

**(2015) 06 KL CK 0151**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) No. 10727 of 2013 (M)**

Inter Media Publishing Ltd.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision : 23-06-2015**

**Acts Referred:**

Constitution of India, 1950 — Article 19 (2), 19(1), 19(1)(a), 19(2), 21  
Penal Code, 1860 (IPC) — Section 153A  
Press Council Act, 1978 — Section 13, 13(2)(d)

**Citation : (2015) 4 KLT 868**

**Hon'ble Judges : A. Muhamed Mustaque, J**

**Bench : Single Bench**

**Advocate : P. Martin Jose, M.A. Mohammed Siraj, P. Prijith, Thomas P. Kuruvilla and Justine Jacob, for the Appellant; Anitha Ravindran, Govt. Pleader, Advocates for the Respondent**

**Final Decision : Disposed off**

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## **Judgement**

A. Muhamed Mustaque, J.—This writ petition is filed by the publisher of "Thejass", a Malayalam news daily, aggrieved by the denial of Governmental advertisements in their newspaper.

2. Thejass was initially granted Governmental advertisements. The petitioner says that the State has withdrawn the advertisements to the Thejass without any justifiable reasons and that the decision of the Government was without affording an opportunity of being heard. It is projected by the petitioner that Thejass is having more than 2 lakhs readers. It is also argued that the Governmental advertisements cannot be selective and discriminative.

3. The State's version for denial was on the ground that all the main Directors of Thejass, except one Director, are former activists of the Students Islamic Movement of India, a banned organisation and are acting as the main leaders of the Popular Front of India (for short, "PFI"). It is the case of the State that the editorial policy of Thejass is based on the ideology of PFI. The State version also

shows that PFI has a clandestine agenda of islamisation of society by promoting conversion, communalization of issues with a view to the benefit of Islam, recruitment and maintenance of a branded committed indoctrinated muslim youth for undertaking actions including selective elimination of persons, who in their perception are enemies of Islam.

4. It is also the case of the State that PFI utilises Thejass daily to propagate its extremists ideology among its readers and various news items published in Thejass daily clearly expose communal agenda and therefore, the State is of the view that Thejass is acting as a catalyst for polarisation and is creating communal divisions in the Society at large.

5. Newspaper in India is registered under the Press and Registration of Books Act, 1867 (for short, "the PRB Act 1867"). This registration is a mandatory requirement under law. The Parliament enacted the Press Council Act 1978 to establish a Press Council for the purpose of preserving the freedom of the Press and to maintain and improve the standards of newspapers and news agencies in India.

6. It is necessary to decide in this matter on the extent of State control on freedom of Press. For that, this Court needs to advert to the freedom of Press, its nature of function, limitation on operational freedom of Press, test to classify freedom of press for control and action, and the scope of judicial review of the decisions related to security of the State.

7. Freedom of Press in general in democratic State and in our Constitution:

7.1. The democracy survives only when there is a serious inter play between public opinion and law making. Informed choice is central, in governance in democratic republic. In "Democracy" every citizen is born with an appetite for information that transforms him as a true citizen. Thus, like a child hungry for food, like diseased need medicine, like underfed needs nourishment, like insecure needs security, the citizen depend upon information for his own strength and need. If a citizen's surge for free flow of information is denied, it would be the death bell of democracy itself. Realisation of a well ordered constitutional State is possible only when freedom is nourished; and that freedom is the life blood of democracy. It is based on the formation of public reasoning, the democracy acts as a catalyst in public governance based on an elected representation.

7.2. The freedom of Press is not specifically referable to the Constitution. However, under Article 19(1) of the Constitution, such freedom is referred.

7.3. In Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others, AIR 1973 SC 106 : (1972) 2 SCC 788 : (1973) 2 SCR 757 , it was held by the Hon"ble Supreme Court as follows:

"Although Article 19(1)(a) does not mention the freedom of press, it is settled view of this Court that freedom of speech and expression includes the freedom of

the press and circulation".

7.4. In *Indian Express Newspapers (Bombay) Private Ltd. and Others Vs. Union of India and Others*, AIR 1986 SC 515 : (1985) 1 SCC 641, it was observed by the Hon"ble Supreme Court that the purpose of the press is to advance public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.

7.5. In *Arthur Terminiello v. City of Chicago* [337 US 1-37] the Hon"ble Supreme Court of the United States succinctly laid down the principles on Freedom of Press in general as follows:

"Right in general; freedom from censorship and punishment.

The freedom of speech and of press are fundamental personal rights and liberties, the exercise of which lies at the foundation of free government by free men, since free discussion of the problems of society is a cardinal principle of Americanism, and the vitality of civil and political institutions in our society depends on such discussion. ....

It is only through free debate and free exchange of ideas that the government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets the United States apart from totalitarian regimes.

.....

The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. ...."

7.6. In *McCartan Turkington Breen (a firm) v. Times Newspapers Ltd.* [(2000) 4 All ER 913] at 922 Lord Bingham introduces the particular importance of free expression for the media:

"In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

7.7. In *Romesh Thappar Vs. The State of Madras*, AIR 1950 SC 124 : (1950) CriLJ 1514 : (1950) 1 SCR 594 the Hon"ble Supreme Court held as follows:

"... (The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse ... (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

In *Indian Express Newspapers (Bombay) Private Ltd. and Others Vs. Union of India and Others*, AIR 1986 SC 515 : (1985) 1 SCC 641 , the Hon"ble Supreme Court observed as follows:-

"...The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves." (Per Lord Simon of Glaisdale in *Attorney-General v. Times Newspapers Ltd.* (1973) 3 All ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) It helps an individual to attain self-fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration ...."

7.8. Thus, democracy cannot exist without public reasoning based on freedom of expression. The role of Press is therefore generally perceived to allow citizen to allow formation of public reasoning to realise their goal in public governance.

7.9. Therefore, the right to have a free flow of information and formulate idea of individual in their public conduct, co-exists with Freedom of Press in disseminating information in public domain.

8. Nature and function of Press in India under the Constitution and ordinary law:

8.1. The PRB Act 1867 defines newspaper as follows:

"newspaper means any printed periodical work containing public news or comments on public news"

The definition accorded to newspaper clearly indicates that operational freedom conferred on press is in public domain.

8.2. Therefore, it is necessary to understand the nature of the function discharged by the Press registered under the PRB Act 1867.

8.3. The Hon'ble Supreme Court in Board of Control for Cricket in India and Others Vs. Cricket Association of Bihar and Others(2015) 1 SCALE 608 : (2015) 3 SCC 251 emphasised on functional test to determine action of BCCI as a State function and held that a non governmental body undertaking such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.

8.4. In Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, AIR 1975 SC 1331 : (1975) 30 FLR 283 : (1975) LabIC 881 : (1975) 1 LLJ 399 : (1975) 1 SCC 421 : (1975) 3 SCR 619 , it was observed in paras 101 and 102 as follows:

"101. In America, corporations or associations, private in character, but dealing with public rights, have already been held subject to constitutional standards. Political parties, for example, even though they are not statutory organisations, and are in form private clubs, are within this category. So also are labour unions on which statutes confer the right of collective bargaining .....

102. Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government function. This demands the delineation of a theory which requires Government to provide all persons with all fundamentals of life and the determinations of aspects which are fundamental. The State today has an affirmative duty of seeing that all essentials of life are made available to all persons. The task of the State today is to make possible the achievement of a good life both by removing obstacles in the path of such achievements and in assisting individual in realising his ideal of self-perfection..... "

8.5. In Marsh v. Alabama (3) 326 US 501 : 19 L.ed. 265 , it was held by the Hon'ble Supreme Court of the United States that where a private Corporation is privately performing a public function it is bound by the constitutional standard applicable to all State actions. The above judgment was relied on by the Hon'ble Supreme Court in Board of Control for Cricket in India and Others Vs. Cricket Association of Bihar and Others(2015) 1 SCALE 608 : (2015) 3 SCC 251 while emphasising on functional test.

8.6. In Binny Ltd. and Another Vs. V. Sadasivan and Others, AIR 2005 SC 3202 : (2005) 5 CTC 117 : (2005) 7 JT 214 : (2005) 3 LLJ 738 : (2005) 6 SCC 657 : (2005) SCC(L&S) 881 : (2005) 2 SCR 421 Supp : (2005) 3 SLJ 485 , the Hon'ble Supreme Court held in para. 11 as follows:

"..... A body is performing a "public function" when it seeks to achieve some

collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest..."

8.7. The registration under the PRB Act 1867 is fettered with a responsibility to act in public domain. The PRB Act 1867, enacted during the British Government, was with the intention to catalogue all the works in India within public domain. Thereafter, it underwent several amendments by different legislations after independence. The publisher has also to make a declaration as contemplated under the PRB Act 1867 showing the name of the reader and the publisher. This declaration, in fact, is to create accountability and responsibility on the printer and the publisher for the news published.

8.8. The Press Council of India Act, 1978 (for short, the "PCI Act 1978") was enacted to preserve the freedom of the Press and for maintaining and improving the standards of newspapers and news agencies in India. It establishes a Press Council. The objects and functions of the Council have been set out in Section 13 of the above Act. It is relevant to go through such objects in the context of public function as provided under Sections 13(2)(d) and (2)(e), which read as follows:

"13.(2)(d) to encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism.

(13)(2)(e) to keep under review any development likely to restrict the supply and dissemination of news of public interest and importance."

8.9. The Press has pervasive control of individual and society at large in moulding public reasoning. The accountability of the Press is regulated in terms of its responsibility. This responsibility is essentially emanating from the constitutional value for public governance. The underlined principles behind registration and the control being exercised by the Council is to ensure such responsibility of the Press. It is not a mere regulation of private activities of an entity which established the Press. Thus, the registration of the Press under the PRB Act 1867 and the control exercised by the Press Council under the PCI Act 1978 is clearly indicative of the public function discharged by the Press.

8.10. In Marsh's case (supra), the question arose for consideration whether exercise of free speech and freedom by distribution of religious literature in a privately owned property used by public in general as town and shopping centre would amount to trespass or exercise of constitutional right of free speech rights or not. It was opined that Press functions in platform for formation and transmission of information in a privately built infrastructure and the domain of the activity is in public interest and therefore, public character of the press is remained unchanged merely because it is owned by a private body. Thus, as held in Marsh's case, Press function though a private activity, is having public element and is also bound by the standards applicable to the State in respect of the dissemination of information and reporting. The functional duties discharged by

the Press also postulate that it discharges public function. The role of the Press is to disseminate information/knowledge to the public at large.

8.11. Under Art. 41 of Part IV of the Constitution, it is the duty of the State to endeavour within the limits of its economic capacity, for securing the right to work, education etc. The directive principles though are not enforceable, nevertheless in terms of liberty of an individual, on the right to have education, the principles have a relevance while amplifying his right under Article 21 of the Constitution. This education is not to be limited for any learning programme for employment or otherwise. Its reach is beyond learning or knowledge and is to equip him as a reasonable citizen, think ideally for him in the democratic State. The education of individual through dissemination of information and knowledge is the bedrock of democracy. The universal declaration of Human Rights in its Preamble speaks about such right available to the individual. Thus, to exercise political power in democracy, citizen must be educated to actuate his public reasoning. Thus, the media's role has to be understood on the anvil of public function to educate the citizen in terms of his political, social and economic aspiration and development. The liberty of the Press having operational freedom in terms of Art. 19(1) of Constitution must be understood with liberty with responsibility. This responsibility has to be considered from the constitutional scheme of polity and the society as envisaged under the Constitution.

8.12. In Re: Harijai Singh and Another; In Re: Vijay Kumar, AIR 1997 SC 73 : (1997) CriLJ 58 : (1996) 8 JT 332 : (1996) 6 SCALE 728 : (1996) 6 SCC 466 : (1996) 6 SCR 411 Supp : (1996) AIRSCW 4227 : (1996) 7 Supreme 293 , the Hon"ble Supreme Court held as follows:

"In an organised society, the rights of the Press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded."

8.13. In Sanjoy Narayan Editor in Chief Hindustan and Others Vs. Hon. High Court of Allahabad thr. R.G., (2012) 1 Crimes 26 : (2011) 10 JT 74 : (2012) 1 RCR(Civil) 525 : (2012) 1 RCR(Criminal) 361 : (2011) 9 SCALE 532 : (2011) 10 SCR 781 : (2011) 5 UJ 2875 : (2011) AIRSCW 5761 : (2011) 8 Supreme 486 , it was held in para. 6 as follows:

"6. The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society. The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy."

8.14. The Delhi High Court in W.P.(C). No. 12730/2005 (in *Abc v. Commissioner of Police and Others*) held that the media performs a public function and held as follows:

"In the light of the aforesaid discussion, I am of the view, that the press and the media perform a public function and discharge a public duty of: disseminating news, views and information; initiating and responding to debates; dealing with matters of current interest in the society in all fields such as politics, morality, law, crime, arts, sports, entertainment, science, philosophy, religion, etc. There is not an aspect related to human rights and human existence which is not dealt with by the press and the media.

Considering the immense impact that the press and media has over the polity, in my view, it cannot be said that they do not perform a public function or discharge a public duty, inter alia, when they perform the act of reporting news. Their functions touch the lives of practically everyone. Their reach is very deep and pervasive. In fact, the audio-visual media creates an even greater impact in today's time with deeper and wider penetration all across the State. They command immense power of making, moulding, sustaining or even changing public opinion. The functions performed by the press and media are recognised by the State which, consequently, accords various rights and privileges to them."

8.15. In *Judicial Review of Administrative Action* (5th edition) by de Smith, Woolf and Jowell in Chapter 3, para. 024 it is stated on public function as follows:

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

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

as capable of abusing their powers as is Government."

8.16. The State function is essentially understood to act for collective good of the Society in common, in the sphere of political, social, economical activities of the people comprised therein. Public function is discharge of duties to achieve those aspirations of the State. The State control is the element in such function. However, due to expansion of the State activities in modern State, the private function also swaps such power to have impact upon the public in general. The function of the Press is one among them. The Press functions for collective benefit of the public. The reporting of information and circulation of ideas through Press thus, have the public element.

9. Freedom of Press in comparison with the freedom of individual and limitation of freedom of Press under the Constitution.

9.1. The Constitution is the result of collective "will" of the people to create a legal system with the principles of definite character to regulate themselves. The fundamental values of the Constitution must embrace their conduct in general and collectively, though individual still may have discord. This collective regulation must bind them to retain the collectivity. The public function in the State is therefore, essential to sustain this collectivity for common good. A legal system is understood as a coercive order to regulate the conduct of subjects. The public functionary is a protector and keeper of such order.

9.2. There are two primordial freedom with the individual. These are freedom of idea or thought and freedom of expression. These freedom is inherent and inalienable right with the individual. The Constitution of India also categorizes fundamental freedom of its citizen under Art. 19(1). The Press is also having same freedom as available to the individual. Though seemingly individual freedom and freedom of Press appears to be one and the same, it has a significant difference while such freedom is practised. Art. 19(2) sets out area where individual liberty could be restricted. This restriction is in the interest of the State based on State's security, public order, social order; to maintain friendly relationship with foreign States etc. This restriction are ideals and reasons on which freedom of citizen is regulated. Although it reflects enabling power to restrict freedom of individual, it nevertheless forms the very ideal in the legal order in public governance. An individual has freedom to think in terms of his aspiration unless his aspiration confronts with any positive law of the State as framed or enacted under Article 19(2) of the Constitution. His ideas and thoughts even if it is in not conformity with the constitutional values, remain unfettered unless it is encroached upon any area restricted in terms of Art. 19(2) of the Constitution (see S. 153A of IPC, Unlawful Activities (Prevention) Act, 1967). However, Press has no such freedom. The liberty of the Press is to disseminate information or idea in circulation. Since it is public function, it has bounden duty and responsibility to discharge its functions in conformity with the constitutional values and ideals, and without any repugnancy to principles under Art. 19(2) of the Constitution. Therefore, Freedom of Press must take into account, values of

constitutional polity as envisaged under the constitution while discharging its function as like any other public functionary under the Constitution. The keeper of such values cannot denounce those values as the same would be repugnant to the responsibility attached to the very nature of the public function being discharged by them. Thus, the Press has inherent limitation on their freedom based on the criteria of restriction under Article 19(2) of the Constitution.

9.3. In *Samuel Roth v. United States of America* [354 US 476, 1 L.ed 2d 1498, 77 S Ct 1304 - Nos. 582 and 61] , the Hon"ble Supreme Court of the United States opined as follows:

"All ideas having even the slightest social importance-unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-have the full protection of the constitutional guaranties of free speech and press, unless excludable because they encroach upon the limited area of more important interests."

(emphasis supplied)

9.4. In a recent judgment of the Hon"ble Supreme Court in *Devidas Ramachandra Tuljapurkar Vs. State of Maharashtra and Others* AIR 2015 SC 2612 : (2015) 3 AKR 433 : (2015) 90 ALLCC 601 : (2015) 3 BomCR(Cri) 1 : (2015) 2 CCR 464 : (2015) 3 MLJ(Cri) 51 : (2015) 2 NCC 299 : (2015) 6 SCALE 356 : (2015) 6 SCC 1

"The words, freedom of speech and expression find place in the association words "liberty of thought, expression, belief, faith and worship", which form a part of the Preamble of the Constitution. Preamble has its own sanctity and the said concepts have been enshrined in the Preamble. There can be no two opinions that one can express his views freely about a historically respected personality showing his disagreement, dissent, criticism, non-acceptance or critical evaluation. Freedom of speech and expression has to be given a broad canvas, but it has to have inherent limitations which are permissible within the constitutional parameters. We have already opined that freedom of speech and expression as enshrined under Article 19(1)(a) of the Constitution is not absolute in view of Article 19(2) of the Constitution. We reiterate the said right is a right of great value and transcends and with the passage of time and growth of culture, it has to pave the path of ascendancy, but it cannot be put in the compartment of absoluteness. There is constitutional limitation attached to it."

## 10. Secularism under Constitution and Press

10.1. The Preamble of the Constitution was amended by the 42nd Amendment 1976 to include secularism.

10.2. The secularism is not a mere ideal in the legal order enshrined under the Constitution but the very fundamental principle governing Indian polity. Secularism has a different connotation in each Country. In Indian context, while upholding freedom of religion, State limits its control to the extent, as provided

under the Constitution particularly under Art. 25 of the Constitution. The salient feature of Indian Constitution is that the State will not identify itself or will be controlled by particular religion though, vast majority of Indian citizens is deeply enmeshed in religion and custom. The basic idea of secularism as propounded in the Indian Constitution is to retain the characteristics of heterogeneous society for the common good. It has also provided measures to uplift those communities identified as backward or minority to rise in par with majority or those with advantage.

10.3. The Hon<sup>ble</sup> Supreme Court in *S.R. Bommai and others Vs. Union of India and others etc. etc.*, AIR 1994 SC 1918 : (1994) 2 JT 215 : (1994) 2 SCALE 37 : (1994) 3 SCC 1 : (1994) 2 SCR 644 held as follows in para 28:

"28. Notwithstanding the fact that the words "Socialist", and "Secular" were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our Constitutional philosophy. The term "secular" has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit."

10.4. The principle object of politics and the object of religion are different. Indian Constitution enjoins citizens to promote harmony and spirit of common brotherhood among all the people of India transcending religious, linguistic and regional or sectional diversity (Art. 51A). This value is the essence of every major religion in the world. In Durga Das Basu's Commentary on the Constitution of India, 8th edition in volume (1) it was observed as follows:

"No sane man would question the proposition that the objects of religion and politics are different and that they should not be mixed up. Obviously, the cause of both will be ruined if the one is used for achieving the purposes of the other. It may also be conceded that if "secularism" be a basic feature of the Constitution, it would be impaired if the freedom of religion is subverted to achieve political purposes."

10.5. Essence of being religious is struggle for humanity and not to work against humanity. Thus, a religion can be the medium of emancipation of the people to work in tandem with polity but not polity in tandem with religion. Every religion in India could work in collaboration with one another for common good of all under the polity and not the religion being used by the polity for the purpose of polity.

10.6. In *Spirit of Laws*, Volume 1, by Baron De Montesquieu at Book V, Chapter II states on what is meant by Virtue in a "political state", and adds as follows:

"Virtue in a republic is a most simple thing; it is a love of the republic; it is a sensation, and not a consequence of acquired knowledge: a sensation, that may be felt by the meanest as well as by the highest person in the state. . . . ."

The love of our Country is conducive to a purity of morals, and the latter is again

conducive to the former. The less we are able to satisfy our private passions, the more we abandon ourselves to those of a general nature. .... " "

In fact, the essence of religion is to promote those values. Thus, religion can become conducive in democratic State; if religion is used for collective good of all.

10.7. The major religions in India are not averse to secularism as a concept. In fact, religion promotes such concept. Raja Dharma, the polity governed in ancient India promoted secularism. In the book "Raja Dharma with lessons on Raja-neeti" by the former Chief Justice of Punjab and Haryana High Court, Justice Dr. M. Rama Jois, in page 16 illustrates thus:

"Narada Smriti vide Dharmakosha, P. 870...

King should afford protection to compacts of association of believers of veda (Naigamas) as also of disbeliever in veda (Pashandis) and of others."

Islam is also one of the earliest proponents of secularism. The Madina Accord entered by the Prophet Mohammed with Jews is the example of secular polity accepted by the Islam for common good of Muslims and Jews in general in plural society. The Jews were given the right of religious freedom along with Muslims in the Accord apart from promoting measures for common security of all. Thus, secularism as ideal is the religious concept itself.

10.8. The Indian Press has to maintain secular credential while discharging public function. Their actions must be in conformity with secular values of the State as envisaged in the Constitution. Any negative approach by Press denouncing fundamental constitutional values such as secularism will have a cascading effect on public reasoning to impair the collectivity, integrity and unity of the nation. The registration under the PRB Act 1867 must be exercised by the Press for the good governance envisaged under the Constitution. Press has to strive for participation of average or ordinary citizen in democratic process with the aim to create a responsibility on them to maintain democratic and constitutional values of State polity. Media or Press must be able to promote such values unregulated with the above objectives. However, their freedom must be stopped when it indulges in polarisation of freedom of thought of citizen on religious line or communal line which is anti-thesis to social or political ethos of the society intended to be created under the Constitution. Any attempt on the part of the Press to divide the people and country on the line of religious or communal hostility will have to be curbed by any responsible Government.

10.9. The Press Council of India have no teeth to tackle issues affecting security of the State or unity or integrity of the State. The regulatory mechanism under the PCI Act is only with the intent to regulate standards of newspapers in India. The very challenge of the Press against the security, unity and integrity of India is to be dealt with based on the registration of the Press of the PRB Act 1867. The power to register includes, power to de-register. Therefore, in appropriate circumstances if Press function pose threat to State security, unity and integrity,

necessarily sufficient power is vested with the registering authority to de-register the Press.

11. Test for classifying freedom of Press for the purpose of control and action.

11.1. The freedom of Press as has been noted is the paramount in public governance in democratic State. Voicing for the deprived, exploited marginalised people, who may be identifiable collectively as a caste, linguistic or belonging to a particular community or religion is not anathema to the constitutional values. Essence of expression must be with an objective to accommodate their need or right within the Scheme of Constitution. Having plural voices in democracy is conducive to democratic and polity itself. Therefore, any attempt of the Press portraying the voice of the people for their upliftment or emancipation cannot be decried as a foul against the State to deny the constitutional protection of free speech and expression. The Press has full freedom to criticize Governmental policy and decision without any fear or restraint.

11.2. The American Courts particularly the Supreme Court of the United States have developed three concepts veering around freedom of speech and expression. These are advocacy, discussion and incitement.

11.3. In *Whitney v. California* [274 US 357 (1927)], the Supreme Court opined, while upholding individual liberty to advocate, as follows:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

11.4. In *Benjamin Gitlow v. People of the State of New York* [268 US 652 1925] the Supreme Court of the United States held as follows:

"The advocacy for the purpose of bringing about the destruction of organised

parliamentary government, of mass industrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily implies the use of force and violence, and in its essential nature is inherently unlawful in a constitutional government of law and order.

The freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom."

11.5. In *Arthur Terminiello's* case (supra) [337 US 1-37] the Hon<sup>ble</sup> Supreme Court of the United States held as follows:

"Breach of peace; attacks on religious or racial groups.

While the Supreme Court, as a matter of principle, has recognised that the right of free speech does not render immune utterances tending to incite an immediate breach of the peace or riot, particularly, where made for the purpose of attacking racial and religious groups, nevertheless attacks of this kind have been held protected by the right of free speech, in the absence of a showing that they produced a clear and present danger "to a substantial interest of the state," or of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest, it being not sufficient, at least in the opinion of a majority of the Court, that the utterances result in disturbances of public order by an angry and turbulent crowd which the police is unable to prevent."

11.6. The touchstone to control, restrict and prevent freedom as provided under Art. 19(1) are referred in Art. 19(2) of the Constitution which are threat of security to the State, public order, integrity and unity of India decency or morality of friendly relation with Foreign States etc. The concept of advocacy, discussion and incitement has to be adjudged in the light of ground for restriction under Art. 19(2) of the Constitution. The Hon<sup>ble</sup> Supreme Court in the recent judgment, *Shreya Singhal Vs. Union of India* (UOI)AIR 2015 SC 1523 : (2015) 2 CompLJ 143 : (2015) 2 RCR(Criminal) 403 : (2015) 4 SCALE 1 : (2015) 5 SCC 1 after observing persuasive value of American decision, held as follows:

"13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations

with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

11.7. In *Romesh Thappar Vs. The State of Madras*, AIR 1950 SC 124 : (1950) CriLJ 1514 : (1950) 1 SCR 594 public order is defined as an expression of wide connotation and signifies state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established.

11.8. In *Arun Ghosh Vs. State of West Bengal*, AIR 1970 SC 1228 : (1970) CriLJ 1136 : (1970) 1 SCC 98 : (1970) 1 SCC(Cri) 67 : (1970) 3 SCR 288, it has been held that if a thing disturbs the current of the life of the community, and does not merely affect an individual, it would amount to disturbance of the public order.

11.9. In the context of Press freedom, what could be the prohibited line for the Press? A Press can advocate presidential form of system in India, instead of Parliamentary system. Though this may appear, is against the very basic structure of the Indian Constitution, it will not amount to threat to the State security or results in public order. However, a Press cannot advocate or incite public for control of the State by a particular religion or by use of theocracy in the governance. This would necessarily pose threat to the unity and integrity of the country which composed of plural religious society or communities. An advocacy or incitement has to be differentiated from discussion. A discussion, in normal course is a deliberation of issues among public. A discussion normally cannot have any impact upon the security of the State or Unity and integrity of the State or also of public order. However, advocacy or incitement, necessarily fall within the prohibited line. The objective line of test is based on the purpose of reporting by the Press. Any distorted version with the intention to polarise people on communal line, certainly would fall within the prohibited line. The proximate relationship between advocacy or incitement and threat caused to the unity and integrity of the Nation or security of the State or public order or decency or morality and other areas referred in Article 19 (2), is the gauge to restrict freedom of speech and of the Press. If security of India and sovereignty and integrity of India or friendly relationship with foreign state is imminent, necessarily, it warrants urgent action to deny the very right to function as a Press based on the registration. It all depends upon the assessment of the dissemination of information and ideas reported for such action. In the matter relating to the public order or decency or morality, it is also open for the State to regulate activity to remove the evil. As has been noted it is all for the State to adjudge after analysing the function of the Press.

11.10. In *Romesh Thappar Vs. The State of Madras*, AIR 1950 SC 124 : (1950) CriLJ 1514 : (1950) 1 SCR 594 the Hon<sup>ble</sup> Supreme Court had reiterated the scope of restriction under Art. 19(1)(a) based on Art. 19(2) as follows:

"Nothing less than serious and aggravated forms of public disorder, endangering

the foundations of the state or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression conferred by Art. 19(1) (a). . . . . "

12. Scope of judicial review in State's measures to regulate freedom of Press for security:

12.1. Administrative action of the State in dealing with security measures often perplexed the scope of exercise of judicial review. The standards of review in reviewing the decision of the Government in security related issues must be placed at different pedestal by the Courts. The Courts have to be cautious by applying normal test like unreasonableness, proportionality, secondary review or strict scrutiny in the matters reviewing decisions of security of the Country.

12.2. The legitimate object of restriction of freedom of Press must be with a view to protect substantial interest of the State by resorting to any measures or any criteria as prescribed under Art. 19(2) of the Constitution. The very foundation of civil society in a State is to secure safety of the people composed in it. The Government is the guardian of such public safety. The measures as contemplated under Art. 19(2) must be in relation to protect the safety of the people and as a measure to preventive measures to protect the people. It is to be noted that these measures as provided under Article 19(2) are in fact, to prevent threat to the organized life to the community of the State at large and not as a mere tool to the law and order exercised by the Government in routine way. The Hon'ble Supreme Court while dealing with constitutional validity of various provisions of the Prevention of Terrorist Act, 2002 in peoples People's Union for Civil Liberties and Another Vs. Union of India (UOI), AIR 2004 SC 456 : (2004) 1 CTC 241 : (2003) 10 JT 70 : (2003) 10 SCALE 96 : (2004) 9 SCC 580 held as follows:

"12. Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environments for terrorism and also leading the struggle against terrorism. Anti-terrorism law is not only a penal statute but also focuses on pre-emptive rather than defensive State action..... "

12.3. The most of the measures taken by the Government are therefore, as a preventive measure to avert possible threat to the life of the citizen. Any threat to the security, unity and integrity of the Nation, necessarily, will have ramification on the life of the people. Therefore, the Courts particularly in UK have taken an approach to give respect to Governmental wisdom in dealing with measures for National security, unity and integrity of the Country.

12.4. In A and others v. Secretary for the Home Department [(2004) UKHL 56] in page 85 it is noted as follows:

"The Government, democratically accountable to Parliament, is responsible for the protection of the public; assessment of the risk to the public and the

appropriate formulation and implementation of the protective measures are, on grounds of political legitimacy, primarily for the Government and Parliament. . . . . "

It is further held as follows:

"It is not for the court to substitute its view for that of the Government as to the effective measures to be taken, and the Court of Appeal were correct not to disturb the commission's finding of fact that the measures did not exceed what was strictly required by the exigencies of the situation. . . . . "

12.5. House of Lords in Secretary of State for the Home Department v. Rehman [(2001) UKHL 47] unanimously upheld the decision of the Secretary of the State to deport a Pakistani-born Imam because he was involved in terrorist activities in India. The House of Lords was of the view that even if his activities found no threat to National security, "the cost of failure can be high" and further held that "this seems to me to underline the need for the judicial arm of the Government to respect the decision of the members of the Crown on the question whether support for terrorist activities in a foreign country constitutes a threat to National security.

12.6. In Brind and others v. Secretary of State for the Home Department [1991 (1) All ER 720], the issue before the House of Lords was in relation to the direction of the Home Secretary to the Broadcasting Authorities prohibiting broadcast of direct statement of proscribed Northern Ireland organizations in the light of the European Convention on Human Rights, Lord Bridge of Harwich gave an opinion as follows:

" . . . . . The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on a material before him, could reasonably make that primary judgment.

..... In any civilized and law-abiding society the defeat of the terrorist is a public interest of the first importance. That some restriction on the freedom of the terrorist and his supporters to propagate his cause may well be justified in support of that public interest is a proposition which I apprehend the appellants hardly dispute. Their real case is that they, in the exercise of their editorial judgment, may and must be trusted to ensure that the broadcasting media are not used in such a way as will afford any encouragement or support to terrorism and that any interference with that editorial judgment is necessarily an unjustifiable restriction on the right to freedom of expression. Accepting, as I do, their complete good faith, I nevertheless cannot accept this proposition. The Secretary of State, for the reasons he made so clear in Parliament, decided that it was necessary to deny to the terrorist and his supporters the opportunity to speak directly to the public through the most influential of all the media of

communication and that this justified some interference with editorial freedom. I do not see how this judgment can be categorised as unreasonable. . . . . "

Further Lord Lowry gave opinion as follows:

"It finally occurs to me that there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach. To introduce an intermediate area of deliberation for the court seems scarcely a practical idea, quite apart from the other disadvantages by which, in my opinion, such a course would be attended."

House of Lords in principle has adopted a "deferential approach" to executive wisdom in the dealing with review of National security and terrorism.

12.7. There are two key issues that arise in the context of national security, and public order:

(a) The right of victim or; possible victim.

(b) The right of the accused.

The Governmental activities aiming to take measures for preventing or providing security have to be viewed as protective measures. In our Country, individuals' rights on liberty are measured on the line of constitutional protection and therefore, any action of the State has to be tested on the anvil of reasonable restriction under Art. 19(2) and 21 of the Constitution. The actual crime has to be dealt with in accordance with the procedure of ordinary law. It is only when such procedure is violated it gives room for complaint on violation of individual liberty.

12.8. While protecting the rights of an accused, equal importance has to be given to the rights of victim or possible victim. The criteria of restriction under Art. 19(2) of the Constitution ensures security in the wake of fundamental rights of those possible victims.

12.9. Dr.Rajan Varghese in his article on the The Relevance of "Wednesbury Unreasonableness" in the Light of "Proportionality" as a Ground for Judicial Review (published in the Indian journal of Public Administration Vol. LX, No. 1) stated as follows:

"The restriction by an administrative action and fundamental right of an individual should be balanced and should include a clear proportionality between the parties. In short, the gain or loss to the community which is necessary for public interest and loss and gains to individual should be balanced."

Learned author also relied and referred on EU Law Craig and G. de Burca (5th edition) Oxford Press (2011) in which mentions following as criteria of judicial review:

a) There must be a legitimate aim for measure.

- b) The measure must be suitable to achieve the aims, (potentially with requirement of evidence to show that it will have that effect)
- c) The measure must be necessary to achieve the aims, that there cannot be any less onerous way of doing it and;
- d) The measure must be reasonable, considering the competency interest of different groups at hand.

J. Jowell in "Beyond the Rule of Law: Towards Constitutional Judicial Review" has propounded proportionality test as follows:

- "(1) Did the action pursue a legitimate aim?
- (2) Were the means employed suitable to achieve that aim?
- (3) Could the aim have been achieved by a less restrictive alternative?
- (4) Is the derogation justified overall in the interests of a democratic society?"

12.10. Thus, the scope of judicial review must be narrowed down to find out whether the State action is consistent with the objectives of criteria under Art. 19(2) and materials or evidence relied on by the State are having proximate relation to protect the substantial interest of the State in relation to security, unity and integrity or public order or any other criteria as the case may be under Art. 19(2) of the Constitution. If the State is able to show the proximate relation of materials relied on substantial interest of the State, it is not for the Court to assess "reasonableness" of evidence or materials. The wisdom of the Home Department or any Authority analyzing such materials cannot be subjected to judicial scrutiny for reasonableness. The words of Brennan J. of the United States Supreme Court in the decision of *Baker v. Carr* [369 US 186 (1962)] are pertinent in this regard:

" ..... the courts are not fit instruments of decisions where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade."

How to manage the security of the State is the wisdom of the Government. However, clear distinction has to be made by the State based on the materials relied on to distinguish with the different categories of restriction to which it may fall under Art. 19(2) of the Constitution.

### 13. Consideration of issues in this matter:

13.1. The Government of Kerala has accorded permission for publication of Government advertisements to Thejass as seen from Ext. P6 dated 11/6/2007. The Government also prescribed the rate to be given to the newspaper. It seems the Government denied permission since 15/05/2010 without assigning any reason. The petitioner seems sought information under Right to Information Act regarding denial. Petitioner also had sent a representation to the Government on

23/07/2007. The petitioner thereafter received a reply stating that there was ban on giving advertisement to Thejass on the basis of communication from Ministry of Home Affairs, Government of India. Petitioner thereafter filed a writ petition, W.P.(C). No. 29142/2010. This was withdrawn with a permission to pursue the matter with the Government by a representation. Thereafter, it seems petitioner was given advertisement from 8/9/2011 till 25/8/2012. It was also stopped for the period from 26/8/12 to 28/12/2012. Again it was resumed from 29/12/2012 till 19/3/2013. It is thereafter from 20/03/2013, the advertisements have been denied to the petitioner.

13.2. It seems from the pleadings that denial was on the ground of extremist ideology of threatening National security, unity and integrity of the State, which have been first time communicated to the petitioner through the counter affidavit filed in this case. In the reply filed by the petitioner, various counter allegations have been refuted and rebutted. It is also denied that they have any affiliation with PFI. Essentially, what is narrated in the reply is that dissemination of the information in the newspaper by way of various reports were true reporting of the news, incidents and discussions of certain matters. It appears the petitioner is countering the State version by contending that the information was of true and frank reporting.

13.3. There are two points essentially to be considered in relation to the issue based on the facts and in the light of law in the afore-noted paragraph. Point No. (i) is that by the decision of the Government, the Government is justified by substantial norm in denying the advertisement and point No. (ii) is that whether due procedure has been followed while denying the advertisement.

13.4. It is settled principles of law that even in contractual matters, the State action must conform to the principles of fairness. The Government applied substantive norms under Art. 19(2) to deny the advertisement. Whether the Government is justified in applying substantive norms is a different issue. The Government, necessarily, can apply restriction only when there are substantial grounds as contemplated under Art. 19(2) to deny the advertisement. The materials before this Court, through the averments in the counter affidavit, cannot be taken as a ground for this Court to find that substantive norms have been applied. The application of substantive norms will normally arise when there are definite procedures as contemplated under law to apply substantive norms. It is only when such exercise is completed, normally, the Court would dwell upon exercising their power of judicial review to find out whether substantive norms have been correctly applied or not. This Court, considering the nature of the allegations and the manner in which decision has been taken, is of the view that judicial review by the Court is premature at this stage, obviously, for the reason that the petitioner's case has not been adverted by procedural due process by the Government.

13.5. The action initiated against the petitioner for denying advertisement is based on the ground that dissemination of information through the newspaper

pose threat to the National security, unity and integrity and public order. The denial is not merely related to a contractual sphere of function of Government to demand pre-audience when Government denied the contract. This is essentially based on the parameters under Art. 19(2) of the Constitution. In the matter relating to national security, when any right is infringed, no one can demand pre-audience before taking an action. The exercise now being done by the Government is in fact to secure the measures in terms of security, unity and integrity and public order of the State though it appears that denial was manifested by refusing to award contract. In those circumstances, I am of the view that the Rule of observance of right of pre-audience which is ordinarily demanded when a right is negated would not apply. In this matter, it can be conceived that the denial was purely as a measure undertaken by the State not to encourage a newspaper which poses threat to the National security, unity and integrity and public order. The Government in its wisdom, thought that if advertisement is given it would amount to promotion of anti-National activities. Thus, observance of the rule of natural justice for pre-audience cannot be demanded by the petitioner.

13.6. However, due procedure has a different connotation when substantive scrutiny is made based on the materials relied on to take action even based on the grounds referred under Art. 19(2) of the Constitution. It is to be noted that the Directorate of Advertising and Visual Publicity, Ministry of Information Broadcasting, issued an advertisement policy in respect of advertisements to be published by various Ministries and Governmental organisations of India. By the above policy, the Union Government has taken a decision to avoid releasing advertisements to newspapers/journals which incite or tend to incite communal passion, preach violence, offend sovereignty and integrity of India or socially accepted norms of public decency and behavior. The Government undoubtedly have enough power to regulate freedom of Press. There are large number of newspapers which have got registration and being published from the State. The Government of India has a definite policy to deal with similar issues, in a sense that all the publishers would have to satisfy the norms as laid down in the policy. This is essentially required when there are numerous players operating and the same shall apply equally to all of them. However, nothing is seen from the records as to whether the State has adopted any such policy applicable to all newspapers, though such policy is reflected from the counter affidavit of the Government. Even in the absence of such a policy, the Government is entitled to evolve such norms. But that must be applied in an objective manner to all whom it is intended to govern. Otherwise, it would result in arbitrariness and selective discrimination to deny advertisement. It is a requirement to weed out arbitrariness to formulate a definite procedure by the Government to have a substantive scrutiny of the information provided in the newspaper to deny the advertisement. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621, the Hon'ble Supreme Court has cautioned about unguided and unrestricted powers in an authority to

affect the rights of a person without laying down any policy or principle which is to guide the authority, in exercise of the power. Thus, this Court is of the view that in the absence of constitution of any mechanism by way of formation of a Committee to assess and evaluate the information and ideas provided in the newspaper, the decision taken to deny advertisement is unjustifiable.

13.7. This Court is not expressing anything on the merit in relation to the materials relied on by the Government in the counter affidavit. It is for the committee to have a substantive scrutiny of the materials relied on to deny the advertisement or to take an action against the petitioner. This Court is of the view that the Government shall constitute a committee to evaluate and assess the informations provided in the newspaper taking into account of the numerous players in the public domain. The Committee, if possible, shall be headed by the Home Secretary of the State.

#### 14. Reliefs and directions:

In the light of the discussions as above, the right of the petitioner to have advertisement in Thejass, would depend upon the scrutiny by the committee to be constituted by the Government.

ii. The Government shall constitute the Committee within three months and shall cause the Committee to take a decision within a further period of three months.

iii The Government shall also deal with the powers of the Committee and its composition for its future function in terms of the observations made as above.

The writ petition is disposed of as above. No costs.