

“Freedom to Practice Any Profession or Carry on any Occupation, Trade or Business - an indepth Analysis”

Divyam Jhaveri

ABSTRACT

Democracy is enshrined in the famous motto- *“of the people, by the people and for the people”* and this motto of democracy is upheld with strong and effective establishment of fundamental rights by the state. The Indian Constitution is backed with six major fundamental rights and out of them there is one important right which helps in opening the arena of true democratic establishment and the said right is Freedom To Carry Trade, Occupation, Business and Profession. This right is guaranteed by our constitution under Article 19(1)(g), which states that all the citizens have right to practise any profession, or to carry on any occupation ,trade and business. This basic intention of this fundamental rights is to evolve socio-economic strengthening throughout our country.However, this fundamental right is not unregulated and cannot be looked in to isolation. Under Article 19(6) the state is not prevented from making a law in interest of general public and thereby impose reasonable restrictions on the exercise of the above right. Time and again Indian Judiciary has been asked to check reasonableness and in the light of the same situation Supreme Court has evolved several parameters to check reasonability of the same. Also there are five articles namely Article 301 which helps in maintaining environment of economic unity in both aspects intra as well as inter states in our country. The main objective behind these articles is to promote free trade ,commerce and inter-course activities within the territory of India.

Lastly, the author has tried to portrait a comprehensive work of research which comments upon the contemporaneous scheme of the freedom to carry Trade, Occupation, Business and Profession, along with inter-twinkling between Article 301 of our Indian constitution.

AN EXPLANATION

The essence of true and just democracy is derived from the powers provided to citizens of any nation. These powers are in form of fundamental rights guaranteed by State. The word “guarantee” plays an eminent as well as vital role in deciding the gravity of power provided by the state to its citizens. Our Indian Constitution provides six basic fundamental rights to citizens of India and even some rights are conferred to non-citizens also. Our Constitution has tried to cover all the ambits under which citizens can be guaranteed fundamental rights.

Article 19(1)(g) provides a tool which will ensure to all citizens their right to earn livelihood, this article is an enabling provision for the same. Article 19(1)(g) guarantees to all citizens the right to practise any profession or to carry on any occupation, trade or business. The ambit of this article tries to cover all forms as well as means to earn livelihood and to do economic activity. The basic objective to add so many overlapping terms i.e trade , business ,occupation, profession in this article in our constitution is that the our constitution makers did not want to omit any kind of economic activity and create any loophole. Kuldeep Singh J has defined the four expressions i.e profession, occupation, trade and business in *Sodan Singh's*¹ case as follow –

“ ‘Profession’ means an occupation carried on by a person by virtue of his personal and specialised qualifications, training or skill. The word ‘occupation’ has a wide meaning such as any regular work, profession, job, principal activity ,employment, business or a calling in which an individual is engaged. ‘Trade’ in its wider sense includes any bargain or sale , any occupation or business carried on for subsistence or profit, it is an act of buying and selling of goods and services. It may include any business carried on with a view to profit whether manual or merchantile. ‘Business’ is very wide term and would include anything which occupies the time. Attention and labour of am man for the purpose of profit. It may include in its form trade, profession, industrial and commercial operations ,purchase and sale of goods and would include anything which is an occupation as distinguished from pleasure”²

Thus, the basic underlying intention behind using such overlapping words is to make the article comprehensive piece of legislature which covers the entire ambit. But if the wordings of the article were **“FREEDOM TO UNDERTAKE ANY ECONOMIC ACTIVITY OR ACTIVITIES”**, then no such baffling interpretation of the same would have been required. Over here Economic Activity means financial rewards through any activities. Profit is the essence of any economic activity not following the literal meaning of the same.

Restrictions

Why there is need for restrictions on our basic rights when we are enriching our self in a democratic set up? .The simple answer could be that we want to ensure that our nation does not become victim of unruly democracy. Now the restrictions laid for right in Article 19(1)(g) is defined in Article 19(6). This clause six of Article 19 brings forward three major contentions:-

¹*Sodan Singh v. New Delhi Municipal Committee AIR 1989 SCC 155*

² V.N SHUKLA , *CONSTITUTION OF INDIA* 172-173 (Eastern Book Company 12th ed. 2013)

- State shall make any law imposing the rights provided under Article 19(g) in interest of general public.
- Also State shall make any law relating to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business,
- And also law in relation to creation of State Monopoly.

Under no circumstances State should impose unreasonable restrictions and that too in arbitrary manner.

All the contentions in this clause has two main ingredients i.e power to impose and the said imposition should be in interest of general public. All of them needs to be interpreted together and not in isolation. Now, there are several interpretation of the phrase“ **in the interest of general public**” but no concrete definition of the same has been carved out. The Supreme Court in *Jan Mohammed Usmanbhai*³ case tried to bring forward the understanding of the said phrase “ in the interest of general public.” The court said “ *It(“ in the interest of general public”) is of wide import comprehending public order, public health , public security , morals, economic welfare of the community and the object mentioned in PART IV of the Constitution....A law providing for basic amenities ; for dignity of human labour....is a social welfare measure “ in the interest of general public.”*

In *Jan Mohammed Usmanbhai*⁴ case the court said that morals are included in the phrase “ in the interest of general public” but morality is something which is absolutely subjective and the support based on such is invalid. The major source for unreasonable restrictions carved out by the state is in the name of “ in the interest of general public The foremost thing which state should keep in mind while deciding reasonability of restrictions imposed under Article 19(6) is the nature of the economic activity and its indelible effect on public interest. Though there is no well- defined contention on public policy but the state after in detail analysis of the restrictions backed by reasonable interpretation should impose any. State should not forget the concept of “**Parens patriae**” i.e state is parent of her citizens. The Supreme Court in *Sivani's*⁵ case heavily emphasized that the concept of reasonability should not be formulated on any abstract or general notion but the court must take into account whether law imposing restrictions has maintained proper balance between social control and the rights of individuals. Thus Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the

³*Municipal Corpn. Of the City of Ahmedabad v. Jan Mohammad Usmanbhai AIR 1986 SC 1205*

⁴*IBID*

⁵*Sivani v. State of Maharashtra Air 1995 SC 1770*

general public and make sure that restriction imposed is not from the view point on whom the restriction is imposed but from the viewpoint of the interest of public at large.⁶

There are certain sectors which are termed as grievously injurious to public policy and in lieu of the said fact the Supreme Court has removed such sectors from the ambit as well as protection of Article 19(1)(g). In case of *Nashirwar*⁷ liquor trading case, the Supreme court without any error interpreted that there was no inherent right to carry on trade in liquor because it was clearly in against of interest of general public and also it was properly abridged with the essence laid down in Part IV of our constitution i.e Article 47 of Directive Principle of State Policy. Clearly, Court opened the gates for the state to exercise any kind of restrictions as well as prohibition on the trade of liquor, but this does not mean they have lost their all fundamental rights in total but they can approach court if any restriction imposed on liquor trade is found to be arbitrary, irrational or unreasonable.⁸ In cases of betting and gambling Supreme court has removed them from purview as well as protection of Article 19(1)(g) because it is against public policy. The major contention for removing certain businesses lies in the profound reasoning that it does not emphasize on public welfare at large. Also cases in regards to contemptory as well as unorganized money-lending, the Supreme Court discarded this economic activity out of the purview of Article 19(1)(g)'s protection stating that this kind of exploitative activity is undoubtedly against the interest general public and also the said is anti-social, usurious and unscrupulous.⁹

There were many cases in which Supreme Court after detailed examination, upheld the restrictions imposed by the state in interest of general public. In famous case of *Sodan Singh v. New Delhi Municipal Committee*¹⁰, the Supreme Court upheld the restrictions imposed by the New Delhi Municipal Corporation. The restrictions commented that the hawkers cannot occupy a stationery place on street pavement which by and large result in enormous difficulties to pedestrians and other public at large. The Supreme Court while upholding the restriction imposed by the New Delhi Municipal Corporation stated that though there is inherent right to carry on any trade or business on street pavements but the right extends only to hawking on the street pavements i.e by moving from one point to other rather than being stationary at one place also the restrictions imposed by the municipal corporation is *pro bono* in nature.

⁶M.P JAIN, *INDIAN CONSTITUTIONAL LAW OF INDIA*, 1132-1134 (Lexis Nexis Butterworths 6th ed. 2010)

⁷*Nashirwar v. State of Madhya Pradesh AIR 1975 SC 1368*

⁸*Ugar Sugar Works Ltd. v. Delhi Administartion AIR 2001 SC 1447 SCC 635*

⁹*Fatechand v. State of Maharashtra AIR 1977 SC 1825*

¹⁰*Sodan Singh v. New Delhi Municipal Committee AIR 1989 SC 1988*

Also the state's action to curb production, supply and distribution of commodities essential to life of the public at large during any emergency or paucity of any commodity/commodities is not at all violative of Article 19(1)(g) because it is in the interest of general public and also empowered by Essential Commodities Act, 1955.

Thus in every such cases the judiciary plays a vital role in scrutinizing the objective & reasonableness of such restrictions imposed by the state. Now, there are certain cases in which judiciary itself failed to analyse the restrictions in matter of ban on sale of meat during Jain Parushyan festival. Since many years Supreme Court has upheld in majority of the cases the restriction in regards to sale of meat during Jain Parushyan festival. It is evident from the cases like *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*¹¹, in which Ahmedabad Municipal Corporation's order to ban slaughter house for nine days during Jain Festival was upheld, the Supreme Court heavily relied on *Om Prakash v. State of UP*¹² case while deciding the *Hinsa Virodhak*¹³, in this case also the Municipal Corporation notice to ban the sale and consumption of eggs in three municipal towns during religious festival was upheld.

On basis of the following there are certain important question which Judiciary needs to undertake while upholding such ban. They are:-

- What is the objective behind the said ban on meat during any religious occasion?
- Is it in interest of general public at large or restricted for sentiments of one community?
- What about one's right under Article 19(1)(g)?
- Is it at all reasonable?
- Is it mere politicization of the issue?
- What about individual freedom at large?
- Does not our constitution tell citizens to respect every religion's sentiments?
- What is role of faith in any religion?

The above mentioned questions were clearly taken into consideration by the Supreme Court¹⁴ in deciding the meat ban imposed by Bombay Municipal Corporation during Jain Parushyan festival. The division bench had no dissenting view in regards to contending the ban imposed as unreasonable, arbitrary and discriminatory which undoubtedly violated the freedom to carry business envisaged under article 19(1)(g). Also the bench the said the ban imposed was illogical as

¹¹ *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat* AIR 2008 SC 1892

¹² *Om Prakash v. State of UP* AIR 2004 SCC402

¹³ Supra 10

¹⁴ *Bombay Mutton Dealer Association v. State of Maharashtra* SC AIR 2015 (Stay Order)

only meat was banned sold in open shops, rest other non- vegetarian was not brought under the same purview. The major inference which we can make out of such instances is that is our nation becoming so intolerant?, by and large we have only adopted the external manifestation contented by Western culture but what about the internal manifestation in form liberalism and tolerance. Despite ruling of Bombay High Court and subsequently upheld by the Supreme Court , around eight more states have joined the “banistan” drive , they have also banned sale of meat during Jain Festival as well as during Ganesh Pooja festival. Above all of these Indian Culture Minister has demanded and urged the state governments to observe meat ban during Navratras also. It is absolutely ironical because on one hand the Indian Prime Minister as well as our Indian Constitution is urging to set up tolerant nation while such vague and illogical comment on the other hand dilute the same.

State Monopoly

Article 19(6)(ii) was added by First constitutional amendment, 1951. It lays down the empowering provision for the state under which state can make any law related to complete or partial exclusion of citizens or otherwise from any economic activity which state deem fits. This provision is saving provision for the state, and state till 1991's reforms was using this provision to the utmost. The said provision is also subject to implied restrictions. The said concept of State is that she is parent of her citizen and it is the implied restriction upon the state commanded by Article 19(6)(ii) that state will always undertake any action pro bono . In landmark case of *Akdasi Padhan v. State of Orissa*¹⁵ , the Supreme Court laid down test of to check the validity as well as the nature of State Monopoly. The following were the major points to be considered:-

- Law formulated for State monopoly should have direct relation with the creation of monopoly.
- No other provisions in furtherance of law formulated for creation of monopoly should have any subsidiary, incidental or helpful to the operation of monopoly.¹⁶

In the said case, two provisions were made by Orissa government in furtherance of creation of state monopoly with the help of Orissa Kendu Leaves (Control Act), 1961. Firstly , the act empowered only government or its officers or independent agents to purchase or transport the Kendu Leaves and secondly, the fixation of price of Kendu Leaves lied in the hands of government only. The

¹⁵ AIR 1963 SC 1047

¹⁶ M.P JAIN , *INDIAN CONSTITUTIONAL LAW OF INDIA* 1129-1133 (Lexis Nexis 6th ed. 2010)

Supreme Court upheld the second contention while quashed the first contention because the said contention failed to create direct nexus between the law formulated and State's monopoly. At last, the tool of monopoly enshrined under Article 19(6)(ii) should be considered keeping in mind the following main points

- interest of general public ,
- direct benefit of the law formulated is in hands of state which was proposed for the benefit of public at large,
- no third party should be benefited in lieu of laws formulated
- and also the nature of laws formulated for creation of monopoly is not indirectly creating unreasonable restriction upon the right under article 19(1)(g).

Thus, tool of monopoly should always be scrutinized and also in detail analysis of the "objective" of the state should be done and for the same power has been given in hands of our Judiciary, in order to ensure that state is not arbitrarily imposing restrictions and the real beneficiaries avails the benefit out of the said monopoly.

➤ **Article 19(6)(i)- Fulfilments of some inherent professional and technical requirements guided by the code of the respective profession or contemplated by the state.**

This empowers state to formulate any law required to be formed in regards to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business. For instance, lawyer needs to get educational degree as well as pass Bar Council Exam in order to practice in court. This does not impose any unreasonable restrictions or violate Article 19(1)(g). This restriction has not restricted its power to any particular space but tried to include every ambit, such various forms can be license & licensing fees, trade entry fees and others. But nowhere judicial interpretation of words professional or technical qualifications is there. But undoubtedly this restrictions also needs to pass test of reasonableness and objective test.

State has now and then used this indirect restriction to curtail citizen's right to practise any profession or carry on any trade, business or occupation. If state feels that if private companies will overtake the state's monopoly(not in literal sense) or narrow down their demand and profit then state through indirect means try to hamper private companies in doing their economic activity. State through licensing activities will try to curb private companies to enter into market, and the parameters for the said would be so stringent and intricate that private company in order to complete the said requirement for obtaining a licence will roll up and down and lastly give up the

same. In *Excel Wear v. Union Of India*¹⁷, the court said the government has come to view its role more as a facilitator, rather than as a controller.¹⁸ The private companies have to face "*KAFKAESQUE*" situation in order to obtain licences and such kind of intricate process also invites the evil of corruption. Recently, the Delhi Government has asked to file fresh licence application to Ola and Uber before Delhi Transport Office, this is for the third time government has asked them to file fresh licence application in lieu of suggesting new methods for the same. This kind of indirect regulatory action hampers the right enshrined under Article 19(1)(g). If this kind of system prevails then the aim of making India Foreign Investor's friendly nation will shun down. Thus, regulatory measure should not be so stringent that it will curb the business opportunities at large and give a major blow to employment opportunities. Recently India was ranked only **142** out of **189** economies of world in "**EASE OF DOING BUSINESS INDEX 2015**"¹⁹, India's position fell two positions from 140 to 142 in comparison to the said index of 2014. This shows the clear scenario that how much business friendly environment mechanism is in place and how much government needs to work for the same.

Relationship between Article 301 with Article 19(1)(g)

Article 301- FREEDOM TO TRADE, COMMERCE AND INTERCOURSE- TRADE, COMMERCE AND INTERCOURSE THROUGHOUT THE TERRITORY OF INDIA SHALL BE FREE, SUBJECT TO PROVISIONS."²⁰

The main objective behind this constitutional right is to establish economic unity and equality in all parts of India. The essence of the said Article was derived from Section 92 of the Australian Constitution which stated that trade, commerce and inter-course shall be absolutely free. This section provides absolute and unqualified freedom but this has been subject to many Australian Judiciary's interpretation. Now in context of India, the said article is not subject to absolute and unqualified freedom because our constitution makers found that giving uncurtailed liberty may get prone to misuse and for the same under article 302 gave absolute power is given to parliament for imposing restriction in the interest of general public and subsequent provisions. Also the restrictions laid down should have indirect consequences and they should not directly curtail the freedom laid down in Article 19(1)(g). This is well settled principle from catena of judgements that impediment on direct movement of commerce is violative of Article 301 and also of Article

¹⁷ AIR 1976 SC 36

¹⁸ Supra 17

¹⁹ Source- <http://www.doingbusiness.org/data/exploreconomies/india> (World bank)

²⁰ The Constitution of India, 1950

19(1)(g) (based on situations). For an instance direct impediment can be held if any state applies discriminatory policy, and indirect impediment can be held under instances like levy of octroi, sales tax, purchase tax etc. Article 19(1)(g) is a fundamental right and can only be invoked by citizens of India. While Article 301 is an explanatory provision to Article 19(1)(g) and also Article 301 is very limited because it can be invoked only when free flow of trade, commerce and intercourse is hampered through any direct impediment from the state as such. Also Article 301 can be used by citizen as well as non-citizen and corporate person/private entity, removing the limited scope of civilians under Article 19(1)(g).

Taxation laws propounded by the state were not brought under the purview of Article 301 in Automobile Transport case²¹ by Supreme Court, the Court commented that the taxes are the sole key for state in order to maintain the state's financial health at large. The concept of "**Compensatory or Regulatory Taxes**" was evolved in this case which will ensure that the state will levy such taxes which are having objective laid down in form of compensatory, in other words for public interest as well as regulatory if needed. In this case, State of Rajasthan levied a tax on motor vehicles (Rs 60 on a motor vehicle and Rs 2000 on a goods vehicle per year) used within the state, and the said was challenged formulating direct impediment and violating Article 19(1)(g). The Supreme Court rejected the contention of the same.

Thus Article 301 in form a constitutional right has limited scope to entertain but the main objective is to propagate economic unity in the entire nation.

CONCLUSION

The Article 19(1)(g) in detail tries to cover all ambits of any economic activity at large and restrictions laid down tries to create "**level playing field**". This provision also ensures that economic equality and true spirit of democracy our constitution at large is upheld. It is believed that state imposes restrictions upon its citizens considering the said fact that the citizens are still not mature enough to declassify for them, what is apt for them or not. Recent nature of Indian Government of being **Mr. Banistan** portrays inefficiency on part of her Indian citizens that despite being independent for last six decades they are not able to grow out of their infancy and the said contention is true then serious question will be raised on the failure of the state's mechanism in regards to nurturing of her citizens.

There are three major grey area which state and judiciary needs to reaffirm of Article 19(1)(g) :-

²¹*Automobile Transport v. State of Rajasthan AIR 1962 SC 1406*

- The interpretation of the phrase “in the interest of general public.”
- Effective restriction and not mere normative completeness.
- Try to simplify intricate regulatory procedure.

Thus these are major contentions which will help in making the impact of Article19(1)(g) more effective and help in accomplishing the ambition of our constitution makers in relation to the same.