REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 889 of 2007

Arup Bhuyan .. Appellant

Versus

State of Assam & Anr. .. Respondents

With

Review Petition (Criminal) No. 417/2011 In Criminal Appeal No. 1383/2007

With

Review Petition (Criminal) No. 426/2011 In Criminal Appeal No. 889/2007

With

Special Leave Petition (Crl) No. 5971/2019

With

Special Leave Petition (Crl) No. 5964/2019

With

Criminal Appeal No. 1383/2007

With

SLP(Crl.)...CRLMP No. 16637/2014

With

Special Leave Petition (Crl.) No. 5643/2019

With

Special Leave Petition (Crl.) No. 6270/2019

J U D G M E N T

M. R. Shah, J.

1. Present reference to the larger Bench is made against the judgment and order in the case of **Arup Bhuyan vs. Union of India, (2011) 3 SCC 377** as well as **State of Kerala vs. Raneef, (2011) 1 SCC 784**, pursuant to the order passed by this Court dated 26.08.2014, reported as **(2015) 12 SCC 702.**

Background of the Reference

2. That the Division Bench of this Court in the case of **Raneef (supra)** whilst relying upon numerous American decisions concerning freedom of speech and position on

membership of banned organizations rejected the doctrine of "guilt by association" and observed that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence. In paragraphs 10 to 14 this Court in the case of **Raneef (supra)** observed and held as under:

> "10.) As regards the allegation that the respondent belongs to the PFI, it is true that it has been held in Redaul Husain Khan vs. National Investigation Agency 2010 (1) SCC 521 that merely because an organization has not been declared as an `unlawful association' it cannot be said that the said organization could not have indulged in terrorist activities. However, in our opinion the said decision is distinguishable as in that case the accused was sending money to an extremist organization for purchasing arms and ammunition. That is not the allegation in the present case.
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> The decision in State of Maharashtra vs. Dhanendra Shriram Bhurle 2009(11) SCC 541 is also distinguishable because good reasons have been given in the present case by the High Court for granting bail to the respondent. In the present case there is no evidence as yet to prove that the P.F.I. is a terrorist organization, and hence the respondent cannot be penalized merely for belonging to the P.F.I. Moreover, even assuming that the P.F.I. is an illegal organization, we have yet to consider whether all members of

the organization can be automatically held to be guilty.

11. In Scales vs. United States 367 U.S. 203 Mr. Justice Harlan of the U.S. Supreme Court while dealing with the membership clause in the McCarran Act, 1950 distinguished between active `knowing' membership and passive, merely nominal membership in a subversive organization, and observed :

"The clause does not make criminal all association with an organization which has been shown to engage in illegal activity. A person may be foolish, deluded, or perhaps mere optimistic, but he is not by this statute made a criminal. There must be clear proof that the defendant specifically intends to accomplish the aims of the organization by resort to violence."

12. In Elfbrandt vs. Russell 384 US 17-19 (1966) Justice Douglas of the U.S. Supreme Court speaking for the majority observed :

"Those who join an organization but do not share its unlawful purpose and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. A law which applies to membership without the `specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of `guilt by association' which has no place here."

13. In Joint Anti-Fascist Refugee Committee vs. McGrath 341 US 123 at 174 (1951) Mr. Justice Douglas of the U.S. Supreme Court observed :

"In days of great tension when feelings run high, it is a temptation to take shortcuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive

> influence of our own design that destroys us from within."
>
> 14. We respectfully agree with the above decisions of the U.S. Supreme Court, and are of the opinion that they apply in our country too. We are living in a democracy, and the above observations apply to all democracies."

2.1 That thereafter the Division Bench of this Court in another decision in the case of **Arup Bhuyan (supra)** whist relying upon **Raneef (supra)** and relying upon the same American doctrines which were earlier considered in the case of **Raneef (supra)** has observed in paragraph 12 as under:

> "We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the U.S. Constitution. In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence. Hence, the conviction of the appellant under Section 3(5) of the TADA is also not sustainable."

2.2 At this stage it is required to be noted that at the time when **Raneef (supra)** and **Arup Bhuyan (Supra)** were decided neither Section 10(i) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the 'UAPA Act, 1967') was under challenge and/or the constitutionality of the said provision was under challenge nor even the Union of India was a party to the said proceedings and the Division Benches of the Court in the aforesaid two decisions made observations on Section 10(a)(i) of the UAPA Act, 1967 without giving any opportunity to the Union of India. Therefore, the Union of India filed the applications seeking permission to file a review petition on the ground that the interpretation made by this Court in the aforesaid two decisions would be prejudicial to their interests and therefore, the Union of India had a right to be heard. The State of Assam also preferred the review petitions.

2.3 Having regard to the important issue raised by the learned Solicitor General and the Senior Counsel for the State of Assam, by order dated 26.08.2014 reported in **(2015) 12**

SCC 702 the matter is referred to the larger Bench. While referring the matter to the larger Bench this Court noted the submissions made by the learned Solicitor General in paragraphs 4 to 7 and 10 to 11 as under:

> "4.Mr. Ranjit Kumar, learned Solicitor General appearing for the Union of India, has submitted that in the case of Arup Bhuyan vs. State of Assam, 2011 (3) SCC 377, this Court has read down the provision to the detriment of the interest of the Union of India when it was not a party before it. He has also invited our attention to the decision in Sri Indra Das vs. State of Assam 2011 (3) SCC 380. In Arup Bhuyan's case as well as in the case Sri Indra Das, the two-Judge Bench has referred to many authorities of Supreme Court of United States of America and thereafter quoted a passage from Kedar Nath vs. State of Bihar AIR 1962 SC 955 and relied on State of Kerala vs. Raneef (2011) 1 SCC 784 and eventually opined thus:
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> "27. We may also consider the legal position, as it should emerge, assuming that the main s. 124A is capable of being construed in the literal sense in which the Judicial Committee of the Privy Council has construed it in the cases referred to above. On that assumption, it is not open to this Court to construe the section is such a way as to avoid the alleged unconstitutionality by limiting the application of the section in the way in which the Federal Court intended to apply it ? In our opinion, there are decisions of this Court which amply justify our taking that view of the legal position. This Court, in the case of R.M.D. Chamarbaugwalla v. The Union of India (1) has examined in detail the several decisions of this

Court, as also of the Courts in America and Australia. After examining those decisions, this Court came to the conclusion that if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the impugned section or Act, the Court will take that view of the matter and limit its application accordingly, in preference to the view which would make it unconstitutional on another view of the interpretation of the words in question.

In that case, the Court had to choose between a definition of the expression 'Prize Competitions" as limited to those competitions which were of a gambling character and those which were not. The Court chose the former interpretation which made the rest of the provisions of the Act, Prize Competitions Act (XLII of 1955), with particular reference to ss. 4 and 5 of the Act and Rules 11 and 12 framed thereunder, valid. The Court held that the penalty attached only to those competitions which involved the element of gambling and those competitions in which success depended to a substantial degree on skill were held to be out of the purview of the Act.

The ratio decidendi in that case, in our opinion, applied to the case in hand in so far as we propose to limit its operation only to such activities as come within the ambit of the observations of the Federal Court, that is to say, activities involving incitement to violence or intention or tendency to create public disorder or cause disturbance of public peace."

5. It is submitted by Mr. Ranjit Kumar that such reading down of a provision should not have been done without impleading the Union of India as a party and moreover, when the constitutional validity was not called in question. He has drawn

our attention to Section 10 of the Unlawful Activities (Prevention) Act, 1967. It reads as follows:

"[10. Penalty for being member of an unlawful association, etc.- Where an association is declared unlawful by a notification issued under section 3 which has become effective under sub-section (3) of that section,-

(a) a person, who

(i) is and continues to be a member of such association; or

(ii) takes part in meetings of such association; or

(iii) contributes to, or receives or solicits any contribution for the purpose of, such association; or

(iv) in any way assists the operations of such association, shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine; and

(b) a person, who is or continues to be a member of such association, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, (i) and if such act has resulted in the death of any person, shall be punishable with death or imprisonment for life, and shall also be liable to fine;

(ii) in any other case, shall be punishable with imprisonment for a term which shall not be

less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]"

6. The aforesaid provision was inserted by way of amendment with effect from 21/09/2004. Relying upon the said provision, it is contended by him that if the view expressed in Arup Bhuyan (supra) and Sri Indra Das (supra) is allowed to remain in the field various laws in other enactments would be affected. It is further urged by him that the Court has erroneously referred to its earlier judgment in Raneef's case wherein the basic fact was different, namely, the Social Democratic Party of India (SDPI) was not a banned organization. The learned Solicitor General would impress upon us that once an organization is banned, Section 10 of the 1967 Act would come into play. Learned Solicitor General has also drawn our attention to certain paragraphs in Raneef's case wherein it has been opined even assuming the PFI is an illegal organization, yet it remains to be considered whether all the members of the Organization can be categorically held to be guilty. It is put forth by him that the said judgment did not affect the provisions in other enactments inasmuch as the PFI was not a banned Organization, but after the decisions in Arup Bhuyan (supra) and Sri Indra Das (supra), the Trial Courts and the High Courts are relying on the said decisions by giving emphasis on the facet of mens rea. The submission in essence, is that had the Union of India been impleaded as a party it could have put forth its stand before the Court and then possibly such reading down of the provision would not have been required.

7. Mr. Jaideep Gupta, learned senior counsel appearing for the State of Assam, supporting the stand put forth by the Union of India has urged that if such an interpretation is allowed to stand

the terrorism would spread and it will be difficult on the part of the State to control the said menace. It is further canvassed by him that the abuse of process of law would not affect the constitutional validity and that to when it is not under assail.

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10. The crux of the matter as submitted by Mr. Ranjit Kumar, learned Solicitor General for Union of India, is that when any provision in Parliamentary legislation is read down, in the absence of Union of India it is likely to cause enormous harm to the interest of the State as in many cases certain provisions have been engrafted to protect the sovereignty and integrity of India.

11. The learned Solicitor General would contend that the authorities which have been placed reliance upon in both the judgments by the two-Judge Bench are founded on Bill of Rights which is different from Article 19 of the Constitution of India.

He has referred to Article 19(1)(c) and 19(4) of the Constitution.

Article 19(1)(c) reads as follows.

"19(1)(c) to form associations or unions;"

The said article is further restricted by Article 19(4) which is as follows:

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of 4 [the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the

> exercise of the right conferred by the said sub-clause."
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> Relying upon the same it is highlighted by the learned Solicitor General that the Court has not kept this aspect in view while placing heavy reliance on the foreign authorities which are fundamentally not applicable to the interpretative process of the provisions which have been enacted in consonance with the provisions of the Constitution of India.
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> Regard being had to the important issue raised by the learned Solicitor General and Mr. Jaideep Gupta, learned senior counsel for the State of Assam, we think it appropriate that the matter should be considered by a larger Bench. Let the Registry place the papers before the Hon'ble the Chief Justice of India for appropriate orders."

That is how the matter is listed before this Bench of three judges.

2.4 The short issue before the Bench is whether the judgments in **Raneef (supra)** and **Arup Bhuyan (supra),** have been correctly decided and whether "active membership" is required to be proven over and above the membership of a banned organization under the UAPA, 1967. Another issue which is required to be considered by this Bench is whether

American decisions concerning freedom of speech referred to in the case of **Raneef (supra)** to which this Court agreed could have been relied upon while considering the right to freedom of speech available under the Constitution of India more particularly Article 19(1)(c) and 19(4) of the Constitution of India? Another question which is required to be considered is whether this Court was justified in reading down of a provision (Section 10(a)(i) of the UAPA Act, 1967) without impleading the Union of India as a party and more particularly when the constitutional validity of the aforesaid provision was not called in question?

2.5 While appreciating the submissions on behalf of the respective parties on the aforesaid issues, the relevant provisions of the UAPA, 1967 are required to be referred to which are as under:

> **"Section 2 – Definitions:**
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> (1) In this Act, unless the context otherwise requires,--
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> **(a)** association means any combination or body of individuals;

(k) terrorist act has the meaning assigned to it in section 15, and the expressions terrorism and terrorist shall be construed accordingly;

(l) terrorist gang means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

(m) terrorist organisation means an organisation listed in the [9][First Schedule] or an organisation operating under the same name as an organisation so listed;

(o) unlawful activity, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),--

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;

(p) unlawful association means any association,--

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

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

Section 3 – Declaration of an association as unlawful

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

(2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary:

Provided that nothing in this sub-section shall require the Central Government to disclose any fact which it considers to be against the public interest to disclose.

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

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

(4) Every such notification shall, in addition to its publication in the Official Gazette, be published in not less than one daily newspaper having circulation in the State in which the principal office, if any, of the association affected is situated, and

shall also be served on such association in such manner as the Central Government may think fit and all or any of the following modes may be followed in effecting such service, namely:—

(a) by affixing a copy of the notification to some conspicuous part of the office, if any, of the association; or

(b) by serving a copy of the notification, where possible, on the principal office-bearers, if any, of the association; or

(c) by proclaiming by beat of drum or by means of loudspeakers, the contents of the notification in the area in which the activities of the association are ordinarily carried on; or

(d) in such other manner as may be prescribed.

Section 4 – Reference to Tribunal -

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

(2) On receipt of a reference under sub-section *(1)*, the Tribunal shall call upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association

should not be declared unlawful.

(3) After considering the cause, if any, shown by the association or the office-bearers or members thereof, the Tribunal shall hold an inquiry in the manner specified in section 9 and after calling for such further information as it may consider necessary from the Central Government or from any office-bearer or member of the association, it shall decide whether or not there is sufficient cause for declaring the association to be unlawful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under sub-section *(1)* of section 3, such order as it may deem fit either confirming the declaration made in the notification or cancelling the same.

(4) The order of the Tribunal made under sub-section *(3)* shall be published in the Official Gazette.

Section 5 – Tribunal -

(1) The Central Government may, by notification in the Official Gazette, constitute, as and when necessary, a tribunal to be known as the "Unlawful Activities (Prevention) Tribunal" consisting of one person, to be appointed by the Central Government:

Provided that no person shall be so appointed unless he is a Judge of a High Court.

(2) If, for any reason, a vacancy (other than a temporary absence) occurs in the office of the presiding officer of the Tribunal, then, the Central Government shall appoint another person in

accordance with the provisions of this section to fill the vacancy and the proceedings may be continued before the Tribunal from the stage at which the vacancy is filled.

(3) The Central Government shall make available to the Tribunal such staff as may be necessary for the discharge of its functions under this Act.

(4) All expenses incurred in connection with the Tribunal shall be defrayed out of the Consolidated Fund of India.

(5) Subject to the provisions of section 9, the Tribunal shall have power to regulate its own procedure in all matters arising out of the discharge of its functions including the place or places at which it will hold its sittings.

(6) The Tribunal shall, for the purpose of making an inquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) the summoning and enforcing the attendance of any witness and examining him on oath;

(b) the discovery and production of any document or other material object producible as evidence;

(c) the reception of evidence on affidavits;

(d) the requisitioning of any public record from any court or office;

(e) the issuing of any commission for the examination of witnesses.

(7) Any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860) and the Tribunal shall be deemed to be a civil court for the purposes of section 195 and [1] [Chapter XXVI] of the [2][Code].

Section 6 – Period of operation and cancellation of notification -

(1) Subject to the provisions of sub-section *(2)*, a notification issued under section 3 shall, if the declaration made therein is confirmed by the Tribunal by an order made under section 4, remain in force for a period of [1] [five years] from the date on which the notification becomes effective.

(2) Notwithstanding anything contained in sub-section *(1)*, the Central Government may, either on its own motion or on the application of any person aggrieved, at any time, cancel the notification issued under section 3, whether or not the declaration made therein has been confirmed by the Tribunal."

3. Shri Tushar Mehta, learned Solicitor General has also taken us to the background to the UAPA and the enactment of Article 19(1) and 19(4) of the Constitution of India vide Constitution (Sixteenth Amendment) Act, 1963. It is submitted that exception to the freedom to form associations under Article 19(1) was inserted in the form of sovereignty and integrity of India in Article 19(4), after the National

Integration Council appointed a Committee on National Integration and Regionalisation. The said committee was to look into the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. It is submitted that pursuant to the acceptance of the recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. Article 19(1)(c) and 19(4) of the Constitution of India reads as follows:

> "19.(1)(c) to form associations or unions;"
>
> The said is further restricted by Article 19(4) which is as follows:
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> 19(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."
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> Relying upon the same it is highlighted by the learned Solicitor General that the Court has not kept this aspect in view while placing heavy reliance on the foreign authorities which are fundamentally not applicable to the interpretative process of the provisions which have been enacted in consonance with the provisions of the Constitution of India."

3.1 It is submitted that in order to implement the provision of the 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament. The main objective of the UAPA is to make powers available for dealing with activities directed against the integrity and sovereignty of India. He has taken us to the preamble and the objects and reasons for enactment of the UAPA. It is submitted that to achieve the object and purpose for which the UAPA has been enacted, Section 10(a)(i) provides that where an association is declared unlawful by a notification issued under Section 3 which has become effective under sub-section (3) of that Section, a person, who is and continues to be a member of such association shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine. It is submitted that therefore so long as Section 10(a)(i) stands a person who is or continues to be a member of such association shall be liable to be punished. It is submitted that Section 10(a)(i) does not require any further overt act and/or *mens rea*. It is submitted that mere membership of a

declared unlawful association, declared unlawful under Section 3 is sufficient to warrant the prosecution and the conviction.

3.2 It is submitted that under the provisions of the UAPA, 1967 before an organization/association is declared as unlawful under Section 3 of the UAPA the procedure as required under the UAPA namely Section 3 of the UAPA is required to be followed. It is submitted that even thereafter and after any association/organization is declared as unlawful under Section 3 of the UAPA, such association which has been declared unlawful by a Notification issued under sub-section (1) of Section 3, within 30 days from the date of the publication of the notification, the Central Government is required to refer to the Tribunal for the purpose of adjudicating whether or not, there is sufficient cause for declaring the association unlawful. It is submitted that as per Section 4(2) on receipt of a reference under sub-section (1) of 4, the Tribunal shall thereafter call upon the association affected by notice in writing to show cause within

30 days from the date of the service of such notice, why the association be not declared unlawful? It is submitted that thereafter and after considering the cause, if any, shown by the association or the office-bearers or members thereof, the Tribunal is required to hold an inquiry in the manner specified in Section 9 and after calling for such further information as it may consider necessary from the Central Government or from office-bearer or member of the association, the Tribunal shall decide whether or not there is sufficient cause for declaring the association to be unlawful and thereafter may pass such order as it may deem fit either confirming the declaration made in the notification or cancelling the same. It is submitted that the order of the Tribunal made under sub-section (3) shall have to be published in the Official Gazette.

3.3 Taking us to the relevant provisions of UAPA on declaration of any organization/association as "unlawful" namely Sections 3 to 6, learned Solicitor General has submitted that from a perusal of the aforesaid

provisions/sections, it is clear that the declaration of an organization as an "unlawful organization" is not on the basis of an executive diktat. It is submitted that such designation is actually a product of a robust adversarial process wherein ample opportunity is given to the organization to appeal to the better senses of a judicially trained mind in order to justify its aims, objectives and activities being legal and not "unlawful" within the constitutional setup. It is submitted that the same must have a bearing whilst deciding any question of criminalization of "mere membership".

4. Now so far as the correctness of the observations made by this Court in the case of **Raneef (supra)** and **Arup Bhuyan (supra)** that while considering the offences under Sections 10(a)(i) the prosecution has to prove the "active membership" of any person accused of being a member of a banned organization, it is submitted that in the case of **Arup Bhuyan (supra)** this Court has just followed the observations made in the earlier decision in the case of **Raneef (supra)** in which this Court just accepted and followed the American decisions

referred to on the freedom of speech applicable in America and considering the American doctrine on freedom of speech. It is submitted that as such this Court ought not to have straight way followed and/or accepted the American doctrine on freedom of speech without taking into consideration the Constitutional provisions so far as the India is concerned, more particularly Article 19(1)(c) and 19(4) of the Constitution. It is submitted that this Court in the case of **Babulal Parate vs. State of Maharashtra, (1961) 3 SCR 423** has specifically rejected the importing of the American doctrine on freedom of speech and specifically rejected the said importing in the context of 'determining criminality' by way of two Constitution Bench judgments which have not even been considered by the learned Benches hearing the case in **Raneef (supra)** and **Arup Bhuyan (supra).** The learned Solicitor General has heavily relied upon paragraphs 23 to 28 of the decision in the case of **Babulal (supra)** and paragraphs 16 & 17 of the decision in the case of **Madhu Limaye vs. Sub-Divisional Magistrate, (1970) 3 SCC 746**.

4.1 Learned Solicitor General has also relied upon the decisions of this Court in the case of **Supdt., Central Prison vs. Dr. Ram Manohar Lohia, (1960) 2 SCR 821** (paragraphs 9 to 11) and in the case of **Ramlila Maidan Incident, In re, (2012) 5 SCC 1** on the reliance to be placed on American constitutional position in context of public order and free speech. It is submitted that in the aforesaid it is specifically observed that the American doctrine adumbrated in **Schenck** case cannot be imported or applied. It is observed that under our Constitution, this right - freedom of speech is not an absolute right but is subject to the restrictions. It is submitted that it is further observed that thus the position under our Constitution is different. It is observed by this Court in the aforesaid decisions that fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. It is submitted that it is

further observed that thus there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US Laws.

4.2 It is further submitted by the learned Solicitor General that on numerous occasions this Court declined to import the American doctrine of such subjects. Reliance is placed on the decisions of this Court in the case of **Joseph Kuruvilla Vellukunnel vs. Reserve Bank of India, 1962 Supp (3) SCR 632** (para 50 & 75); **M.C. Mehta vs. Union of India (Shriram – Oleum Gas), (1987) 1 SCC 395** (para 29); **Ashoka Kumar Thakur vs. Union of India (2008) 6 SCC 1** (para 188 to 190) and **Pathumma vs. State of Kerala, (1978) 2 SCC 1** (para 23).

4.3 Making above submissions and relying upon the above decisions, it is vehemently submitted by Shri Mehta, learned Solicitor General that therefore the American doctrine of "clear and present danger" **[Schenck vs. United States, 249 U.S. 47 (1919)]** and "imminent lawless action" [**Brandenburg**

vs. Ohio, 395 U.S. 444 (1969)] are alien to Indian constitutional law.

4.5 Making above submissions, it is submitted that the observations made by this Court in **Raneef (supra)** and **Arup Bhuyan (supra)** following and/or relying upon the American doctrines on freedom of speech may be overruled and the statutory position be reaffirmed.

5. Now so far as reading down Section 3(5) of Terrorist and Disruptive Activities (Prevention) Act, 1987, which is *pari materia* to Section 10(a)(i) of UAPA Act, 1967 and reading down the said provision to the extent by observing that mere membership of a banned organization will not make a person guilty unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence and that mere membership of a banned organization will not incriminate a person is concerned, it is vehemently submitted by Shri Tushar Mehta, learned Solicitor General that as such in absence of challenge to the relevant provisions, more particularly Section 10(a)(i) of the

UAPA, 1967, such a reading down was not permissible. It is submitted that as such in the case of **Raneef (supra)**, which has been subsequently followed in the cases of **Arup Bhuyan (supra)** and **Indra Das v. State of Assam, (2011) 3 SCC 380**, this Court was considering the bail application and the constitutional validity of Section 10(a)(i) of the UAPA Act was not under challenge.

5.1 Learned Solicitor General has relied upon the decision of this Court in the case of **Subramanian Swamy & Others v. Raju through Member, Juvenile Justice Board & Another, reported in (2014) 8 SCC 390** on as to when the power of reading down of a provision can be exercised. Reliance is placed on paragraphs 59 to 62 of the said judgment. It is submitted that therefore when language in Section 10(a)(i) of the UAPA Act is very clear and unambiguous and looking to the object and purpose for which UAPA Act was enacted and taking into consideration the plain and literal meaning of a statute and in the absence of any constitutional challenge, it was impermissible for this Court to read down the statute. It

is submitted that there was no occasion to "read down" Section 10 of the UAPA Act in absence of a constitutional challenge.

6. Shri Vinay Navare, learned Senior Counsel appearing on behalf of the State of Assam, while adopting the submissions made by Shri Tushar Mehta, learned Solicitor General, has in addition submitted that under the scheme of a statute (UAPA) every effort is made to ensure that every member of the association is made aware of the fact that such association is declared as unlawful.

6.1 It is further submitted that the language employed in Section 10 is very significant in the present context. It provides that "where an association is declared as unlawful by notification under Section 3 which has become effective under sub-section (3) of that Section." It is submitted that therefore it is only after notification under Section 3 has become effective under sub-section (3), that the latter part of that Section applies. It is submitted that language of Section 10(a)(i) is very cautiously worded – 'who is and continues to

be a member of such association'. It is submitted that so if a person 'has been' a member but does not 'continue to be' a member after declaration, that does not attract mischief under Section 10. The intention in the Section is that not only is he a member on the day when the association is declared unlawful but he continues to be a member. It is submitted that therefore a person who is a member or wishes to be a member is well aware of the fact that such an association is declared unlawful and if he still wishes to continue being a part of such an unlawful association it shows a clear and conscious intention on his part and Section 10 of the UAPA Act penalises this act of mere membership with such unlawful association.

6.2 It is further submitted that Section 38 of the UAPA Act, 1967 provides that a person who associates himself or professes to be associated with a terrorist organization with intention to further its activities commits an offence relating to the membership of a terrorist organization. It is submitted that therefore it is seen that in case of a terrorist organization

mere membership is not sufficient but there has to be an act with intention to further the activities of the terrorist organization which is not the case under Section 10 with an unlawful association.

6.3 It is submitted that there is a clear distinction between the provisions under Section 10 which punish mere membership of an unlawful association and Section 38 which do not punish passive membership with terrorist organization. It is submitted that the reason is that Section 10 has already undergone the rigours of Section 3 but Section 38 has not undergone the rigours of Section 3 and it is a delegated legislation involving inclusion of a name of an organisation in the schedule. It is submitted that even if you are a member, it gives an opportunity in Section 38 that the terrorist organization was not a terrorist organization at the time when you became a member and he is not taking part.

6.4 It is submitted that the United Liberation Front of Assam (ULFA) has been declared to be an unlawful association from time to time.

Making above submissions and relying upon the above decisions, Shri Tushar Mehta, learned Solicitor General and Shri Vinay Navare, learned Senior Counsel appearing on behalf of the State of Assam have prayed to hold that the observations/decisions of this Court in the cases of **Raneef (supra), Arup Bhuyan (supra) and Indra Das (supra)** taking the view that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence or does an act intending to create disorder or disturbance of public peace by resort to violence is not a good law, in view of the specific provision under Section 10(a)(i) of the UAPA Act, 1967, the constitutionality of which is not under challenge and even otherwise on merits also looking to the object and purpose of enacting the UAPA Act, 1967.

7. Shri Sanjay Parikh, learned Senior Counsel appearing for the applicant – People's Union for Democratic Rights has heavily relied upon the subsequent decision of this Court in the case of **Indra Das (supra)**. It is submitted that in the said

decision, after following the decisions of this Court in the cases of **Raneef (supra) and Arup Bhuyan (supra)**, this Court has rightly interpreted Section 3(5) of TADA Act, 1987 and Section 10(a)(i) of the UAPA Act, 1967 which is in consonance with Articles 14, 19 and 21 of the Constitution. It is submitted that in the case of **Indra Das (supra)**, this Court has observed and held as under:

> "a. statutory provisions cannot be read in isolation, but have to be read in consonance with the fundamental rights guaranteed by our Constitution.
>
> b. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional
>
> c. Had there been no Constitution having fundamental rights in it then of course a plain and literal meaning could be given to Section 3(5) of TADA or Section 10 of the Unlawful Activities (Prevention) Act. But since there is a Constitution in our country providing for democracy and fundamental rights we cannot give these statutory provisions such a meaning as that would make them unconstitutional."

7.1 It is submitted that in the case of **Indra Das (supra)**, this Court has interpreted the relevant provisions of TADA and UAPA to bring them in conformity with the Constitution.

7.2 It is further submitted that this Court has on several occasions interpreted provisions to bring them in consonance with the Constitution and even by reading down to save the provisions from unconstitutionality. It is submitted that in the case of **People's Union for Civil Liberties v. Union of India, (2004) 9 SCC 580 (paragraphs 48 & 49)**, this Court has read "mens rea" into the statute to save it from unconstitutionality.

7.3 It is submitted that in the case of **State of Gujarat v. Shyamlal Mohanlal Choksi, 1965 (2) SCR 457**, this Court read down Section 94 of the Cr.P.C. to exclude persons accused from its ambit. It is submitted that **Shyamlal Mohanlal Choksi (supra)** was a special leave petition from a High Court decision and the Union of India was not a party to those proceedings.

7.4 On the submission made on behalf of the Union of India that without hearing the Union of India, this Court ought not to have and/or could not have read down Section 10(a)(i) of the UAPA Act, 1967 or Section 3(5) of TADA Act, 1987, Shri Sanjay Parikh, learned Senior Counsel has relied upon the decision of this Court in the case of **Sanjeev Coke Manufacturing Company v. M/s Bharat Cooking Coal Limited, reported in (1983) 1 SCC 147 (paragraph 25)**. It is submitted that in the said decision, it is observed and held by this Court that "no one may speak for the Parliament and Parliament is never before the Court." It is further observed that "After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say, none else." It is further observed that "once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament and the Court will do the same with reference to the language of the statute and other permissible aids." It is submitted that while reading down Section 10(a)(i) of the UAPA Act and Section 3(5) of the

TADA Act, this Court has interpreted the statutory provisions in light of Articles 14, 19 and 21 of the Constitution. It is submitted that judgments under reference correctly hold that "mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence."

7.5 Now so far as the submission made by Shri Tushar Mehta, learned Solicitor General that while deciding **Raneef (supra) and Arup Bhuyan (supra)**, this court ought not to have relied upon the US Supreme Court judgments, Shri Sanjay Parikh, learned Senior Counsel has submitted that in the case of **Shreya Singhal v. Union of India, (2015) 5 SCC 1**, this Court has held that the legal position in India is not different. He has relied upon the observations made in paragraph 41 made in the case of **Sherya Singhal (supra)**.

7.6 It is submitted that the decision of this Court in the case of **Shreya Singhal (supra)** has been recently relied upon and considered by one of the Hon'ble Judge of the

Constitution Bench in the case of **Kaushal Kishor v. State of Uttar Pradesh and Others, 2023 SCC OnLine SC 6**, while concurring on the question that the restrictions under Article 19(2) are exhaustive.

7.7 It is further submitted by Shri Sanjay Parikh, learned Senior Counsel appearing on behalf of the applicant that **Shreya Singhal (supra)** is the culmination of an unbroken line of Indian precedent stipulating that speech or association can be prevented or punished only if,

- Speech or association is 'intended' or has the 'tendency' to disturb 'public order', 'sovereignty and integrity of India', 'security of the state', or one of the other permitted ground of restrictions under Article 19; and

- The connection between the speech or association and the 'intended' or likely effect on 'public order', 'sovereignty and integrity of India' or 'security of the state' is "proximate" not "far- fetched, hypothetical or

problematical or too remote in the chain of its relation."

7.8 Shri Parikh, learned Senior Counsel has relied upon the observations made by the Federal Court in the case of **Niharendu Dutt Majumdar v. The King Emperor 1942 F.C.R. 38** taking the view that "the acts or words complained of must, either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." It is submitted that the said decision has been approved and adopted by this Court in the case of **Kedar Nath v. State of Bihar, AIR 1962 SC 955.** He has relied upon the observations made in paragraph 26 of **Kedar Nath (supra).**

7.9 It is further submitted that in the case of **State of Bihar v. Shailabala Devi, AIR 1952 SC 329**, this Court asserted that it was not sufficient for law restricting freedom of speech and expression to be under one of the permitted heads of restriction enumerated under Article 19(2), but must also have a proximate link to it. The Patna High Court had found that a pamphlet whose central theme was "to bring about a

bloody revolution and change completely the present order of things", fell foul of a provision targeting "words or signs or visible representations which incite, or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence." It is submitted that this Court however found that for rhetoric of the kind used in the pamphlet to be justifiably restricted, the State would have to establish that it was addressed to an excited mob or other such exceptional circumstance.

7.10 Shri Sanjay Parikh, learned Senior Counsel has also heavily relied upon the observations made in paragraph 45 in the case of **S. Rangarajan v. P. Jagjivan Ram and others, (1989) 2 SCC 574**, which read as under:

> **"45.** .... There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought

> should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

7.11 It is further submitted that in the case of **O.K. Ghosh v. E.X. Joseph, AIR 1963 812**, this Court was considering the scope of the term 'public order' in Clause (4) of Article 19, that allows for reasonable restrictions on the right to Freedom of Association. It is submitted that this Court held that "the words 'public order' occurs even in clause (2), which refers, inter alia, to security of the State and public order. There can be no doubt that the said words must have the same meaning in both clauses (2) and (4)." It is further observed that "...a restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression "in the interests of public order."

7.12 It is further submitted that in the case of **Balwant Singh v. State of Punjab, (1995) 3 SCC 214**, it is observed and held by this Court that only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and order or affect public tranquility, that the law needs to step in to prevent such an activity. It is submitted that it is further observed that the intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153-A of the IPC and the prosecution has to prove the existence of mens rea in order to succeed.

7.13 It is further submitted that in the case of **Kartar Singh v. State of Punjab, (1994) 3 SCC 569**, this Court held that:

i) mens rea is an essential ingredient of a crime;

ii) vague provisions can implicate innocent persons in offences; and

iii) mens rea must be read into Section 2(i)(a) of TADA

It is submitted that the reasoning in **Kartar Singh (supra)** will also apply to Section 10(a)(i) of the UAPA Act, 1967.

It is further submitted that in fact, even at the Constituent Assembly debates, Dr. B.R. Ambedkar clarified that

> "…it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American Constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution, one can refer to at least one judgment of the United States Supreme Court.
>
> What the Draft Constitution has done is that instead of formulating fundamental rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute."

7.14 It is submitted that the submissions made on behalf of the Union of India by the Solicitor General are mostly on non-

applicability of American cases and they do not deal with the applicability of the principle evolved in American cases and their acceptance by the Indian Supreme Court.

8. It is further submitted that even otherwise the provisions of Section 10(a)(i) of the UAPA Act and Section 3(5) of the TADA Act are vague and overbroad and will have a chilling effect and therefore this Court in the aforesaid three decisions have rightly read down the said provisions to bring them in consonance with Articles 14, 19 and 21 of the Constitution of India.

8.1 It is further submitted by Shri Sanjay Parikh, learned Senior Counsel that in the recent decision of this Court in the case of **Thawaha Fasal v. Union of India, 2021 SCC OnLine SC 1000**, this Court has observed and held that "mere association with a terrorist organization is not sufficient to attract Section 38 and mere support given to a terrorist organization is not sufficient to attract Section 39." It is submitted that it is further observed that "association and

the support have to be with intention of furthering the activities of a terrorist organization."

8.2 It is further submitted that even if there can be restrictions under Article 19(2), in that case also, the restrictions should be reasonable and shall stood the test of reasonableness or proportionality.

Making above submissions and relying upon the aforesaid decisions, it is prayed to answer the reference accordingly and not to disturb the view taken by this Court in the cases of **Raneef (supra); Arup Bhuyan (supra)** and **Indra Das (supra)**.

9. In rejoinder to the submissions made by Shri Sanjay Parikh, learned Senior Counsel appearing on behalf of the applicant/intervener Shri Tushar Mehta, learned Solicitor General has submitted that so far as the submissions made by Shri Sanjay Parikh, learned Senior Counsel on reasonability and proportionality, it is submitted that a detailed adversarial judicial process prior to declaration of organization as banned organization is required to be

undertaken under Sections 3 and 4 of the UAPA, 1967. It is submitted that the said judicial adversarial process ensures inbuilt reasonability and proportionality and ensures that such provisions are just, fair and reasonable.

9.1 Now so far as the submission made by Shri Parikh, learned senior counsel on *mens rea* element and reliance placed upon the judgments in criminal law which have held *mens rea* an essential ingredient of crime, it is submitted by Shri Mehta, learned Solicitor General that the question of *mens rea* may depend on the facts and circumstances of each case and would have to be adjudicated during trial. It is submitted that the judgments in **Raneef (supra), Arup Bhuyan (supra)** and **Indra Das (supra)** as such do not deal with the concept of *mens rea* and neither do the judgments in America on which the reliance has been placed.

9.2 Now so far as the reliance placed upon the decisions relating to IPC and more particularly the decisions of this Court in the case of **Kedar Nath Singh (supra), Balwant Singh (supra)** and **Bidal (supra),** it is submitted that the said

reliance may not be appropriate as the offences under the IPC are standalone offences and are applied for a far wider canvass than the offence of membership of banned organization under the UAPA and TADA. It is submitted that the banning of an organization under the UAPA takes place after a detailed adversarial judicial process which is given wider publicity, thereby ensuring reasonableness, limited application and availability of information with regard to the inherently legal nature of such banned organization. It is submitted that the same is absent in IPC offences which can be applied by any police officer investigating any offence, without there being the presence of any banned organization or the procedure preceding the banning of such organization. It is submitted that therefore there is vast differences between UAPA and IPC offences. It is submitted that in the present case the Parliament in its wisdom and taking into consideration the sovereignty of India has thought it fit to enact the UAPA and provide under Section 10(a)(i) that mere member of the banned organization itself is an offence.

9.3 Now so far as the submission of Shri Praikh, learned Senior Counsel on vagueness and possibility of misuse of Section 10(a)(i), it is submitted that as observed and held by this Court in catena of decisions vagueness and possibility of misuse cannot be a ground for reading down a declaration of unconstitutionality. It is submitted that possibility of abuse/misuse of a law would not be a relevant consideration while considering the constitutionality of a provision.

Reliance is placed on the decisions of this Court in the case of **Kedar Nath Singh vs. State of Bihar, AIR 1962 SC 955; Kesavananda Bharti vs. State of Kerala, (1973) 4 SCC 225; T.N. Education Deptt. Ministerial and General Subordinate Services Assn. vs. State of Tamil Nadu, (1980) 3 SCC 97** and **Mafatlal Industrial Ltd. vs. Union of India, (1997) 5 SCC 536.** It is submitted that in the aforesaid decisions it is held that merely because power may sometimes be abused, it is no ground for denying the existence of power.

9.4 Now so far as the reliance placed upon the decision of **Thawaha Fasal vs. Union of India, (2021) SCC Online SC 1000** by Shri Parikh, learned Senior Counsel, it is vehemently submitted by Shri Mehta, learned Solicitor General that the said decision shall not be applicable while considering the offence under Section 10(a)(i) of UAPA, 1967. It is submitted that in the said judgment this Court was dealing with the offence under Section 38 of UAPA, 1967 and was not dealing with the provisions concerning membership. Sections 38 and 39 of the UAPA, 1967 are worded completely differently as compared to the provisions concerning criminalization of membership of a banned organization. It is submitted that therefore any observations made while considering the different provision/offence may not be *stricto sensu* applicable while considering Section 10(a)(i) of the UAPA, 1967.

Making above submissions, it is prayed to declare that the observations made by this Court in the case of **Raneef (supra), Arup Bhuyan (supra)** and **Indra Das (supra)** are not

a good law taking the view that mere membership of a banned organization will not make a person a guilty unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

10. Heard Shri Tushar Mehta, learned Solicitor General appearing on behalf of Union of India, Shri Vinay Navare, learned Senior Counsel appearing for the State of Assam and Shri Sanjay Parikh, learned Senior Counsel appearing on behalf of the appellant/intervener.

10.1 At the outset, it is required to be noted that pursuant to the order passed by this Court reported in the case of **Arup Bhuyan vs. State of Assam, (2015) 12 SCC 702,** the present reference is before the larger Bench. The present reference to the larger Bench is made on the request made on behalf of the Union of India and the State of Assam doubting the correctness of the decisions of this Court in the case of **Raneef (supra)** and **Arup Bhuyan (supra)** taking the view on reading down Section 10(a)(i) that mere membership of a banned organization will not make a person a criminal/guilty

unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

10.2 Therefore, this Court in the present reference is required to consider the correctness of the decisions of this Court in **Raneef (supra), Arup Bhuyan (supra)** and **Indra Das Singh (supra)** to the extent as above.

10.3 Section 10 of the UAPA, 1967 reads as under:

> **"Section 10 in The Unlawful Activities (Prevention) Act, 1967**
>
> 1[10. Penalty for being member of an unlawful association, etc.—Where an association is declared unlawful by a notification issued under section 3 which has become effective under sub-section (3) of that section,—
>
> (a) a person, who—
>
> (i) is and continues to be a member of such association; or
>
> (ii) takes part in meetings of such association; or
>
> (iii) contributes to, or receives or solicits any contribution for the purpose of, such association; or
>
> (iv) in any way assists the operations of such association, shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine; and
>
> (b) a person, who is or continues to be a member of such association, or voluntarily does an act aiding

> or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property,—
>
> (i) and if such act has resulted in the death of any person, shall be punishable with death or imprisonment for life, and shall also be liable to fine;
>
> (ii) in any other case, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]"

10.4 Having gone through the decision of this Court in the case of **Raneef (supra)**, it appears and cannot be disputed that in the said case this Court was considering the bail application. The constitutional validity of Section 10 more particularly Section 10(a)(i) of the UAPA, 1967 was not under challenge before this Court. It is also required to be noted that even the Union of India was not a party and/or the Union of India was not even heard while deciding the case of **Raneef (supra).** Despite the above, this Court while deciding the bail application has made certain observations that mere

membership of a banned organization will not make a person a criminal and/or mere membership of a banned organization cannot be an offence. In the case of **Raneef (supra)** this Court has heavily relied upon and followed the American Supreme Court decisions which were dealing with the relevant provisions of the American Laws and/or the laws prevailing in the America. If the entire judgment in the case of **Raneef (supra)** is seen except following the American Supreme Court decisions in the case of **Scales vs. United States [6 L Ed 2d 782]; Elfbrandt vs. Russell [16 L Ed 2d 321]** and **Joint Anti-Fascist Refugee Committee vs. McGrath, [95 L Ed 817],** there does not appear to be any further discussion on the constitutional validity and the validity of Section 10(a)(i) of UAPA which specifically provides that if a person was and continues to be a member of the banned organization, he can be said to have committed an offence and he can be punished. Therefore, as such the observations made by this Court in the case of **Raneef (supra)** are to be treated having confined to the bail matter

only. At this stage, it is required to be noted that as such in paragraph 8 this Court in the case of **Raneef (supra)** has specifically observed that "we are presently only considering the bail matter and are not deciding whether the respondent is guilty or not".

10.5 Now so far as the decision of this Court in the case of **Arup Bhuyan vs. State of Assam, (2011) 3 SCC 377**, taking the view that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence……., is concerned it is required to be noted that in the said decision this Court has just followed the decision in the case of **Raneef (supra).** In the said decision this Court has also considered some other American Judgments of the US Supreme Court **(para 10 & 11).**

10.6 From the judgment and order passed by this Court in the case of **Arup Bhuyan (Supra),** it appears that after referring to the decisions of the US Supreme Court in paras

10 & 11 thereafter this Court had read down Section 3(5) of TADA and has observed that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence.

10.7 It is required to be noted that even while deciding **Arup Bhuyan (supra)** neither the constitutional validity of Section 3(5) of the TADA nor the Union of India was heard. Even in both the aforesaid decisions this Court had not taken into consideration Article 19(1)(c) and Article 19(4) of the Constitution of India.

10.8 In the case of **Indra Das (supra)** this Court has just followed the earlier decision in the case of **Raneef (supra) and Arup Bhuyan (supra).**

11 In light of the aforesaid factual aspects let us now consider the correctness of the decisions of this Court in the case of **Raneef (supra), Arup Bhuyan (supra)** and **Indra Das (supra).**

11.1 Now so far as the reading down of Section 10(a)(i) of the UAPA, 1967 by this Court in the case of **Arup Bhuyan (supra)** is concerned, at the outset it is required to be noted that such reading down of the provision of a statute could not have been made without hearing the Union of India and/or without giving any opportunity to the Union of India.

11.2 When any provision of Parliamentary legislation is read down in the absence of Union of India it is likely to cause enormous harm to the interest of the State. If the opportunity would have been given to the Union of India to put forward its case on the provisions of Section 10(a)(i) of the UAPA, 1967, the Union of India would have made submissions in favour of Section 10(a)(i) of the UAPA including the object and purpose for enactment of such a provision and even the object and purpose of UAPA. The submission made by Shri Parikh, learned Senior Counsel relying upon the decision of this Court in the case of **Sanjeev Coke (supra)** that it is ultimately for the Court to interpret and read down the provision to save any provision from

declaring as unconstitutional is concerned, it is true that it is ultimately for the Court to interpret the law and/or particular statute. However, the question is not the power of the Courts. The question is whether can it be done without hearing the Union of India?

11.3 Even otherwise in absence of any challenge to the constitutional validity of Section 10(a)(i) of the UAPA there was no question of reading down of the said provision by this Court. Therefore, in absence of any challenge to the constitutional validity of Section 10(a)(i) of UAPA, 1967 there was no occasion for this Court to read down the said provision.

11.4 Even otherwise as observed and held by this Court in the case of **Subramanian Swamy and others vs. Raju through Member, Juvenile Justice Board and Anr., (2014) 8 SCC 390** reading down the provision of a statute cannot be resorted to when the meaning of a provision is plain and unambiguous and the legislative intent is clear. This Court

has thereafter laid down the fundamental principle of "reading down doctrine" as under:

"Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. At the cost of repetition, it is observed that reading down a particular statute even to save it from unconstitutionality is not permissible unless and until the constitutional validity of such provision is under challenge and the opportunity is given to the Union of India to defend a particular parliamentary statute".

11.5 In view of the above in all the aforesaid three decisions, this Court ought not to have read down Section 10(a)(i) of the UAPA, 1967 more particularly when neither the

constitutional validity of Section 10(a)(i) of the UAPA, 1967 was under challenge nor the Union of India was heard.

12. As observed hereinabove and even it can be seen from the decisions of this Court in the case of **Arup Bhuyan (Supra)** and **Raneef (supra)** that while deciding the abovesaid cases this Court has followed the US Supreme Court decisions on freedom of speech and on mere membership without any criminality and/or overt act and mere membership be said to have committed an offence or not. Therefore, the next question which is posed for consideration before this Court is whether this Court was justified/right in following the US Supreme Court judgments which as such were on interpretation and/or considering the laws of United States.

12.1 How far the decisions of US Supreme Court on "freedom of speech and/or the public order" can be made applicable vis-à-vis the laws in India, few decisions of this Court on applicability of the US Supreme Court decisions vis-à-vis the

laws applicable in India are required to be referred to and considered.

12.2 In the case of **Babulal Parate vs. State of Maharashtra, (1961) 3 SCR 423,** it is observed in paragraphs 23 to 27 as under:

> **"23.** The argument that the test of determining criminality in advance is unreasonable, is apparently founded upon the doctrine adumbrated in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] that previous restraints on the exercise of fundamental rights are permissible only if there be a clear and present danger. It seems to us, however, that the American doctrine cannot be imported under our Constitution because the fundamental rights guaranteed under Article 19(1) of the Constitution are not absolute rights but, as pointed out in *State of Madras* v. *V.G. Row* [(1952) 1 SCC 410 : 1952 SCR 597] are subject to the restrictions placed in the subsequent clauses of Article 19. There is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of our Constitution. The Fourteenth Amendment to the U.S. Constitution provides, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ….".
>
> **24.** The framework of our Constitution is different from that of the Constitution of the United States. Then again, the Supreme Court of the United States has held that the privileges and

immunities conferred by the Constitution are subject to social control by resort to the doctrine of police power. It is in the light of this background that the test laid down in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] has to be understood.

25. The language of Section 144 is somewhat different. The test laid down in the section is not merely "likelihood" or "tendency". The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.

26. Apart from this it is worthy of note that in *Scheneck case* [*Scheneck* v. *U.S.*, 249, US 47] the Supreme Court was concerned with the right of freedom of speech and it observed:

"It well may be that the prohibition of law abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.... We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a

right to prevent. It is a question of proximity and degree.

27. Whatever may be the position in the United States it seems to us clear that anticipatory action of the kind permissible under Section 144 is not impermissible under clauses (2) and (3) of Article 19. Both in clause (2) (as amended in 1951) and in clause (3), power is given to the legislature to make laws placing reasonable restrictions on the exercise of the rights conferred by these clauses in the interest, among other things, of public order. Public order has to be maintained in advance in order to ensure it and, therefore, it is competent to a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order. We must, therefore, reject the contention."

12.3 In the case of **Madhu Limaye vs. Sub-Divisional Magistrate, (1970) 3 SCC 746**, while reconsidering and affirming the judgment of **Babulal Parate (supra),** this Court considered in a combination of seven Hon'ble Judges, speaking through Mr. Justice Hidayatullah, J., has observed and held in paragraphs 16 & 17 as under:

"16. We may here observe that the overlap of public order and public tranquillity is only partial. The terms are not always synonymous. The latter is a much wider expression and takes in many things which cannot be described as public disorder. The

> words "public order" and "public tranquillity" overlap to a certain extent but there are matters which disturb public tranquillity without being a disturbance of public order. A person playing loud music in his own house in the middle of the night may disturb public tranquillity, but he is not causing public disorder. "Public order" no doubt also requires absence of disturbance of a state of serenity in society but it goes further. It means, what the Frunch designate order publique, defined as an absence of insurrection, riot turbulence, or crimes of violence. The expression "public order" includes absence of all acts which are a danger to the security of the State and also acts which are comprehended by the expression "order publique" explained above but not acts which disturb only the serenity of others.
>
> **17.** The English and American precedents and legislation are not of such help. The Public Order Act, 1936 was passed because in 1936 different political organisations marched in uniforms causing riots. In America the First Amendment freedoms have no such qualifications as in India and the rulings are apt to be misapplied to our Constitution."

12.4 Thereafter in the case of **Supdt., Central Prison vs. Dr. Ram Manohar Lohia, (1960) 2 SCR 821,** this Court had taken note of the difference in the American Law and the Indian Law more particularly the restrictions under Article 19(2).

12.5 Thereafter in the case of **Ramlila Maidan Incident, In re, (2012) 5 SCC 1,** it is observed and held in paragraphs 7 to 11 on applicability of the American doctrine/US Supreme Court decisions as under:

> **"7.** In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(*a*). It also provides the right to assemble peacefully and without arms to every citizen of the country under Article 19(1)(*b*). However, these rights are not free from any restrictions and are not absolute in their terms and application. Articles 19(2) and 19(3), respectively, control the freedoms available to a citizen. Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause. Similarly, Article 19(3) enables the State to make any law imposing reasonable restrictions on the exercise of the right conferred, again in the interest of the factors stated therein.
>
> **8.** In face of this constitutional mandate, the American doctrine adumbrated in *Schenck case* [63 L Ed 470 : 249 US 47 (1919)] cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the abovenoticed restrictions. Thus, the position under our Constitution is different.

9. In *Constitutional Law of India* by H.M. Seervai (4th Edn.), Vol. 1, the author has noticed that the provisions of the two Constitutions as to freedom of speech and expression are essentially different. The difference being accentuated by the provisions of the Indian Constitution for preventive detention which have no counterpart in the US Constitution. Reasonable restriction contemplated under the Indian Constitution brings the matter in the domain of the court as the question of reasonableness is a question primarily for the court to decide. (*Babulal Parate* v. *State of Maharashtra* [AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423])

10. The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. For instance, the right to freedom of speech and expression is not violated by a law which requires that the name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper.

11. Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note that the freedom of speech is the bulwark of a democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties,

> giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press."

12.6 In the case of **Joseph Kuruvilla Vellukunnel vs. Reserve Bank of India, 1962 Supp (3) SCR 632,** it is observed in para 75 that the aid of American concepts, laws and precedents in the interpretation of our laws is not always without its dangers and they have therefore to be relied upon with some caution if not, with hesitation because of the difference in the nature of those laws and of the institutions to which they apply.

12.7 In the case of **State of Bihar vs. Union of India, (1970) 1 SCC 67,** it is observed and held in para 13 as under:

> "Our attention was drawn to some provisions of the American Constitution and of the Constitution Act of Australia and several decisions bearing on the interpretation of provision which are somewhat similar to Art. 131. But as the similarity is only limited, we do not propose to examine either the

provisions referred to or the decisions to which our attention was drawn. In interpreting our Constitution we must not be guided by decisions which do not bear upon provisions identical with those in our Constitution."

12.8 In the case of **Ashok Kumar Thakur vs. Union of India, (2008) 6 SCC 1**, it is observed in para 165 as under:

"165. At the outset, it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. Reference may be made to Bhikaji Narain Dhakras & Ors. Vs. The State of Madhya Pradesh & Anr.56 and A.S. Krishna Vs. State of Madras57 wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India. While considering the scope and applicability of Article 19(1)(g) in Kameshwar Prasad and Others Vs. State of Bihar and Another, it was observed –

"As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading "Congress shall make no law ….abridging the freedom of speech…." appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power – the scope of which however has not been defined with precision or uniformly."

12.9 In the similar case of **Kesavananda Bharati case, (1973) 4 SCC 225**, it is noticed by this Court that there are structural differences in the Constitution of India and the Constitution of the United States of America.

13. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and considering the different position of laws in US and in our country more particularly faced with Articles 19(1)(c) and 19(4) of the Constitution of India under which the right to freedom of speech is subject to reasonable restrictions and is not an absolute right and the constitution permits the Parliament to frame the laws taking into consideration the public order and/or the sovereignty of India, without noticing the differences in American Laws and the Indian laws, this Court in the case of **Arup Bhuyan (supra)** and **Raneep (supra)** has erred in straightway and directly following the US Supreme Court decisions and that too without adverting to the differences and the position of laws in India.

13.1 In the aforesaid two decisions without noticing the differences of the US Supreme Court (referred to in the said decisions) this Court has just followed the American decisions to which we are not agreeable. This Court ought to have considered the differences in the American laws and the Indian laws more particularly the provisions in the Indian Constitution. By the aforesaid we do not say for a moment that in a given case the US Supreme Court decisions may not be taken into consideration and/or may not be a guidance. Before following the American decisions, the Indian Courts are required to consider the difference in the nature of the laws applicable in the respective countries.

13.2 As observed and held by this Court in the case of **Joseph Kuruvilla Vellukunnel (supra)**, the aid of American concepts, laws and precedents in the interpretation to which laws is not always without its dangers and they have therefore to be relied upon with some caution if not with hesitation because of the difference in the nature of those laws and the institutions to which they apply.

14. Now the next question which is posed for consideration before this Court is whether Section 10(a)(i) is required to be read down so as to save the said provision from being declared unconstitutional and is required to be read down as had been done in the case of **Arup Bhuyan (supra)** and **Raneep (supra)** that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence meaning thereby over and above the membership of a banned organization there must be a *mens rea* required to be established and proved and/or there must be a further overt act? While deciding this issue elaborate submissions have been made by Shri Tushar Mehta, learned Solicitor General, Shri Vinay Navare, learned Senior Counsel appearing for the State of Assam and Shri Sanjay Parikh, learned Senior Counsel appearing on behalf of the appellant/intervener.

14.1 While considering the aforesaid issue relevant provisions of the Constitution of India and the UAPA, 1967 are required to be referred to which are as under:

> "**19. Protection of certain rights regarding freedom of speech, etc.—**(1) All citizens shall have the right—
>
> (*c*) to form associations or unions [or co-operative societies];
>
> [(2) 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 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.]
>
> (4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Relevant provisions of UAPA of 1967 are as under:

> **2. Definitions**.—(1) In this Act, unless the context otherwise requires,—

(*a*) "association" means any combination or body of individuals;

[9][(*ec*) "person" includes—

(*i*) an individual,

(*ii*) a company,

(*iii*) a firm,

(*iv*) an organisation or an association of persons or a body of individuals, whether incorporated or not,

(*v*) every artificial juridical person, not falling within any of the preceding sub-clauses, and

(*vi*) any agency, office or branch owned or controlled by any person falling within any of the preceding sub-clauses;]

(*k*) "terrorist act" has the meaning assigned to it in Section 15, and the expressions "terrorism" and "terrorist" shall be construed accordingly;

(*l*) "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

(*m*) "terrorist organisation" means an organisation listed in the [First Schedule] or an organisation operating under the same name as an organisation so listed;

(*p*) "unlawful association" means any association,—

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

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

Provided that nothing contained in sub-clause (*ii*) shall apply to the State of Jammu and Kashmir;

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

(2) Every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary:

Provided that nothing in this sub-section shall require the Central Government to disclose any fact which it considers to be against the public interest to disclose.

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

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

(4) Every such notification shall, in addition to its publication in the Official *Gazette*, be published in not less than one daily newspaper having circulation in the State in which the principal office, if any, of the association affected is situated, and shall also be served on such association in such manner as the Central Government may think fit and all or any of

the following modes may be followed in effecting such service, namely:

(*a*) by affixing a copy of the notification to some conspicuous part of the office, if any, of the association; or

(*b*) by serving a copy of the notification, where possible, on the principal office-bearers, if any, of the association; or

(*c*) by proclaiming by beat of drum or by means of loudspeakers, the contents of the notification in the area in which the activities of the association are ordinarily carried on; or

(*d*) in such other manner as may be prescribed.

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

(2) On receipt of a reference under sub-section (1), the Tribunal shall call upon the association affected by notice in writing to show cause, within thirty days from the date of the service of such notice, why the association should not be declared unlawful.

(3) After considering the cause, if any, shown by the association or the office-bearers or members thereof, the Tribunal shall hold an inquiry in the manner specified in Section 9 and after calling for such further information as it may consider necessary from the Central Government or from any office-bearer or member of the association, it shall decide

whether or not there is sufficient cause for declaring the association to be unlawful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under sub-section (1) of Section 3, such order as it may deem fit either confirming the declaration made in the notification or cancelling the same.

(4) The order of the Tribunal made under sub-section (3) shall be published in the Official Gazette.

8. Power to notify places for the purpose of an unlawful association.—(1) Where an association has been declared unlawful by a notification issued under Section 3 which has become effective under sub-section (3) of that section, the Central Government may, by notification in the Official Gazette, notify any place which in its opinion is used for the purpose of such unlawful association.

Explanation.—For the purposes of this sub-section, "place" includes a house or building, or part thereof, or a tent or vessel.

(2) On the issue of a notification under sub-section (1), the District Magistrate within the local limits of whose jurisdiction such notified place is situate or any officer authorised by him in writing in this behalf shall make a list of all movable properties (other than wearing-apparel, cooking vessels, beds and beddings, tools of artisans, implements of husbandry, cattle, grain and foodstuffs and such other articles as he considers to be of a trivial nature) found in the notified place in the presence of two respectable witnesses.

(3) If, in the opinion of the District Magistrate, any articles specified in the list are or may be used for the

purpose of the unlawful association, he may make an order prohibiting any person from using the articles save in accordance with the written orders of the District Magistrate.

(4) The District Magistrate may thereupon make an order that no person who at the date of the notification was not a resident in the notified place shall, without the permission of the District Magistrate, enter, or be on or in, the notified place:

Provided that nothing in this sub-section shall apply to any near relative of any person who was a resident in the notified place at the date of the notification.

(5) Where in pursuance of sub-section (4), any person is granted permission to enter, or to be on or in, the notified place, that person shall, while acting under such permission, comply with such orders for regulating his conduct as may be given by the District Magistrate.

(6) Any police officer, not below the rank of a sub-inspector, or any other person authorised in this behalf by the Central Government may search any person entering, or seeking to enter, or being on or in, the notified place and may detain any such person for the purpose of searching him:

Provided that no female shall be searched in pursuance of this sub-section except by a female.

(7) If any person is in the notified place in contravention of an order made under sub-section (4), then, without prejudice to any other proceedings which may be taken against him, he may be removed therefrom by any officer or by any other person authorised in this behalf by the Central Government.

(8) Any person aggrieved by a notification issued in respect of a place under sub-section (1) or by an order made under sub-section (3) or sub-section (4) may, within thirty days from the date of the notification or order, as the case may be, make an application to the Court of the District Judge within the local limits of whose jurisdiction such notified place is situate—

(*a*) for declaration that the place has not been used for the purpose of the unlawful association; or

(*b*) for setting aside the order made under sub-section (3) or sub-section (4),

and on receipt of the application the Court of the District Judge shall, after giving the parties an opportunity of being heard, decide the question.

[**10. Penalty for being member of an unlawful association, etc**.—Where an association is declared unlawful by a notification issued under Section 3 which has become effective under sub-section (3) of that section,—

(*a*) a person, who—

(*i*) is and continues to be a member of such association; or

(*ii*) takes part in meetings of such association; or

(*iii*) contributes to, or receives or solicits any contribution for the purpose of, such association; or

(*iv*) in any way assists the operations of such association,

shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine; and

(*b*) a person, who is or continues to be a member of such association, or voluntarily does an act aiding or promoting in any manner the objects of such

association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property,—

(*i*) and if such act has resulted in the death of any person, shall be punishable with death or imprisonment for life, and shall also be liable to fine;

(*ii*) in any other case, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.]

13. Punishment for unlawful activities.—(1) Whoever—

(*a*) takes part in or commits, or

(*b*) advocates, abets, advises or incites the commission of,

any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under Section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

(3) Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the Government of any other country or to any negotiations therefor carried on by any person authorised in this behalf by the Government of India.

38. Offence relating to membership of a terrorist organisation.—(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:

Provided that this sub-section shall not apply where the person charged is able to prove—

(*a*) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(*b*) that he has not taken part in the activities of the organisation at any time during its inclusion in the [First Schedule] as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

39. Offence relating to support given to a terrorist organisation.—(1) A person commits the offence relating to support given for a terrorist organisation,—

(*a*) who, with intention to further the activity of a terrorist organisation,—

(*i*) invites support for the terrorist organisation, and

(*ii*) the support is not or is not restricted to provide money or other property within the meaning of Section 40; or

(*b*) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which, he knows, is —

(*i*) to support the terrorist organisation, or

(*ii*) to further the activity of the terrorist organisation, or

(*iii*) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(*c*) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both."

Thus, the rights guaranteed under Article 19(1)(a) (Right to freedom of speech and expression) and under Article 19(1)(c) (Right to form association or unions) are not absolute rights, but are subject to reasonable restrictions as per Article 19(2) and 19(4) of the Constitution of India. Article 19 (2) (3) & (4) have been amended vide the Constitution (Sixteenth Amendment) Act, 1963 and the words "sovereignty and integrity of India" have been inserted. Therefore, as per Article 19(2)(3) & (4) nothing in clause (a), (b) and (c) of clause 1 of Article 19 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 exercises of the right conferred by the said sub-clauses in the interests of **sovereignty and integrity of India**, the security of State..... As per Article 19(4) nothing in sub-clause (c) (Right to form Associations or Unions) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of **sovereignty and integrity of India** or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause. At this stage the statement of objects and reasons for amending Article 19(2)(3) & (4) are required to be referred to and considered.

The statements of objects and reasons appended to the Constitution (Sixteenth Amendment) Bill, 1963 which was enacted as the Constitution (Sixteenth Amendment) Act, 1963 reads as under:

> **"STATEMENT OF OBJECTS AND REASONS**
>
> The Committee on National Integration and Regionalism appointed by the National Integration Council recommended that article 19 of the Constitution be so amended that adequate powers

> become available for the preservation and maintenance of the integrity, and sovereignty of the Union. The Committee were further of the view that every candidate for the membership of a State Legislature or Parliament, and every aspirant to, and incumbent of, public office should pledge himself to uphold the Constitution and to preserve the integrity and sovereignty of the Union and that forms of oath in the Third Schedule to the Constitution should be suitably amended for the purpose. It is proposed to give effect to these recommendations by amending clauses (2), (3) and (4) of article 19 for enabling the State to make any law imposing reasonable restrictions on the exercise of the rights conferred by sub-clauses (a), (b) and (c) of clause (1) of that article in the interests of the sovereignty and integrity of India."

14.2 The UAPA, 1967 has been enacted in exercise of powers conferred under Article 19(2) & (4) of the Constitution of India. At this stage, it is required to be noted that exceptions to the freedom to form associations under Article 19(1) was inserted in the form of sovereignty and integrity of India under Article 19(4), after the National Integration Council (NIC) appointed a Committee on National Integration and Regionalisation. The said Committee was to look into the aspect of putting reasonable restrictions in the interests of

the sovereignty and integrity of India. Pursuant to the acceptance of the recommendations of the said Committee, the Constitution (Sixteenth Amendment) Act, 1963 came to be enacted to impose by law, reasonable restrictions in the interests of sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament. The main objective of the UAPA is to make powers available for dealing with activities directed against the integrity and sovereignty of India. It is also required to be noted that pursuant to the recommendation of the Committee on National Integration and Regionalisation appointed by the National Integration Council Act on whose recommendation the Constitution (Sixteenth Amendment) Act, 1963 was enacted, UAPA has been enacted. It appears that National Integration Council appointed a Committee on National Integration and Regionalisation to look into, *inter alia*, the aspect of putting reasonable restrictions in the interests of sovereignty and integrity of India and thereafter the UAPA has been enacted.

Therefore, the UAPA has been enacted to make powers available for dealing with the activities directed against integrity and sovereignty of India.

14.3 Now let us consider the Preamble of the UAPA, 1967. As per Preamble, UAPA has been enacted to provide for the more effective **prevention** of certain unlawful activities of individuals and associations and dealing with terrorist activities and for matters connected therewith. Therefore the aim and object of enactment of UAPA is also to provide for more effective prevention of certain unlawful activities. That is why and to achieve the said object and purpose of effective prevention of certain unlawful activities the Parliament in its wisdom has provided that where an association is declared unlawful by a notification issued under Section 3, a person, who is and continues to be a member of such association shall be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine. Therefore, the Parliament in its wisdom had thought it fit that once an association is declared unlawful after following due

procedure as required under Section 3 and subject to the approval by the Tribunal still a person continues to be a member of such association is liable to be punished/penalized.

14.4 At this stage it is required to be noted that before an association is declared unlawful, the procedure as required under Section 3 of the Act is required to be followed/undertaken. As per Section 3(1) if the Central Government is of the opinion that any association is, or has become an unlawful association, it may, by notification in the Official Gazette, declare such association to be unlawful. As per Section 3(2) every such notification shall specify the grounds on which it is issued and such other particulars as the Central Government may consider necessary....subject to the right of the Central Government not to disclose any fact which it considers to be against the public interest to disclose. Section 3(3) provides that no such notification shall have effect until the Tribunal has, by an order made under Section 4, confirmed the declaration made therein and the

order is published in the Official Gazette. It also confers power upon the Central Government to declare an association to be unlawful with immediate effect if the Central Government is of the opinion that circumstances exist which render it necessary to declare an association to be unlawful with immediate effect, however subject to the reasons to be stated in writing and subject to any order that may be made under Section 4. As per Section 4 every such notification shall in addition to its publication in the Official Gazette be published in not less than one daily newspaper having circulation in the State in which the principal office, if any, of the association affected is situated, and shall be served on such association in such a manner as the Central Government may think fit. As per Section 4 where any association has been declared unlawful by a notification issued under sub-section (1) of Section 3, the Central Government is required, within thirty days from the date of the publication of the notification, refer the notification to the Tribunal for the purpose of adjudicating whether or not there

is sufficient cause for declaring the association unlawful. As per Section 4(2) on receipt of a reference the Tribunal shall call upon the association affected by notice in writing to show cause, why the association should not be declared unlawful. Thereafter the Tribunal is required to hold an inquiry in the manner specified in Section 9 and after calling for such further information as it may consider necessary from the Central Government or from any office-bearer or **member of the association**, it shall decide whether or not there is sufficient cause for declaring the association to be unlawful and make, as expeditiously as possible and in any case within a period of six months from the date of the issue of the notification under sub-section (1) of Section 3, such order as it may deem fit either confirming the declaration made in the notification or cancelling the same.

14.5 Thus from the aforesaid it can be seen that before any organization is declared unlawful a detailed procedure is required to be followed including the wide publicity and even the right to a member of such association to represent before

the Tribunal. As observed hereinabove the notification issued by the Central Government declaring a particular association unlawful, the same is subject to inquiry and approval by the Tribunal as per Section 4. Once that is done and despite that a person who is a member of such unlawful association continues to be a member of such unlawful association then he has to face the consequences and is subjected to the penal provisions as provided under Section 10 more particularly Section 10(a)(i) of the UAPA, 1967.

14.6 At this stage it is required to be noted that a particular association is declared unlawful only after the Central Government is satisfied that such association is indulging to unlawful activity and the same is against sovereignty and integrity of India. 'Unlawful activity' is defined under Section 2(o) and 'unlawful association' is defined under Section 2(p). Thus, thereafter a person who is the member of such unlawful association cannot be permitted to say that still he may continue to be associated with and/or continue to be a member of such unlawful association despite such an

association is declared unlawful on the ground of its unlawful activities which is found to be against the interests of the sovereignty and integrity of India. At the cost of repetition, it is observed that the object and purpose of the enactment of UAPA is to provide for more effective prevention of certain unlawful activities. To punish such a person who is continued as a member of such unlawful association which is declared unlawful due to unlawful activities can be said to be in furtherance of providing for effective prevention of the unlawful activities. Therefore, as such Section 10(a)(i) which provides that where an association is declared unlawful by a notification issued under Section 3 which has become effective under sub-section 3 of that Section, a person who is and continues to be a member of such association shall be punishable with imprisonment for a term which may extend to 2 years and shall also be liable to fine, can be said to be absolutely in consonance with Article 19(1)(2) & (4) of the Constitution of India and can be said to be in furtherance of the object and purpose for which the UAPA has been enacted.

15. Now so far as the submission of Shri Parikh, learned Senior Counsel on *mens rea* element and the reliance placed upon the judgments referred to hereinabove on *mens rea* and in support of his submissions that mere membership of a person of such unlawful association alone cannot be a ground to punish such person including the decision of **Kedar Nath (supra)** and other decisions are concerned, at the outset it is required to be noted that the said decisions shall not be applicable while considering the provisions of UAPA. The offences under IPC and offences under the UAPA both are different. As observed hereinabove in the present case an association is declared unlawful after following due procedure as required under Section 3 and subject to the approval by the Tribunal under Section 4 and after giving an opportunity to such association, the office bearers of the association and even the member of the association.

15.1 Now so far as the reliance placed upon the decision of this Court in **Kedar Nath Singh (supra)** by Shri Parikh, learned Senior Counsel is concerned, at the outset it is

required to be noted that the said decision was pre – Constitution (Sixteenth Amendment) Act, 1963. Post **Kedar Nath Singh (supra)** on the recommendation of the National Integration Council, Article 19(2) and 19(4) which operate as exception to freedom of speech and freedom of association respectively, have been amended to specifically include an exception as to "sovereignty and integrity of India". Therefore, the same will have a material bearing on any question as to the application of Articles 19 & 21 in the context of UAPA. Thus, UAPA is to be interpreted in congruence with the amendment of the Constitution in 1963 including "sovereignty and integrity of India" as an exception to Article 19.

16. Now so far as the submission made by Shri Parikh, learned Senior Counsel on the vagueness and possibility of misuse of Section 10(i)(a) is concerned, at the outset it is required to be noted that as per catena of decisions of this Court mere possibility of misuse cannot be a ground and/or relevant consideration while considering the constitutionality

of a provision. As per the settled position of law any action which is the result of abuse/misuse of any law is subject to challenge. But on the possibility of abuse/misuse of law otherwise constitutionally valid legislation cannot be declared unconstitutional.

16.1 Now so far as the submission on vagueness of Section 10(a)(i) is concerned, as observed hereinabove an association is declared unlawful after complying with all the requirements under Sections 3 & 4 of the UAPA, 1967 as discussed hereinabove. A person who is a member of such an unlawful association is as such aware of the declaration of such association as unlawful and despite the same if he still continues to be the member of such unlawful association which is indulging into the unlawful activities and acting against the sovereignty and integrity of India, his intention is very clear that he still wants to associate with such an association which is indulging into 'unlawful activities' and acting against the interests of sovereignty and integrity of India. The language used in the Section 10(1)(i) and the

procedure to be followed under Sections 3 & 4 of the Act, before any association is declared as unlawful are very clear. There is no vagueness at all as sought to be contended by Shri Sanjay Parikh, learned Senior Counsel. Therefore, Section 10(a)(i) does not suffer from any vagueness and/or on the ground unreasonable and/or disproportionate.

17. Now so far as the submission made by Shri Parikh, learned Senior Counsel on chilling effect doctrine is concerned, it is required to be noted that a person knowing full well that an association of which he is the member is declared as unlawful association due to its unlawful activities and acting against the interests of sovereignty and integrity of India and still he continues to be a member of such unlawful association thereafter such person cannot be permitted to submit on chilling effect. The consequences are provided under the Act itself. Such a person is made to understand and/or known that to continue with the membership of such unlawful association itself is an offence. Despite such knowledge still he continues then is liable to be punished

more particularly so long as Section 10(a)(i) stands and is not declared unconstitutional.

17.1 At this stage it is required to be noted that as per Section 10(a)(i) a person cannot be punished merely because he was the member of such unlawful association. The language including Section 10 is very significant. It provides that "wherein an association is declared unlawful" by notification under Section 3 which has become effective under sub-Section 3 of that Section. So, it is only after the Notification under Section 3 has become effective under sub-section 3, that the latter part of that Section applies. The language of Section 10(a)(i) is also very cautiously worded "who is and continues to be a member of such association". Therefore, on true interpretation, if a person has been a member but does not continue to be a member after declaration, that does not attract mischief of Section 10. The intention seems to be that not only was he a member on the day when the association is declared unlawful but he continues to be a member. The intention is very clear that

not only on the given date but even after that you continue to be a member of that association which is declared as unlawful association due to unlawful activities which is found to be against the interests of sovereignty and integrity of India. Therefore, once an association is declared unlawful of whom the concerned person was the member wishes to continue as a member despite the fact that he is well aware of the fact that such an association is declared unlawful and if he still wishes to continue being a part of such unlawful association it shows a conscious decision on his part and therefore liable to be penalized for such an act of continuation of his membership with such unlawful association. Therefore, thereafter he may not make grievance of chilling effect.

18. In view of the above and for the reasons stated above we hold that the view taken by this Court in the cases of **State of Kerala vs. Raneef, (2011) 1 SCC 784; Arup Bhuyan vs. Union of India, (2011) 3 SCC 377** and **Sri Indra Das vs. State of Assam 2011 (3) SCC 380** taking the view that

under Section 3(5) of Terrorists and Disruptive Activities (Prevention) Act, 1987 and Section 10(a)(i) of the Unlawful Activities (Prevention) Act, 1967 mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence and reading down the said provisions to mean that over and above the membership of a banned organization there must be an overt act and/or further criminal activities and adding the element of *mens rea* are held to be not a good law. It is observed and held that when an association is declared unlawful by notification issued under Section 3 which has become effective of sub-section 3 of that Section, a person who is and **continues** to be a member of such association is liable to be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine under Section 10(a)(i) of the UAPA, 1967.

Any other decisions of the High Court taking a contrary view are held to be not a good law and are specifically overruled by this Judgment.

Reference is answered accordingly. Consequently, the Review applications filed by the Union of India and the State of Assam are hereby allowed.

Now the main appeals/SLPs be placed before the concerned Bench for taking of such matters after obtaining the appropriate order from Hon'ble the Chief Justice.

.....J.
(M. R. SHAH)

.....J.
(C.T. RAVIKUMAR)

.....J.
(SANJAY KAROL)

New Delhi,
March 24, 2023

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRL. APPEAL NO. 889 OF 2007

WITH

REVIEW PETITION (CRL.) NO. 417 OF 2011 IN CRL. A. NO.1383/2007

REVIEW PETITION (CRL.) NO. 426 OF 2011 IN CRL. A. NO.889/2007

SLP (CRL.) 5971/2019

SLP (CRL.) 5964/2019

CRL. A. NO. 1383/2007

SLP (CRL.) ... CRLMP NO.16637/2014

SLP (CRL.) NO. 5643/2019

SLP (CRL.) NO. 6270/2019

ARUP BHUYAN ..... APPELLANT

VERSUS

STATE OF ASSAM ..... RESPONDENT

J U D G M E N T

SANJAY KAROL, J.

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I have perused the erudite opinion proposed by my esteemed colleague Hon'ble M.R. Shah, J., with which I concur. It is my further endeavour to trace the development of law on the issue in India and the application of the decisions rendered by the Courts in the United States of America, thereto. My conclusions are as follows:

Reference made to this Court

1. The present Review Petition arises out of Order of this Court dated 26.08.2014 in **Arup Bhuyan v. State of**

Assam[1] (hereafter referred to as Reference Order). The operative part of the order is reproduced as under:

> "**10.** The crux of the matter as submitted by Mr Ranjit Kumar, learned Solicitor General for the Union of India, is that when any provision in Parliamentary legislation is read down, in the absence of the Union of India it is likely to cause enormous harm to the interest of the State as in many cases certain provisions have been engrafted to protect the sovereignty and integrity of India.
>
> **11.** The learned Solicitor General would contend that the authorities which have been placed reliance upon in both the judgments [**Arup Bhuyan v. State of Assam, (2011) 3 SCC 377 : (2011) 1 SCC (Cri) 855**], [**Indra Das v. State of Assam, (2011) 3 SCC 380 : (2011) 1 SCC (Cri) 1150**] by the two-Judge Bench are founded on Bill of Rights which is different from Article 19 of the Constitution of India. He has referred to Articles 19(1)(c) and 19(4) of the Constitution. Article 19(1)(c) reads as follows :
>
> "**19. (1)(c)** to form associations or unions;"
>
> The said article is further restricted by Article 19(4) which is as follows:
>
> "**19. (4)** Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on

1 (2015) 12 SCC 702

> the exercise of the right conferred by the said sub-clause."

Relying upon the same it is highlighted by the learned Solicitor General that the Court has not kept this aspect in view while placing heavy reliance on the foreign authorities which are fundamentally not applicable to the interpretative process of the provisions which have been enacted in consonance with the provisions of the Constitution of India.

12. Regard being had to the important issue raised by the learned Solicitor General and Mr. Jaideep Gupta, learned Senior Counsel, for the State of Assam, we think it appropriate that the matter should be considered by a larger bench. Let the registry place the papers before the Hon'ble Chief Justice of India for appropriate orders."

2. Therefore, the issue which arises for consideration is, whether the Hon'ble Division Bench in **Arup Bhuyan v. State of Assam**[2] and similarly in **Sri Indra Das v. State of Assam**[3] (two-Judge Bench) (hereafter referred to as '**Arup Bhuyan**' and '**Indra Das**', respectively) was correct in placing reliance on American decisions stating

2 (2011) 3 SCC 377

3 (2011) 3 SCC 380

that the decisions apply to India too, "*as our fundamental rights are similar to the Bill of Rights in the US Constitution*" to read down S.3(5) of Terrorist and Disruptive Activities Prevention Act, 1987/S.10 of Unlawful Activities (Prevention) Act, 1967 (hereafter referred to as UAPA*)* ? [4]

General Development of Article 19 of the Indian Constitution

3. It is important, at the outset, to reproduce **Article 19 of the Indian Constitution** which reads as follows:

"19(1) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

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

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

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

4 Arup Bhuyan, Paragraph 12.

(2) 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 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.

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

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

4. At the time of the enactment of the Indian Constitution, as submitted by the Union of India, Article 19 did not contain '*reasonable restrictions*'. The words 'reasonable restrictions' within Article 19(2) were introduced by the **Constitution (First**

Amendment) Act, 1951, which stated in its object and reasons that within the first fifteen months of the working of the Constitution certain difficulties were experienced, particularly, in regard to the chapter on Fundamental Rights and to address those issues the State was empowered to impose reasonable restrictions in the interest of general public.

5. This was followed by the **Constitution (Sixteenth) Amendment Act, 1963**, wherein the State was empowered to impose reasonable restrictions on the freedoms conferred under Article 19, particularly on the ground of protection of interests of "sovereignty" and "integrity" of India. In its object and reasons, it was stated that this Amendment is upon the recommendation of the Committee on National Integration and Regionalism appointed by the National Integration Council for preservation and maintenance of the integrity and sovereignty of the Union of India.

6. The interpretation of Article 19 and application of reasonable restrictions therein has been summarized by this Court in **Dharam Dutt v. Union of India**[5] (two-Judge Bench) in the following terms:

> **"35.** The scheme of Article 19 shows that a group of rights are listed as clauses (*a*) to (*g*) and are recognized as fundamental rights conferred on citizens. All the rights do not stand on a common pedestal but have varying dimensions and underlying philosophies. This is clear from the drafting of clauses (2) to (6) of Article 19. The framers of the Constitution could have made a common draft of restrictions which were permissible to be imposed on the operation of the fundamental rights listed in clause (1), but that has not been done. The common thread that runs throughout clauses (2) to (6) is that the operation of any existing law or the enactment by the State of any law which imposes reasonable restrictions to achieve certain objects, is saved; however, the quality and content of such law would be different by reference to each of sub-clauses (*a*) to (*g*) of clause (1) of Article 19 as can be tabulated hereunder:
>
> *Article 19*
>
> | *Clause (1)* | *Clauses (2) to (6)* |
> |---|---|
> | *Nature of right* | *Permissible restrictions* |
> | | *By existing law or by law made by the State imposing reasonable restrictions in the* |

5 (2004) 1 SCC 712

	interests of
(*a*) Freedom of speech and expression	(*i*) the sovereignty and integrity of India (*ii*) the security of the State (*iii*) friendly relations with foreign States (*iv*) public order, decency or morality (*v*) in relation to contempt of court, defamation or incitement to an offence
(*b*) right to assemble peaceably and without arms	(*i*) the sovereignty and integrity of India (*ii*) public order
(*c*) right to form associations or unions	(*i*) the sovereignty and integrity of India (*ii*) public order or morality
(*d*) and (*e*) right to move freely and/or to reside and settle throughout the territory of India	(*i*) the general public (*ii*) the protection of the interests of Scheduled Tribes
(*g*) right to practise any profession, or to carry on any occupation, trade or business	The general public and *in particular* any law relating to (*i*) the professional or technical qualifications necessary for practising of any profession or carrying on of any occupation, trade or business (*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade,

	business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

36. Article 19 confers fundamental rights on citizens. The rights conferred by Article 19(1) are not available to and cannot be claimed by any person who is not and cannot be a citizen of India. A statutory right — as distinguished from a fundamental right — conferred on persons or citizens is capable of being deprived of or taken away by legislation. The fundamental rights cannot be taken away by any legislation; a legislation can only impose reasonable restrictions on the exercise of the right. Out of the several rights enumerated in clause (1) of Article 19, the right at sub-clause (*a*) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by reference to freedom. In the words of the then Chief Justice Patanjali Sastri in *State of W.B.* v. *Subodh Gopal Bose* [AIR 1954 SC 92 : 1954 SCR 587] these rights are great and basic rights which are recognized and guaranteed as the natural rights, inherent in the status of a citizen of a free country. Yet, there cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraints, the rights and freedoms may tend to become the synonyms of anarchy and disorder. The founding fathers of the Constitution, therefore, conditioned the enumerated rights and freedoms reasonably and such

> reasonable restrictions are found to be enumerated in clauses (2) to (6) of Article 19…"

(Emphasis supplied)

7. While considering the reasonableness of the restrictions imposed under Article 19(2) to 19(6), a Constitution Bench of this Court in **State of Madras v. VG Row**[6] (five-Judge Bench) observed as under:

> **"22.** This Court had occasion in *Khare case* [*N.B. Khare* v. *State of Delhi*, 1950 SCR 519 : 1950 SCC 522] to define the scope of the judicial review under clause (5) of Article 19 where the phrase "imposing reasonable restrictions on the exercise of the right" also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised.
>
> 23. It is important in this context to bear in mind that the test of reasonableness,

6 1952 SCR 597

> wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict....."
>
> (Emphasis supplied)

8. Furthermore, laws restricting freedoms under Article 19, must be under one of the permitted heads of restrictions and must have a proximate link to it. [**See: State of Bihar v. Shailabala Devi**[7] (five-Judge Bench); **O.K. Ghosh and Anr. v. E.X. Joseph**[8] (five-Judge Bench) and **Shreya Singhal v. Union of India**[9] (two-Judge Bench)]

9. This development of Article 19 has been encapsulated by a Constitution Bench of this Court in **Kaushal Kishor v.**

7 AIR 1952 SC 329

8 AIR 1963 SC 812

9 (2015) 5 SCC 1

State of U.P. & Ors.[10] (five-Judge Bench). Justice V. Ramasubramanian has reiterated that the restrictions under Article 19(2) have been included after detailed deliberations. Furthermore, after the amendments to the Constitution that have been discussed herein above, the restrictions "save and enable the State" to make laws restricting freedoms under the enumerated heads, such as, sovereignty and integrity of India, security of the State and incitement to an offence.[11]

Specifically, Development of Article 19(1)(c)

10. Article 19(1)(c) guarantees to all citizens the right to form associations which are subject to reasonable restrictions under Article 19(4). These reasonable restrictions are not limited to formation of the association but extends to effective functioning of the association relating to lawful objectives. [**A.P. Dairy Development Corpn.**

10 2023 SCC Online 6

11 Paragraphs 29 - 31.

Federation v. B. Narasimha Reddy[12] (two-Judge Bench)]

11. A Constitution Bench of this Court in **Raghubar Dayal Jai Prakash v. Union of India**[13] (five-Judge Bench), made specific reference to restrictions imposed by statutes, vis-a-vis Article 19 (1)(c) and observed as under:

> "**11.** ... An application for the recognition of the association for the purpose of functioning under the enactment is a voluntary act on the part of the association and if the statute imposes conditions subject to which alone recognition could be accorded or continued, it is a little difficult to see how the freedom to form the association in affected unless, of course, that freedom implies or involves a guaranteed right to recognition also....".

12. Furthermore, this Court, while considering the constitutional validity of the Indian Council of World Affairs Ordinance 2001, in **Dharam Dutt**

12 (2011) 9 SCC 286

13 AIR 1962 SC 263

(supra), while tracing the settled legal position, reiterated that restrictions can be imposed on the right conferred by Article 19(1)(c). It was observed that this right can be subjected to those restrictions which satisfy the test of Article 19(4) of the Constitution.

13. While adjudicating a case involving the UAPA, in **Jamaat-E-Islami Hind v. Union of India**[14] (three-Judge Bench), with respect to restrictions that may be imposed on such a right under Article 19(4) as also the requirements of natural justice, it was observed as under:

> **"20.** … The scheme under this Act requiring adjudication of the controversy in this manner makes it implicit that the minimum requirement of natural justice must be satisfied, to make the adjudication meaningful. No doubt, the requirement of natural justice in a case of this kind must be tailored to safeguard public interest which must always outweigh every lesser interest. This is also evident from the fact that the proviso to sub-section (2) of Section

14 (1995) 1 SCC 428

> 3 of the Act itself permits the Central Government to withhold the disclosure of facts which it considers to be against the public interest to disclose. Similarly, Rule 3(2) and the proviso to Rule 5 of the Unlawful Activities (Prevention) Rules, 1968 also permit non-disclosure of confidential documents and information which the Government considers against the public interest to disclose."

> "**26.** An authorised restriction saved by Article 19(4) on the freedom conferred by Article 19(1)(*c*) of the Constitution has to be reasonable."

(Emphasis supplied)

Distinction between Indian and American Constitution

14. In view of the above discussion, one now proceeds to consider the First Amendment of the American Constitution which is extracted as under:

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

15. The contradistinction between the rights created by the First Amendment of the American Constitution and Article 19 of the Indian Constitution is the power given to the State to make laws reasonably restricting such freedoms in India. Conversely, in the United States of America, restrictions have been imposed by the Judiciary in instances, as relied upon in **Arup Bhuyan** and **Indra Das**, however no such explicit power is available with the Legislature.

16. This distinction has been enunciated by this Court as well. In **Babulal Parate v. State of Maharashtra**[15], as submitted by the Union of India, a Constitution Bench of this Court (five-Judge Bench) while upholding the constitutional validity of Section 144, Cr.P.C. has held that whatever may be the position in the United States, the anticipatory action under S.144, Cr.P.C. is permissible under

15 (1961) 3 SCR 423

clauses (2) and (3) of Article 19, which allow the legislature to make laws placing reasonable restrictions on the rights conferred by these clauses of Article 19. Importantly, this Court further observed there is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of the Indian Constitution. It was further observed that the framework of the Indian Constitution is different from the American Constitution.

17. The above distinction in **Babulal Parate** (supra), was reaffirmed by another Constitution Bench in **Madhu Limaye v. Sub-Divisional Magistrate**[16] (seven-Judge Bench), wherein this Court while dealing with the constitutionality of S.144 of the Cr.P.C. and the scope of restrictions that can be imposed, observed that in America, the First Amendment freedoms have no qualifications, as in India and the American rulings are apt to be misapplied to our Constitution.[17]

16 (1970) 3 SCC 746

17 Paragraph 17 and 28.

18. Furthermore, in **Indian Express Newspapers (Bombay) Pvt. Ltd. and Others v. Union of India and Others**[18] (three-Judge Bench), through the pen of E.S Venkatramaiah J., (as his Lordship then was), observed that:

> "**44.** While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that in a democratic country, we may take them into consideration. The pattern of Article 19(1)(a) and of Article 19(1)(g) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is in absolute terms. The rights guaranteed under Article 19(1)(a) and Article 19(1)(g) of the Constitution are to be read along with clauses (2) and (6) of Article 19, which carve out areas in respect of which valid legislation can be made."

19. In **Union of India v. Naveen Jindal and Another**[19] (three-Judge Bench) this Court, while discussing the issue of a citizen's right to fly the National Flag, on the issue of Right to freedom of Speech and Expression, noted the distinction

18 (1985) 1 SCC 641

19 (2004) 2 SCC 510

between the Constitution of India and that of the United States of America. Such a distinction being that in the USA, the First Amendment gives an absolute right to a citizen of free expression, but under Article 19(1)(a), no absolute right is conferred. It only provides for a qualified right, which is subject to regulatory measures contained in clause 2 of Article 19.[20] This distinction between the Bill of Rights contained in the American Constitution and the fundamental rights provided for in the Indian Constitution was also noted in **Superintendent, Central Prison v. Dr. Ram Manohar Lohia**[21] (five-Judge Bench); **Pathumma v. State of Kerala**[22] (seven-Judge Bench)**; M.C. Mehta v. Union of India**[23] **(Shriram – Oleum Gas)** (five-Judge Bench)**; Ashok Kumar Thakur v.**

20 Paragraph 77.

21 (1960) 2 SCR 821

22 (1978) 2 SCC 1

23 (1987) 1 SCC 395

Union of India[24] (two-Judge Bench) and **Jayendra Vishnu Thakur v. State of Maharashtra**[25] (two-Judge Bench).

20. In **Ramlila Maidan Incident, In re, (2012) 5 SCC 1** (two-Judge Bench)**,** as submitted by the Union of India, while discussing the Right to Freedom of Speech and Expression under Article 19, refused to apply the US case of *Schneck v. United States*[26], which propounded the doctrine of clear and present danger, stating that it cannot be imported and applied in India.[27] Further, holding that, the right to freedom of speech and expression in India is subject to reasonable restrictions and therefore, there is a marked distinction in the language of law, its application and interpretation under the Indian and the US laws.[28]

21. **Shreya Singhal** (supra), this Court speaking through R.F. Nariman, J. highlighted on the differences between the

24 (2008) 6 SCC 1

25 (2009) 7 SCC 104

26 249 US 47 (1919)

27 Paragraph 8.

28 Paragraph 9 - 11.

US First Amendment and Freedom of Speech and Expression under Article 19(1)(a) read with Article 19(2) in the following words:

> **"15.** It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make no law which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2)."

> **17.** So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely

necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law."

18. American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to subserving the general public interest that there is a world of difference."

(Emphasis Supplied)

22. The abovementioned decision in **Shreya Singhal** (supra), has been followed recently in **Kaushal Kishor** (supra) by Justice B.V. Nagarathna in her erudite concurring opinion while analyzing the freedom of speech and expression under Article 19.[29]

23. The distinction as noted by this Court in various

29 Paragraph 202(iii) & 203.

decisions between the American Constitution, specifically the First Amendment therein and Article 19 of the Indian Constitution have been noted hereinabove.

24. There have been, however, cases where this Court has, taken into consideration, judgments of the Supreme Court of the United States of America. For instance, the Constitution Bench in **Express Newspapers (Pvt.) Limited and Another v. Union of India and Others**[30] (five-Judge Bench) wherein the constitutionality of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 was in question.

Justice N.H. Bhagwati writing for the Court, observed, that since Article 19(1)(a) of our Constitution is based on the First Amendment of the American Constitution, it would be "legitimate and proper" to refer to the decisions of the Supreme Court of the United States "in order to appreciate the true nature, scope and extent of this right". This observation comes in addition to and despite having taken

30 (1959) SCR 12

note of the warnings issued in **State of Travancore – Cochin and Others v. Bombay Co. Ltd**[31] (five-Judge Bench) and **State of Bombay v. R.M.D. Chamarbaugwala**[32] (five-Judge Bench). This was, however, after having duly recognized the "paucity of authority in India on the nature, scope and extent of this fundamental right of freedom of speech and expression enshrined under article 19(1)(a) of the Constitution", at that point in time.

25. This observation of Justice N.H. Bhagwati has been further followed in **Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Ors.**[33] (two-Judge Bench) wherein the effect of Article 19 on the freedom of press was in question.[34] The court while making reference to US and UK decisions in *Nebraska Press Association v. Hugh Stuart*[35], *John D.*

31 1952 SCR 1112

32 1957 SCR 874

33 (1988) 4 SCC 592

34 Paragraph 10.

35 427 US 539

Pennekamo v. State of Florida[36] *and Attorney General v. British Broadcasting Corporation*[37], held that there was no reason for the injunction in question, to continue.[38]

26. In **R.K. Garg v. Union of India**[39] (five-Judge Bench), a Constitution Bench, placed reliance on the Supreme Court of United States decisions in *Morey v. Doud*[40] and *Secy. of Agriculture v. Central Roig Refining Co.*[41] to hold that the courts cannot be converted into tribunals for relief from inequalities in economic legislations.[42]

27. An observation by Lord Denning in **Ghani v. Jones**[43] quoted with approval **in Maneka Gandhi v. Union of India**[44] (seven-Judge Bench), is worth reproducing herein. It reads, "*a man's liberty of movement is regarded so highly*

36 (1945) 90 L Ed 331

37 (1979) 3 All ER 45

38 Paragraph 20 - 22, 38.

39 (1981) 4 SCC 675

40 354 US 457 (1957)

41 338 US 604 (1949)

42 Paragraph 8.

43 (1970) 1 QB 693

44 (1978) 1 SCC 248

by the law of England that it is not to be hindered or prevented except on surest grounds". It is then, by extension, without a shadow of doubt, a sure ground for the restriction of liberty, in the present case of association, if the legislature, after following procedure established by law, found appropriate reasons to restrict such right, in particular, with banned organizations.

28. The purpose of delving into both nature of decisions, where judgments of the United States Supreme Court have and have not been relied on, is to demonstrate that in certain cases reference to those judgments is justified. Such reference though, needless to say, has to be appreciated in the light of our own constitutional, legislative as well as judicial, historic perspective. They cannot, as was done in the **Arup Bhuyan** and **Indra Das** referred to this bench, form the sole basis for the conclusion arrived at.

29. In the aforesaid backdrop, in order to answer the reference, it is essential to appreciate the decisions relied

upon in the two decisions, namely, **Arup Bhuyan** and **Indra Das**. It is only subsequent to having appreciated these decisions that we may examine effectively, their application to the scenario before us.

Background, import and relevance of decisions of Supreme Court of United States relied on in *Arup Bhuyan*

30. In **Arup Bhayan**, the learned bench of two judges placed reliance on American decisions in **Elfbrandt v. Russel**[45], **Clarence Brandenberg v. State of Ohio**[46] **and United States v. Eugene Frank Robel**[47] wherein the doctrine of 'guilt by association' has been rejected. The court observed that the abovementioned judgments apply to India too, since the fundamental rights in India are similar to the Bill of Rights in the U.S. Constitution. Furthermore, this court while setting aside the conviction of the appellant under S.3(5) TADA observed:

45 384 U.S. 17 (1966)

46 395 U.S. 444 (1969)

47 389 U.S. 258 (1967)

> "**12.** In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence."

31. Reliance was placed on the decision of this court in **State of Kerela v. Raneef**[48] (two-Judge Bench)**,** wherein Justice Katju, while upholding the order granting bail to the Respondent, placed reliance on US Supreme Court decisions such as **Elfbrandt** (supra) which has rejected the doctrine of "guilt of association".

32. In **Elfbrandt** (supra)**,** the constitutionality of the Arizona Act was in question which required all state employees to take oath. Under the oath, an employee is subject to prosecution for perjury and discharge from office if he "**knowingly and willfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations**" or

48 (2011) 1 SCC 784

"any other organization" having for "one of its purposes", the overthrow of the state government, where the employee had knowledge of such unlawful purpose. It was held that those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat. This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment.

33. In Clarence Brandenberg v. State of Ohio[49], the Appellant was convicted under the Ohio Criminal Syndicalism statute for:

(i) 'advocating ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and

49 395 U.S. 444 (1969)

(ii) for 'voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'

The Supreme Court of the United States of America, while reversing the conviction, held that Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who 'justify' the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who 'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.' Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent

lawless action. Furthermore, it held that the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

34. In **United States v. Eugene Frank Robel**[50], the constitutionality of S. 5(a)(1)(D) of the Subversive Activities Control Act of 1950, was drawn into question before the Supreme Court of the United States of America. S.5(a)(1)(D) of the Act provided that, when a Communist-action organization is under a final order to register, it shall be unlawful for any member of the organization 'to engage in any employment in any defense facility.' In this case, the appellee was indicted since he was a member of the Communist Party and was employed at Todd Shipyards

50 389 U.S. 258 (1967)

Corporation, which was designated as a 'defense facility.' The Court declared S.5(a)(1)(D) as unconstitutional and held that:

> "It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment."

Background, import and relevance of decisions of Supreme Court of United States relied on in *Indra Das*

35. In **Indra Das**, the learned bench of two Judges relied on and followed its earlier judgment in **Arup Bhuyan** and while similarly relying on the American decisions discussed henceforth, it was held that S.3(5) of TADA/S.10 of UAPA have to be read down to bring them in consonance with the Constitution.

36. Reliance was placed on **Elfbrandt** (supra), as discussed above.

37. The learned division bench relied on **Scales v. United States**[51], *to make a distinction between an active and a passive member of an organization.* In this case, the Petitioner's conviction under the Smith Act came in review before the Supreme Court of the United States of America. This act, made a felony "the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force of violence." Further, the Court, while overruling the Petitioner's constitutional challenge observed that:

> "The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant "specifically intends to accomplish the aims of the organization by resort to violence."
>
> Thus, the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.' Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal."

51 367 US 203 (1960)

38. In **Noto v. United States**[52], the Petitioner was convicted of violating the membership clause of the Smith Act, which makes a felony the acquisition or holding of membership in any organization which advocates the overthrow of the Government of the United States by force or violence, knowing the purpose thereof. The Supreme Court observed that There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching.

In this backdrop, it was held that the conviction of the Petitioner is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force.

39. Reliance was placed on the *dissenting opinion of Justice Hugo Black in* **Communist Party v. Subversive Activities Control Board**[53]. In this case, the registration of the

52 367 US 290 (1960)

53 367 US 1 (1961)

Communist Party of the United States since it was a "Communist action organization," under the Subversive Activities Control Act of 1950 was brought into question. Justice Hugo Black observed that: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas -- whether that association be called a political party or not -- marks a fateful moment in the history of a free country. That moment seems to have arrived for this country."

40. In **Joint Anti-Fascist Refugee Committee v. McGrath**[54], the Petitioner organisations were included by the Attorney General as Communist, without hearing and furnished by him to the Loyalty Review Board of the United States Civil Service Commission. The court, while recognising that the Attorney General had no power to do so, remanded the matter back to the district court. It was observed that:

54 341 US 123, 174 (1951)

> "In days of great tension, when feelings run high, it is a temptation to take shortcuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."

41. In **Keyishian v. Board of Regents of New York**[55], the Supreme Court of the United States of America, struck down a law which authorized the board of regents to prepare a list of subversive organizations and to deny jobs to teachers belonging to those organizations. The law made membership in the Communist Party prima facie evidence for disqualification from employment. Mr. Justice Brennan, speaking for the Court held that, penalizing mere knowing membership, without a specific intent to further the unlawful aims of an organization, is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.

55 385 US 589 1966

42. In Yates v. U.S.[56], the Petitioners were members of the Communist Party in California and were indicted under the Smith Act, charging them with conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force. While reversing the conviction of the Petitioners, the Supreme Court observed that the district court failed to distinguish between advocacy of forcible overthrow and advocacy of action, by holding that advocacy of violent action at some future time was enough.

43. Reliance was placed on **Clarence Brandenberg** (supra), as discussed above.

44. In **Whitney v. California**[57], the question which arose was whether the petitioner, who joined and assisted in the organization of a Communist Labor Party contravening the

56 354 US 298 (1957)

57 274 US 357 (1926)

California Criminal Syndicalism Act, did so with knowledge of its unlawful character and purpose. The Supreme Court of the United States of America, while upholding the constitutionality of the abovementioned act, observed that the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility. Furthermore, although the rights of free speech and assembly are fundamental, they are not, in their nature, absolute.

In **Indra Das**, reliance was placed on the concurring opinion of Mr. Justice Brandeis wherein he observed that fear of serious injury cannot alone justify suppression of free speech and assembly. 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.

45. Reliance was placed on the dissenting opinion of Mr. Justice Holmes in **Gitlow v. New York**[58]. In this case, the appellant was a member of the Left-Wing Section of the Socialist Party. He was indicted for advocating the overthrow and upending of the organized government. The majority opinion reiterated that it is a fundamental principle, long established, that 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. a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press does not protect disturbances to the public peace or the attempt to subvert the government. The constitutionality of the statute and conviction of the appellant was upheld. Justice Holmes observed that:

58 268 US 652 (1925)

"It is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement.

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. .... but the indictment alleges the publication, and nothing more."

46. In **Terminiello v. Chicago**[59], the Petitioner was charged with violation of an ordinance forbidding any "breach of the peace". While reversing his conviction, the Supreme Court of the United States of America held that a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. The Court observed that "..speech is often provocative and challenging."

59 337 US 1 (1948)

47. In **De Jonge v. Oregon**[60], the Appellant was charged on the basis that he assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The Supreme Court of the United States of America while considering the Criminal Syndicalism Law of Oregon held that "none of our decisions goes to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application." Reliance was placed on the abovementioned decisions in **Gitlow** (supra) and **Whitney** (supra).

Conclusions

48. The abovementioned decisions are in contradistinction to the scenario in question in India. The American decisions primarily involve indictment on the basis of membership of political organizations or incidents of free speech advocating overthrow of the government. However, under Indian law, it is

60 299 US 353 (1936)

not membership of political organizations etc. or free speech or criticism of the government that is sought to be banned, it is only those organizations which aim to compromise the sovereignty and integrity of India and have been notified to be such and unlawful, whose membership is prohibited. This is in furtherance of the objective of the UAPA, which has been enacted to provide for the more effective prevention of certain unlawful activities of individuals and associations and dealing with terrorist activities and for matters connected therewith. The distinction, therefore, is clear.

49. Furthermore, the UAPA provides for a system of checks & balances and public notification for any association being declared unlawful:

- **S.3** of the Act, states that the Central Government must publish a notification declaring an unlawful association in the Official Gazette and Daily Newspaper in the State in which the principal office of

the association affected is situated. Furthermore, the Association must be notified by affixing a copy on its office or by serving its office bearers or by means of loudspeakers.

- Under **S.4** of the Act, any notification under S.3 of the Act, shall be adjudicated upon by the Tribunal for the purpose of whether or not there is sufficient cause for declaring the association unlawful. In this adjudication, the association is given an opportunity to be heard. **S.5** provides for setting up this UAPA Tribunal, to which no person shall be appointed unless he is a **Judge of a High Court.**

- Under **S.10** of the Act, which may be termed as the genesis if the present controversy to be adjudicated upon, in my understanding is forthcoming in its meaning. “Is and continues to be” implies that a person, even after the organization being so notified as

unlawful, is **and continues to be a member**, would attract penalty under the said section. The use of the conjunction "and" means that both of the abovementioned conditions have to be satisfied. [**Hyderabad Asbestos Cement Products and Anr. v. Union of India and Ors.**[61], (three-Judge Bench)]

It is important to reiterate, that the above observations have been made in light of and for application to the present reference.

50. Importantly, **Shreya Singhal** (supra) captures the situation in regards the use of judgments of the Supreme Court of the United States of America aptly to say that those judgments are of "great persuasive value" but it also notes that there is "a world of difference" between the American and Indian scenario, so far as, subserving public interest is concerned. It is this difference which seemed to have escaped

61 (2000) 1 SCC 426

the learned division bench's attention in **Arup Bhyan** and **Indra Das**.

51. As recorded by the Constitution (First Amendment) Act, 1951, issues in the functioning and implementation of such rights were being faced right from the start and so the law-making authority, in order to ensure smooth functioning of law. This Court cannot be oblivious to such fact. The vast, varied and scholarly jurisprudence developed by this court has been in view of these clauses within Article 19. Now, at this juncture, seven decades thence, in my view a stand of whichever court, cannot be allowed to stand if it is in ignorance of constitutional provisions. I may hasten to add that neither I, or this bench, nor any other court would hold otherwise to state that influences or even borrowing from other constitutions has not taken place in the formation of our constitution, but, it is equally and ever so more important to note, that the development thereof has been done in specific context of the situations and conditions prevalent in India.

52. In light of the above, I may conclude that placing reliance therefore, on decisions rendered in a distinct scenario as well as a demonstrably different constitutional position, that too almost singularly, especially in cases which involve considerations of national security and sovereignty, was not justified.

53. The reference is answered in the above terms.

.....J.

(Sanjay Karol)

Place: New Delhi;

Date: 24th March, 2023.