A BENNETT COLEMAN & CO. & ORS.

v.

UNION OF INDIA & ORS.

October 30, 1972

[S. M. SIKRI, C.J., A. N. RAY, P. JAGANMOHAN REDDY, K. K.
B MATHEW AND M. H. BEG, JJ.]

Constitution of India 1950, *Arts.* 14 & 19 (1)(*a*)—*Newsprint policy for* 1972-73 *whether violates Articles* 19(1)(*a*) *and* 14 —*Validity of Remarks V, VII*(*a*), *VII*(*c*), *VIII and X of Policy—Competency of shareholders of company to file petitions under Art.*32—*Emergency proclaimed under Art.* 358 *of Constitution—Application in respect of enforcement of fundamental rights whether barred.*

C

The Import Control Order 1955 passed by the Central Government under ss. 3 and 4A of the Imports and Exports Control Act 1947 laid restrictions on the import of newsprint. As an essential commodity newsprint was also subject to control under s.3 of the Essential Commodities Act 1955. The Newsprint Control Order 1962 was passed under s. 3 of the Essential Commodities Act. Sub-clause 3 of clause 3 of the 1962
D Order states that no consumer of newsprint shall in any licensing period consume or use newsprint in excess of quantity authorised by the Controller from time to time. Sub-clause 3A of clause 3 states that no consumer of newsprint other than a publisher of text books of general interest shall use any kind of paper other than newsprint except with the permission in writing of the Controller. Sub-clause (5) of Clause 3 of the 1962 Order states that in issuing an authorisation under this clause the Controller shall have regard to the principles laid down in the Import Control Policy
E with respect to newsprint announced by the Central Government from time to time. The newsprint Policy for 1972-73 was challenged in this Court in petitions under Art. 32 of the Constitution. The questions that fell for consideration were : (i) whether the petitioners being companies could invoke fundamental rights; (ii) whether Art. 358 of the Constitution was a bar to any challenge by the petitioners on violations of fundamental rights; (iii) whether the restriction on newsprint import under the 1955 Order was violative of Art. 19(1)(a) of the Constitution;
F (iv) whether the newsprint Policy fell within clause 5(1) of the Import, Control Order 1955 and was valid; (v) whether clauses 3 and 3A of clause 3 of the 1962 Newsprint Order were violative of Arts. 19(1)(a) and 14 of the Constitution; (vi) whether Remarks V, VII(a), VII(c), VIII, and X of the Newsprint Policy for 1972-73 were violative of Arts. 19(1)(a) and 14 of the Constitution because of the following objectionable features : (a) No new paper or new edition could be started by a
G common ownership unit (*i.e.*, a newspaper establishment or concern owning two or more news interest newspapers including at least one daily) even within the authorised quota of newsprint; (b) there was a limitation on the maximum number of pages to 10, no adjustment being permitted between circulation and the pages so as to increase the pages; (c) no interchangeability was permitted between different papers of common ownership unit or different editions of the same paper; (d) allowance of 20 per cent increase in page level up to a maximum of 10 had been given
H to newspapers with less than 10 pages; (e) a big newspaper was prohibited and prevented from increasing the number of pages, page area, and periodicity by reducing circulation to meet its requirement even within its admissible quota; (f) there was discrimination in entitlement between

newspapers with an average of more than 10 pages as compared with newspapers of 10 or less than 10 pages. A

Allowing the petitions,

HELD : *Per* Majority (Sikri, C.J., Ray and Jaganmohan Reddy, JJ.) (1) The *Bank Nationalisation* case has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1)(a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the Corporation. [773C-D] B

In the present case, the individual rights of freedom of speech and expression of editors, Directors and Shareholders are all expressed through their newspapers through which they speak. The *locus standi* of the shareholder petitioners is beyond challenge after the ruling of this Court in the *Bank Nationalisation* case. The presence of the company is on the same ruling not a bar to the grant of relief. [773D-F] C

(ii) The present petitions which were originally filed to challenge the Newsprint Policy for 1971-72 were amended to challenge the 1972-73 policy. The impeached policy was a continuation of the old policy. Article 358 does not apply to executive action taken during the emergency if the same is a continuation of the prior executive action or an emanation of the previous law which prior executive action or previous law would otherwise be violative of Art. 19 or be otherwise unconstitutional. [774 F, G, H] D

Executive action which is unconstitutional is not unusual during the proclamation of emergency. During the proclamation Art. 19 is suspended. But it would not authorise the taking of detrimental executive action during the emergency affecting the fundamental rights in Art. 19 without any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when enacted. [775A-B] E

(iii) The power of the Government to import newsprint cannot be denied. The power of the Government to control the distribution of newsprint cannot equally be denied. This Court cannot adjudicate on such policy measures unless the policy is alleged to be *mala fiae*. The Court could also not go into the dispute as to tre quantity of indigenous newsprint available for newspapers. [776D; 776E] F

(iv) The records with regard to the making and publication of the newsprint policy for 1972-73 showed that the policy was published under the authority of the Cabinet decision. The policy was therefore validly brought into existence. G

(v) Although Art. 19(1)(a) does not mention the freedom of the Press, it is the settled view of this Court that freedom of speech and expression includes freedom of the Press and circulation. The Press has the right of free propagation and free circulation without any previous restraint on publication. If a law were to single out the press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid, this would violate Art. 19(1)(a) and would fall outside the protection afforded by Art. 19(2). [777B-D] H

A The concept of regulation of fundamental rights borrowed and extracted from American decisions cannot be accepted. The American First Amendment contains no exceptions like our Art. 19(2) of the Constitution. This Court has established freedom of the press to speak and express. That freedom cannot be abridged and taken away by the manner the impugned policy has done. [783B; 784C]

(vi) A newspaper control policy is *ultra vires* the Import Control Act B and the Import Control Order. The machinery of Import Control cannot be utilised to control or curb circulation or growth or freedom of newspapers in India. The pith and substance doctrine is used in ascertaining whether the Act falls under one Entry while incidentally encroaching upon another Entry. Such a question does not arise here. The Newsprint Control Policy is found to be newspaper control order in the guise of framing an Import Control Policy for newsprint. [780H; 781A-B]

C (vii) This Court in the *Bank Nationalisation* case laid down two tests. First it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test. [781C-D]

An examination of the provisions of the newsprint policy indicates how the petitioner's fundamental rights had been infringed by the restrictions D on page limit, prohibition against new newspapers and new editions. The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed. [782B-C]

(viii) It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express. [782G]

(ix) In the present case fixation of page limit will not only deprive E the petitioners of their economic vitality but also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and demanding the area of coverage for news and views. [790D-E]

If as a result of reduction in pages the newspapers will have to depend on advertisements as the main source of their income, they will be denied dissemination of news and views. That will also deprive them of their G freedom of speech and expression. On the other hand if as a result of restriction on page limit the newspapers will have to sacrifice advertisements and thus weaken the limit of financial strength, the organisation may crumble. The loss on advertisements may not only entail the closing down but also affect the circulation and thereby infringe on freedom of speech and expression. [790F-G]

(x) The impeached policy violates Art. 14 because it treats newspapers which are not equal equally in assessing the needs and requirements of H newsprint. The 7 newspapers which were operating above 10 page level are placed at a disadvantage by the fixation of 10 page limit and entitlement to quota on that basis. There is no intelligible differentia. [791H; 792A-B]

The basic entitlement in Remark V to quota for newspapers operating above 10 page level violates Article 19(1)(a) because the quota is hedged in by direction not increase the page number above 10. The reduction of page limit to 10 for the aforesaid reasons violates Article 19(1)(a) and Article 14 of the Constitution. [792C] A

(xi) Under Remark VII(c) those newspapers within the ceiling of 10 pages get 20 per cent increase in the number of pages. They require circulation more than the number of pages. They are denied circulation as a result of the policy. The big English dailies which need to increase their pages are not permitted to do so. Other dailies which do not need increase in pages are permitted quota for increase but they are denied the right of circulation. This is not newsprint control but newspaper control. [792F-G] B

(xii) Discrimination is apparent from Remark VII in the newsprint Policy for 1972-73 by which newspapers with less than 1,00,000 circulation have been given 10% increase in circulation whereas those with more than 1,00,000 circulation have been given only 3% increase in circulation. [795C-D] C

(xiii) The first part of Remark VIII prohibits increase in pages by reducing circulation. In the past adjustability between pages and circulation was permitted. The individual requirements of different dailies render it eminently desirable in some cases to increase the number of pages than circulation. The denial of this flexibility or adjustment is rightly said to hamper the quality, range and standard of the dailies and to affect the freedom of the press. Big dailies are treated to be equal with newspapers who are not equal to them thus violating Art. 14. [793E-F] D

(xiv) The second prohibition in Remark VIII prevented common ownership units from adjusting between them the newsprint quota alloted to each of them. The prohibition is to use the newsprint quota of one newspaper belonging to a common ownership unit for another newspaper belonging to that unit. Newsprint is allotted to each paper. The newspaper is considered to be the recipient. A single newspaper will suffer if common ownership units are allowed to adjust quota within their group. [794 B; & D] E

(xv) Under Remark X a common ownership unit could bring out a newspaper or start a new edition of an existing paper even from their allocated quota. It is an abridgment of the freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use the allotted quota for changing the page structure and circulation of different editions of the same paper. Newspapers however cannot be permitted to use allotted quota for starting a new newspaper. Newspapers will have to make necessary application for allotment of quota in that behalf. It will be open to the appropriate authorities to deal with the application in accordance with law. [794G-H] F G

(xvi) The liberty of the press remains an Ark of the Covenant. The newspapers give the people the freedom to find out which ideas are correct. Therefore the freedom of the press is to be enriched by removing the restrictions on page limit and allowing them to have new editions of newspapers. [796A-C] H

(xvii) The Press is not exposed to any mischief of monopolistic combination. The newsprint policy is not a measure to combat monopolies.

A The newsprint policy should allow the newspapers that amount of freedom of discussion and information which is needed or will appropriately enable the members of the society to preserve their political expression of comment not only upon public affairs but also upon the vast range of views and matters needed for free society. [797D-E]

(xix) Clause 3(3A) of the 1962 Order provides that no consumer of newsprint other than a publisher of text books of general interest shall B use any kind of page other than newsprint except with the permission of the Controller. It was therefore wrong to say that it was open to newspapers to make unrestricted use of any form of paper so long as newspapers did not apply for newsprint. [798F]

(xx) In the result the provisions in remarks V, VII(a), VII(c) and VIII of the Policy being violative of Arts. 14 & 19 (1)(a) of the Constitution must be struck down as unconstitutional. The prohibition in Re- C mark X against common ownership unit from starting a new newspaper periodical or a new edition must be declared unconstitutional and struck down as violative of Art. 19 (1) (a) of the Constitution. [799B-D]

[In the circumstances of the case the Court did not find it necessary to express any opinion on Clause 3(3) and Clause 3(3A) of the Control Order]

State Trading Corporation of India Ltd. v. *The Commercial Tax Officer,* D *Visakhapatnam,* [1964] 4 S.C.R. 99, *Tata Engineering & Locomotive Co.* v. *State of Bihar,* [1964] 6 S.C.R. 885, *Chiranjit Lal Choudhuri* v. *The Union of India & Ors.* [1950] S.C.R. 869, *Express Newspapers (Private) Ltd. & Anr.* v. *The Union of India & Ors.,* [1959] S.C.R. 12, *Sakal Papers (P) Ltd. & Ors.* v. *The Union of India,* [1962] 3 S.C.R. 842, *Romesh Thappar v. State of Madras,* [1950] S.C.R. 594, *Brij Bhushan* v. *State of Delhi,* [1950] S.C.R. 605, *R. C. Cooper* v. *Union of India,* [1970] 3 S.C.R. 530, *District Collector of Hyderabad & Ors.* v. *M/s Ibrahim & Co. etc.* E [1970] 3 S.C.R. 498, *State of Madhya Pradesh & Anr.* v. *Thakur Bharat Singh,* [1967] 2 S.C.R. 454, *Hamdard Dawakhana (Wakf) Lal Kuan Delhi & Anr.* v. *Union of India & Ors.,* [1960] 2 S.C.R. 1671, *Red Lion Broadcasting Co.* v. *Federal Communications Com.* [1969] 393 US 367=23 L.Ed 371, *United States* v. *O'Brian,* [1968] 391 US 367=23L.Ed. 2d 371, *United States* v. *O'Brien,* [1968] 391, U.S. 367=20 L.Ed. 2d. 672, *Abdul Azia Aminudin* v. *State of Maharashtra,* [1964] 1 S.C.R. 830, *Dwarka-* F *das Shrinivas* v. *The Sholapur & Weaving Co. Ltd.,* [1954] S.C.R. 674, *Commonwealth of Australia* v. *Bank of New South Wales,* [1950] A.C. 235 and *Citizen Publishing Co.* v. *United States,* [1969] 394 U.S. 131=22 L. Ed. 2 d. 148, referred to.

Per Beg J. (concurring)—The ambit of the conditions in a licence cannot under the provisions of the Imports and Exports Control Act, after newsprint has been imported under a licence, extend to laying down how it is to G be utilized by a newspaper concern for its own genuine needs and businesses because this would amount to control of supply of news by means of newsprint instead of only regulating its import. [833C-D]

The relevant enactments and orders seem to authorise only the grant of licences for particular quotas to those who run newspapers on the strength of their needs, assessed on the basis of their past performances and future requirements and other relevant data, but not to warrant an imposition of H further conditions to be observed by them while they are genuinely using the newsprint themselves in the course of carrying on a legitimate and permissible occupation and business. The impugned restrictive conditions thus appear to go beyond the scope of the Essential Commodities Act 1955 as well as the Imports & Exports (Control) Act, 1947. Nor could any legal

authority be found for them in the provisions of the Press Books Act 1867, Registration of Newspapers (Central Rules) 1956, and Press Council Act, 1965, to which reference was made. [833D-G] A

Therefore the argument put forward on behalf of the petitioners that after the allocation of quotas of newsprint to each set of petitioners, on legally relevant material, the further restrictions sought to be imposed, by means of the notified newsprint control policy, on the actual mode of user of newsprint for publication of information or views by the licensees, similar to those which were held by this Court in *Sakal Papers* case to be invalid, are not covered by any law in existence, had to be accepted. Hence it was not even necessary to consider whether they were reasonable restrictions warranted by either Art. 19(2) or Art. 19(6) of the Constitution. They must first have the authority of some law to support them before the question of considering whether they could be reasonable restrictions on fundamental rights of the petitioner could arise. [833H—834B] B C

Per Mathew J. (dissenting) (i) Art. 19 (1)(a) guarantees to the citizens, the fundamental right of the freedom of speech and Art. 19(2) enumerates the type of restrictions which might be imposed by law. It does not follow from this that freedom of expression is not subject to regulations which may not amount to abridgment. It is a total misconception to say that speech cannot be regulated or that every regulation of speech would be an abridgment of the freedom of speech. No freedom however absolute, can be free from regulation. Though the right under Art. 30(1) is in terms absolute, this Court said in *In Re the Kerala Education Bill* 1957, ([1959] S.C.R. 995), that the right is subject to reasonable regulation. [803F-G] D

(ii) If, on account of scarcity of newsprint, it is not possible, on an equitable distribution to allot to the petitioners, newsprint to the extent necessary to maintain the present circulation of the newspapers or their page level has to be reduced, it cannot be contended that there has been abridgment of freedom of speech. Surely the reduction in the page level or circulation is the direct result of the diminished supply of newsprint. Yet it cannot be said that there is an abridgment of the freedom of speech of the petitioners. There might be an abridgment of speech, but not an abridgment of the freedom of speech. [807C-D] E

(iii) The pith and substance test, although not strictly appropriate, might serve a useful purpose in the process of deciding whether the provisions in question which work some interference with the freedom of speech are essentially regulatory in character. [807C-D] F

(iv) The crucial question today, as regards Art. 14, is whether the command implicit in it constitutes merely a bar on the creation of inequalities existing without any contribution thereto by State action. It has been said that justice is the effort of man to mitigate the inequality of man. The whole drive of the directive principles of the Constitution is toward this goal and it is in consonance with the new concept of equality. The only norm which the Constitution furnishes for distribution of the material resources of the community is the elastic norm of the common good [see Art. 39(b)]. It cannot be said that the principle adopted for the distribution of newsprint is not for the common good. [816C-F] G

That apart one of the objects of the Newsprint policy was to remedy the inequality created by the previous policies and to enable the dailies having less than 10 pages attain a position of equality with those operating on a page level of 10 or more. The allowance of 20 per cent H

A increase for growth in the page level provided in Remark VII is based on a classification and that classification is grounded on an intelligible differentia having a nexus to the object sought to be achieved. [816G]

(v) If the entitlement of a consumer of newsprint is calculated on the basis of page-level and circulation of the newspaper it would be an integral part of any system of rationing to tell the consumer that he should maintain the page level and circulation of the paper. The provision in Remark B VIII does not say that the proprietor or publisher of a newspaper should reduce its circulation. The provision in effect only tells the proprietor/publisher of the newspaper: "maintain the circulation at the present level or increase it if you like by reducing the page level." This would not amount to an abridgment of the freedom of speech. [817 D & F]

(vi) Under the theory of the freedom of speech which recognises C not only the right of the citizens to speak but also the right of the community to hear, a policy for the distribution of newsprint for maintenance of circulation at its highest possible level as it furthers the right of the community to hear, will only advance and enrich that freedom. [819D]

(vii) It is difficult to understand how the fixation of a maximum page level of 10 for calculation of quota of newsprint would offend the fundamental right of freedom of speech of the petitioners. The freedom of D speech does not mean a right to obtain or use an unlimited quantity of newsprint. Art. 19(1)(a) is not the "guardian of unlimited talkativeness." [814F-G]

(viii) It is settled by the decision of this Court in *Hamdard Dawakhana* ([1960] 2 S.C.R. 671) that commercial advertisement does not come within the ambit of the freedom of speech guaranteed by Art. 19(1)(a). Curtailment of speech occasioned by rationing of newsprint due to its E scarcity can only affect freedom of speech indirectly and consequently there would be no abridgment of it. [815B-C]

(ix) The Government may under cls. 3 of the Imports (control) Order, 1955 totally prohibit the import of newsprint and thus disable any person from carrying on a business in newsprint, if it is in the general interest of the public not to extend any foreign exchange on that score. If the affirmative obligation to expend foreign exchange and permit the import F of newsprint stems from need of the community for information and the fundamental duty of Government to educate the people as also to satisfy the individual need for self expression, it is not for the proprietor of a newspaper alone to say that he will reduce the circulation of the newspaper and increase its page level, as the community has an interest in maintaining or increasing circulation of newspapers. The claim to enlarge the volume of speech at the expense of circulation is not for exercising the freedom of speech guaranteed by Art. 19(1)(a) but for commercial G advertisement for revenue which will fall within the ambit of that sub-article. [820B-E]

(x) The printer or publisher of each newspaper owned by a common ownership unit is a separate consumer and it is to that consumer that the quota is allotted. The application for quota made by the common ownership unit specifies the entitlement of each newspaper owned by it, and H quota is granted to each newspaper on that basis. If it were opened to a common ownership unit to use the quota allotted for one newspaper owned by it for another newspaper, or for a different edition of the same newspaper, that would frustrate the whole scheme of rationing. Prohibition of interchangeability has nothing to do with Art. 19(1)(a). [822C-D]

(xi) That there is a valid classification between a person owning no newspaper and a common ownership unit owning two or more newspapers cannot be denied. Any person desiring to express himself by the medium of a newspaper cannot be denied an opportunity for the same. The right guaranteed under Art. 19(1)(a) has an essentially individual aspect. A common ownership unit has already been given the opportunity to express itself by the media of two or more newspapers. If a common ownership unit were to go on acquiring or sponsoring new newspapers and if the claim for quota for all the newspapers is admitted, that would result in concentration of newspaper ownership and will accelerate the tendency towards monopoly in the newspaper industry. Since the quantity of newsprint available for distribution is limited, any system of rationing must place some limitation upon the right of a person to express himself through newspapers. [822H; 823A-D]

(xii) The contention that the newsprint Policy was not binding since it had no statutory backing could not be accepted. The newsprint Policy was issued by the Chief Controller of Imports & Exports and the Additional Secretary to Government, had authenticated it. The newsprint Policy was placed before both the Houses of Parliament. Even if it was administrative in character it was capable of founding rights and duties. [823F; 824B]

(xiii) The contention that after newsprint has been imported, there was no longer any power left in the Government or in the Chief Controller of Imports and Exports to direct the manner in which it should be utilized, could not be accepted. Even if it be assumed that Government or the Chief Controller of Imports and Exports has no power under cl. 5(1)(i) of the Imports (Control) Order 1955 to issue directions as regards the mode of utilization of newsprint after its import, it is clear that the Government has power by virtue of the provisions of s. 3 of the Essential Commodities Act, 1955, to pass an Order as regards the utilization of newsprint, as newsprint is an "essential commodity" under s. 2(vii) of that Act. [824F; 825C-D]

(xiv) Clauses 3(3) and 3(3A) of that newsprint order were not violative of Art. 14 of the Constitution. [826F]

(xv) It was not necessary to express any opinion as regards the maintainability of the writ petitions on the ground that consumers of newsprint in question were not citizens. [826G]

ORIGINAL JURISDICTION : Writ Petitions Nos. 334 of 1971, 175, 186 and 264 of 1972.

Petitions under Article 32 of the Constitution of India for the enforcement of fundamental rights.

N. A. Palkhiwala, S. J. Sorabjee, M. O. Chenai, S. Swarup, Ravinder Narain, O. C. Mathur and *J. B. Dadachanji*, for the petitioners (in W.P. No. 334 of 1971.)

C. K. Daphtary, M. C. Bhandare, Liela Seth, O. P. Khaitan and *N. C. Shah*, for the Petitioner (in W.P. No. 175 of 1972).

S. J. Sorabjee, Ramanathan, J. B. Dadachanji, Ravinder Narain and *O. C. Mathur*, for the Petitioners (in W.P. No. 186 of 1972).

A *M. K. Nambyar, K. K. Venugopal, J. B. Dadachanji, Ravinder Narain* and *O. C. Mathur*, for the petitioners (in W.P. No. 264 of 1972).

F. S. Nariman, Additional Solicitor-General of India, *G. Das* and *B. D. Sharma*, for the respondents (in W.Ps. Nos. 334, 175 B and 186 of 1972).

J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the Interveners Nos. 1 and 2.

O. P. Khaitan, for Intervener No. 3.

The majority judgment of Sikri, C.J. and Ray and Jaganmohan C Reddy, JJ. was delivered by Ray, J. Beg, J. delivered a separate concurring opinion. Mathew, J. delivered a separate dissenting opinion.

RAY, J. These petitions challenge the Import Policy for Newsprint for the year April 1972 to March 1973. The Newsprint Policy is impeached as an infringement of fundamental rights D to freedom of speech and expression in Article 19(1)(a) and right to equality in Article 14 of the Constitution. Some provisions of the Newsprint Control Order 1962 are challenged as violative of Article 19(1)(a) and Article 14 of the Constitution.

The import of newsprint is dealt with by Import Control Order, 1955 (referred to as the 1955 Import Order). The 1955 E Import Order is made in exercise of powers conferred by sections 3 and 4A of the Imports and Exports Control Act, 1947 (referred to as the 1947 Act). Section 3 of the 1947 Act, speaks of powers of the Central Government to prohibit, restrict or otherwise control imports and exports. Section 4A of the 1947 Act contemplates issue or renewal of licences under the 1947 Act for F imports and exports. Item 44 in Part V of Schedule I of the 1955 Import Order relates to newsprint. Newsprint is described as white printing paper (including water lined newsprint which contained mechanical wood pulp amounting to not less than 70% of the fibre content). The import of newsprint is restricted under the 1955 Import Order. This restriction of newsprint import is also G challenged because it infringes Article 19(1)(a). It is said that the restriction of import is not a reasonable restriction within the ambit of Article 19(2).

The Newsprint Control Order 1962 (referred to as the 1962 Newsprint Order) is made in exercise of powers conferred by section 3 of the Essential Commodities Act 1955 (referred to as H the 1955 Act). Section 3 of the 1955 Act enacts that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supply of essential commodities or for securing their equitable distribution and availability

at fair prices, it may, by order, provide for regulating or prohibiting production, supply and distribution and trade and commerce therein. Section 2 of the 1955 Act defines "essential commodity". Paper including newsprint, paper board and straw board is defined in section 2 (a) (vii) of the 1955 Act to be an essential commodity.

The 1962 Newsprint Order in clause 3 mentions restrictions on acquisition, sale and consumption of newsprint. Sub-clause 3 of clause 3 of the 1962 Newsprint Order states that no consumer of newsprint shall, in any licensing period, consume or use newsprint in excess of the quantity authorised by the Controller from time to time. Sub-clause 3A of clause 3 of the 1962 Newsprint Order states that no consumer of newsprint, other than a publisher of text books or books of general interest, shall use any kind of paper other than newsprint except with the permission, in writing, of the Controller. Sub-clause 5 of clause 3 of the 1962 Newsprint Order states that in issuing an authorisation under this clause, the Controller shall have regard to the principles laid down in the Import Control Policy with respect of newsprint announced by the Central Government from time to time. Sub-clauses 3 and 3A of clause 3 of the 1962 Newsprint Order are challenged in these petitions on the ground that these clauses affect the volume of circulation, the size and growth of a newspaper and thereby directly infringe Article 19(1)(a) of the Constitution. The restrictions mentioned in these sub-clauses of clause 3 of the 1962 Newsprint Order are also said to be not reasonable restrictions within the ambit of Article 19(2) of the Constitution.

Sub-clauses 3 and 3A of clause 3 of the 1962 Newsprint Order are further impeached on the ground that they offend Article 14 of the Constitution. Sub-clause 3A is said to confer unfettered and unregulated power and uncontrolled discretion to the Controller in the matter of granting of authorisation. It is said that there are no provisions for redress of grievances by way of appeal or revision of the Controller's decision in the matter of grant or renewal of authorisation. The restrictions are said to be not reasonable or justified in the interest of general public. The distinction between publishers of text-books and books of general interest on the one hand and other consumers of newsprint on the other in sub-clause 3A is said to be discriminatory and without any rational basis. Again, the disability imposed by sub-clause 3A on newspapers preventing them from using printing and writing paper while permitting all other consumers to do so, is said to be irrational discrimination between newspapers and periodicals as the latter are permitted to use unlimited quantity of printing and writing paper in addition to their allocation of newsprint.

A The Newsprint Policy of 1972-73 referred to as the Newsprint Policy deals with white printing paper (including water lined newsprint which contained mechanical wood pulp amounting to not less than 70 per cent of the fibre content). Licences are issued for newsprint. The validity of licences is for 12 months. The Newsprint Policy defines "common ownership unit" to mean B newspaper establishment or concern owning two or more news interest newspapers including at least one daily irrespective of the centre of publication and language of such newspapers. Four features of the Newsprint Policy are called in question. These restrictions imposed by the Newsprint Policy are said to infringe rights of freedom of speech and expression guaranteed in Article C 19 (1)(a) of the Constitution. First, no new paper or new edition can be started by a common ownership unit even within the authorised quota of newsprint. Secondly, there is a limitation on the maximum number of pages to 10. No adjustment is permitted between circulation and the pages so as to increase the pages. Thirdly, no inter-changeability is permitted between different papers of common ownership unit or different editions of the D same paper. Fourthly, allowance of 20 per cent increase in page level up to a maximum of 10 has been given to newspapers with less than 10 pages. It is said that the objectionable and irrational feature of the Newsprint Policy is that a big daily newspaper is prohibited and prevented from increasing the number of pages, page area and periodicity by reducing circulation to meet its E requirement even within its admissible quota. In the Newsprint Policy for the year 1971-72 and the earlier periods the newspapers and periodicals were permitted to increase the number of pages, page area and periodicity by reducing circulation. The current policy prohibits the same. The restrictions are, therefore, said to be irrational, arbitrary and unreasonable. Big daily newspapers F having large circulation contend that this discrimination is bound to have adverse effects on the big daily newspapers.

The Newsprint Policy is said to be discriminatory and violative of Article 14 because common ownership units alone are prohibited from starting a new paper or a new edition of the same paper while other newspapers with only one daily are permitted G to do so. The prohibition against inter-changeability between different papers of the same unit and different editions of the said paper is said to be arbitrary and irrational, because it treats all common ownership units as equal and ignores pertinent and material differences between some common ownership units as compared to others. The 10 page limit imposed by the policy is said to violate Article 14 because it equates newspapers which are H unequal and provides the same permissible page limit for newspapers which are essentially local in their character and newspapers which reach larger sections of people by giving world news

and covering larger fields. The 20 per cent increase allowed for newspapers, whose number of pages was less than 10 is also challenged as violative of Article 14 by discriminating against newspapers having more than 10 pages. The difference in entitlement between newspapers with an average of more than 10 pages as compared with newspapers of 10 or less than 10 pages is said to be discriminatory because the differentia is not based on rational incidence of classification.

The import policy for newsprint has a history. From 1963-64 quota of newsprint for dailies has been calculated on the basis of page level of 1957 and circulation of 1961-62 with *ad hoc* increases for growth on the basis of percentage of pages calculated on circulation and allowance of page increase of not more than 2 pages at a time subject to a maximum of 12 pages. The bulk of newsprint was imported in the past. Indigenous newsprint was limited in supply. From 1963-64 till 1970-71 printing and writing paper available in our country was taken into account for framing the import policy. The quantity which could be made available to consumers of newsprint for the requirements of publishers of text books were considered in that behalf. After 1971-72 printing and writing paper was in short supply. According to the Government this was adversely affecting the requirements of the publishers of text books. The loss to newsprint consumer from the non-availability of white printing paper was made good in additional quantity of imported newsprint. The import quota of newsprint was increased from 1,40,000 tonnes in 1970-71 to 1,80,000 tonnes in 1971-72.

From 1972-73 with regard to daily newspapers three principal changes were effected. First, the base year for circulation was taken at 1970-71. Second, the page level was taken at the maximum of 10 pages instead of the previously operating 10 page level. Those operating at a page level of over 10 pages were given the facility of basing their required quota either on actual circulation for 1970-71 or admissible or calculated circulation for 1971-72 whichever is more. Third, the increase in quota for growth was allowed as in the past. In the case of circulation growth it was stipulated in terms of percentage of circulation over the previous year. In the case of page growth the maximum of 10 pages was permitted.

The Additional Solicitor General raised two pleas in demurrer. First, it was said that the petitioners were companies and therefore, they could not invoke fundamental rights. Secondly, it was said that Article 358 of the Constitution is a bar to any challenge by the petitioners of violation of fundamental rights.

A This Court in *State Trading Corporation of India Ltd.* v. *The Commercial Tax Officer, Visakhapatnam*(1) and *Tata Engineering & Locomotive Co.* v. *State of Bihar*(2) expressed the view that a corporation was not a citizen within the meaning of Article 19, and, therefore, could not invoke that Article. The majority held that nationality and citizenship were distinct and separate con-
B cepts. The view of this Court was that the word "citizen" in Part II and in Article 19 of the Constitution meant the same thing. The result was that an incorporated company could not be a citizen so as to invoke fundamental rights. In the *State Trading Corporation*(1) case (supra) the Court was not invited to "tear the corporate veil". In the *Tata Engineering & Loco-*
C *motive Co.* (2) case (supra) this Court said that a company was a distinct and separate entity from shareholders. The corporate veil it was said could be lifted in cases where the company is charged with trading with the enemy or perpetrating fraud on the Revenue authorities. Mukherjea J., in *Chiranjit Lal Choudhuri* v. *The Union of India & Ors.*(3) expressed the minority view that
D an incorporated company can come up to this Court for enforcement of fundamental rights.

There are however decisions of this Court where relief has been granted to the petitioners claiming fundamental rights as shareholders or editors of newspaper companies. These are *Express Newpapers (Private) Ltd. & Anr.* v. *The Union of India*
E *& Ors.*(4) and *Sakal Papers (P) Ltd. & Ors.* v. *The Union of India*(5).

In *Express Newspapers*(4) case (supra) the Express News papers (Private Ltd. was the petitioner in a writ petition under Article 32. The Press Trust of India Limited was another peti-
F tioner in a similar writ petition. The Indian National Press (Bombay) Private Ltd. otherwise known as the "Free Press Group" was a petitioner in the third writ petition. The Saurashtra Trust was petitioner for a chain of newspapers in another writ petition. The Hindustan Times Limited was another petitioner. These petitions in the *Express Newspapers*(4) case (supra) challenged the vires of the Working Journalists (Condi-
G tions of Service) and Miscellaneous Provisions Act, 1955. The petitioners contended that the provisions of the Act violated Articles 19(1)(a), 19(1)(g) and 14 of the Constitution.

In *Sakal Papers*(5) case (supra) the petitioners were a Private limited company carrying on business of publishing daily
H and weekly newspapers in Marathi and two shareholders in the

(1) [1964] 4 S.C.R. 99.
(2) [1964] 6 S.C.R. 885.
(3) [1950] S.C.R. 869.
(4) [1959] S.C.R. 12.
(5) [1962] 3 S.C.R. 842.

company. There were two other petitions by readers of "Sakal" newspaper. The reader petitioners also challenged the constitutionality of the Act. The petitioners there challenged the Daily Newspapers (Price and Page) Order, 1960 as contravening Article 19(1)(a) of the Constitution.

Neither in the *Express Newspapers* case (supra) nor in *Sakal Papers* case (supra) there appears to be any plea raised about the maintainability of the writ petition on the ground that one of the petitioners happened to be a company.

In the *Express Newspapers* case (supra) this Court held that freedom of speech and expression includes within its scope the freedom of the Press. This Court referred to the earlier decisions in *Romesh Thappar* v. *State of Madras*(1) and *Brij Bhushan* v. *State of Delhi*(2). *Romesh Thappar's* case (supra) related to a ban on the entry and circulation of Thapper's journal in the State of Madras under the provisions of the Madras Maintenance of Public Order Act, 1949. Patanjali Sastri, J. speaking for the Court said in *Romesh Thappar's* case (supra) that "there can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation publication would be of little value". In *Brij Bhushan's* case (supra) Patanjali Sastri, J. speaking for the majority judgment again said that "every free man has undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press". Bhagwati, J. in the *Express Newspapers* case (supra) speaking for the Court said that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press is an essential part of the right to freedom of speech and expression and that the liberty of the press consists in allowing no previous restraint upon publication.

Describing the impugned Act in the *Express Newspapers* case (supra) as a measure which could be legitimately characterised to affect the press this Court said that if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a) it would certainly be liable to be struck down. But the Court found in the *Express Newspapers* case (supra) that the impugned measures were enacted for the benefit of the working journalists and it was, therefore, neither the intention nor the effect and operation

(1) [1950] S.C.R. 594 (2) [1950] S.C.R. 605

A of the impugned Act to take away or abridge the right of freedom of speach and expression enjoyed by the petitioners. There are ample observations of this Court in the *Express Newspapers* case (supra) to support the right of the petitioner companies there to invoke fundamental right in aid of freedom of speech and expression enshrined in the freedom of the press. This Court
B said that if the impugned measure in that case fell within the vice of Article 19(1)(a) it would be struck down. This observation is an illustration of the manner in which the truth and spirit of the freedom of press is preserved and protected.

In *Sakal Papers* case (supra) this Court struck down
C section 3(1) of the Newspaper (Price and Page) Act, 1956 and allowed the petitioner company relief on that basis. In the *Sakal Papers* case (supra) relief was granted to the shareholders and the company. The Court thought it unnecessary to express any opinion on the right of the readers to complain of infraction of fundamental rights in Article 19(1)(a) by reason
D of impact of law abridging or taking way the freedom of speech and expression.

In the present case, the petitioners in each case are in addition to the company the shareholders, the editors and the publishers. In the Bennett Coleman group of cases one shareholder, a reader
E of the publication and three editors of the three dailies published by the Bennett Coleman Group are the petitioners. In the Hindustan Times case a shareholder who happened to be a Deputy Director, a shareholder, a Deputy Editor of one of the publications, the printer and the publisher of the publications and a reader are the petitioners. In the Express Newspapers case the company and the Chief Editor of the dailies are the
F petitioners. In the Hindu case a shareholder, the Managing Editor, the publisher of the company are the petitioners. One of the important questions in these petitions is whether the shareholder, the editor, the printer, the Deputy Director who are all citizens and have the right to freedom under Article 19(1) can invoke those rights for freedom of speech and expression, claim-
G ed by them for freedom of the press in their daily publication. The petitioners contend that as a result of the Newsprint Control Policy of 1972-73 their freedom of speech and expression exercised through their editorial staff and through the medium of publications is infringed. The petitioners also challenge the fixation of 10 page ceiling and the restriction on circulation and
H growth on their publications to be not only violative of but also to abridge and take away the freedom of speech and expression of the shareholders and the editors. The shareholders, individually and in association with one another represent the medium

of newspapers through which they disseminate and circulate their views and news. The newsprint policy express them to heavy financial loss and impairs their right to carry on the business of printing and publishing of the dailies through the medium of the companies.

In *R. C. Cooper* v. *Union of India*(1) which is referred to as the *Bank Nationalisation*(1) case Shah, J. speaking for the majority dealt with the contention raised about the maintainability of the petition. The petitioner there was a shareholder, a Director and holder of deposit of current accounts in the Bank. The *locus standi* of the petitioner was challenged on the ground that no fundamental right of the petitioner there was directly impaired by the enactment of the Ordinance and the Act or any action taken thereunder. The petitioner in the *Bank Nationalisation* case (supra) claimed that the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution were impaired. The petitioner's grievances were these. The Act and the Ordinance were without legislative competence. The Act and the Ordinance interfered with the guarantee of freedom of trade. They were not made in public interest. The President had no power to promulgate the Ordinance. In consequence of hostile discrimination practised by the State the value of the petitioner's investment in the shares is reduced. His right to receive dividends ceased. He suffered financial loss. He was deprived of the right as a shareholder to carry on business through the agency of the company.

The ruling of this Court in *Bank Nationalisation* case (supra) was this :

> "A measure executive or legislative may impair the rights of the company alone, and not of its shareholders; it may impair the rights of the shareholders not of the Company; it may impair the rights of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief."

(1) [1970] 3 S.C.R. 530.

A In the *Bank Nationalisation* case (supra) this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the *Bank Nationalisation* case (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the *Bank Nationalisation* case (supra) B it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The *Bank Nationalisation* case (supra) has established the view that the fundamental rights C of shareholders as citizens are not lost when they associate to from a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1)(a) are D projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the Newspapers. The shareholders speak through their editors. The fact that the companies are the E petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The *locus standi* of the shareholder petitioners is beyond challenge after the ruling of this Court in the *Bank Nationalisation* case (supra). The presence of the F company is on the same ruling not a bar to the grant of relief.

The rulings in *Sakal Papers* case (supra) and *Express Newspapers* case (supra) also support the competence of the petitioners to maintain the proceedings.

Article 358 of the Constitution was invoked by the Additional G Solicitor General to raise the bar to the maintainability of the petition. Under Article 358 while a proclamation of a emergency is in operation nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take. It was, therefore, said on behalf of H the Government that the petitioners could not challenge the 1972-73 Newsprint Policy during the proclamation of emergency. Counsel on behalf of the petitioners contended that Article 358 is inapplicable because it has no application to the law or executive

action taken prior to the proclamation of emergency. The Newsprint Policy was said by the petitioners to be a continuation of the old newsprint policy which had originated earlier and continued from year to year for a decade till the proclamation of emergency in 1971. The restrictions on newsprint policy were imposed before the proclamation of emergency. It was, therefore, said that these restrictions could be challenged.

In *District Collector of Hyderabad & Ors.* v. *M/s Ibrahim & Co. etc.*(1) this Court considered whether the Sugar Control Order 1963 was protected under Article 358 and 359 because the President had declared that state of emergency. The Sugar Control Order 1963 was made in exercise of powers conferred by section 3 of the Essential Commodities Act. The order placed restrictions on sale and delivery by the producers. The Order also controlled the production, distribution of sugar by producers or recognised dealers. The Order regulated the movement of sugar at fixed price. The state of emergency was declared on 28 October, 1962. It was contended that on the issue of proclamation of emergency the State is, for the duration of the emergency, competent to enact legislation notwithstanding that it impairs the freedoms guaranteed by Article 19 of the Constitution. The State was also said to be competent to take executive action during the proclamation of emergency which the State would for the provisions contained in Article 19 of the Constitution be competent to make. In *Ibrahim's* case (supra) the State made an executive order. It was said "the executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken". The Order of the State Government in that case was held to be contrary to statutory provisions contained in the Sugar Dealers Licensing Order and the Sugar Control Order. The executive action was, therefore, held not to be protected under Article 358 of the Constitution.

Originally, the petitioners challenged the validity of the Newsprint Policy for 1971-72. The petitions were amended. As a result of the amendment the petitioners challenged the validity of the 1972-73 newsprint policy. The contention of the petitioners is correct that the impeached policy is a continuation of the old policy. Article 358 does not apply to executive action taken during the emergency if the same is a continuation of the prior executive action or an emanation of the previous law which prior executive action or previous law would otherwise be violative of Article 19 or be otherwise unconstitutional. The contention on behalf of the Government that the 1972-73 policy is protected during the proclamation of emergency and is a mere administrative action is unsound Executive action which is unconstitutional

(1) [1970] 3 S.C.R. 498.

A is not immune during the proclamation of emergency. During the proclamation of emergency Article 19 is suspended. But it would not authorise the taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 without any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when B enacted.

This Court in *State of Madhya Pradesh & Anr.* v. *Thakur Bharat Singh*(1) considered whether the State Government could make an order under the Madhya Pradesh Public Security Act 1959 directing that Thakur Baharat Singh shall not be in any place in Raipur District and that he was to reside in a named town. C The Order was made on 24 April, 1963. The Government contended in the *Madhya Pradesh* case (supra), that Article 358 protected legislative and executive action taken after the proclamation of emergency which was declared on 20 October, 1962. This Court rejected the contention of the State that the Order was protected by Article 358. This Court held that if the power conferred by the 1959 Act to impose unreasonable restrictions offended D Article 13 by taking away or abridging the rights conferred by Part III of the Constitution the law in contravention of Article 13 would be void. Article 358 suspends the provisions of Article 19 during an emergency. This Court said that all executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do E not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State but for the provisions in Part III of the Constitution. Article 358 does not invest the State with arbitrary authority to take action to the prejudice of citizens, and others; it merely provides that so long as the proclamation of emer- F gency subsists law may be enacted and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority. *The Madhya Pradesh* was (supra) is an authority for the proposition that Article 358 does not operate to validate G any legislative provision which is invalid because of the constitutional prohibition. In the present case, the impugned newsprint policy is continuation of prior executive action and of previous law. Therefore, in our judgment there is no merit in this preliminary objection.

H The Additional Solicitor General contended that the right to import and utilise newsprint was not a common law right. It was said to be a special right covered by several statutes. The Imports

(1) [1967] 2 S.C.R. 454.

and Exports Act 1947, the Imports Control Order, 1955, the Essential Commodities Act 1955 and the Newsprint Control Order 1962 were referred to in support of the proposition that if the petitioners asked for a quota of newsprint they had to abide the conditions prescribed. It was also said that the Press would have no special fundamental right under Article 19 (1)(a). The legislative measures were, therefore, said by the Government to be regulation of newspaper business even though there might be the incidental result of curtailing circulation. Reliance was placed on the decisions in *Express Newspapers* case (supra) and *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Apr.* v. *Union of India & Ors.*(1), in support of the contention that there would be no abridgement of fundamental right of the press if as a result of regulation of newspaper business there was the incidental effect of courtailing circulation. The Newsprint Policy was defended by the Government to be in aid of allowing small newspapers to grow and to prevent a monopolistic combination of big newspapers.

The power of the Government to import newsprint cannot be denied. The power of the Government to control the distribution of newsprint cannot equally be denied. It has, of course, to be borne in mind that the distribution must be fair and equitable. The interests of the big, the medium and the small newspapers are all to be taken into consideration at the time of allotment of quotas. In the present case, there was some dispute raised as to whether there should be more import of newsprint. That is a matter of Government policy. This Court cannot adjudicate on such policy measures unless the policy is alleged to be malafide. Equally, there was a dispute as to the quantity of indigenous newsprint available for newspapers. This Court cannot go into such disputes.

The petitioners raised a question as to whether the Newsprint Control Policy is a newsprint control or a newspaper control. Mr. Palkhivala characterised the measure to be newspaper control with degrees of subtlety and sophistication. Rationing of newsprint is newsprint control. That is where quota is fixed. Newspaper control can be said to be post-quota restrictions. The post-quota restrictions are described by Mr. Palkhivala to be newspaper control. The newspaper control, according to the petitioners, is achieved by measures adopted in relation to common ownership units owning two or more newspapers. These common ownership units are not allowed to bring out new papers of new editions of their dailies. These are not to have interchangeability of quota within their unit. In addition large papers are not allowed to have more than 10 pages. It was said that in the past several years Newsprint Control Policy worked remarkably without any challenge.

(1) [1960] 2 S.C.R. 671.

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Article 19(1)(a) provides that all citizens shall have the right to freedom of speech and expression. Article 19 (2) states that nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the B security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence. Although Article 19(1)(a) does not mention the freedom of the Press, it is the settled view of this Court that freedom of speech and expression includes freedom of the Press and circulation.

C

In the *Express Newspapers* case (supra) it is said that there can be no doubt that liberty of the Press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(a). The Press has the right of free propagation and free circulation without any previous restraint on publication. If a law were to single out the Press for laying down prohibitive burdens on it that D would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19 (1)(a) and would fall outside the protection afforded by Article 19 (2).

In *Sakal Papers* case (supra) it is said that the freedom of E speech and expression guaranteed by Article 19 (1) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In *Sakal* Papers case (supra) the Newspaper (Price and Page) Act 1956 empowered the Government to regulate the prices of newspapers in relation F to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newpaper according to the price charged. The Government prescribed the number of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to G circulate. This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers.

Publication means dissemination and circulation. The press has to carry on its activity by keeping in view the class of readers, the conditions of labour, price of material, availability of advertise- H ments, size of paper and the different kinds of news comments and views and advertisements which are to be published and circulated. The law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by

Article 19 (2). If the area of advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in *Sakal Papers* case (supra) to be the direct consequence of curtailment of advertisement. The freedom of a newspaper fo publish any number of pages or to circulate it to any number of persons has been held by this Court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19 (1)(a) on the aspects of propagation, publication and circulation.

This Court in *Hamdard Dawakhana* case (supra) considered the effect of Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 in relation to Articles 19 (1)(a), 19 (1)(f), 19 (1)(g) and 19(6). The Act in that case was to control the advertisement of drugs in certain cases to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities and to provide for matters connected therewith. The Act was challenged on the ground of violation of fundamental rights. The ruling of this Court in *Hamdard Dawakhana* case (supra) that advertisement is no doubt a form of speech and it is only when an advertisement is considered with the expression or propagation of idea that it can be said to relate to freedom of speech. The right to publish commercial advertisements is not a part of freedom of speech.

The Additional Solicitor General contended that the newsprint policy did not violate Article 19 (1)(a). The reasons advanced were these. The newsprint policy does not directly and immediately deal with the right mentioned in Article 19 (1)(a). The test of violation is the subject matter and not the effect or result of the legislation. If the direct object of the impugned law or action is other than freedom of speech and expression Article 19 (1)(a) is not attracted though the right to freedom of speech and expression may be consequentially or incidentally abridged. The rulings of this Court in *Express Newspapers* case (supra) and *Hamdard Dawakhana* case (supra) were referred to. In the *Express Newspapers* case (supra) the Act was said to be a beneficient legislation intended to regulate the conditions of service of the working journalists. It was held that the direct and inevitable result of the Act could not be said to be taking away or abridging the freedom of speech and expression of the petitioners. In the *Hamdard Dawakhana* case (supra) the scope and object of the Act and its true nature and character were found to be not interference with the right of freedom of speech but to deal with trade or business. The subject matter of the import policy in the

present case was rationing of imported commodity and equitable distribution of newsprint. The restrictions in fixing the page level and circulation were permissible as directions, which were considered necessary in order to see that the imported newsprint was properly utilised for the purpose for which the import was considered necessary. Article 369 of the Constitution shows that rationing of and distribution of quota of newsprint and regulation of supply is not a direct infringement of Article 19 (1)(a). The scarcity of newspapers justifies the regulation and the direction in the manner of use. The American decision in *Red Lion Broadcasting Co.* v. *Federal Communications Com.*(1) was relied on to show that neither regulation nor direction with regard to medium of expression encroaches on the First Amendment right of the American Constitution. Regulatory statutes which do not control the content of speech but incidentally limit the unfettered exercise are not regarded as a type of law which the First Amendment to the American Constitution forbade the Congress of the United States to pass. The decision in *United States* v. *O'Brien*(2) was relied on as an authority for such regulation and control of the content of speech. Any incidental limitation or incidental restriction on the freedom of speech is permissible if the same is essential to the furtherance of important governmental interest in regulating speech and freedom.

The Additional Solicitor General further put emphasis on the pith and substance of the Import Control Act to control imports and exports for these reasons. One method of controlling import is to regulate the use and disposition of the goods after they are bought. The decision in *Abdul Aziz Amiudin* v. *State of Maharashtra*(3) was referred to indicate that the scope of control of import extended to every stage at which the Government felt it necessary to see that the goods were properly utilised. Therefore, the Government submission is that regulations regarding utilisation of goods by importers after import is not a regulation with regard to production, supply and distribution of goods so as to attract Entry 29 List II of the Government of India Act, 1935 corresponding to Entry 27 of List II in the Constitution. It was said that even if there was any trenching on Entry 29 List II of the 1935 Act corresponding to Entry 27 List II of the Constitution it would be an incidental encroachment not affecting the validity of the Act. The directions in the control policy are, therefore, justified by the Government under clause 5 of the 1955 Import Control Order read with section 3(1) of the 1947 Import and Export Act and they are also justified under the provisions of clause 3 of the Newsprint Control Order 1962.

(1) [1969] 393 US 367-23L Ed. 2d. 371. (2) [1968] 391 US 367-20 L. Ed. 2d. 672.

(3) [1964] 1 S.C.R. 830.

The Newsprint Control Order 1962 was said to give sufficient guidance with regard to exercise of powers. Clause 3(5) of the Control Order of 1962 indicated that the Controller was to have regard to the principles. The Import policy was upheld by the Government to have administrative character for guidance in the matter of grant of licences. It was said that the impeached newsprint policy was given to the public as information regarding principles governing issue of import licences. The import policy was evolved to facilitate mechanism of the Act. The Import policy was said to have necessary flexibility for six years prior to April 1961. The Newsprint Policy operated successfully. The Controller has not abused his power.

Mr. Palkhivala said that the tests of pith and substance of the subject matter and of direct and of incidental effect of the legislation are relevant to questions of legislative competence but they are irrelevant to the question of infringement of fundamental rights. In our view this is a sound and correct approach to interpretation of legislative measures and State action in relation to fundamental rights. The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental right although its direct subject matter may be different. A law dealing directly with the Defence of India or defamation may yet have a direct effect on the freedom of speech. Article 19(2) could not have such law if the restriction is unreasonable even if it is related to matters mentioned therein. Therefore, the word "direct" would go to the quality or character of the effect and not to the subject matter. The object of the law or executive action is irrelevant when it establishes the petitioner's contention about fundamental right. In the present case, the object of the newspaper restrictions has nothing to do with the availability of newsprint or foreign exchange because these restrictions come into operation after the grant of quota. Therefore the restrictions are to control the number of pages or circulation of dailies or newspapers. These restrictions are clearly outside the ambit of Article 19(2) of the Constitution. It, therefore, confirms that the right of freedom of speech and expression is abridged by these restrictions.

The question neatly raised by the petitioners was whether the impugned Newsprint Policy is in substance a newspaper control. A newspaper control policy is *ultra vires* the Import Control Act and the Import Control Order. Entry 19 of List I of the 1935 Act could empower Parliament to control imports. Both the State legislature and Parliament have power to legislate upon newspapers

A falling under Entry 17 of List III. The two fields of legislation are different. The Import Control Act may include control of import of newsprint but it does not allow control of newspapers. The machinery of the Import Control cannot be utilised to curb or control circulation of growth or freedom of newspapers in India. The pith and substance doctrine is used in ascertaining whether B the Act falls under one Entry while incidentally encroaching upon another Entry. Such a question does not arise here. The Newsprint Control Policy is found to be newspaper control order in the guise of framing an Import Control Policy for newsprint.

This Court in the *Bank Nationalisation* case (supra) laid down C two tests. First it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test.

D

In *Sakal Papers* case (supra) this Court referred to the ruling in *Dwarkadas Shrinivas* v. *The Sholapur & Weaving Co. Ltd.*(1) that it is the substance and the practical result of the act of the State that should be considered rather than the pure legal form. The correct approach should be to enquire what in substance is the loss or injury caused to the citizen and not merely what man- E ner and method has been adopted by the State in placing the restrictions. In *Sakal Papers* case (supra) raising the price affected and infringed fundamental rights. In *Sakal Papers* case (supra) this Court said that the freedom of a newspaper to publish any number of pages or to circulate it to any number of persons is each an integral part of the freedom of speech and expression. F A restraint placed upon either of them would be a direct infringement of the right of freedom of speech and expression. The impact on the freedom of the press would still be direct in spite of the fact that it is not said so with words. No law or action would state in words that rights of freedom of speech and expression are abridged or taken away. That is why Courts have to protect and G guard fundamental rights by considering the scope and provisions of the Act and its effect upon the fundamental rights. The ruling of this Court in *Bank Nationalisation* case (supra) is the test of direct operation upon the rights. By direct operation is meant the direct consequence or effect of the Act upon the rights. The decision of the Privy Council in *Commonwealth of Australia* v. *Bank of New South Wales*(2) also referred to the test, as to H whether the Act directly restricted inter-State business of banking, in order to ascertain whether the Banking Act 1947 in that case

(1) [1954] S.C.R. 674. (2) [1950] A.C. 235.

is aimed or directed at, and the purpose, object and intention of the Act is restriction of inter-State trade, commerce and intercourse. A

The various provisions of the newsprint import policy have been examined to indicate as to how the petitioners' fundamental rights have been infringed by the restrictions on page limit, prohibition against new newspapers and new editions. The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed. B C

The Additional Solicitor General contended that a law which merely regulates even directly the freedom of the press is permissible so long as there is no abridgment or taking away of the fundamental rights of citizens. He leaned heavily on American decisions in support of the submission that the right of the press of free expression is of all citizens speaking, publishing and printing in all languages and the grave concern for freedom of expression which permitted the inclusion of Article 19 (1)(a) is not to be read as a command that the Government of Parliament is without power to protect that freedom. The Constitutional guarantees of freedom of speech and expression are said by the Additional Solicitor General to be not so much for the benefit of the press as for the benefit of all people. In freedom of speech, according to the Additional Solicitor General, is included the right of the people to read and the freedom of the press assures maintenance of an open society. What was emphasised on behalf of the Government was that the freedom of the press did not countenance the monopolies of the market. D E F

It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express. G

Article 13 of our Constitution states that the State is prohibited from making any law which abridges or takes away any fundamental rights. Again, Article 19(2) speaks of reasonable restrictions on the exercise of fundamental rights to freedom of speech and expression. Our Constitution does not speak of laws regulating fundamental rights. But there is no bar on legislating on the subject of newspapers as long as legislation does not impose unreasonable restrictions within the meaning of Article 19(2). It H

A is also important to notice as was done in earlier decisions of this Court that our Article 19(1)(a) and the First Amendment of the American Constitution are different. The First Amendment of the American Constitution enacts that the Congress shall make no law..... abridging the freedom of speech or of the press. The American First Amendment contains no exceptions like our B Article 19 (2) of the Constitution. Therefore, American decisions have evolved their own exceptions. Our Article 19(2) speaks of reasonable restrictions. Our Article 13 states that the State shall not make laws which abridge or take away fundamental rights in Part III of the Constitution.

The concept of regulation of fundamental rights was borrowed C and extracted by the Additional Solicitor General from American decisions. In *Citizen Publishing Co.* v. *United States*(1) the power of the Government to regulate the newspaper industry through the provisions of the Sherman Act was recognised. In that case the Court affirmed a decree requiring the separation of two potentially competing newspapers. The two newspapers entered into an agreement to end business or commercial competition D between them. Three types of control were imposed by the agreement. One was with regard to price fixation. The second was profit pooling. The third was market control. The Government complained that the agreement was an unreasonable restraint on trade or commerce in violation of Sherman Act. The *Citizen Publishing Co.*(1) case (supra) held that the First Amendment in the E American Constitution far from providing an argument against the application of the Sherman Act under the facts of the case provided strong reasons to the contrary. The American decision rested upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. The Sherman Act was invoked in F that case to prevent non-governmental combinations which tended to impose restraints upon constitutional guarantee of freedom. The regulation of business is one thing. The American case is an instance of the power of the Government to regulate newspaper industry.

The other American decision on which the Additional Solicitor G General relied is *United States* v. *O'Brien* (supra). In *O'Brien's* case (supra) the Court held that one who had burnt one's selective service registration certificate did so in violation of a federal statute making the knowing destruction or mutilation of such a certificate a criminal offence. It was contended in *O'Brien's* case (supra) that whenever the person engaging in the conduct of burning the certi- H ficate intends thereby to express an idea the idea of both "speech" and "non-speech" elements were combined to the same course

(1) [1969] 394 U.S. 131=22L.Ed.2d. 148

of conduct. It was held that there was a sufficiently important governmental interest in regulating the non-speech element. The Court noticed there that such incidental limitation on First Amendment freedom was justified because an important and substantial governmental interest was involved. The Governmental interest was found to be unrelated to the suppression of free expression and that the incidental restriction on any First Amendment freedoms involved was no greater than absolutely essential in the furtherance of the governmental interest.

These American decisions establish that a government regulation is justified in America as an important or essential government interest which is unrelated to the suppression of free expression. This Court has established freedom of the press to speak and express. That freedom cannot be abridged and taken away by the manner the impugned policy has done.

At this stage it is necessary to appreciate the petitioners' contentions that the newsprint policy of 1972-73 violates Articles 19 (1)(a) and 14 of the Constitution.

The first grievance is about Remark V in the newsprint policy. Remark V deals with dailies which are not above 10 pages and dailies over 10 pages. With regard to dailies which are not above 10 pages the policy is that the computation of entitlement to newsprint is on the basis of the actual newsprint consumption in 1970-71 or 1971-72 whichever is less. The average circulation, the average number of pages and the average page area actually published are all taken into consideration. The petitioners and in particular the Bennett Coleman Group illustrated the vice of this feature in Remark V by referring to their publications Maharashtra Times, Nav Bharat Times and Economic Times. The average circulation of these three publications in 1971-72 was higher than the average circulation in 1970-71. It is, therefore, said that Remark V which shows the basis of consumption to be the lesser of the two years will affect their quota. The Government version is that the figure of consumption in 1971-72 did not represent a realistic picture because of three principal events during that year. These were the Bangladesh Crisis, the Indo-Pak War in 1971 and the Elections. The petitioners say that the quota for 1971-72 was determined in April 1971 which was prior to the occurrence of all the three events. Again, in the past when there was the Sino Indian Conflict in 1962 and the Indo-Pak War in 1965 the performance of the newspapers during the years preceding those events was not ignored as was done in the impugned policy for 1972-73. With regard to elections, the petitioners say that a separate additional quota has been given. In the policies prior to 1971-72 the growth achieved in circulation as a result of the grant of the additional quota

A for elections was taken into consideration in determining the quota for the following year. The Petitioners, therefore, contend that the policy in Remark V instead of increasing circulation will result in the reduction of circulation. The petitioners are, in our judgment, right in their submission that this policy negatives the claim of the Government that this policy is based on circulation.

B With regard to dailies over 10 pages Remark V proceeds on the calculation of the basic entitlement to be on an average of 10 pages and either the average circulation in 1970-71 or the admissible circulation in terms of 1971-72 Newsprint Policy plus increases admissible in terms of Remark VII whichever is more. The Bennett Coleman Group contends that the Times of India C Bombay, the Times of India Delhi and the Times of India Ahmedabad had 13.13, 13.99 and 17.83 as the average number of pages in 1971-72. The average number of pages in 1972-73 under Remark V of the Policy is fixed at 10. Therefore, the percentage of cut in pages is 23.8, 28.4 and 43.8 per cent respectively with regard to these three papers.

D The dominant direction in the newsprint policy particularly in Remarks V and VIII is that the page limit of newspapers is fixed at 10. The petitioners who had been operating on a page level of over 10 challenge this feature as an infringement of the freedom of speech and expression.

E Remark V is therefore impeached first on the ground of fixation of 10 page ceiling and secondly on the basis of allotment of quota.

Prior to 1972-73 newspapers which had started before 1961-62 were allowed to increase pages by reducing circulation. On the other hand newspapers which started after 1961-62 did not F have sufficient quantity of newsprint for increasing circulation and could not increase pages. To remedy this situation the Government case is that the impeached newsprint policy of 1972-73 provided in Remark V for newspapers operating on a page level of 10 or less quota on an average page number and actual circulation of 1970-71 or 1971-72 whichever G is less and 20% increase for increasing page number subject to ceiling of 10 pages. The other provision in Remark V for quota relating to newspapers operating above 10 page level is an average circulation of 1970-71 and admissible circulation in 1971-72 plus increases admissible whichever is more. Thus in the case of newspapers operating on 10 or less than 10 page level additional quota has been given to increase their pages to H 10. But the imposition of 10 page ceiling on newspapers operating on a page level above 10 is said to violate Articles 19(1)(a) and 14.

The Government advances these six reasons in support of their policy. First, there is shortage of newsprint. Second, the average page number of big dailies is 10.3. Out of 45 big dailies 23 operate on a page level of less than 10 and 22 operate on a page level of more than 10. Therefore, the Government says that the average of all dailies is 5.8. Thirdly, the Government says that the 45 big dailies with a circulation of 46.74 lakhs get about 1,16,700 metric tonnes. This is about 59.9 per cent of the total allocation. The 346 medium and small dailies with a circulation of 41.60 lakhs get about 74,300 metric tonnes which represent as 40.1 per cent of the total allocation. Fourthly it is said that the feature is to remedy the situation arising out of historical reasons. Fifthly, the Government says that the reduction in allotment is marginal. By way of illustration it is said that the Bennett Coleman group gets 828.79 metric tonnes less. Sixthly, it is said that 500 dailies applied for quota. Newprint has to be equitably rationed. Allowing some dailies more than 10 pages will adversely effect those dailies with less than 10 pages.

In our view shortage of newsprint can stop with allotment. If the Government rests content with granting consumers of newsprint a quantity equitably and fairly, the consumers will not quarrel with the policy. The consumers of newsprint are gravely concerned with the other features.

The fixation of 10 page limit is said by the Government to be on account of short supply of newsprint and equitable distribution of newsprint. In the year 1972-73 the quantity available for allocation was 2,15,000 tonnes. In the previous year the quantity was 2,25,000 tonnes. The shortfall is 10,000 tonnes. The percentage therefore will be $\frac{10,000 \times 100}{2,25,000} = 4\frac{1}{2}\%$

If the reduction is only 4½% the cut in the Hindu was calculated by Mr. Nambiar to be 16—10=6 *viz.* $\frac{6 \times 100}{16} = 37\frac{1}{2}$ per cent.

In other words, the cut worked out to much higher proportion. Mr. Palkhivala for the Bennett Coleman group, Mr. Daphtary for the Hindustan Times group contended that there was no shortage in quantity of newsprint. It is not possible to go into these disputes of figures. The reduction is established by Mr. Nambiar to be disproportionate to shortfall. Particularly in the past, in the year 1962 there was a shortage. There was a cut in quota. The original cut was 5 per cent on those whose quota was above 100 tonnes but less than 1000 tonnes and 7½ per

A cent for those whose quota was 1000 tonnes and above. Later, the cut was reduced to 2½ per cent and applied uniformly to those whose quota was 1000 tonnes and above. On behalf of the petitioners it was rightly said that if there was any real shortage 20 per cent increase in pages under Remark VII(c) to newspaper below 10 page level would not have been possible.

B According to the petitioners, there is no distinction made by the Government between dailies in Indian language and English dailies and particularly big English dailies. A big daily, according to the Government, is taken to mean a daily with a circulation of more than 50,000 copies irrespective of the number of pages and it makes no distinction between language and English C dailies. Out of the 45 big dailies 30 are language dailies and 15 are English dailies. The 15 English dailies operate on an average page level of over 10. The average of their page level has been about 13. The medium English dailies have had an average page level of above 11. Of the 30 language dailies 23 operate on an average page level below. The language dailies, D it is said by the petitioners, operate on an average page level below 10 as they do not require more than 10 pages. The average of the page level of language dailies is about 8. Six of the big language dailies have a page level of about 9. The petitioners, therefore, contend that if the maximum number of pages is fixed at 10 the average page level of the big English and language dailies would come down to 9.8 E and their page level would become more or less equal to the page level of medium dailies whose requirements are much less. It would, therefore, in our view amount to treating unequals equally and to benefit one type of daily at the cost of another.

Since 1957, dailies operating on a page level of 12 or more have not been given any increase in page level. There was no F fixed number of pages. For determining quota the page level of 1957 was taken. Dailies operating on a page level of less than 10 have been granted increase in pages from time to time. Such dailies operating on a page level of less than 10 have chosen to increase circulation rather than to increase the number of pages, because of lack of advertisement support. From 1963- G 64 upto and including 1971-72 any quota for increase in pages could always be used for or adjusted against increase in circulation. Similarly any quota for increase in circulation, could be used for or adjusted against increase in number of pages. It is only because the newspapers were allowed to adjust between pages and circulation in the past that the big dailies had an actual page level of more than the permissible page level of 1957. H But most of the big language dailies which had a page level of less than 10 did not increase their pages though they were permitted to do so.

In the past, newspapers which had 12 page limit were allowed to increase the page number. This is said to be the justification on the part of the Government to wipe out any inequity. It appears that 19 language dailies reduced their page numbers on the basis of which their quota was fixed in order to increase their circulation. If that is so, there is no reason for giving them additional quota for increasing page number specially by reducing the quota of the big dailies and imposing a 10 page limit on them. It is also found that 11 newspapers whose quota was calculated on a page level above 10 have reduced their page numbers below 10 in order to increase circulation. These papers have also been granted additional quota to increase their pages upto 10. The Government Annexure R-4 establishes that these 11 newspapers are obtaining double benefit. First, because of quota calculated on a page level above 10 and second because of additional quota to increase pages upto 10 for they had actually reduced their page number to 10.

There are only 7 dailies of above 12 pages until the impugned policy hit these. Those are Amrita Bazar Patrike, Bombay Samachar, Hindu, Hindustan Times, Indian Express (Delhi, Bombay, Madurai, Vijayawada and Bangalore editions), the Times of India (Bombay and Delhi editions) and the Statesman. Out of these 7 dailies 6 are English dailies. Bombay Samachar is a Gujarati daily. The maximum page level fixed at 10 and the prohibition against the adjustability between pages and circulation are strongly impeached by the petitioners. These 7 dailies except Bombay Samachar are common ownership units. Some of them publish other leading language dailies also. The maximum number of pages at 10 will, according to the petitioners, not only adversely affect their profits but also deprive them of expressing and publishing the quality of writings and fulfilment of the role to be played by the newspaper in regard to their freedom of speech and expression. While it must be admitted that the language dailies should be allowed to grow, the English dailies should not be forced to languish under a policy of regimentation. It is therefore correct that the compulsory reduction to 10 pages offends article 19(1)(a) and infringes the rights of freedom of speech and expression.

It is further urged that the Government has fixed the quota on the basis of circulation multiplied by pages. The Government has on the one hand compared the circulation of the big dailies with the circulation of medium and small dailies and on the other has ignored the difference in the number of pages of big dailies as compared to the number of pages of the medium and the small dailies. The difference in pages coupled with the

A difference in circulation affords a reason for difference in the percentage of total allocation given to the big dailies as compared to the medium and the small dailies. The average number of pages for the big dailies is 10.3, for the medium dailies 8.3, and for the small dailies 4.4 (See Press in India 1971 page 134). The B percentage of allocation for the big dailies reflects really the large number of pages they publish. The big dailies therefore have not only larger requirements but also they render larger services to the readers. The Newprint Policy of fixing the page level at 10 is seeking to make unequals equal and also to benefit one type of daily at the expense of another.

C

The historical reason given by the Government for fixing the maximum number of pages at 10 is that the effect of the policy on allowing any page increase and circulation increase from time to time has been to help the growth of the Press. D This is how newspapers like Ananda Bazar Patrika, Jugantar and Deccan Herald are said to have come up. The Government also relies on the recommendation of the newspaper proprietors in the year 1971 that 8 pages should be considered the national minimum requirement for medium of information. The big English dailies had the number of pages over 12 in 1957. Because of E adjustability between pages and circulation they had an actual page level which was higher than the permissible page level of 1957. The petitioners say that this has not impeded the growth of other papers. The policy prescribed by the Government of fixing the maximum page limit at 10 is described by the petitioners F to hit the big dailies and to prevent the newspapers from rising above mediocrity. It is true that the Government relied on an historical reason. It is said to prevent big newspapers from getting any unfair advantage over newspapers which are infant in origin. It is also said that the Government policy is to help news- G papers operating below 10 pages to attain equal position with those who are operating above 10 page level. But this intention to help new and young newspapers cannot be allowed to strangulate the freedom of speech and expression of the big dailies.

The Government has sought to justify the reduction in the page level to 10 not only on the ground of shortage of newsprint H but also on the grounds that these big dailies devote high percentage of space to advertisements and therefore the cut in pages will not be felt by them if they adjusted their advertisement space. In our judgment the policy of the Government to limit all papers

at 10 pages is arbitrary. It tends to treat unequals as equals and discriminates against those who by virtue of their efficiency, standard and service and because of their All-India stature acquired a higher page level in 1957. The main source of income for the newspapers is from advertisements. The loss of revenue because of the cut in page level is said to be over several lakhs of rupees. Even if there is a saving in raw material by cut in page level there would be a revenue gap of a large sum of money. This gap could have been partly recouped by increasing the page level. The newspaper has a built-in mechanism. Advertisements are not only the sources of revenue but also one of the factors for circulation. Once circulation is lost it will be very difficult to regain the old level. The advertisement rate has undergone slight increase since 1972. As a result of the cut in page level the area for advertisements is also reduced.

This Court held in *Hamdard Dawakhana* case (supra) that an advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. In *Sakal Papers* case (supra) this Court held that if the space for advertisement is reduced earnings would decline and if the price is raised that would affect circulation. It appears to us that in the present case, fixation of page limit will not only deprive the petitioners of their economic viability but also restrict the freedom of expression by reason of the compulsive reduction of page level entailing reduction of circulation and denuding the area of coverage for news and views.

The estimated loss on account of reduction of page limit is Rs. 39 lakhs in the case of Bennett Coleman group, Rs. 44 lakhs in the case of Hindustan Times and Rs. 38 lakhs in the case of the Hindu. If as a result of reduction in pages the newspapers will have to depend on advertisements as their main source of income, they will be denied dissemination of news and views. That will also deprive them of their freedom of speech and expression. On the other hand, if as a result of restriction on page limit the newspaper will have to sacrifice advertisements and thus weaken the link of financial strength, the organisation may crumble. The loss on advertisements may not only entail the closing down but also affect the circulation and thereby impinge on freedom of speech and expression.

The reason given by the Government that the entitlement on the basic of the previous year has caused only a marginal loss in allotment is controverted by the petitioners. It is said that if the total quantity of newsprint available is 2,15,000 tonnes in 1972-73 the shortfall is only 10,000 tonnes because in the previous year the quantity available was 2,25,000 tonnes. The Bennett Coleman group alleges that the actual circulation of Times of India Bombay

A in 1971-72 was of 1,58,700 copies though the quota for that year was calculated on the basis of a circulation of 2,02,825 copies and a page level of 13 and adjustability between pages and circulation were permissible. It is, therefore, said that though the Times of India under the impeached policy would have an allowable circulation of 2,08,920 and a page level of 10 it would not under the B new policy have any permission to adjust between pages and circulation. In fact, it is said that if the pages are reduced to 10, its circulation would fall even below that of last year by reason of the fact that owing to reduction in pages the quality will suffer and the consequence will be downfall in circulation. The petitioners therefore rightly emphasise that to equate the big English dailies C which are in a class by themselves with other dailies which need less than 10 pages indicates negation of an equitable distribution and proves irrational treating of dailies.

The justification pleaded by the Government is that big dailies chose to increase pages rather than circulation in the past. In the past the newsprint allocation was based on the page level of 1957 D and the circulation figures of 1961-62. The Government says that newspapers which started after 1961-62 were unable to increase their pages. Therefore, the present policy is intended to remove that position. In our judgment it will depend on each paper as to how it will grow. Those who are growing should not be restricted if they can grow within their quota. In the past dailies having less E than 10 pages were given increases and were allowed to come up to 10 pages from 4 pages in 1961-62 and 6 pages in 1962-63. Most of them could not even fully utilize the page increase allowed. The present impeached policy seeks to remove iniquities created by previous policies. It depends upon facts as to how much more newsprint a group of newspapers started after 1961-62 will re- F quire and secondly whether they are in a position to increase the page number. It also appears that 19 language dailies reduced their page numbers on the basis of which the quota was calculated in order to increase their circulation. Therefore, there appears to be no justification for giving them additional quota for increasing page numbers by reducing the quota of the big dailies by imposing upon them the 10 page ceiling. The 10 page ceiling imposed G affecting 22 big newspapers operating above 10 page level with approximate circulation of over 23 lakhs *i.e.* more than 25% of the total circulation is arbitrary and treats them equally with others who are unequal irrespective of the needs and requirements of the big dailies and thus violates Article 14 of the Constitution.

H The impeached policy violates Article 14 because it treats newspapers which are not equal equally in assessing the needs and requirements of newsprint. The Government case is that out of

35 newspapers which were operating on a quota calculated on a higher page level than 10 pages 28 newspapers will benefit by the impeached policy of 1972-73. But 7 newspapers out of 22 which were operating above 10 page level are placed at a disadvantage by the fixation of 10 page limit and entitlement to quota on that basis. There is no intelligible differentia. Nor has this distinction any relation to equitable distribution of newsprint. The impeached policy also offends Article 19 (1)(a) of the Constitution. Newspapers like 19 language dailies reduced their pages in odrer to increase circulation though such language dailies had prior to 1972-73 been given quota to increase pages. Under the impeached policy these language dailies are given additional quota to increase their pages against to 10.

The basic entitlement in Remark V to quota for newspapers operating above 10 page level violates Article 19(1)(a) because the quota is hedged in by direction not to increase the page number above 10. The reduction of page limit to 10 for the aforesaid reasons violates Article 19 (1)(a) and Article 14 of the Constitution.

The other features in the newsprint policy complained of are those in Remark VII (c) read with Remark VIII of the impeached policy. Remark VII (c) allows 20 per cent increase to daily newspapers in the number of pages within the ceiling of 10 over the average number of pages on which the basic entitlement is fixed under Remark V. In other words, dailies with less than 10 pages are prevented from adjusting the quota for 20 per cent increase for increase in circulation. The Bennett Coleman group says that their Nav Bharat Times, Maharashtra Times and Economic Times would prefer to increase their circulation. Under Remark V they are entitled to quota on the basis of consumption in 1970-71 or 1971-72 whichever is less. This feature also indicates that the newsprint policy is not based on circulation. Under Remark VII (c) these newspapers within the ceiling of 10 can get 20 per cent increase in the number of pages. They require circulation more than the number of pages. They are denied circulation as a result of this policy. The big English dailies which need to increase their pages are not permitted to do so. Other dailies which do not need increase in pages are permitted quota for increase but they are denied the right of circulation. In our view, these features were rightly said by counsel for the petitioners to be not newsprint control but newspaper control in the guise of equitable distribution of newsprint. The object of the impeached policy is on the one hand said to increase circulation and on the other to provide for growth in pages for others. Freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views.

A Remark VIII in the Newsprint Policy of 1972-73 imposes two types of restrictions. First a daily is not permitted to increase its number of pages by reducing circulation to meet its individual requirements. Secondly, dailies belonging to a common ownership unit are not permitted interchangeability between them of the quota allotted to each even when the publications are different
B editions of the same daily published from different places.

The first prohibition in Remark VIII against increase in pages by reducing circulation has been introduced for the first time in the policy for 1972-73. The reason given by the Government for this feature is that newspapers would obtain a quota on the basis of a certain stated circulation and they should not be allowed to
C reduce circulation. The petitioners say that quota is not granted on the basis of actual circulation but is granted on the basis of notional circulation which means the actual circulation of 1961-62 with permissible increases year after year even though the actual circulation does not correspond to the permissible circulation on which the quota was based year after year. The Times of India
D Bombay in 1971-72 demanded quota on the basis of 20 pages and a circulation of 1,70,000. The Times of India was allowed quota on the basis of 13.13 pages and a circulation of 2,02,817. The actual performance was average page number of 18.25 and circulation of 1,54,904. In the past, adjustability between pages and circulation was permitted. In our judgment, the petitioners correctly say that the individual requirements of the different
E dailies render it eminently desirable in some cases to increase the number of pages than circulation. Such adjustment is necessary to maintain the quality and the range of the readers in question. The denial of this flexibility or adjustment is in our view rightly said to hamper the quality, range and standard of the dailies and to affect the freedom of the press.

F The restriction on the petitioners that they can use their quota to increase circulation but not the page number violates Articles 19(1)(a) as also Article 14. Big dailies are treated to be equal with newspapers who are not equal to them. Again, the policy of 1972-73 permits dailies with large circulation to increase their circulation. Dailies operating below 10 page level are allowed
G increase in pages. This page increase quota cannot be used for circulation increase. Previously, the big dailies were allowed quota for circulation growth. The present policy has decreased the quantity for circulation growth. In our view counsel for the petitioners rightly said that the Government could not determine thus which newspapers should grow in page and circulation and which newspapers should grow only in circulation and not in pages.
H Freedom of press entitles newspapers to achieve any volume of circulation. Though requirements of newspapers as to page, circulation are both taken into consideration for fixing their quota

but the newspapers should be thereafter left free to adjust their page number and circulation as they wish in accordance with the dictates of Article 19 (1)(a) of the Constitution. A

Counsel for the petitioners contended that the second prohibition in Remark VIII in the Newsprint Policy prevented common ownership units from adjusting between them the newsprint quota allotted to each of them. The prohibition is to use the newsprint quota of one newspaper belonging to a common ownership unit for another newspaper belonging to that unit. On behalf of the petitioners it was said that from 1963-64 till 1966-67 interchangeability was permitted between different editions of the same publication to the extent of 20 per cent. In 1967-68 and 1968-69 complete interchangeability between different editions of the same newspaper and between different newspapers and periodicals was permitted. In 1969-70 and 1970-71 the total entitlement was given as an aggregate quota, though there was a separate calculation made for each newspaper. The present policy does not permit interchangeability. Interchangeability by using the quota for a new newspaper or a new edition or for another newspaper of the same unit will put common ownership unit in an advantageous position. Newsprint is allotted to each newspaper. The newspaper is considered to be the recipient. A single newspaper will suffer if common ownership units are allowed to adjust quota within their group. B C D

The petitioners impeach Remark X in the Newsprint Policy for 1971-72 on the ground that a common ownership unit cannot bring out a new newspaper or start a new edition of an existing newspaper even from their allotted quota. Counsel on behalf of the petitioners rightly characterised this feature as irrational and irrelevant to the availability of newsprint. By way of illustration it was said that the Economic Times is sent by air to Calcutta and Delhi but the common ownership unit is not permitted to reduce the number of copies printed at Bombay and print copies out of the authorised quota for circulation at Calcutta and Delhi. Similarly, it was said that there was no reason to support the policy in Remark X preventing a common ownership unit from publishing a new daily though a person who brought out one daily was allowed to start a second daily. This was challenged as discriminatory. It is an abridgment of the freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use its allotted quota for changing the page structure and circulation of different editions of the same paper. It is made clear that newspapers cannot be permitted to use allotted quota for starting a new newspaper. Newspapers will E F G H

A have to make necessary application for allotment of quota in that behalf. It will be open to the appropriate authorities to deal with the application in accordance with law.

Until 1968-69 big dailies were treated alike but thereafter from 1970-71 onwards dailies with circulation of more than B 1,00,000 copies have been put in a different category and given a lesser increase than those with a circulation of 50,000 to 1,00,000 copies though both are big dailies. The policy of the Government is to level all papers at 10 pages. It tends to treat unequals as equals. It discriminates against those who by virtue of their standing status and service on all India basis acquired a higher C page level in the past. The discrimination is apparent from Remark VII in the newsprint Policy for 1972-73 by which newspapers with less than 1,00,000 circulation have been given 10% increase in circulation whereas those with more than 1,00,000 circulation have been given only 3% increase in circulation.

D Mr. Palkhivala said the policy worked admirably in the past because adjustability between pages and circulation was permitted. In our view the Newsprint Control has now been subverted to newspaper control. The growth of circulation does not mean that there should not be growth in pages. A newspaper expands with the news and views. A newspaper reaches different sections. It E has to be left to the newspapers as to how they will adjust their newsprint. At one stage the Additional Solicitor General said that if a certain quantity of steel was allotted the Government could insist as to how it was going to be used. It was said that the output could be controlled. In our view, newsprint does not stand on the same footing as steel. It has been said that freedom of the press is indispensable to proper working of popular Govern- F ment. Patna jali Sastri, J. speaking for this Court in *Ramesh Thappar's* case (supra) said that "Thus, every narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democractic organisation, for G without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible". It is appropriate to refer to what William Blackstone said in his commentaries :

> H "Every free man has a undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. The faith in the popular Government rests on the old dictum "let the people have the truth and the freedom to discuss it and all will go well". The liberty of the press remains an "Art" of the Covenant" in every democracy. Steel will yield products of steel. Newsprint will manifest whatever is thought of by man. The newspapers give ideas. The newspapers give the people the freedom to find out what ideas are correct. Therefore, the freedom of the press is to be enriched by removing the restrictions on page limit and allowing them to have new editions or new papers. It need not be stressed that if the quantity of newsprint available does not permit grant of additional quota for new papers that is a different matter. The restrictions are to be removed. Newspapers have to be left free to determine their pages, their circulation and their new editions within their quota of what has been fixed fairly.

Clauses 3 and 3A of the 1962 Newsprint Order prevent the petitioners from using white paper and writing paper. The additional Solicitor General at one stage said that it was open to any newspaper to an unrestricted use of any form of paper so long as newspapers do not apply for newsprint. This argument exposes grave errors. In the first place, it shows that there is no shortage of white printing paper. Secondly, it will show that there is no justification for rationing of newsprint. The cost of indigenous white paper is double the cost of the imported newsprint. This high price of white printing paper is a deterrent to any newspaper to use it. The periodicals are permitted the use of white printing paper. That is because of Public Notice No. 4-ITC(PN)/63 dated 11 January, 1963. That may be one of the reasons why periodicals have not complained of the policy. The periodicals can supplement their newsprint quota. Further, the clientele of the periodicals is different. The prices of periodicals are also different. In any event, it cannot be said that the newspapers can buy white printing paper to meet their requirements. Nor can such plea be an answer to the violation of fundamental rights in Article 19(1)(a) or infraction of Article 14 by the provisions of the impeached Newsprint Policy.

In the present case, it cannot be said that the newsprint policy is a reasonable restriction within the ambit of Article 19(2). The newsprint policy abridges the fundamental rights of the petitioners in regard to freedom of speech and expression. The newspapers are not allowed their right of circulation. The newspapers are not allowed right of page growth. The common ownership units of newspapers cannot bring out newspapers or new editions. The newspapers operating above 10 page level and newspapers operating below 10 page level have been treated equally for assessing

A the needs and requirements of newspapers with newspapers which are not their equal. Once the quota is fixed and direction to use the quota in accordance with the newsprint policy is made applicable the big newspapers are prevented any increase in page number. Both page numbers and circulation are relevant for calculating the basic quota and allowance for increases. In the garb of distribution of newsprint the Government has tended to B control the growth and circulation of newspapers. Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content. The newsprint policy which permits newspapers to increase circulation by reducing the number of pages, page area and periodicity, prohibits them to increase the number of pages, page area and periodicity by reducing circula- C tion. These restrictions constrict the newspapers in adjusting their page number and circulation.

The Additional Solicitor General relied on the American decision in *Red Lion Broadcasting Co.* v. *Federal Communications Com.* (supra) in support of the contention that there D should be an uninhibited marketplace of idea in which truth will ultimately prevail and there should not be monopolization of that market whether it be by the government itself or by a private licensee. The press is not exposed to any mischief of monopolistic combination. The newsprint policy is not a measure to combat monopolies. The newsprint policy should allow the newspapers that amount of freedom of discussion and information which is E needed or will appropriately enable the members of the society to preserve their political expression of comment not only upon public affairs but also upon the vast range of views and matters needed for free society.

This Court in *Sakal Papers* case (supra) dealt with measures F empowering the government to regulate allocation of space to be allotted for advertising matter. This Court held that the measure had the direct effect of curtailing the circulation of the newspaper and thus to be violation of Article 19 (1)(a). It was said on behalf of the Government that regulation of space for advertisement was to prevent unfair competition. This Court held that the State could help or protect newly started newspapers but G there could not be an abridgment of the right in Article 19(1)-(a) on the ground of conferring right on the public in general or upon a section of the public.

The Additional Solicitor General contended that the business aspect of the press had no special immunity and the incidental curtailment in the circulation could not be freedom of speech and H expression of the press. This Court in *Sakal Papers* case (supra) dealt with the measures for the fixation of price in relation to pages and the regulation of allotment of space for adver-

tisement by each paper. These measures were said to be commercial activities of newspapers. This Court said that restrictions could be put upon the freedom to carry on business but the fundamental right of speech and expression could not be abridged or taken away. There could be reasonable restrictions on that right only as contemplated under Article 19(2).

Mr. Nambiar contended that the Newsprint Policy did not fall within clause 5(1) of the Import Control Order 1955 and it was not validly made by the Central Government. The records with regard to the making and publication of the newsprint policy for 1972-73 were looked into by this Court. It appears that the policy was published under the authority of the Cabinet decision. The policy was therefore validly brought into existence. The various restrictions of the newsprint policy have been examined earlier. The various restrictions imposed by the newsprint policy are found to be unconstitutional.

Clause 3 of the Newsprint Control Order 1962 was contended to confer unfettered and unregulated power on an executive officer. Clause (3A) of the Order of 1962 was also said to confer naked and arbitrary power. The disability imposed on newspapers from using printing and writing paper was said to be discriminatory. The Additional Solicitor General contended that it is open to an unrestricted use of any form of paper so long as newspapers do not apply for newsprint. This would establish that there is no shortage of white printing paper. The error in the Government contention is thereby exposed. The periodicals were permitted in terms of public Notice 4-ITC(PN)/63 dated 11 January 1963 unrestricted use of white printing paper to supplement their quota of newsprint. That again shows that the Government contention is wrong because there is restriction with regard to use of white printing paper. The cost of white printing paper is high. It is said that the cost is Rs. 2,750 per metric tonne for white printing paper compared to Rs. 1,274 of imported newsprint and Rs. 1,362 of Nepa newsprint. Clause 3 (3A) of the Order provides that no consumer of newsprint other than a publisher of text books or books of general interest shall use any kind of paper other than newsprint except with the permission in writing of the Controller. White printing paper like newsprint can be rationed. The distribution is to be fair and equitable. It is necessary also to point out that text books and books of general interest require facilities for using white printing paper. Such measures with regard to rationing are defensible. It is true that no guidelines are to be found in clause 3(3A) as to the circumstances under which a particular consumer of newsprint or class of consumers of newsprint other than a publisher of text books or books of general interest should or should not be allowed to use white printing paper. The Public Notice allowing periodicals

A permission to use white printing paper is not challenged. Periodicals were not before this Court. It is therefore not necessary to express any opinion on clause 3(3) and clause 3(3A) of the Control Order.

For the foregoing reasons the newsprint policy for 1972-73 violates Articles 19(1)(a) and 14 of the Constitution. The restrictions by fixing 10 page limit in Remarks V and VIII of the policy infringe Articles 19(1)(a) and 14 of the Constitution and are, therefore, declared unconstitutional and struck down. The policy of basic entitlement to quota in Remark V is violative of Articles 19(1)(a) and 14 of the Constitution and is therefore struck down. The measure in Remark VII(a) is violative of Articles 14 and 19(1)(a) of the Constitution and is struck down.

The measures in Remark VII(c) read with Remark VIII are violative of Articles 19(1)(a) and 14 of the Constitution and are struck down. The prohibition in Remark X against common ownership unit from starting a new newspaper/periodical or a new edition is declared unconstitutional and struck down as violative of Article 19(1)(a) of the Constitution.

For these reasons the petitioners succeed. The import policy for newsprint for the year 1972-73 in regard to Remarks V, VII-(a), VII(c), VIII and X as indicated above is struck down. The parties will pay and bear their own costs.

MATHEW, J. These four writ petitions concern the validity of sub-clauses (3) and (3A) of Cl. 3 of the Newsprint Control Order, 1962, passed by the Government of India under s. 3 of the Essential Commodities Act, 1955, and the provisions of the Newsprint Import Control Policy for 1972-73 hereinafter called the Newsprint Policy". The petitioners challenge the validity of sub-clause (3) and (3A) of Cl. 3 of the Newsprint Control Order and the provisions of the Newsprint Policy on the ground that they are violative of their fundamental right under Arts. 14 and 19(1)-(a) of the Constitution.

Newsprint, which is a variety of printing paper, is the principal raw material required for newspapers and periodicals. Until 1957, the newsprint required in the country was being imported. In or about the year 1957, a mill called the National Newsprint and Paper Mills Ltd. was started. This mill is the only source of supply of indigenous newsprint. The newsprint produced in this mill is quite inadequate to meet the needs of the country.

The production, supply and distribution of newsprint has been controlled ever since 1939. Art. 369 of the Constitution vests the control of production, supply and distribution of newsprint within the exclusive jurisdiction of Parliament for a period of five years

from the commencement of the Constitution. Newsprint is an 'essential commodity' under the Essential Commodities Act, 1955 (see s. 2(a)(vii) of the Act).

The bulk of newsprint has to be imported from foreign countries and the Central Government has a restricted system of import from the year 1943. The Central Government promulgated the Import (Control) Order, 1955, in the exercise of the powers conferred by sections 3 and 4A of the Imports and Exports (Control) Act, 1947, and cl. 3(1) thereof reads as follows :

> "3. Restrictions of Import on certain goods—(1) Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II".

White printing paper (excluding laid marked paper which contains mechanical wood pulp amounting to not less than 70 per cent of the fibre content) is included as item 44 in Part V of Schedule I to that Order.

Licence was granted to publishers of newspapers till 1962 for import of newsprint in accordance with the Import Trade Control policy promulgated from time to time.

On January 17, 1962, in the exercise of the powers under cl. 3 of the Essential Commodities Act, 1955, the Central Government promulgated the newsprint Control Order, 1962. Clause 3 and Schedule I of the Order are as follows :

"3. Restrictions on acquisition, sale and consumption of newsprint :—

(1) No person other than an importer shall acquire newsprint except under and in accordance with the terms and conditions of an authorisation issued by the Controller under this Order.

(2) No dealer in newsprint shall sell to any person newsprint of any description or in any quantity unless the sale to that person of newsprint of that description or in that quantity is authorised by the Controller.

(3) No consumer of newsprint shall, in any licensing period, consume or use newsprint in excess of the quantity authorised by the Controller from time to time.

A

SCHEDULE—I

1. White printing paper (excluding laid marked paper) with fibre content of not less than 70 per cent mechanical wood pulp.
2. Glazed newsprint.

B

3. Indigenous newsprint manufactured by NEPA mills."

On December 29, 1962, the Central Government amended the said Order by promulgating a new sub-clause in cl. 3, *viz.*, cl. (3A) which runs as follows :—

C

"(3A)—No consumer of newsprint, other than an publisher of text books or books of general interest, shall use any kind of paper other than newsprint except with the permission, in writing, of the Controller."

The policy with regard to the import and utilization of newsprint is enumerated from time to time in the Import Trade Control
D Policy (Red Books). The Registrar of Newspapers determines the newsprint and printing and writing paper entitlement of publishers of each of the newspapers in accordance with the aforesaid policy and the Chief Controller of Imports and Exports issues licences for import of newsprint in accordance with the determination by the Registrar.

E The imported newsprint together with that produced in the country has to be rationed among the various newspapers in the Country.

In the year 1972-73, on account of suspension of U.S. aid, there was a reduction of 11,000 tonnes in the import of newsprint.
F Therefore, the newsprint available for distribution was less than what it was in 1971-72.

The provisions of the Newsprint Policy which are challenged in these petitions might be summarised as follows :—

1. Fixation of basic entitlement for newspapers
G whose actual number of pages was more than 10 during 1970-71 or 1971-72 on the basis of (i) an average of 10 pages, and (ii) either the average circulation in 1970-71 or admissible circulation in 1971-72 plus increases admissible under the Policy of 1971-72 whichever is more (Remark V).

H 2. (i) Reduction in increases from 5 per cent to 3 per cent for dailies with circulation of more than 1 lakh (Remark VII); and giving of 20 per cent increase to daily newspapers in the number of

pages within the ceiling of 10 pages provided this increase is not utilised for the increase of circulation (Remarks VII(c) and VIII).

(ii) Prohibition to increase the number of pages, page area and periodicity by reducing circulation within the authorised quota but they are permitted to reduce the number of pages, page area and periodicity for increasing circulation (Remark VIII).

3. (i) Prohibition to use the newsprint quota of one newspaper/periodical for the other newspaper/periodical in the case of newspapers/periodicals belonging to a Common Ownership Unit (Remark VIII); and

(ii) Prohibition to start a new newspaper/periodical by the Common Ownership Unit (Remark VIII); and

4. Denial of newsprint quota to :

(i) an existing newspaper belonging to a Common Ownership Unit which has not been granted newsprint quota; and

(ii) additional newspapers sponsored or acquired by a common Ownership Unit (Remark X).

5. Prohibition to use white printing paper by the newspapers which have been allotted newsprint (Cl. 3-(3A) of the Newsprint Control Order).

That there can be no unlimited right to acquire or use a scarce commodity like newsprint can admit of no doubt. The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of Governmental policy.

Let me first take the general question whether the provisions of the Newsprint Policy and the Newsprint Control Order abridge the freedom of speech.

The freedom of the press is no higher than the freedom of speech of a citizen under Art. 19(1)(a). Art. 19 does not specifically provide for the freedom of the press as the First Amendment of the Constitution of the U.S.A. does. The freedom of the press is simply an emanation from the concept of fundamental right of the freedom of speech of every citizen (see *Pandit M. S. M. Sharma* v. *Shri Sri Krishna Sinha and Others*(1)).

(1) [1959] Supp. 1 S.C.R. 806.

A The respondents contended that the Newsprint Control Order and the Newsprint Policy are concerned with regulating the distribution of newsprint as a scarce commodity, and, if, in regulating the distribution of the commodity, the fundamental right of the freedom of speech is indirectly affected, that is not an abridgment of the freedom of speech, but only an abridgment of speech B which is not prohibited by Art. 13(2). In other words, the contention is that the provisions of the Newsprint Control Order as well as those of the Newsprint Policy relate to the regulation and distribution of newsprint as a commodity necessitated by its scarcity and that these provisions are concerned, if at all, with the business activity of the press and have nothing to do with the freedom of C speech, and, even if there is an indirect impingment upon the freedom of speech, it is not an abridgment of that freedom as contemplated by Art. 13(2).

Art. 13(2) provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent D of the contravention, be void. In the context, what is prohibited by Art. 13(2) is, the making of any law which takes away or abridges the right conferred by Art. 19(1)(a). What Dr. Meiklejohn said of the First Amendment of the Constitution of U.S.A. applies equally to Art. 19(1)(a) read with Art. 13(2). He said:

> "That amendment, then, we may take it for granted. E does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech."

(See Political Freedom, p. 21)

Art. 19(1)(a) guarantees to the citizens, the fundamental right of the freedom of speech and Art. 19(2) enumerates the type of F restrictions which might be imposed by law. It does not follow from this that freedom of expression is not subject to regulations which may not amount to abridgment. It is a total mis-conception to say that speech cannot be regulated or that every regulation of speech would be an abridgment of the freedom of speech. In other words, regulation of speech is not inconsistent with the con- G cept of the freedom of speech unless the regulation amounts to abridgment of that freedom. No freedom, however absolute, can be free from regulation. Though the right under Art. 30(1) is in terms absolute, this Court said *In Re the Kerala Education Bill*, 1957(1), that the right is subject to reasonable regulation. The Privy Council said in *Commonwealth of Australia* v. *Bank of New South Wales*(2) that regulation of trade and commerce H is compatible with the absolute freedom of trade and commerce. In fact, the very essence of freedom in an ordered society is regu-

(1) [1959] S.C.R. 995. (2) [1950] A.C. 235, 310.

lation. The application of the term 'abridge' is not difficult in many cases but the problem arises in certain types of situations. The important ones are where a regulation is not a direct restriction of expression but is designed to accomplish another objective and the impact upon the expression is secondary or indirect. This problem may appropriately be formalized in terms of defining the key elements, namely, "freedom of speech" "abridge" and "law". These definitions must be functional in character, derived from the basic considerations underlying a system of freedom of expression (See Thomas I Emerson, *Toward a General Theory of First Amendment*(1). As I said, measures which are directed at other forms of activity but which have a secondary, indirect or incidental effect upon expression do not generally abridge the freedom of speech unless the content of the speech itself is regulated. Such measures include various types of tax and economic regulations, the imposition of political qualification for obtaining Government employment or any other benefits or privileges, the activities of legislative committees and the political restrictions on rights of aliens. By hypothesis, the regulation imposed is, taken by itself, a legitimate one, aimed directly at the control of some other activity. The question is its secondary impact upon an admitted area of expression. This is essentially a problem of determining when the regulation at issue has an effect upon expression which constitutes an abridgment within the meaning of Art. 13(2). In other words, the Court must undertake to define and give content to the word "abridge" in Art. 13(2). This judgment, like the judgment in defining "free speech" must be made in the light of the affirmative theory underlying freedom of expression to which I shall come in a moment, and the various conditions essential to maintaining a workable system. In fact, regular tax measures, economic regulations, social welfare legislation like a general corporation tax, wage and hour legislation, factory laws and similar measures may, of course, have some effect upon freedom of expression when applied to persons or organisations engaged in various forms of communication. But where the burden is the same as that borne by others engaged in different forms of activity, the similar impact on expression seems clearly insufficient to constitute an abridgment of freedom of expression. The use of such measures to control the content of expression would be clearly impermissible as that would be an abridgment of the freedom of speech. (see Thomas I. Emerson, *Toward a General Theory of First Amendment*(1). So also a special tax on press alone, or, a tax exemption available only to those with particular political views or associations would not be permitted (see *Alice Lee Gorsjean* v. *American Press Company*(2) and *Robert Murdock* v. *Commonwealth of Pennsylvania*(3). "In other words, though the speech itself be under the First Amendment,

(1) Yale Law Journal, Vol. 72, 962-63, 877. (2) 297 U.S. 233.

(3) 319 U.S. 105.

A the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment"(1). This principle is illustrated by the case of *Naresh Shridhar Mirajkar and Others* v. *The State of Maharashtra and Another*(2) where the Bombay High Court, by an order, prohibited the publication of the evidence of a witness and the question was, whether the order abridged the fundamental B right of the freedom of speech of the petitioner in the case. This Court held by a majority that it did not. Gajendragadkar, C. J. said :

> "As we have already indicated, the impunged order was directly concerned with giving such protection to the witness as was thought to be necessary in order to C obtain true evidence in the case with a view to do justice between the parties. If, incidentally, as a result of this order, the petitioners were not able to report what they heard in Court, that cannot be said to make the impugned order invalid under Article 19(1)(a) .... Any incidental consequence which may flow from the order will D not introduce any constitutional infirmity in it".

It was said that this dictum of the learned Chief Justice was made under the radiating influence of *A. K. Gopalan* v. *State of Madras*(3) and that the decision has been practically overruled by *Bank Nationalization Case*(4). I do not wish to enter the controvercial thicket as to the extent to which the principle laid down in E *Gopalan's* case(3) has been eroded by the *Bank Nationalisation* case(4). I need only say that in the area of free speech, the principle I have stated is well established. The principle was applied by this Court in *Express Newspapers Private Ltd. and Another* v. *The Union of India and others*(5). There the question was, whether the provisions of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, violated the fundamental right of the petitioner under Art. 19(1)(a). The argument was that the decision of the Wage Board in fixing the rates and scales of wages without any consideration whatsoever as to the capacity of the newspaper industry to pay the same, imposed too heavy a financial burden on the industry and had G disabled it from exercising its fundamental right of the freedom of speech. But the Court said :

> "The impugned Act, judged by its provisions, was not such a law but was a beneficient legislation intended to regulate the conditions of service of the working journalists and the consequences aforesaid could not be the

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(1) William J. Brennan, Jr., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," Harvard Law Review, Vol. 79, No. 1, p. 1.
(2) (1966) 3 S.C.R. 744, 762.
(3) (1960) S.C.R. 88.
(4) (1970) 3 S.C.R. 532.
(5) (1959) S.C.R. 12.

direct and inevitable result of it. Although there could be no doubt that it directly affected the press and fell outside the categories of protection mentioned in Art. 19(2), it had not the effect of taking away or abridging the freedom of speech and expression of the petitioner and did not, therefore, infringe Art. 19(1)(a) of the Constitution."

The same principle finds expression in the decision in *U. S.* v. *O' Brien*(1) where the U.S. Supreme Court said that even assuming that the alleged communicative element in the burning of the Selective Service Certificate is sufficient to bring into play the freedom of speech, it combines both 'speech' and 'non-speech' 'elements, and when speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on the freedom of speech. The Court further obseved that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression and the freedom of speech is no greater than is essential to the furtherance of that interest.

In *Sakal Papers (P) Ltd. and others* v. *Union of India*(2) this Court was concerned with the validity of the Newspaper (Price and Page) Act, 1956, and Daily Newspaper (Price and Page) Order, 1960. The whole subject matter fell directly under Art. 19(1)(a). It was not a case where the impingement on the freedom of speech was indirect. The legislation in that case directly restricted circulation of newspapers. The direct effect of the legislation, in other words, was to abridge the freedom of speech by curtailing circulation. The learned judges, after referring to the *Express Newspaper* case(3) said that the impugned law, far from being one, which merely interfered with the right of freedom of speech incidentally, did so directly.

Mr. Palkhiwala, appearing for the petitioners in Writ Petition No. 334 of 1971, submitted that the true test to decide whether the freedom of speech of the petitioners has been abridged is to see what is the direct effect of the Newsprint Control Order and the Newsprint Policy. He submitted that it is neither their pith and substance nor their subject matter that should be taken into consideration for deciding the question whether they operate to abridge the freedom of speech, but their direct effect. The question to be asked and answered, according to counsel is, what is the direct effect of the Newsprint Control Order and the Newsprint Policy ?

(1) 391 U.S. 367.
(2) [1962] 3 S.C.R. 842, 866.
(3) [1959] S.C.R. 12.

A If, on account of scarcity of newsprint, it is not possible, on an equitable distribution, to allot to the petitioners, newsprint to the extent necessary to maintain the present circulation of the newspapers owned by them with same page level and, as a result, the circulation of the newspapers or their page level has to be reduced, could it be contended that there has been abridgment of B the freedom of speech? Surely, the reduction in page level or circulation is the direct result of the diminished supply of newsprint. Yet, I do not think that anybody will say that there is an abridgement of the freedom of speech of the petitioners. There might be an abridgement of speech, but not an abridgment of the freedom of speech.

C The pith and substance test, although not strictly appropriate, might serve a useful purpose in the process of deciding whether the provisions in question which work some interference with the freedom of speech are essentially regulatory in character (see the observation of Lord Porter in *Commonwealth of Australia* v. *Bank of New South Wales*(1)).

D With this background, let me proceed to consider more specifically the arguments of the petitioners.

It was contended for the petitioners that the newsprint policy which fixes a 10-page ceiling for calculation of newsprint quota for their dailies which had a page level above ten directly abridges E their fundamental right of free speech and that the provision of the Newsprint Policy which provides for 20 per cent increase in the number of pages to daily newspapers within the ceiling of 10 pages offends Art. 14.

Before 1972-73, the newsprint allocation policy was based on the page level of 1957 coupled with the circulation figures of F 1961-62, and all entitlements were calculated, with allowable increases and adjustments, from year to year on that basis. As a result, the newspapers which entered the field after 1962-63 were at a disadvantage and were pegged to their own lower page and circulation level. There were many papers specially in the Indian Languages group where the actual circulation even during G 1970-71 exceeded the notional circulation figure which was arrived at cumulatively based on the 1961-62 figures. The result of the previous policies was that some news papers which had already a very large circulation at the time of introduction of newsprint rationing and were not interested in increasing circulation substantially were able to use the newsprint allotted to them so as to increase the number of pages. On the other hand, the newspapers H which were at a lower level of circulation but had the potential to increase the readership were restricted to the *ad hoc* percentage

(1) [1950] A.C. 235, 312-3.

increase allowed under those policies but were unable at the same time to increase the number of their pages as they could not afford to cut down the existing circulation. The growth of such newspapers was, therefore, affected by the prior newsprint allocation policies. The Newsprint Policy in question seeks to remedy this situation. It recognises the circulation of all newspapers big and small as of 1970-71 and provides for a small growth rate. 1970-71 is taken as the base year because, with the events in Bangla Desh, Indo-Pak hostilities and the State elections, the circulation figures for 1971-72 would not represent the circulation figures of a normal year.

The fixation of 10-page ceiling for the calculation of newsprint quota has, among the big newspapers, affected 22 newspapers which, prior to the policy for 1972-73, were actually operating on a page-level above 10.

The Union of India justifies the reduction in the page level of these papers to 10 on three principal grounds : (1) that these papers devote proportionately high percentage of space for advertisements at high rates and that the cut in pages imposed would not be felt by them if they rationalise their working and adjust their advertisement space; (2) that the imposition of cut in the pages was necessary on account of the short supply of 11,000 tonnes of newsprint due to suspension of U.S. Aid and (3) that the cut was necessary to have fair and equitable distribution of newsprint amongst all newspapers and periodicals.

The objectives sought to be achieved by the Newsprint Policy are : (1) to correct the inequity of the previous newsprint allocation policies as a result of which the newspapers which had high page level in 1957 got unfair advantage over the newspapers which were started thereafter and (2) to help the newspapers operating below 10 pages to achieve a 10 page level by 20 per cent increase in growth rate so as to enable them to attain a position of equality with those which were operating above 10-page level in 1970-71.

It may be recalled that the Newsprint Policy provides for fixation of basic entitlement for newspapers whose actual number of pages was more than 10 during 1970-71 and 1971-72 on the basis of (1) an average of 10 pages, and (2) either the average circulation in 1970 or admissible circulation in 1971-72, plus, increase admissible under the policy of 1971-72 whichever is greater. Fixation of page level for calculating the entitlement of quota for a newspaper is not a new feature. The previous policies provided *inter alia* that allocation would be calculated on the basis of a page level upto 12 pages and restricted to an increase of not more than 2 pages at a time. Therefore, even under the prior policies, the newsprint allocation was calculated on the basis of a maximum

A page level which was 12 pages as mentioned above, except in the case of six newspapers whose page level in 1957 was more than 12 pages.

Dailies are classified as 'big', 'medium' and 'small'. A newspaper with a circulation of over 50,000 is 'big', that with a circulation ranging from 15,000 to 50,000 is 'medium' and that with a circulation below 15,000 is 'small'. The average page number of big dailies was 10.3. Out of the 45 big dailies, 23 operated on a page level of less than 10 pages and 22 operated on a page level of more than 10. The average page level of all the dailies was 5.8. Out of the 45 big dailies, 30 are language and 15 English. All the 15 big dailies in English operated on an average page level over 10 and their average page level was 13.45. Even the medium English dailies operated on a page level over 10 and the average of their page level was 11.08.

The Government contended that the effect of the policy of allowing page increase and circulation increase from time to time has been to help the growth of press; that this is how papers like *Anand Bazar Patrika, Jugantar* and *Deccan Herald* (English) have come to the present level of circulation and that newspaper proprietors in India including the petitioners have unanimously recommended to the Government in January, 1969, that a page level of 8 should be the national minimum requirement for a medium of information and that it should be permitted to reach as wide a public as possible.

To examine the question whether Newsprint Policy is directed against the big dailies and is calculated to strangle them and whether it would offend their fundamental rights under Art. 14 and 19(1)(a), it is necessary to have an idea as to what are the objects sought to be achieved by the freedom of speech and how they could be achieved. It is also necessary to have some notion about the concept of equality in the distribution of a scare commodity like newsprint.

The freedom of speech is a concept which was transplanted into our Constitution from the First Amendment to the Constitution of U.S.A. In *Express, Newspapers case*(1) this Court observed :—

> "It is trite to observe that the fundamental right to the freedom of speech and expression enshrined in Art. 19(1)(a) of our Constitution is based on these provisions in Amendment I of the Constitution of the United States of America....."

(1) [1959] S.C.R. 12.

As to what the 'freedom of speech' means there is no unanimity among the jurists. Writing in the *Federalist Papers*(1), Alexander Hamilton observed :

> "On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two.... I contend that whatever has been said about it.... amounts to nothing. What signifies a declaration that "the liberty of the press shall be inviolably preserved" ? What is the liberty of the Press ? Who can give it any definition which would not leave the utmost latitude for evasion ? I hold it to be impracticable...."

Professor Chafee said(2) :

> "The truth is, I think, that the framers had no very clear idea as to what they meant by "the freedom of speech or of the press" but we can say with reasonable assurance .... that the freedom which Congress was forbidden to abridge was not, for them, some absolute concept which had never existed on earth."

What Lincoln said on liberty is relevant here :

> "The world has never had a good definition of [it]".

Justice Holmes gave at different times opposite interpretations of the historic meaning of the First Amendment. Speaking for himself and Justice Brandeis, he observed :(3)

> "History seems to me against the notion (that) the First Amendment left the common law of seditious libel in force."

A few years earlier, he had written for the Court :(4)

> "(T)he main purpose of such constitutional provisions 'to prevent all such previous restraints... as had been practices by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare".

In this statement Holmes had the support of Cooley, who maintained that its Blackstonian outlook "has been followed by American commentators of standard authority as embodying correctly the idea incorporated in the constitutional law of the country by the provisions in the American Bill of Rights."

The values sought by society in protecting the right to the freedom of speech would fall into four broad categories. Free expression is necessary : (1) for individual fulfilment, (2) for attainment of truth, (3) for participation by members of the society

(1) The Federalist, No. 84, at p. 514.
(2) Chafee, Book Review, 62, Harvard Law Review, 891, 898.
(3) *Abrams v.* U.S., 250 U.S. 616, 630.
(4) Patterson *v.* Colorado, 215 U.S. 454, 462.

A in political or social decision making and (4) for maintaining the balance between stability and change in society. In the traditional theory, freedom of expression is not only an individual good, but a social good. It is the best process for advancing knowledge and discovering truth. The theory contemplates more than a process of individual judgment. It asserts that the process is also the best B method to reach a general or social judgment. In a democracy the theory is that all men are entitled to participate in the process of formulating common decisions. (see Thomas I. Emerson, *Toward a General Theory of First Amendment*) (*supra*). The crucial point is not that freedom of expression is politically useful but that it is indispensable to the operation of a democratic system. In a democracy the basic premise is that the people are both the governors C and the governed. In order that governed may form intelligent and wise judgment it is necessary that they must be appraised of all the aspects of a question on which a decision has to be taken so that they might arrive at the truth. And this is why Justice Holmes said in *Abrams* v. *United States* (*supra*) :

D

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon E which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Judge Learned Hand said that the newspaper industry serves one of the most vital of all general interests, namely, the dissemination of news from as many different sources, and with as many different facets and colours as is possible; that the freedom of speech pre- F supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection (see *United States* v. *Associated Press*).(1) The same sentiment was echoed by Justice Black when he said that the freedom of speech rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources G is essential to the welfare of the public (*Associated Press* v. *United States*).(2) But this fundamental presupposition is seriously weakened by concentration of power. Instead of several views of the facts and several conflicting opinions, newspaper readers in many cities, or, still worse, in wide regions, may get only a single set of facts and a single body of opinion, all emanating from one or two H owners.(3) Our Constitutional law has been singularly indifferent

(1) 52 Federal Supplement 362, 372, (So Dist. N.Y. (1943).
(2) 326 U.S. Reports, 1, 20 (1945).
(3) See Zechariah Chafee, Jr., Government and Mass Communications, Vol. I, pp. 24-25.

to the reality and implications of non-governmental obstructions to the spread of political truth. This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability (see Jerome A. Barren, "Access to the Press"—A New First Amendment Right").(1)

With the concentration of mass media in a few hands, the chance of an idea *antagonistic* to the idea of the proprietors of the big newspapers getting access to the market has become very remote. It is no use having a right to express your idea, unless you have got a medium for expressing it. The concept of a free market for ideas presupposes that every type of ideas will get into the market and if free access to the market is denied for any ideas, to that extent, the process of competition becomes limited and the chance of all the ideas coming to the market is removed. There can be no doubt that any mass medium having the greatest circulation will influence the political life of the country because the ideal for which the paper stands has got the greatest chance of getting itself known to the public. It will also affect the economic pattern of the society. Whether or not the modern big newspaper is the cultural arm of the industry, it has an interest in the present method of production and distribution, as it subsists mainly upon advertisement.

The Mahalanobic Committee on Distribution of Income and Levels of Living, in its report has; after stating that economic power is exercised also through control over mass media of communication, said :(2)

> "Of these, newspapers are the most important and constitute a powerful ancillary to sectoral and group interests. It is not, therefore, a matter for surprise that there is so much inter-linking between newspapers and big business in this country, with newspapers controlled to a substantial extent by selected industrial houses directly through ownership as well as indirectly through membership of their boards of directors. In addition, of course, there is the indirect control exercised through expenditure on advertisement which has been growing apace during the Plan periods. In a study of concentration of economic power in India, one must take into account this link between industry and newspapers which exists in our country to a much larger extent than is found in any of the other democratic countries in the world."

(1) Harvard Law Review, Vol. 80, 1641, 1643.
(2) Report of the Committee on Distribution of Income and levels of Living, Part I, pp. 51-52.

A If ever there was a self-operating market of ideas, as Justice Holmes assumed, it has long since ceased to exist with the concentration of mass media in few hands. Protection against government is not enough to guarantee that a man who has something to say will have a chance to say it. The owners and the managers of the press determine which persons, which facts, which version of B facts, which ideas shall reach the public. Through concentration of ownership, the variety of sources of news and opinion has become limited. At the same time, the citizen's need for variety and new opinions has increased. He is entirely dependent on the quality, proportion and extent of his news supply,—the materials for the discharge of his duties as a citizen and a judge of public affairs—on a few newspapers. The Press Commission has observed C in its report (Part I, p. 310) that since the essence of the process of formation of opinion is that the public must have an opportunity of studying various points of view and that the exclusive and continuous advocacy of one point of view through the medium of a newspaper which holds a monopolistic position is not conducive to the formation of healthy opinion, diversity of opinion D should be promoted in the interest of free discussion of public affairs.

The mass media's development of an antepathy to ideas *antagonistic* to theirs or novel or unpopular ideas, unorthodox points of view which have no claim for expression in their papers makes the theory of market place of ideas too unrealistic. The problem E is how to bring all ideas into the market and make the concept of freedom of speech a live one having its roots in reality. A realistic view of our freedom of expression requires the recognition that right of expression is somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers. The freedom of speech, if it has to fulfil its historic mission, namely, the spreading of political truth and the widest dissemination of F news, must be a freedom for all citizens in the country. "What is essential" according to Meiklejohn, "is not that everyone shall speak, but that everything worth saying shall be said".(1) If media are unavailable for most of the speakers, can the minds of the hearers be reached effectively? It is here that creation of new opportunities for expression or greater opportunities to small and G medium dailies to reach a position of equality with the big ones, is as important as the right to express ideas without fear of governmental restraint. It is only the new media of communication that can lay sentiments before the public and it is they rather than the government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a con- H stitutional theory for communication of ideas, *laissez faire* is manifestly irrelevant (see Barren, *Access to Press*).(2) What is, therefore, required is an interpretation of Art. 19(1)(a) which focuses

(1) Political Freedom, p. 26. (2) Harvard Law Review, Vol. 80, 1641.

on the idea that restraining the hand of the government is quite useless in assuring free speech, if a restraint on access is effectively secured by private groups. A constitutional prohibition against governmental restriction on the expression is effective only if the Constitution ensures an adequate opportunity for discussion. A

Any scheme of distribution of newsprint which would make the freedom of speech a reality by making it possible the dissemination of ideas as news with as many different facets and colours as possible would not violate the fundamental right of the freedom of speech of the petitioners. In other words, a scheme for distribution of a commodity like newsprint which will subserve the purpose of free flow of ideas to the market from as many different sources as possible would be a step to advance and enrich that freedom. If the scheme of distribution is calculated to prevent even an oligopoly ruling the market and thus check the tendency to monopoly in the market, that will not be open to any objection on the ground that the scheme involves a regulation of the press which would amount to an abridgment of the freedom of speech (see *Citizen Publishing Co.* v. *United States*).(1) Promoting effective competition of ideas in the market alone will ensure the emergence of truth out of the competition; at any rate that is the basis underlying the guarantee of free speech and any distribution of newsprint calculated to promote competition by making the competitors equal in strength cannot but be characterized as a scheme to advance the freedom. One cannot promote competition by making the strong among the competitors stronger or the tall taller but by making the weak among them strong and the short tall. So, even if the scheme of distribution aims at making dailies with smaller page-level and less circulation attain a position of equality in respect of page level and circulation with those having a page level of 10 and enjoying greater circulation, that would not, in any way, be open to objection on the ground of violation of Art. 19(1)(a). I am unable to understand how the fixation of a maximum page level of 10 for calculation of quota of newsprint would offend the fundamental right of the freedom of speech of the petitioners. In any scheme of distribution of a scarce commodity, there must be some basis on which the entitlement should be calculated. It is because newsprint is scarce that it is being rationed. Ex-hypothesi, newsprint cannot be distributed according to the needs of every consumer. The freedom of speech does not mean a right to obtain or use an unlimited quantity of newsprint. Art. 19(1)(a) is not a "guardian of unlimited talkativeness". The average page level of all the dailies was 5.8. The Union of India contends that the petitioners themselves recommended a national minimum page level of 8 for dailies and that, but for the inordinate space devoted to commercial advertisement, 10 pages for a

B C D E F G H

(1) 394 U.S. 131.

A daily would be sufficient to express its views and publish the news and that the petitioners beat the big bass drum of Art. 19(1)(a). not because their freedom of expression is abridged, but that they are deprived of a part of the revenue from commercial advertisement.

B It is settled by the decision of this Court in *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Another* v. *Union of India and Others*(1) that commercial advertisement does not come within the ambit of the freedom of speech guaranteed by Art. 19(1)(a). I have already indicated that any curtailment of speech occasioned by rationing of newsprint due to its scarcity can only affect freedom C of speech indirectly and consequently there would not be any abridgement of it.

It has been said that in the scheme of distribution of newsprint, unequals have been treated equally and therefore, the Newsprint Policy violates Art. 14 of the Constitution. To decide this D question regard must be had to the criteria to be adopted in distributing the material resources of a community. Arguments about equality in this sphere are really arguments about the criteria of relevance. The difficulties involved in developing such criteria have occupied philosophers for centuries. Despite the refinements that distinguish the theories of various philosophers, most such theories represent variations on two basic notions of equality : E numerical equality and proportional equality. The contrast between the two notions is illustrated by the difference between the right to an equal distribution of things and the equal right with respect to a distribution of such things. According to the former, each individual is to receive numerically identical amounts of the benefit being distributed or the burden imposed in the public sector, F whereas the latter means only that all will receive the same consideration in the distributional decision, but that the numerical amounts distributed may differ. Proportional equality means equality in the distribution according to merit or distribution according to need (see *Developments—Equal Protection*).(2) But the Supreme Court of U.S.A. has departed from this traditional G aproach in the matter of equality and has adopted a more dynamic concept as illustrated by the decision in *Griffin* v. *Illinois*(3) and *Douglas* v. *California*.(4) In these cases it was held that the State has an affirmative duty to make compensatory legislation in order to make men equal who are really unequal has undergone radical other words, the traditional doctrine that the Court is only concerned with formal equality before the law and is not concerned H to make men equal who are really unequal has undergone radical

(1) [1960] 2 S.C.R. 671, 688-90 (2) Harvard Law Review, Vol. 82, p. 1165.
(3) 351 U.S. 12. (4) 372 U.S. 353.

change in the recent years as illustrated by these cases. Justice Harlan dissented both in *Griffin's case* and *Douglas' case* and his dissenting opinion in the former case reveals the traditional and the new approaches and also highlights the length to which the majority has gone :

> 'The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what is requires others to pay for.... It may as accurately be said that the real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate."

The crucial question today, as regards Art. 14, is whether the command implicit in it constitutes merely a ban on the creation of inequalities by the State, or, a command, as well, to eliminate inequalities existing without any contribution thereto by State action. The answer to this question, has already been given in the United States under the equal protection clause in the two cases referred to, in certain areas. The Court, in effect, has began to require the State to adopt a standard which takes into account the differing economic and social conditions of its citizens, whenever these differences stand in the way of equal access to the exercise of their basic rights. It has been said that justice is the effort of man to mitigate the inequality of men. The whole drive of the directive principles of the Constitution is toward this goal and it is in consonance with the new concept of equality. The only norm which the Constitution furnishes for distribution of the material resources of the community is the elastic norm of the common good [see Art. 39(b)]. I do not think I can say that the principle adopted for the distribution of newsprint is not for the common good.

That apart, one of the objects of the Newsprint Policy was to remedy the inequality created by the previous policies and to enable the dailies having less than 10 pages attain a position of equality with those operating on a page level of 10 or more. I think the allowance of 20 per cent increase for growth in page-level provided in Remark VII is based on a classification and that the classification is grounded on an intelligible differentia having a nexus to the object sought to be achieved.

By far the most fundamental attack made by counsel for the petitioners was that levelled against the provision in Remark VIII which provides that within the quantity of newsprint authorised

A for the licensing period, each newspaper/periodical will be free to increase circulation by reducing the number of pages, page area and periodicity, but will not be free to increase the number of pages, page area and periodicity by reducting circulation, to meet its individual requirements. It was contended that this is direct inroad upon the freedom of speech and that by no stretch of imagination B can it be characterized as newsprint control. The argument was that when once the quota has been determined and allotted, further directions as regards circulation or page number is nothing but brazen-faced trespass into the domain of the guaranteed freedom. It was said that once the quota has been fixed and allotted, the control over newsprint as a commodity was over and any stipula- C tion as regards its utilisation thereafter can only sound in the realm of abridgment of the freedom of speech.

Now, let me examine this argument with the respect which it deserves. If the entitlement of a consumer of newsprint is calculated on the basis of page-level and circulation of the newspaper, I think it would be an integral part of any system of rationing to D tell the consumer that he should maintain the page level and circulation of the paper. That apart, as Meiklejohn said—and that is plain commonsense—"First, let it be noted, that by these words (First Amendment) Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it."(1) These E remarks apply with equal force to Art. 19(1)(a) read with Art. 13(2). Any law or executive action which advances the freedom of speech cannot be considered as an abridgment of it. The provision in question does not say that the proprietor or publisher of a newspaper should reduce its circulation. If the provision had said that the proprietor or publisher must reduce the circulation of the newspaper, one could have understood a complaint of F abridgment of the freedom of speech. The provision, in effect, only tells the proprietor/publisher of the newspaper: "maintain the circulation at the present level or increase if it you like by reducing the page level". Would this amount to an abridgment of the freedom of speech? I think not. The freedom of speech is only enriched and enlarged.

G It was contended that a proprietor/publisher of a newspaper has the undoubted freedom to increase its page level within the authorised quota and the provision in question, by insisting that page level should not be increased by reducing circulation, has interfered with that freedom. It was argued that if the provision in question had not insisted upon maintaining the circulation at the H present level, the publisher could have reduced the circulation of the newspaper and increased the number of its pages and, increas-

(1) See Political Freedom, p. 19.

ing the number of pages at the expense of circulation is a matter of freedom included within the concept of the freedom of speech. I cannot agree. Suppose, the provision in the Newsprint Policy had simply said that the proprietor of a newspaper is not allowed to reduce its present circulation and stopped there? What would have been the effect? The effect would have been the same, namely, that the proprietor would not have been entitled to increase the page level of the newspaper within the authorised quota. The incidental effect of the direction to maintain the circulation or increase it would be to tell the proprietor or publisher not to increase the number of its pages. If the Newsprint Policy could legitimately say, without abridging the freedom of speech, that a newspaper should maintain its present circulation, the fact that it also said that it should not increase its page level and reduce circulation would not in any way affect the question. If telling a publisher or proprietor to maintain the circulation of a newspaper or increase it, is not an abridgment of the freedom of speech, the further express direction in the Newsprint Policy not to increase its page-level within the authorised quota would not be an abridgment of the freedom of speech as it is an implied consequence of the direction to maintain the circulation.

The matter can be looked at from another angle. The constitutional guarantee of the freedom of speech is not so much for the benefit of the press as it is for the benefit of the public. The freedom of speech includes within its compass the right of all citizens to read and be informed. In *Time* v. *Hill*(1) the U.S. Supreme Court said:

> "The constitutional guarantee of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people."

In *Griswold* v. *Connecticut*(2) the U.S. Supreme Court was of the opinion that the right of freedom of speech and press includes not only the right to utter or to print, but the right to read.

As I said, the freedom of speech protects two kinds of interest. There is an individual interest, the need of men to express their opinion on matters vital to them and a social interest in the attainment of truth so that the country may not only accept the wisest course but carry it out in the wisest way. "Now, in the method of political Government, the point of ultimate interest is not the words of the speakers, but the minds of hearers..... The welfare of the community requires that those who decide issues shall understand them"(3). "The general principles underlying first amendment safeguards may, for present purposes, be reduced to three judicially recognized specifics. First, Professor Alexander

(1) 385 U.S. 374. (2) 381 U.S. 479, 482.
(3) Meiklejohn, Political Freedom p. 26.

A Meiklejohn's assertion that the first amendment was intended to define not an individual right to speak, but rather, a community right to hear has been assumed by modern constitutional decision (*Rosenblatt* v. *Baer*(1), *Lamont* v. *Postmaster General*(2) *Roth* v. *United States*(3), *Stromberg* v. *California*(4)"(see Paul Goddstein, *Copyright and the First Amendment*(5). That the B right of the public to hear is within the concept of the freedom of speech is also clear from the pioneering opinion of Justice Burger, as he then was, in *Office of Communication of United Church of Christ v. F.C.C.*(6). The learned judge emphasised principally the primary status of "the right of the public to be informed, rather than any right of the Government, any broad- C casting licencee or any individual member of the public to broadcast his own particular views on any matter."

If the right of the public to hear and be informed is also within the concept of the freedom of speech, the government, when it insists upon, the newspapers concerned maintaining their present level of circulation does not abridge the freedom of speech but D only enriches and enlarges it. In other words, under the theory of the freedom of speech which recognises not only the right of the citizens to speak but also the right of the community to hear, a policy in the distribution of newsprint for maintenance of circulation at its higher possible level, as it furthers the right of the community to hear, will only advance and enrich that freedom.

E At present, our circulation is only 1.3 copies for every 100 people and 4.6 copies for every 100 literates in the country. Circulation must be doubled if the press is to reach all the literates in the country. This is a sufficient justification for a circulation oriented policy. Newsprint which is in short supply must be used so as to help to achieve the widest possible dissemination of F news and at the same time meet the demands of the press as a whole.

Under Art. 41 of the Constitution the State has a duty to take effective steps to educate the people within limits of its available economic resources. That includes political education also.

G Public discussion of public issues together with the spreading of information and any opinion on these issues is supposed to be the main function of newspaper. The highest and lowest in the scale of intelligence resort to its columns for information. Newspaper is the most potent means for educating the people as it is read by those who read nothing else and, in politics, the common man gets his education mostly from newspaper.

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(1) 383 U.S. 74, 94-95.
(2) 381 U.S. 301.
(3) 354 U.S. 476, 484.
(4) 283 U.S. 359, 369.
(5) Columbia Law Review, Vol. 70, 983, 989.
(6) Federal Reporter, 359, 2nd series, 994.

The affirmative obligation of the Government to permit the import of newsprint by expending foreign exchange in that behalf is not only because press has a fundamental right to express itself, but also because the community has a right to be supplied with information and the Government a duty to educate the people within the limits of its resources. The Government may, under cl. 3 of the Imports (Control) Order, 1955 totally prohibit the import of newsprint and thus disable any person from carrying on a business in newsprint, if it is in the general interest of the public not to expend any foreign exchange on that score. If the affirmative obligation to expend foreign exchange and permit the import of newsprint stems from the need of the community for information and the fundamental duty of Government to educate the people as also to satisfy the individual need for self expression, it is not for the proprietor of a newspaper alone to say that he will reduce the circulation of the newspaper and increase its page level, as the community has an interest in maintaining or increasing circulation of the newspapers. It is said that a proprietor of a newspaper has the freedom to cater to the needs of intellectual highbrows who may choose to browse in rich pastures and for that he would require more pages for a newspaper and that it would be a denial of his fundamental right if he were told that he cannot curtail the circulation and increase the pages. A claim to enlarge the volume of speech by diminishing the circulation raises the problem of reconciling the citizens' right to unfettered exercise of speech in volume with the community's right to undiminished circulation. Both rights fall within the ambit of the concept of freedom of speech as explained above. I would prefer to give more weight to the community's claim here especially as I think that the claim to enlarge the volume of speech at the expense of circulation is not for exercising the freedom of speech guaranteed by Art. 19(1)(a) but for commercial advertisement for revenue which will not fall within the ambit of that sub-article.

In every society, there are many interests. held in varying degrees, by individuals and groups, *viz.*, the interest in, valuing of, or concern, for free speech, peace, quiet, protection of property, fair trial, education, national security, good highways, a decent minimum wage, etc. "The attainment of freedom of expression is not the sole aim of the good society. As the private right of the individual, freedom of expression is an end in itself, but it is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other goals. It is a basic element in the democratic way of life, and as a vital process it shapes and determines the ends of democratic society. But it is not through this process alone that a democratic society will attain its ultimate ends"(1).

(1) See Thomas I, Emerson, Toward a General Theory of the First Amendment," Yale Law Journal, Vol. 72, 1962-63, 877, 907.

A Therefore, any theory of freedom of expression must take into account other values such as justice, equality, moral progress, the right of the public to education arising from the affirmative duty cast on the Government by the directive principles to educate the people, apart from the right of the community to read and be informed arising under the theory of the freedom of speech itself. B Art. 19(2) is concerned with laws restricting or abridging the freedom of speech for protecting the more important values. It has nothing to do with regulation as to the manner or method of speech, including its volume, when that regulation does not touch or concern the content of speech, and when it is intended or calculated to subserve or promote some paramount social interest(1). The question then is whether the Government could, in the C distribution of newsprint, insist on the widest circulation possible to subserve the right of the people to be educated in opposition to the right of the proprietor or publisher to reduce the circulation and enlarge the page number. As I said, any regulation not intended to control the content of speech but incidentally limiting its unfettered exercise will not be regarded as an abridgment of the D freedom of speech, if there is a valid governmental interest arising from its duty to educate the people and the value of the public of the end which the regulation seeks to achieve is more than the individual and social interest in the unfettered exercise in volume of the right of free speech. The formula in such cases is that the Court must, balance the individual and social interest in E freedom of expression against the social interest sought by the regulation which restricts expression (*supra*).

In *Konigsberg* v. *State Bar*(2), Justice Harlan speaking for the majority observed :

> "..... On the other hand, general regulatory statutes, not intended to control the content of speech F but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First Fourteenth Amendment forbade Congress or the State to pass, when they have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which has necessarily involved a weighing of the G governmental interest involved. See e.g. *Schneider* v. *State*, 308 U.S. 147, 161; *Cox* v. *New Hampshire;* 312 U.S. 569; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77; *American Communications Assn.* v. *Douds*, 339 U.S. 382; *Breard* v. *Alexandria* 341 U.S. 622."

H It was contended on behalf of the petitioners that prohibition of interchangeability of quota between different newspapers

(1) Criminal Appeal No. 152 of 1970 decided on 15-9-1972.
(2) 366 U.S. 36, 50.

owned by a common ownership unit, or different editions of the same newspaper owned by that unit is an abridgment of their fundamental right under Art. 19(1)(a). A common ownership unit is defined to mean a newspaper establishment or concern owning two or more newspapers including at least one daily irrespective of the centres of publication and language of such papers. The newsprint is allotted to a newspaper. In other words, the unit of allotment is a newspaper. Clause 2(a) of the Newsprint Control Order defines "consumer of newsprint":

> "consumer of newsprint means a printer or publisher of newspapers, periodicals, text books or books of general interest who uses newsprint."

The printer or publisher of each newspaper owned by a common ownership unit is a separate consumer and it is to that consumer that the quota is allotted. The application for quota made by the common ownership unit specifies the entitlement of each newspaper owned by it, and quota is granted to each newspaper on that basis. If it were open to a common ownership unit to use the quota allotted for one newspaper owned by it for another newspaper, or, for a different edition of the same newspaper, that would frustrate the whole scheme of rationing. If a common ownership unit were to use the quota allotted to one newspaper for another newspaper owned by it, it could discontinue one newspaper and use its quota for another and thus secure an advantage over individual units owning only one newspaper. It is on the basis of page level and circulation that quota is allotted to a newspaper and to say that it is open to a common ownership unit to use the quota for a different newspaper owned by it or a different edition of the same newspaper would be tantamount to saying that since the common ownership unit gets the ownership of the quota, it can use the quota for a newspaper owned even by a different proprietor. I do not think that the prohibition against interchangeability of quota among different newspapers owned by a common ownership unit is violative of Art. 19(1)(a). In my opinion, prohibition of interchangeability has nothing to do with Art. 19(1)(a). That a commodity rationed to a Unit must be utilized by that Unit and no other unit is, I think, a regulation necessary for the successful working of any system of rationing.

It was then contended for the petitioners that a common ownership unit is not permitted to start a new newspaper or a new edition of an existing newspaper even out of their authorized quota whereas a person owning no other newspaper can start a newspaper and obtain a quota for the same, and that this offends the fundamental right under Art. 19(1)(a) of the common ownership units. That there is a valid classification between a person owning no newspaper and a common ownership unit owning two or more newspapers cannot be denied. Any person desiring to

express himself by the medium of a newspaper cannot be denied an opportunity for the same. The right guaranteed under Art. 19 (1)(a) has an essentially individual aspect. A common ownership unit has already been given the opportunity to express itself by the media of two or more newspapers. If a common ownership unit were to go on acquiring or sponsoring new newspapers and if the claim for quota for all the newspapers is admitted, that would result in concentration of newspaper ownership and will accelerate the tendency toward monopoly in the newspaper industry. When the prohibition against interchangeability of newsprint quota between or among the newspapers owned by a common ownership unit is found valid, the restriction imposed on common ownership unit to bring out a new newspaper from its authorised quota must be held to be valid and not offending Art. 19(1)(a). If the quota allotted for a newspaper owned by the common ownership unit cannot be used for any other newspaper, it stands to reason to hold that the prohibition against bringing out a new newspaper cannot be challenged as violative of Art. 19(1)(a). No doubt, if the system of rationing were not there, it would be open to any person to own or conduct any number of newspapers but, since the quantity of newsprint available for distribution is limited, any system of rationing must place some limitation upon the right of a person to express himself through newspapers.

Mr. M. K. Nambiar, appearing for "The Hindu", contended that the Newsprint Policy is not law, that it is only an administrative direction with no statutory backing and so, the restrictions which the policy impose are not binding.

The Newsprint Policy was issued by the Central Government, and the Chief Controller of Imports and Exports, as Additional Secretary to Government, has authenticated it. The Newsprint Policy was placed before both the Houses of Parliament. In *Joint Chief Controller of Imports and Exports, Madras* v. *M/s. Amin-chand Mutha, etc.*(1) this Court said :

> ".....In order however to guide the licensing authorities in the matter of granting import licences, the Central Government issued certain administrative instructions to be followed by the licensing authorities."

The Import Trade Policy has been characterized as a notice giving information to the public as to the principle governing, the issue of licence for import of goods for a specified period (see *East India Commercial Co. Ltd. Calcutta and Another* v. *The Collector of Customs, Calcutta*(2): Shah, J. speaking for the Court in *Union of India and Others* v. *M/s. Indo Afghan Agencies Ltd.*(3) said:

(1) [1966] 1 S.C.R. 262, 266-68.
(2) [1963] 3 S.C.R. 338, 371-2.
(3) (1968) 2 S.C.R. 366, 377.

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> ".....Granting that it is executive in character, this Court has held that Courts have the power in appropriate cases to compel performance of the obligations imposed by the schemes upon the departmental authorities...."

Even if the Newsprint Policy is administrative in character, it is capable of founding rights and liabilities. Generally speaking, it is true that an administrative order can confer no justiciable rights or impose duties enforceable in a Court. But it can confer rights and impose duties. The limit within which such rights and duties will be recognised and enforced has been stated by an eminent *author* : (1).

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> "Let us take one of Mr. Harrison's instances,—a regulation from the British War Office that no recruit shall be enlisted who is not five feet six inches high. Suppose a recruiting officer musters in a man who is five feet five inches only in height, and pays him the King's shilling; afterwards the officer is sued by the Government for being short in his accounts; among other items he claims to be allowed the shilling paid to the undersized recruit. The Court has to consider and apply this regulation and, whatever its effect may be, that effect will be given to it by the court exactly as effect will be given to a statute providing that murderers shall be hanged, or that last wills must have two witnesses."

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It was contended on behalf of the petitioners that the direction contained in the Newsprint Policy as regards the utilization of the newsprint after the allotment of the quota is *ultra vires* the powers of the licensing authority issuing the same. It is said that after newsprint has been imported, there was no longer any power left in the Central Government or in the Chief Controller of Imports and Exports to direct the manner in which it should be utilized. Cl.5(1) of the Imports (Control) Order, 1955 provides :

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> "5. Conditions of Licenses : (1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below :—
>
> (i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the licensing authority, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it;"

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(1) John Chimpman Gray, the Nature and Sources of the Law, Second Edition (1948), 111-12.

A In *Abdul Aziz Aminuddin* v. *State of Maharashtra*(1), this Court said that the power conferred under s. 3(1) of the Act (Imports and Exports (Control) Act, 1947) is not restricted merely to prohibiting or restricting imports at the point of entry but extends also to controlling the subsequent disposal of the goods imported and that the person licensed to import goods would be amenable to B the orders of the licensing authority with respect to the way in which those goods are to be utilized. This dictum was approved by this Court in State of *West Bengal* v. *Motilal Kanoria*(2). See also the observation of Sarkar, J. in *East India Commercial Co. Ltd., Calcutta and Another* v. *The Collector of Customs Calcutta*(3), at p. 348. Even if it be assumed that Government C or the Chief Controller of Imports and Exports has no power under cl. 5(1)(i) of the Imports (Control) Order, 1955, to issue directions as regards the mode of utilization of newsprint after its import, it is clear that the Government has power by virtue of the provisions of s. 3 of the Essential Commodities Act, 1955, to pass an Order as regards the utilization of newsprint, as newsprint is an D 'essential commodity' under that Act (see s. 2(vii) of the Act).

The only other point which remains for consideration is whether clauses 3(3) and 3(A) of the Newsprint Control Order violate Art. 14 of the Constitution. None of the provisions of the Essential Commodities Act, 1955, is challenged as *ultra vires* the Constitution. The Newsprint Control Order was passed under s. 3 of the Essential Commodities Act, 1955. Sections 3 and 4 of this E Act are in *pari materia* with sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946. These provisions were challenged, on the ground of excessive delegation of legislative power, in the case of *Harishankar Bagla and Another* v. *The State of Madhya Pradesh*(4). But this Court said that the preamble and the body of the sections sufficiently formulate the legis- F lative policy, that the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the frame work of that policy and that s. 3 was valid. And as regards s. 4 the Court said that the section enumerates the classes of persons to whom the power could be delegated or sub-delegated by the Central Govern- G ment and it is not correct to say that the instrumentalities have not been selected by the Legislature itself. Section 4 of the Essential Commodities Act, 1955, provides that an order made under s. 3 may confer powers and impose duties upon the Central Government or the State Government or officers and authorities of the Central Government or State Government, and may contain H directions to any State Government or to officers and authorities thereof as to the exercise of any such powers or the discharge of

(1) [1964] 1 S.C.R. 830, 837-8.
(2) [1966] 3 S.C.R. 933.
(3) [1963] 3 S.C.R. 338, 371-72.
(4) [1955] 1 S.C.R. 380, 388-9.

any such duties. It was, therefore, open to the Government to confer such powers upon the "controller" as defined in the Newsprint Control Order, 1962 :

> "2(b) Controller means the Chief Controller of Imports and Exports and includes any officer appointed by the Central Government to exercise the powers of the Controller under this Order."

Sub-clause (3A) was introduced in cl. 3 of the Newsprint Control Order, 1962, for a particular purpose. There is only a limited quantity of white printing paper. In view of the shortage of white printing paper in the country, it was considered necessary by the Government to restrict its use by consumers of newsprint who were getting quota of imported newsprint. In fact, for newspapers and periodicals, newsprint is the more acceptable raw material than white printing paper. It was found that some of the more affluent papers had started drawing heavily on the limited quantity of white printing paper available, thereby causing great hardship to the other consumers of this commodity like Central and State Governments, text-book publishers and students. It was with a view to meet this situation that restriction on its use by a consumer of newsprint other than the person specified therein was imposed.

The argument that unregulated discretion has been conferred under sub-clauses 3 and 3A of cl. 3 is not correct. The preamble and the provisions of the Essential Commodities Act furnish sufficient guidance for the exercise of the powers conferred. It is impossible, in the nature of things, to specify with greater particularity the guidelines for the exercise of the powers conferred under these clauses. If the conferment of the power upon the Government under s. 3 is valid and is not open to attack under Art. 14, I think the power conferred upon the sub-delegate is also valid.

It is not necessary for me to express any opinion as regards the maintainability of the writ petitions on the ground that the consumers of the newsprint in question are not citizens and I do not express any opinion.

I would dismiss the petitions without any order as to costs.

BEG, J. The Writ Petitions before us challenge what is described as "News Print Policy" notified for the period from April, 1971 to March, 1972. As the impugned Notification does not mention the provision of law under which it was issued, we have to scrutinise its contents to discover the authority for its promulgation. It is headed "Public Notice" on "Import Trade Control". The subject is given as "Import Policy for News Print". The "Policy" is contained in a schedule annexed to the Notice. The first of the

A six columns of the Schedule gives the serial number of the item involved which is 44/V of the ITC Schedule. Volume I of the "Red Book" on Import Trade Control Policy, issued by the Ministry of Foreign Trade, mentions, against item 44/V for white printing paper, that import policy for "News Print" will be announced later. The impugned items, found in the remarks' B column, contain that announcement applicable from April, 1971 to March, 1972. A subsequent similar notification dated 11-4-1972 shows that identically worded terms were to be applicable to the period from April, 1972 to March, 1973, and these are also assailed by the petitioners.

Apparently, the impugned remarks constitute conditions for C the import of quotas of news print assigned to the licensees. They are meant to be obeyed if the licensees want their quotas. The implication of such an imposition clearly is that the licences could be revoked if terms of their grant are not complied with apart from other possible consequences in the future. It is alleged that these terms interfere with the fundamental rights of petitioners to freely D express their opinions through their newspapers and to carry on the manufacture and sale of newspapers to the public. If, however, these terms and conditions do not fall under any provision of law but interfere with the exercise of petitioners' fundamental rights, the question of testing their reasonableness will not arise.

What is termed "policy" can become justiciable when it exhi- E bits itself in the shape of even purported "law". According to Article 13(3)(a) of the Constitution, "law" includes "any Ordinance, Order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law". So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those F authorities as declarations of what they are expected to do under it. But, it cannot bind citizens unless the impugned policy is shown to have acquired the force of "law". Mr. Nambiar, appearing for the Hindu Newspaper, has, therefore, assailed the impugned items of the news print control policy on the ground, *inter-alia*, that the fundamental rights of the petitioners represented by him cannot be curtailed by anything less than "law"

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For the reasons given by both my learned brethren Ray and Mathew the impugned items of what is called the "Newsprint Policy" seem to me to be intended to have the force of law which, if not observed by the petitioners, will impede and jeopardise the H exercise by them of their fundamental rights. The intention behind the publication of the Newsprint Policy was obviously to bind the petitioners by the conditions laid down in the remarks' column. It had, therefore, to be brought under some provision of law which could authorise the laying down of such binding conditions upon

those who run the newspapers and want to either express their opinions freely or to carry on their businesses without let or hindrance. It seems to me that this Court should not hesitate to remove such restrictions if they purport to have the force of law, even if they are not "law", provided they have the effect of restricting the exercise of fundamental rights. This effect the restrictions certainly have had and will have unless they are removed by us. According to the petitioners, their observance has entailed such heavy losses to them that they may have to stop doing their business if the restrictions continue.

It is difficult to over-emphasize the importance of Freedom of the Press as one of the pillars of a Government "of the people, by the people, and for the people". I may quote what Lord Bryce said in The American Commonwealth (New and Revised Edition) (pp. 274, 275, 367) :

> "The more completely popular sovereignty prevails in a country, so much the more important is it that the organs of opinion should be adequate to its expression, prompt, full, and unmistakable in their utterances*** The press, and particularly the newspaper press, stands by common consent first among the organs of opinion*** The conscience and commonsense of the nation as a whole keep down the evils which have crept into the working of the Constitution, and may in time extinguish them. That which, carrying a once famous phrase, we may call the genius of universal publicity, has some disagreeable results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks and jobs of all sorts, shun the light; to expose them is to defeat them. No serious evils, no rankling sort in the body politic, can remain long concealed, and, when disclosed, it is half destroyed. So long as the opinion of a nation is sound, the main lines of its policy cannot go far wrong".

John Stuart Mill, in his essay on "Liberty", pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the 'dialectical' process of a struggle with wrong ones which exposes errors. Milton, in his "Areopagitica" (1644) said :

> "Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her

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> strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter ? ..... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensings to make her victorious: those are the shifts and defences that error makes against her power....."

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Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. *Voltaire* expressed a democrat's faith when he told an adversary in argument : "I do not C agree with a word you say, but I will defend to the death your right to say it". Champions of human freedom of thought and expression throughout the ages, have realised that intellectual paralysis creeps over a Society which denies, in however subtle a form, due freedom of thought and expression to its members.

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Although, our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article. 19(1)(a) of the Constitution, yet, it is well recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said : "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working E of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited."

The exent of permissible limitations on freedom of expression is also indicated by our Constitution which contains the fundaF mental law of the land. To that law all Governmental policies, rules and regulations, orders and directions, must conform so that there is "a Government of laws and not of men", or, in other words, a Government whose policies are based on democratic principles and not on human caprice or arbitrariness. Article 19(2) of the Constitution requires that Governmental action G which affects freedom of speech and expression of Indian citizens should be founded on some "law" and also that such "law" should restrict freedom of expression and opinion reasonably only "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." Although, the H ambit of restrictions which can be imposed by "law" on freedom to carry on any occupation, trade, or business, guaranteed by Article 19(1)(g) of the Constitution, is wider than that of res-

trictions on freedom of speech and expression, yet, these restrictions have also to be limited to those which are reasonably necessary "in the interest of the general public" as contemplated by Article 19(6) of the Constitution. A

Permissible restrictions on any fundamental right, even where they are imposed by duly enacted law must not be excessive, or, in other words, they must not go beyond what is necessary to achieve the objects of the law under which they are sought to be imposed. The power to impose restrictions on fundamental rights is essentially a power to "regulate" the exercise of these rights. In fact, "regulation" and not extinction of that which is to be regulated is generally speaking the extent to which permissible restrictions may go in order to satisfy the test of reasonableness. The term "regulate" has come up for interpretation on several occasions before American Courts which have held that the word "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws". (See : *Words and Phrases*, Vol. 36, p. 587 *by West Publishing Co.*). I do not see any reason to give a different meaning to the term "regulation" when we use it. B C D

In the cases before us, I confess that it is very difficult to make out the real object of the restrictions imposed by the impugned items of Newsprint Policy. The Additional Solicitor General did not contend that these items of newsprint import policy were not meant to have the force of rules for conducting business or regulating actions binding upon the petitioners or of "law". He sought to justify them, in so far as they affect freedom of speech and expression, as either necessary incidents of import of essential commodities and the allocation of foreign exchange, which is limited, between them, or, as a method of ensuring a more widely spread freedom of expression by striking at monopolisation of opinion by large newspaper concerns. I am unable to see how these restrictions, after quotas have been allotted on the basis of past performance and respective needs of each newspaper concern, could fall within the objects of any import policy found in any statutory provision or order. And, so far as any attempt to control any monopolistic tendencies in the newspaper world is concerned, no material was placed before us to enable us to see how the impugned conditions of import licences, sought to be imposed by the entries in the remarks columns of the notified Import Trade Control Policy, are related to any law directed against monopolisation. The impugned items in the declaration of newsprint policy, which are meant to bind those who had obtained import licences, were not imposed under any law made to check monopolies. It was also not possible for me to see the relevance of these restrictions E F G H

A to any of the objects of either the Essential Commodities Act, 1955 or orders passed thereunder or to the Import and Export (Control) Act of 1947 or to orders made thereunder. The objects and ambits of the two enactments mentioned above, which were relied upon on behalf of the Union, are fairly clear and well defined.

B No doubt clause 3 of the Newsprint Control Order, 1962, issued in exercise of powers conferred by Section 3 of the Essential Commodities Act 1955 lays down certain restrictions "on acquisition, sale and consumption of newsprint". The clause runs as follows :—

C "(1) No person other than an importer shall acquire newsprint except under and in accordance with the terms and conditions of an authorisation issued by the Controller under this Order.

(2) No dealer in newsprint shall sell to any person
D newsprint of any description or in any quantity unless the sale to that person of newsprint of that description or in the quantity is authorised by the Controller.

(3) No consumer of newsprint, in any licensing period, consume or use newsprint in excess of the quantity authorised by the Controller from time to time.

E (3A) No consumer of newsprint, other than a publisher of text books or books of general interest, shall use any kind of paper other than newsprint except with the permission, in writing, of the Controller.

(4) An authorisation under this clause shall be in
F writing in the form set out in Schedule II.

(5) In issuing an authorisation under this clause, the Controller shall have regard to the principles laid down in the Import Control Policy with respect of newsprint announced by the Central Government from time to time".

G Section 3(1) of the Essential Commodities Act, 1955 lays down the condition for and objects of issue of orders under it in the following terms :—

"3(1). If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for
H securing their *equitable distribution* and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military

operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein". A

Section 3(2) lays down that "without prejudice to the generality of the powers conferred by sub s. (1), an order made thereunder may provide", *inter alia* : (a) "for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;" and (b) "for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of any essential commodity". B

Orders issued under Section 3 of the Essential Commodities Act 1955 must bear a reasonable relationship to the purposes for which such orders can be made. Clause 3(5) of the Newsprint Control Order, 1962, presupposes the existence of some principles of "Import Control Policy" without either stating them or indicating how they are to be related to the objects of Section 3. Obviously, they cannot go beyond the Act. If the impugned terms and conditions could be covered by the vague clause 3(5) of the News Print Control Order, 1962, I venture to think that this provision of the News Print Control Order 1962 may itself have to be declared invalid by us. I may also mention that there seems to be a serious flaw here inasmuch as no machinery for fair and just administrative decisions, so as to correlate conditions imposed upon competing claimants for quotas of a limited amount of news print to their needs and to the requirements of a law which is meant to ensure an "equitable distribution", is provided here. However, as it is not necessary, for the purposes of giving relief to the petitioners, to pronounce on the validity of clause 3(5) of the Newsprint Control Order, 1962, I will, in conformity with the opinion expressed by my learned brother Ray on this aspect, refrain from deciding the question of the validity of its provisions in the cases before us. C D E F

Section 3(1) of the Imports & Exports (Control) Act, 1947, restricts the power of the Central Government, "by order published in the official Gazette", to making "provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions if any as may be made by or under the order :— G

(a) the import, export, carriage coastwise or shipment in ships stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried". H

A Clause 3 of the Imports (Control) Order, 1955, made in exercise of powers conferred by Sections 3 and 4A of the Imports & Exports (Control) Act, 1947, says : —

"3. Restriction of Import of certain goods :—

B (1) Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance, with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II".

C It seems to me that the ambit of the conditions in a licence cannot, under the provisions of the Imports and Exports Control Act, after newsprint has been imported under a licence, extend to laying down how it is to be utilised by a newspaper concern for its own genuine needs and businesses because this would amount to control of supply of news by means of newsprint instead of only regulating its import.

D

The enactments and orders mentioned above seem to me to authorise only the grant of licences for particular quotas to those who run newspapers on the strength of their needs, assessed on the basis of their past performances and future requirements and other relevant data, but not to warrant an imposition of further E conditions to be observed by them while they are genuinely using the newsprint themselves in the course of carrying on a legitimate and permissible occupation and business. The impugned restrictive conditions thus appear to me to go beyond the scope of the Essential Commodities Act, 1955, as well as of the Imports and Exports (Control) Act, 1947.

F

References were also made by the learned Additional Solicitor General to the provisions of the Press and Regulation Books Act, 1867, Registration of Newspapers (Central Rules), 1956, and Press Council Act, 1965, as parts of a possibly desparate attempt to justify the impugned items of newsprint control policy and to show that they are covered by some provision of law. I am unable G to find the legal authority anywhere here also for these items of Newsprint Control Policy.

I think, for the reasons given above, that the argument put forward on behalf of the petitioners that, after the allocation of quotas of newsprint to each set of petitioners, on legally relevant H material, the further restrictions sought to be imposed, by means of the notified newsprint control policy, on the actual mode of user of newsprint for publication of information or views by the licensees, similar to those which were held by this Court, in *Sakal*

Papers (P.) Ltd. & Ors. Vs. *The Union of India*(1), to be invalid, are not covered by any law in existence, has to be accepted. Hence, it is not even necessary for us to consider whether they are reasonable restrictions warranted by either Article 19(2) or Article 19(6) of the Constitution. They must first have the authority of ome law to support them before the question of considering whether they could be reasonable restrictions on fundamental rights of the petitioners could arise.

I, therefore, concur with the conclusions reached and the orders proposed by my learned brother Ray.

G.C.

(1) [1962] 3 S.C.R. 842.

499 Sup. CI/73—2,500—15-4-74—GIPF.