formulation of such a code of conduct.

Respectfully submitted on the 20th November 2019.

Adv. Kaleeswaram Raj

Counsel for the petitioner