CHAPTER – 7
COTROL OVER ADMINISTRATIVE DISCRETION AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 19 OF OUR CONSTITUTION

1. Where discretion is conferred to regulate the freedom of speech and expression :

Article 19(1) (a) of the Indian Constitution guarantees to all citizens the right of freedom of speech and expression, but according to Article 19(2), the State may make a law imposing restrictions on this freedom in the interests of "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."

The general principle is that unregulated or arbitrary discretion should not be given to an administrative officer to regulate the freedom of speech and expressions. In **Dr. Bhanu Shanker L. Joshi** Vs **State and another**[1] under section7(1) of the Press (Emergency Powers) Act, 1931 the District Magistrate served an order to the petitioner, who was the printer and publisher of the daily newspaper "Fariad", to deposite a security of Rs. 1000/- within 10 days of the order. The order mentioned that the District Magistrate was of the opinion that the petitioner had abused the right of conducting fair journalism. The order of the District Magistrate was challenged on the ground that section 7(1) of the Act did not restrict the power of the District Magistrate' to the objects enumerated in Article 19(2) of the Constitution. The impugned section itself contained no indication for what reasons the magistrate could require security to be furnished and he could without breach of its provision make an order for purpose totally alien to Article 19(2). The Full Bench of the Sarashtra High Court held the exercise of power by the District Magistrate as invalid. The Bench delivering its

opinion through Baxi J. pointed out that section 7(i) of the aforesaid Act merely required that there must be some reason which in the opinion of District Magistrate should have compelled for an order against the publishers. He further observed that the reasons did not relate to the purpose mentioned in Article 19(2) and that section 7(i) of the aforesaid Act did not lay down any condition or limitation within the ambit of which the magistrate might exercise the power to require the security to be furnished. The exercise of the above mentioned power was held to be invalid mainly on two grounds. Firstly, section 7(i) of the Act did not lay down the considerations upon which the power was to be exercised and secondly, for a restriction to be reasonable there must be a rational relational between the restriction itself and the object sought to be achieved.

If there are adequate safeguards against the arbitrary exercise of power, a provision of law cannot declared as void on the ground that the power may be exercised in a arbitrary manner. It is an abuse of power that can be declared as bad not the law itself under which power is exercised. In **Gopal Das** Vs **State of Assam and others**[2] the petitioner published a booklet titled as "Samaj Tantra bad kiya Lagey" in Assamese language which was later on translated into Hindi. The Government acting under section 11 of the Press Objectionable Matter Act, 1951, ordered the forfeiture of the booklet as an objectionable matter under section 3 of the Act. The order was challenged as arbitrary and violative of Article 19(1) (a) of the Constitution. It was held by Sarajoo Pd. C.J. that under section 11 of the Act a very wide power was given to the executive to pass an order of forfeiture without giving the person affected any right to show cause against the order which the Government purposed to make. But in the opinion of the court the power which can be exercised under section 11 is arbitrary only if the safeguards provided were not sufficient and the restrictions were unreasonable. In view of the Court in this case two important safeguards had been provided. Firstly that the Government could only act under Section 11 after the Advocate General or the Principal Law Officer of the State had given a certificate that 'in his opinion the paper, newspaper, or booklet etc. sought to be forfeited contains objectionable matter' and secondly that the party affected could approach the High Court under section

24 of the Act. So Section 11 of the aforesaid Act was declared as intravires because it does not confer an arbitrary power upon the executive to interfere with fundamental rights. But in the instant case as the order did not satisfy the requirements of the Act therefore, it could not stand. Thus section 11 of the Act in the eyes of the Court does not confer any arbitrary power because the action of forfeiture cannot be taken merely on the opinion of the executive but after taking an independent legal opinion given by the responsible law officer and also there is an opportunity provided to the party affected to reach the High Court. This decision has also been followed in **Shantilal Vadi Lal Shah and another** Vs **State of Bombay**.[3]

N. Veerabhraman Vs **State of A.P.**[4] is another case where statutory provision giving power to the executive to impose restrictions on the freedom of speech was found to be valid owing to the adequate safeguards contained in the statute conferring the said powers. Under section 99-A Criminal Procedure Code a State Government can format any book, newspaper or any other documents if it appears to the Government that it contains any seditious matter or any matter intended to promote feeling of enmity or hatred between different classed of citizen or intended to outrage the religious feelings of a class of citizens by outraging their religious feelings etc. in the instant case the book written by the petitioner named as "Bible Bandaram" was seized by the Government under Section 99-A of the Cr. P.C. This section was challenged as invalid because it confers an arbitrary power upon the executive to interfere with the freedom of speech and expression one of the fundamental rights. The majority of the Special Bench through Chandra Reddy C.J. observed that this section did not take away the right of the petitioner to write and publish books but it only empowers the executive to take action in the interest of public order etc. It was further said by the court that absence of provision in section 99-A Cr. P.C. for withdrawal of order of forfeiture passed under that section or for return of copies of book seized does not constitute an unreasonable restriction. Under section 12 of the General Clauses Act, 1897, State Government can withdraw the order of forfeiture and then it must return the copies seized. Moreover, there is another safeguard i.e.

under section 99-B, 99-C and 99-D, the aggrieved person may appeal within a period of 60 days. The court made it clear that for the reasons no opportunity for hearing has been provided, the restriction could not be held as unreasonable. Thus section 99-A of the Cr.P.C. was declared as valid. The court was of opinion that judicial reviews is not an essential condition of reasonableness if the legislature has provided adequate safeguards against the arbitrary exercise of discretionary power by the executive. The **Gopal Das'**[6] case and **N. Veerabrahmam's**[6] case both relate with the seizure of books etc. but in the former case the satisfaction was of an independent law officer whereas in the latter case the satisfaction was of the executive officer himself. Again in both the case opportunity to reach the judiciary was available but in latter case within 60 days. Thus in the former case the chance of arbitrary exercise of power were less as compared to the latter one. The observation of the Andhra Pradesh High Court in **N. Veerabhraman** case has been followed in **Gopal Vinayak Godse's Case**[7] by the Bombay High Court where section 99-A of the Cr. P.C. was also declared as valid.

The conferment of wide power to impose a restriction on the freedom of speech can be saved if there are adequate safeguards including procedural against its arbitrary exercise. In **Virendra** Vs **Punjab**[8] section 2(1)(a) of the Punjab Special Powers (Press) Act, 1956 empowered the State Government to prohibit the printing or publication of any matter relating to a particular subject for a maximum period two months in any issue of a newspaper if the Government was "satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order". The aggrieved party could make a representation against the order to the Government which after considering the same could modify confirm or rescind the order. Section 3(1) authorised the State Government to prohibit the bringing into the State of any newspaper if it was satisfied that such an action was necessary to prevent any activity prejudicial to the maintenance of communal harmony affecting public order. These provisions were challenged on the ground that they gave wide powers to the Government to curtail freedom of speech on its subjective satisfaction and the discretion

conferred on the executive was arbitrary and uncontrolled and therefore, unreasonable under Article 19(2). The Supreme Court through S.R. Das C.J. pointed out that there existed in Punjab serious tension amongst the various communities and the Act in question was enacted for preserving the public safety of the State and for maintaining public order. The State Government charged with the preservation of law and order in the State and being in possession of all materials and could not thus gauge the seriousness of the situation. Therefore, determination of the time when, and the extent to which restriction should be imposed on the press must of necessity be left to the judgment and discretion of the Government. Quick decision and swift action being the essence of these powers, their exercise must be left to the subjective satisfaction of the Government. To make the exercise of those powers justifiable would defeat they very purpose of the Act. Further, the learned C.J. held that a law conferring discretion on the executive could not be invalid if it laid down the policy so that discretion was exercised to effectuate the policy. The law in question satisfied this test for it laid down the purposes for which the power could be exercised. The power could not be exercised for any other purpose and, therefore, the Act did not give unfettered and uncontrolled discretion to the State Government. Further in Section 2, there were two safeguards subject to which the Government was to exercise its power. Firstly the time limit for which and order could remain in force was two months and secondly that the aggrieved person could make representation to the Government against the order. Thus section 2 was declared as valid but section 3 was declared as invalid because it neither laid down any time limit for the operation of the order, nor did it provide for any representation to the Government against the order. This case shows that in presences of exceptional circumstance conferment of discretionary power is not unreasonable if there is a sufficient safeguard against its arbitrary exercise. But if the circumstances are such that conferment of arbitrary power on the administrative body is not subject to any safeguard and the authority has acted in punitive way without applying its mind, then restriction imposed on freedom of speech and expression is unreasonable.[9]

The rule that there should not be an arbitrary and unregulated power to regulate freedom of speech can be better illustrated by references to the cases under Dramatic Performance Act. In **Madan Lal Kapur** Vs **State of Rajashtan**,[10] petitioner commenced on 31st January, 1952 a show of skilled game namely shooting by pistal at stripes of different colours (of choice) on a fixed board 12 feet away from the place of shotting. The District Magistrate acting under section 3 of the Rajasthan Dramatic Performance and Entertainment Ordinance 1949 specifically ordered the closure of the game of skill. The petitioner firstly applied to the District Magistrate for the cancellation of the said order and on refusal he challenged the order of the District Magistrate in the High Court. Sharma J. of the Jaipur Bench observed that the authority who is invested with the power of placing restrictions must conform with the provisions of the section under which power is given. Under the ordinance the District Magistrate could prohibit the performance if he considered that particular performance was detrimental to a larger section of persons. So it was necessary for the District Magistrate before prohibiting any dramatic performance to record an opinion indicating that the performance or entertainment was likely to deprave and corrupt persons present at performance. The order of the District Magistrate which only said that the game should be immediately stopped did not amount to give an opinion that the game was likely to deprave and corrupt persons present at the performance. Thus the power can be said to be exercised in an arbitrary manner and its exercise amounts to an unreasonable restriction on the right. In another case **State** Vs **Baboo Lal**[11] the Dramatic Performance Act, 1876 authorised the District Magistrate to prohibit public dramatic performance of a scandalous or defamatory nature, corrupting persons or arousing or likely to excite feeling of disaffection to the Government. The Act has been declared to be unconstitutional for it made the District Magistrate the final authority to determine the question whether a particular play is offensive under the Act. Further, there was no obligation on the District Magistrate to give reasons for his decision. No provision existed for the appointment of any higher authority (judicial or otherwise) to review or reconsider the order passed by him or to afford an opportunity to the

aggrieved party to make a representation against the prohibitory order. In the opinion of Mulla J. "The final order cannot be left to the mere subjective determination of an executive officer where decision is not open to review or reconsideration". In this case the substantive provision of the statute was declared as reasonable where as procedural provision a unreasonable. This decision shows that in absence of exceptional circumstances fundamental right should not be left to the subjective determination of an executive officer. This observation of the Allahabad High Court was followed by the Punjab High Court in subsequent cases.[12]

A notable example of administrative regulation of freedom of speech and expression is the system of censorship of films under the Cinematograph Act, 1952. A board of Film Censors, appointed by the Central Government, examines the films and may sanction, refuse to sanction or order modification in a film before sanctioning it. The party concerned is given an opportunity to represent his views in the matter. A film is not certified for public exhibition if, in the opinion of the Board, the film is against the interests of the security of the State, friendly relations with foreign states, public order, decency or morality or involves defamation contempt of court, or is likely to incite the commission of any offence. An appeal against the order of the Boardlies to Central Government which passes the order of the holding such inquiry as it thinks fit and after giving the appellant an opportunity to represent his views in the matter. The Act thus provides adequate procedural safeguard though the weakness in the procedure is that hearing of an appeal is by the Government and not by the Court. The discretion vested in the Board is subjective as the ground mentioned in the Act is broad and vague. The decision of the Board can be challenged only on the limited ground of "abuse of power". In K.A. **Abbas** Vs **Union of India and another**[13] the petitioner a journalist and play wright sought a declaration against the Union of India and the Chairman, Central Board of Film Censors, that the provisions of Part II of the Cinematograph Act 1952, together with the rules prescribed by the Central Government, in the purported exercise of its powers under section 5-B of the Act were unconstitutional and void. The petitioner challenged the provisions of the

Act and the rules, orders and directions under the Act as vague, arbitrary and indefinite. The petitioner raised the points- firstly that even if the preconsorship were legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action and secondly that the appeal should lie to a court or to an independent tribunal and not the Central Government. The second point was conceded by the Solicitor General. The court expressed satisfaction that the Central Government will cases to perform curial functions through one of its Secretaries in this sensitive field involving the fundamental right of freedom of speech and expression. Experts constituting a tribunal and deciding matter quasi-judicially inspire more confidence than a Secretary and therefore, it is better that the appeal should like to a court or tribunal. In the opinion of Hidyatullah C.J. "the Central Government in dealing with the problems of Censorship will have to bear in mind the principles prescribed under the Act and they will be the philosophical compass and the logical methods of Ahrens. Of course Parliament can adopt the direction and put them in schedule to the Act.[14] The Government Conceded the Point that the appeal should lie from the Board of Censors to Court or an independent tribunal and not to the Government and agreed to amend the Act accordingly.

The freedom of speech and expression includes peaceful demonstration.[14a] What extent this freedom is subject to the discretionary power of the executive authorities was decided by the Allahabad High Court in **Sri Raj Naraina Singh and others** Vs **D.M. Gorakhpur and another.**[14b] In this case on 23.04.1955 the City Magistrate, Gorakhpur promulgated an order under section 144 of the Criminal Procedure Code. In the preamble he referred to the information removed by him to the effect that certain persons intended to make demonstration on private land belonging to Railway without the consent of railway authorities which would affect public peace and tranquility. The order under section 144 of the Cr. P.C. was expressed to remain in force 7 days with effect from 24.4. 19558 in specified area. It was passed exparte. It warned the public that any breach of its provisions was punishable under the Section 188 I.P.C. The three applicants proceeded to the spot on 25.04.1955 and were promptly arrested by the police for

disobedience of the order. These persons challenged the validity of the order on the ground that it affected freedoms under Article 19(1) of the Constitution Desai J. of the Allahabad High Court was of the opinion that under section 144 of the Code a Magistrate can direct a person to abstain from doing any of the acts, the right to do which is guaranteed under Article 19(1). Therefore, Section 144, though an order passed under it by a magistrate imposed restrictions upon the right guaranteed under Article 19(1) was held to be valid. The reasonableness of the restrictions cannot seriously be doubted if the acts were likely to cause obstruction, annoyance etc; they must be prevented. The magistrate is required to state materials justifying his orders. The order is to remain in force for not more than two months. The persons against whom it is directed have right to appear before the magistrate and show cause against it. Further the magistrate and any other superior magistrates have been given power on their own motion or an application by any aggrieved person to rescind or alter the order. The High Court has jurisdication to revise an order passed by a magistrate. A person disobeying it cannot be punished unless it is found by the court that disobedience caused or tended to cause obstruction, annoyance etc. In the face of all these safeguards the restriction by virtue of section 144(1) of the Cr. P.C. cannot be said to be unreasonable. Similarly in **Virendra** Vs **State of Punjab**[14c] the Constitutionality of section 144 of the Cr. P.C. was also raised. In this case the District Magistrate of Jullundur issued two orders under section 144 directing the editor of two vernacular news papers to abstain from publishing without his previous scrutiny any articles, comments, news etc. relating to the disturbance or agitation in connection with the regional formula, the language controversy and matters calculated to cause communal disharmony in the State for a period of two months from the date of the order. This order was followed by a communication requiring the editors to submit the articles etc. to the office of the Press and Radio Liasion Officer, Jullundur, for scrutiny before publication. The Division Bench of the Punjab High Court through Bhandari C.J. upheld the validity of section 144 of the Cr. P.C. **Naraina Singh's** case. The learned C. J. further said "section 144 is a powerful weapon in the armory of the State and can be employed effectively in

defence of public order in time of stress and strain. It is true that like all other instruments it is capable of being misused but that fact alone would not justify us in allowing this weapon to be so rusted and blunted with constitutional construction as to be rendered practically useless.[14d]

Many of the above cases show that in justifying the conferment of large discretionary powers on the executive, the court emphasised the fact that power had been conferred on a high ranking official or body which was not likely to abuse the power. In ***Radhakrishan,***[14e] the court stated the proposition thus:

> Where power is conferred on high and responsible officers they are expected to act with caution and impartiality while discharging their duties.... The vesting of discretionary power in the State or public authorities or an officer of high standing is treated as guarantee that the power will be used fairly and with a sense of responsibility.

Again in ***Accountant-General v. Doraiswamy,***[14f] broad power conferred on the Comptroller and Auditor-General was held to be valid because he was a high ranking constitutional authority. It was held that a high ranking constitutional authority such as Controller & Auditor General can be expected to act according to the needs of service and without arbitrariness.

In the case of *Tika Ram v. State of U.P.*[14g] the Supreme Court dealt with the constitutionality of the provisions of ss. 17(1), 17(1-A), 17(3-A), 17(4-A) and the proviso to s. 17(4) of the Land Acquisition Act along with s. 2 of U.P. Act 5 of 1991 (hereinafter called "the Validating Act". for short) so also constitutionality of ss. 3-A, 3-B, 4, 5, 6, 7 and 8 of the Land Acquisition Act was also challenged. Challenge was also made to some other Notifications under s. 4(1) of the Act. The Supreme Court rejected the contention that the power under s. 17(4) of the Act of dispensing with the enquiry under s. 5-A is in the nature of unbridled and uncanalised power in the hands of executive to take possession, invoking urgency clause.

It is a myth to say that the power vested in high officials is not apt to be misused as there are many cases on record where the court itself has found some

fault with the exercise of power by high officials or even Central of State Government. This appears to be a very tenuous basis to support conferment of broad powers. In ***Mohinder Singh Gill v. Chief Election Commissioner***,[14h] the Supreme Court has itself warned that "wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks". Thus, the sooner the court discards the argument of validating broad discretion because of the high rank of the donee of the power the better it is for the growth of Administrative Law in India.

In the case of ***S. Khushboo*** *v* ***Kanniammal***[14i] the appellant approached the Supreme Court seeking quashment of criminal proceedings pending against her for the offences contemplated under ss. 499, 500 and 505 of the Penal Code, 1860 and ss. 4 and 6 of the Indecent Representation of Women (Prohibition) Act 1986. The court held that even though the constitutional freedom of speech and expression not absolute and can be subjected to reasonable restrictions on grounds such as "decency and morality" among others, stress must be laid on the need to tolerate unpopular views in the socio cultural space. It was observed that the Framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.

A notable example of administrative regulation of freedom of speech and expression is the system of censorship of films under the Cinematograph Act, 1952. A Board of Film Censors, appointed by the Central Government, examines the films and may sanction, refuse to sanction, or order modifications in a film before sanctioning it. The party concerned is given an opportunity to represent his views in the matter. A film is not certified for public exhibition if, in the opinion of the board, the film is against the interest of security of the State, friendly relations with foreign states, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence. An appeal against the order of the board lay to the Central Government

which passed the order after holding such inquiry as it thought fit and after giving the appellant an opportunity to represent his views in the matter. The Act thus provides adequate procedural safeguards though the weakness in the procedure was that hearing of an appeal was by the Government and not by a court of a tribunal. Further, the discretion vested in the board is subjective as the grounds mentioned in the Act are broad and vague. The decision of the board can be challenged only on the limited group of "abuse of power". In **Khwaja Ahmed Abbas** Vs. **Union of India**[14j] the Cinematograph Act was questioned, inter alia, on the ground that appeal from the Board of Censors lay to the Government and not to a court or an independent tribunal. The Government conceded the point and agreed to amend the Act. Accordingly, in 1974 by an amendment of the Act provision was made for constituting an appellate tribunal. The provisions relating to the tribunal were substantially amended in 1981. Section 6(1) of Cinematograph Act, 1952 which empowered the Central Government to revise the decisions of appellate tribunal in connection with film certification has been held to be unconstitutional. The provision was held to be a travesty of rule of law, which is the basic structure of the Constitution of India. It was laid down that a decision by tribunal would be final and binding on the executive.[14k]

2. Where discretion is conferred to regulate the freedom of assembly:

Article 19(1)(b) of the Constitution guarantees freedom to assemble peaceably and without arms, but under Article 19(3) reasonable restrictions can be imposed on this right by law on the ground inter-alia of public order. Thus under article 19(3) the State my by law authorises executive authorities to impose reasonable restrictions on this important fundamental right but the exercise of such a power conferred on them must not be capable of being abused.

Section 26 of the T.C. Police Act, 1951, empowers a District Magistrate to prohibit a procession or public assembly for the preservation of the public peace or safety. Such a preservation of the public peace or safety is not to operate for more than 15 days without sanction of the Government. This provision was challenged on the ground that Article 19(3) permits only "restriction or

regulation" whereas this section confers power on the District Magistrate to impose prohibition and so was void. The provision was held to be valid because reasonable restriction in a given case could amount to a total prohibition of the exercise of the right so long as the prohibition is strictly circumscribed in time and operative area to suit the exigencies of definite threats to public order.[15] This decision appears to be justified because of the facts that power to regulate meetings was conferred on the District Magistrate- a responsible officer of the Government and that the order of the District Magistrate was limited for a period of 15 days only beyond which it could be extended only after the section of the Government. As previously examined vesting of discretion in superior authority is an important consideration to be taken into account in demining the reasonableness of restriction's. **Brahmanand Lal and others** Vs **The State**[16] is another important case in this connection. In this very case section 9 of the Bihar Mintenance of Public order Act, 1949 imposed restrictions on taking out public processions without a licence from the District Magistrate. Seven persons were prosecuted for violating the provisions of section 9(5) of the Bihar Maintenance of Public Order Act, 1949, holding a public procession without the licence of the District Magistrate. They came in revision against their conviction. The division bench of the High Court through S.C. Mishra J. observed :

> "The authority entrusted with the exercise of the power to grant of refuse licence for taking out a public procession can refuse the prayer for grant of licences only after recording reasons. Therefore, this is an adequate safeguard against the misuse of power. Although there is no provision for an appeal to the State Government, the refusal being an administrative act, there is no reason why, in case of arbitrary refusal of lience, the matter cannot be agitated an taken up with the higher executive authorities in the Government. Consequently the absence of provision for appeal or review by the State Government against the order passed by the District Magistrate would not make the Act invalid :[17]

In the instant case section 9(2) imposes restriction on the public procession Notification issued by the Government under this section was held to be ultravires because it prohibited every procession without firstly being obtained a licence. Thus the notification was held to be ultravires and no offence was held to be committed for violation of this prohibition. Similarly in another case re ***C.N. Annandurai*** and ***others,***[18] the petitioner and other two persons were charged with having committed an offence punishable under section 41 of the City Police Act, which authorised the Commissioner of Police to ban all meetings in the city except certain specified categories of meetings which could be held without a licence. The case was referred to the High Court by the learned Magistrate where it was contended that section 41 of the said Act confers an arbitrary discretion upon the Commissioner of the Police to restrict the fundamental right under Article 19(1)(b) of the Constitution because it laid down no standard or criteria to guide the Commissioner of Police to exercise his discretion. The provision was held to be valid because firstly though it did not expressly give a right to approach the Government to get the Commissioner's order rescinded, yet it is common sense that the same could be done by the Government, secondly though no specific time was mentioned in the provision itself, the practice for last three years had been to limit the operation of the prohibitory order to 14 days, thirdly, the order could be made if the Commissioner considered that it was necessary for the preservation of public peace and safety and fourthly there was nothing wrong in not making such orders subject to judicial scrutiny for the court was wholly unsuited to gauge the seriousness of the situation as it could not be in possession of materials which are available to the executive.[19] In the words of the Court :

> "Section 41 gives a wide discretion according to the exigencies of the situation to allow some public meetings as for marriages and funerals without a licence, some others a licence, and to prohibit same other either in particular areas or for particular days or occasions…… There is no presumption that a high police officer will act unscrupulously and in order to please the political losses. Where the Commissioner's orders are vitiated by malafides, they

could always be challenged on that ground either by a writ to the High Court, before the prosecution or in the criminal case, after the prosecution is launched and the mere possibility that a power may be abused is no reason for denying the power itself or to sticke down the section of the Act conferring that power."[20]

However, the above opinion of the Madras High Court does not appear to be sound because when no power was expressly given to the Government to review the order of the Commissioner has it could exercise the same. Again the High Court also ignored the fact that the order by the Commissioner could be made for an unlimited period and the Court relied on the existing executive practice but how one can guarantee that the practice of three year will be observed in future also. The observation of the High Court that there was nothing wrong in not making such orders subject to judicial scrutiny can be appreciated but at the same time it would not be imporoper to point out that the Court should have pointed out some other supervisory safeguards. This observation of Madras High Court was followed by S.R. Das Gupta J. of the Mysore High Court in a similar case- **Dasappa** Vs **Aditional Deputy Commissioner**.[20a]

In **Mohd. Shafi Qureshi and others** Vs **The D.M. Srinagar and other,**[20b] the petitioners were prohibited from organising addressing or taking part in public meeting, assembly or procession by an order passed by the District Magistrate under rules 50 of the Jammu and Kashmir Security Rules read with Cabinet order No. 708C of 1953 dated 25th June 1953. This rule and the order of the District Magistrate was challenged as violative of Article 19(1)(b) on the ground that it (rule) gives unfettered and uncontrolled power to the State Government or its officers authorised by it in exercise of wide powers given by it. Hon'ble J.N. Wajir C.J. of the High Court observed that the object of the rule and the ordinance is the maintance of public order and to ensure public safety. Though there is nothing in the body of rule 50 to show what is its purpose and its object and what are the limitations imposed on the executive to enforece it, the preamble to ordinance and the heading of the part in which the rule exists give a sufficient indication in regard to the purpose for which the discretion has to be exercised by

the executive or the officer authroised by the executive to enforce it.[21] Before making the prohibitory order the executive must be satisfied that such prohibitory order is necessary for the preservation of public order. The learned C.J. further observed that under the rule power to impose restrictions has been given to a responsible officer of the status of District Magistrate with the presumption that he will exercise his discretion legitimately and honestly and so rule cannot be struck down on the ground that the District Magistrate may possibly abuse his powers.[22] So restriction imposed on the right was held to be not unreasonable. It is submitted that in this case the Court found the guide for exercise of discretion from the pre-amble and from the heading of the rule conferring the power which cannot control the exercise of discretion in an arbitrary manner. It may work as an adequate safeguard in case of delegated legislation but not in case of administrative discretion exercise of which will affect the fundamental right of the citizens. The decision can to some extent be justified only on two grounds firstly the power was vested in a responsible officer with the presumption that he will act legitimately and honestly. Secondly, there was danger of breach of public peace and in exceptional circumstances exercise of discretion on the subjective satisfaction of the authority can be justified. But the observation of the Court that the fact that discretion has been vested in a responsible officer of the State minimises the danger of misuse, is not fully correct because a higher and responsible officer may also misuse or arbitrarily exercise the discretion as any other person can.

However, from the cases discussed above atleast one thing is clear that is an order prohibiting meeting, assemblies or processions will be valid only if it is limited in time and the discretion can be left to the executive officers to make such orders only in the interest of public order but it should not be arbitrary an uncontrolled. In this connection **Himat Lal K. Shah** Vs **Commissioner of Police Ahmedabad**[23] is an important case decided by our Supreme Court. The petitioner who was the secretary of All India Students' Federation applied to the Police Commissioner for permission to hold a public meeting near Panch Kuva Darwaja, Ahmedabad on September 4, 1969 at 8 P.M. in connection with the All India

students federation to be organised on September 5, 1969. On September 2, 1969 this permission was refused because the "application was not sent five days before the days of the meeting as required by notification of the Commissioner of Police dated February 15, 1966." The appellant was also informed that "holding a meeting with or without loudspeaker, without the permission, amounts to an offence". On August 30, 1969 the appellant had also applied for permission to hold another public meeting on September 5, 1969. The Deputy Police Commissioner informed him on September 2, 1969 that the permission cannot be granted "in as much as meeting on August 7, 1969 under a similar permission where after certain elements had indulged in rioting and caused mischief to private and public properties, regarding which a crime also has been registered……. in view of the present position, it is not possible to grant such permission in order to maintain law and order." He was further asked to note that "holding a meeting with or without loudspeaker without permission amounts to an offences". The petitioner filed a writ petition in the High Court. The Court however, examined the contention and held that the power to regulate did not include total prohibition but restriction would include partial prohibition e.g. where a procession is asked to take through one route and not through another. Further the Court observed that the Act and the rules did not confer an arbitrary and unbridled power because a perusal of the Act and the Rules showed that there was clear policy which would guide the exercise of the discretionary power conferred upon the Commissioner of Police. Accordingly the petition was dismissed. On appeal to the Supreme Court the learned Counsel for the appellant contended that section 33(1)(o) read with section 33(7) of the Bombay Polices Act, 1951, and rules 7 to 11, 14, and 15 of the Rules for processions and public meetings, were ultravires and void because firstly the ambit of the power conferred on the executive is very wide uncontrolled, Secondly such power is open to be exercised arbitrarily, thirdly the restrictions imposed are excessive, fourthly the procedure and manner of imposition are not fair and just and lastly there is no sufficient safeguards against the misuse of the power conferred and

there is no right of representation. The Supreme Court unanimously held rule 7 which runs as follows :

> "No public meeting with or without loudspeaker shall be held on the public street within the jurisdiction of the Commissioner of Police, Ahmedabad City unless the necessary permission in writing has been obtained from the officer authorised by the Commissioner of Police."

as void.

In the opinion of S.M. Sikri C.J. who delivered the leading of judgment for himself, Ray and Reddy J.J. :

> "In India a citizen had before the constitution a right to hold meetings on public streets subject to the control of the appropriate authority regarding time and place of the meeting and subject to considerations of public order. Therefore, the impugned rules are not ultravires section 33(1)(b) of the Bombay Police Act in so far as they requires prior permission for holding meetings."[24]

It was further held :-

> "Section 33 (1)(o) enables the Commissioner to make rules to regulate the assemblies and processions. Without such rules is crowded public streets it would be impossible for citizens to enjoy their various rights and thus section 33(1)(o) has been enacted in the aid of right under Article 19(1)(b) of the constitution.[25]".

As regards rule 7 the learned C.J. further held :

> "Rule 7 does not give any guidance to the officer authorised by the Commisioner of police as to the circumstances in which he can refuse permission to hold a public meeting. Primafacie to give an arbitrary discretion to an officer is unreasonable restriction".

It was urged that marginal note of Section 33 namely "Power to make rules for regulations of traffic and for preservation of order in public places etc." will guide the officer but this contention was rejected by the learned Chief Justice on the ground that it is not possible for an officer to decide that his discretion is

limited to the marginal note.[26] But it is submitted that once the leading majority judgment found that there was a policy underlying the Act, which would guide the exercise of discretionary power, numerous judgment of the Supreme Court require the Court to hold that the Act and the rules did not confer unfettered arbitrary power. The Statement that "it is too much to expect the Commissioner of Police to look at the scheme of the Act and decide that his discretion is limited", could have been in every case where discretion was given to public officer to be exercised in the light of the policy of the Act and the purpose for which the rules were to be made and thus the judgment is contrary to a large volume of authority and is clearly erroneous.[27] Again it may be said that this observation of learned author may not hold good in all cases it may be correct only for limited cases that it in cases of delegated legislation where policy and purpose of the Act may provide guidance for the exercise of power but not in cases where exercise of power would affect fundamental rights, because policy will not provide adequate safeguards in all cases as in number statutes it is expressed in vague terms.

Mathew J. who delivered the concurring judgment observed that a power to regulate does not normally include a power to prohibit. A power to regulate implies the continued existence of that which is to be regulated.[28] A system of licensing to regulate the public meetings as regards the time and manner of holding public meetings has not been regarded as unreasonable restriction on the exercise of right but it is only when definite standards are provided by the law for the guidance of the licensing authority has always been considered as bad.[29] The learned judge further said that rule 7 gives an uncontrolled power practically dependent on subjective whim of an authority to grant or refuse permission to hold public meeting on public street so it is violative of the right guaranteed under Article 19(1)(b) of the Constitution.

Bag J. was another judge who delivered the concurring but separate opinion in following words :

> "Although, the right to hold public meeting at a public place may not be fundamental right by itself, yet, it is so closely connected with fundamental rights that a power to regulate it should not be left

> in a nebulous State. In should he hedged round with sufficient safeguards against its misuse even if it is be exercised by the Commissions of Police. He ought to be required to give reasons to show why he refuses or gives the permission for such exceptional user of a "street" as it is denied in the Act. The rule should make clear the circumstances in which the permission may be given or refused."[30]

It is submitted that Mathew J proceeded on the assumption that there was a fundamental right to hold public meeting and so he declared the rule as arbitrary but the position is not the same, there is no fundamental right to hold public meetings on the high ways, Beg J. was also of the view that Rule 7 conferred arbitrary power and it would be open to the Commissioner to give permission to **influential** people and to refuse to others. It is submitted that it has been settled by a series of decisions of the Supreme Court that abuse of power is not to be assumed and there is a presumption that power is not to be assumed and there is a presumption that power will be exercised for the purpose for which it is conferred. If the power is abused, it is abuse of power not the provision of the section conferring the power that can be struck down.

Once it is found, as the High Court of Gujrat and the Chief Justice S.M. Sikri found that there is a policy underlying the Act which should guide the discretion of the Commissioner, the power conferred on him cannot be looked upon as arbitrary or unfettered. So it is submitted that the judgment delivered by Sikri C.J. is clearly wrong and productive of public mischief and should be overruled.

Babulal Parate Vs **State of Maharashtra**[30a] is another case where a statutory provision giving power to the executive to impose restrictions of freedom of speech and to assemble was found valid owing to safeguards contained in the Statute. In this case there was serous tension between two unions of textile workers in Nagpur and so there was danger of breach of public peace, tranquility and public order. The District Magistrate Nagpur passed an order prohibiting among other things the assembly of five or more persons in certain

areas specified in the order issued under section 144(1) of the Cr. P.C. The petitioner challenged the provisions of section 144(1) of the aforesaid code on the grounds that it confers wide powers on the District Magistrate who constitutes the whole legal machinery and while considering the application to recind his order; he acts as a judge in his own cause and so the remedy afforded is illusory and the order of the District Magistrate promulgated under section 144(1) of the Cr. P.C. places unreasonable restrictions on freedoms guaranteed under Articles 19(1)(a) and (b) of the Constitution. Under section 144 Cr. P.C. in cases where in the opinion of a District Magistrate there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, he may, by a written order stating the material factors of the case, direct any person to abstain from a certain act if he considers that such direction is likely to prevent danger to human life, health or safety, or a disturbance of public tranquility or a riot, or an affray. The magistrate could, either on his own motion or on the application of any aggrieved persons, rescind or alter any order made by him. When an aggrieved person applies, the magistrate is to give him an opportunity of showing cause against the order. If the application is rejected, the magistrate will record his reasons it writing for doing so. No order under section 144 is to remain in force for longer than the two months, but the State Government may direct otherwise in cases of danger to human life, health or safety or a likhilhood of a riot or an affray. Dealing with the validity of this section Mudholkar J. of the Supreme Court observed that looking at section 144 as a whole it would be clear that it is intended to be availed of for preventing disorders, obstructions and annoyances and to secure the public weal. The magistrate has to act judicially restraints permissible under section 144 are of temporary nature and can only be imposed in a emergency. The order can be passed to prevent obstruction, annoyance, injury etc. which is in the interest of maintaining public order. As the magistrate has to set out the facts in the order, it envisages that he will not make an order till he is satisfied about the facts and therefore, the section does not confer an arbitrary power on the magistrate in the matter of making an order. The power though wide

is not unlimited as it can be used only for the purposes mentioned in the provision and only in an emergency.

It is true that the initial judge of the emergency is the magistrate himself but it cannot be regarded as unreasonable, because the duty to maintain law and order rests on the executive. The aggrieved person has a right to challenge the order and the magistrate is then bound to give him a hearing. Although no provision has been made for an appeal against the magistrate's order under section 144, the High Court has power under other provisions of the Code to entertain an application for review of such an order. Also when a prosecution is launched for infringing an order under section 144, the validity of the order itself can be challenged. Under section 144, power is exercisable not only were present danger exists but also when there is an apprehension of danger but anticipatory action of this kind is not prohibited under Article 19(2) as a public order has to be maintained in advance in order to ensure it. This observation of the Supreme Court was also followed by the Allahabad High Court in **Ram Manohar Lohia and others** Vs **State of Uttar Pradesh and other**.[30b]

In Railway Board New Delhi Vs. Niranjan Singh[30c]

General Manager Northern Railways issued a direction prohibiting railway employees from holding meetings in railway premises. It was held that though citizens of country have freedom of speech, expression and freedom to assemble, peacefully, it does not mean that they can exercise those freedoms at any place which they like. Accordingly, the direction issued was upheld. Right to takeout both religious and non-religious processions on the highways has been held to be subject to orders of local authorities regulating traffic and subject to Magistrate's direction under any law and rights of public.[30d]

3- Where discretion is conferred to regulate the freedom of association :

Article 19(1)(c) guarantees to the citizens of India the right to form associations and unions. Under clause 4 of the same Article reasonable restrictions may be imposed in the interests of public order or morality or sovereignty and

integrity of India by law. The right to form association is the very life blood of democracy. Without such a right it may become impossible to form political parties in the country. Recognising the importance of the right of forming associations in a democratic country, the courts have not favoured the vesting of absolute discretion in the executive to interfere with this fundamental right. A discretion vested in a Government official to prohibit formation of an association without adequate safeguards has been declared to be unconstitutional.

In V.G. Row Vs State of Madras[31] the petitioner was the general secretary of the People's Education Society registered under the Society Registration Act, 1860. The objects of the Society as indicated in the affidavit filed by the petitioner before the Madras High Court were; to encourage, promote0, diffuse and popularise useful knowledge in all the science and more specifically social science etc.... Under Section 16 of Criminal Law Amendment Act, 1908, the said association was declared as unlawful in the following terms:-

> "Whereas in the opinion of the State Government
> the association known as People's Education Society
> Madras, has for its object interference with
> the maintenance of law and order and constitutes
> a danger of public peace. Now, therefore, His
> Excellency, the Governor of Madras in exercise
> of the powers conferred by section 16 f the
> Criminal law Amendment Act, 1908, hereby declares
> the said Association to be an unlawful
> association within the meaning of the said Act."

This declaration was challenged on the ground that under Section 16 of the said Act the Government has an arbitrary and uncontrolled power to recognise an association as an unlawful. The full Bench of the High Court through Satyanarayana Rao J. observed that under section 16 of the Provincial Government could declare an association unlawful if it was of the opinion that object of the association interfered with the administration of law and maintenance of public order etc. The accused had no right or opportunity to show

that the declaration was erroneous and was not justified; the said declaration was final and conclusive and could not be questioned in a prosecution under section 17 of the Act. So, it was an arbitrary and nacked power conferred upon the Government to impose restriction on the fundamental right guaranteed under Article 19(1) of the Constitution. Vishwanath Shastri another judge of the full bench observed that selection of the association was left to the discretion of the State Government. The grounds for declaration and other particulars as the Government might think fit were published in the gazette. So as soon as the declaration was published the association became an unlawful and its members were liable to be imprisoned, which was done without opportunity to be heard. There was no provision for consultation with an advisory board; there was no time limit for the continuance of the declaration. Thus power conferred was an arbitrary power and restriction imposed was an unreasonable restriction. The order of the Madras Government was quashed. Consequently the Government appeled to the Supreme Court. The Supreme Court through Patanjali Shastri J. declared the provision to be unconstitutional, for the test under it to declare an association unlawful was subjective and factual existence of grounds was not a justiciable issue. The learned C.J. said that the right to form an association or unions had a very wide and varied scope for its exercise and its curtailment was fraught with serious potential reactions in religious, political and economic fields. Therefore, the vesting of power in the Government to impose restrictions on this right without having the grounds therefore tested in a judicial inquiry was a strong element to be taken into consideration in judging the reasonableness of the restriction. The existence of a summary and largely one sided review by an advisory board court not be a substitute for a judicial inquiry.

In another case **S. Ramakrishanaiah** Vs **The President District Board, Nellore and others**[32] the applicant a citizen of India was also member of "The Andhra Rashtriya Elementary Teachers' Federation" and he was joint Secretary of the Nellore District Federation. In 1949 he was elected as the Secretary of the main federation itself. On 23rd April 1950 the applicant was served an order of the President District Board Nellore, that the Director of Public Instruction is

empowered to accord recognition to unions functioning in accordance with the rules; forbid the existence of dissolve any teacher's. Union not conforming the rules. The order was challenged. This order of the Government empowering the Director of Public Instruction to recognise any teachers' association or to forbid its existence and requiring the teachers in Municipal service not to form an association without the previous permission of the Municipality was declared as violative of Article 19(1)(c) of the Constitution. In the words of Rajamanna C.J.:

> "It is well established that exercise of any
> of the fundamental rights like the right to
> free speech or freedom of association cannot
> be made subject to the discretionary control
> of administrative or executive authority which
> can grant or withhold permission to exercise
> such right at its discretion and there should
> not be a previous restraint on such exercise
> which is in nature of administrative censorship."

The right to form associations is the backbone of democracy without which the political parties might not come into existence. It is, therefore, fortunate that the court has not permitted the legislature to leave the matter of declaring an association unlawful merely on the "subjective satisfaction" of the executive. There must be an objective determination by a court of the facts on which the restriction is sought to be imposed by the executive.[33]

In **Madan Lal Thanvi** Vs **Dy. Inspector General of Police Jodhpur and another**[34] the petitioner was a head constable of the non-gazetted staff of Police Department. The petitioner's case was that the gazetted officers of Police Department formed an association and the same was recognised by the Government. Thereafter the non-gazetted police employees also formed an association named as "The Non-Gazetted Police Karamchari Sangh" and the petitioner was one of the sponsors of that association. The association applied for recognition to the Government and gave various reminders for the same but the Government neither recognised the association nor refused the recognition. In the

meanwhile Dy. Suprintendent of Police served a charge sheet on the petitioner with the charge that he had enrolled himself as a member of the unrecognised non-gazetted Police Karamchari Sangh Rajasthan and was continuing as such and had been instrumental in establishing a branch of the association Jodhpur. A number of other subsidiary charges were also framed. A departmental inquiry was held against him and he was served with a notice to show cause why he should not be dismissed from the service. He submitted an explanation but ultimately he was dismissed. He challenged his dismissal on the ground that the non-gazetted staff of the police department had right to from an association and the rules 23, 23-A of the rules prohibiting Government servants from becoming members of unrecognised association and leaving the question of recognition to the arbitrary and nacked discretion of the executive, were ultravires the Constitution. The Division Bench of the High Court through Chhangani N. observed:-

> "Rules 23 and 23-A Rajasthan Government servants and Pensioner's Conduct Rules which prohibited the Government servants from becoming membes of the Association not recognised by the Government and leave the question of recognition to the arbitrary and nacked discretion of the executive, must be held to be infringing the fundamental rights of the Government servants as a class and cannot be sustained with reference to the interest of the public order and morality and they have to be declared ultravires of the constitution. Where the petitioner was dismissed from service only on the basis of the infringement of those rules, his dismissal from service cannot also be sustained."[35]

The learned Judge further said that as the State had reserved the power to grant or refuse recognition to be exercised on its subjective satisfaction and had established no emergent and extraordinary circumstances warranting such

reservation of power, the rules were ultravires the fundamental rights of the Government servants guaranteed under Article 19(1)(c) of the Constitution. The learned Judge was of the opinion "it cannot be held that reservation of a drastic power of refusing recognition of association is at all reasonably connected or related with the discipline in the staff of Police force."[36]

From the analysis of above cited cases it may be said that recognising the importance of the right to form associations in a democratic country the courts have not favoured the vesting of an absolute and uncontrolled discretion in the executive to interfere with the fundamental right. A discretion vested in the Government official to prohibit formation of an association without proper safeguards has been declared as un-constitutional. The rules made under the U.P. Industrial Disputes Act, provided that a Union could not represent the parties in a industrial dispute unless it had been approved of by the Labour Commissioner for this purpose. For approval the application could be made two years after its formation and the Labour Commissioner had discretion to accept or reject the application. The condition of two year and absolute and unguided discretion given to the Labour Commissioner to recognise or not to recognise the Union was held as contravening Article 19(1)(c) of the Constitution.[37] This decision of the Allahabad High Court was followed by the Calcutta High Court in **E.R.E. Congress** Vs **General Manager E.Rly.**[38]

It may be said that the attitude of the judiciary is uniform on the point that a discretion vested in a Government official to prohibit formation of an association without adequate safeguards is unconstitutional.

In **Kamala Kant Mishra and others** Vs **State of Bihar and others**[39] there was a dispute between two sections of workers in the Tata Workers' Union, Jamshedpur. In that connection Shri K.N. Mishra the City Magistrate, passed an order under section 144 of the Cr.P.C. prohibiting the petitioners from entering into the compound and office of the Tata Workers Union situated on "K" road Jamshedpur. This order of the City Magistrate was extended by the State Government under section 144 (6) of the Cr.P.C. for a further period of four months and thus the petitioners were prohibited from entering into said office and

compound of the Tata workers' Union. It was the notification of the State Government under section 144 (6) of the Cr.P.C. which was challenged on the ground that it violated the fundamental rights under Article 19(1) (a) (b) (c) and (d) of the constitution. The Division Bench of the High Court through Rammaswami C.J. observed that Section 144 (6) of the Cr.P.C. confers wide amplitude of powers on the State Government to deprive a citizen of his right of association and movement for an indefinite period of time. So the High Court declared second part of Section 144 (6) of the Cr.P.C. as unconstitutional. Hence the present appeal before the Supreme Court. In Supreme Court Mr. Rammurthi appearing for the petitioners – respondents contended that legislature had provided adequate safeguards in respect of orders made by the magistrate under section 144 (1) of the Cr.P.C. whereas it had failed to provide any safeguards in respect of orders made by the magistrate under second part of the sub-section (6) of Section 144[40] of Cr.P.C. before making an order. It was further contended that under that provision the State Government was not required to make an inquiry no opportunity was given to the aggrieved party to show cause against the order section 144(6); the order made by the State Government was neither appealable nor revisable that imposed unreasonable restriction on fundamental rights under Article 19 (1) (b) (c) and (d) of the Constitution. The majority of the Supreme Court through K.S. Hedge J. observed that the first part of the sixth sub-section of section 144 fixes the period during which the order made by the magistrate would remain in force. Once the order is issued under this part, the function of the magistrate comes to an end. The power conferred on the Government under the second part of the sixth sub section of section 144 is an independent power. Before issuing any direction under that sub-section the State Government has to examine afresh whether the danger to human life, health of safety or likelihood of a riot or an affray continues and if it continues how long the original order made by the Magistrate should be kept alive. It is not a case of Government order getting merged in the magistrate's order. Once the Government notifies its direction, the responsibility for the continuance of the original order is that of the Government and same has to be notified in the official gazette. Thus the power

conferred on the State Government is an independent power and it is an executive power. It is not expected to be exercised judicially. It is likely to be exercised arbitrarily. The directions given in the exercise of that power need not be of a temporary nature. The ambit of that power is very large and it is uncontrolled.[41] The learned judge declared the second part of sub-section (6) of section 144 as unconstitutional, because it provided uncontrolled and arbitrary power to the State Government and not to any judicial authority without any procedural safeguards. While giving the minority judgment Shah J. said that the source of the authority of the order is derived not from the State Government but from the magistrate, the direction of the State Government extends its duration. The direction under second part of sub-section (6) of Section 144 does not depend upon the subjective satisfaction of the Government and on appropriate grounds it can be challenged under Article 226 of the Constitution.[42]

The learned judge further said:

> "It is submitted that in the absence of any statutory restriction on the exercise of the power, the State may abuse the power and continue it in force either permanently or for a period longer than the apprehension or danger or emergency justifies. But the validity of a statute conferring power is not open to challenge on the plea that the power may possibly be abused by the authority in which it is vested."[43]

However, the above observation of Shah J. does not appear to be more convincing than that of the majority. The constitutionality of section 144 of the Cr.P.C. was also raised in **Madhu Limaye and another** Vs **S.D.M. Monghyr.**[43a] Hidayatullah C.J. relied on the observation of Mudhokar J. in **Babu Lal Parate** Vs **State of Maharashtra**[43b] and upheld the validity of section 144 of the Code of Criminal Procedure.

A rule provided that a union could not represent the parties in an industrial dispute unless it had been approved by the Labour Commissioner for this purpose. An application for approval could be made only two years after its formation and the Commissioner had absolute discretion to accept or reject the application. These conditions for recognition were held to contravene Art. 19(1)(*c*).[43c]

In *Damyanti Naranga*[43d] restriction was placed on members of voluntary association in the matter of admission of new members. The association was required to admit Government Sponsored members. It was held to be a case of unreasonable restriction. However, condition relating to membership may be imposed by the State where the association carries on the business which is subject to control by the State in the public interest.[43e]

Section 3 of the Unlawful Activities (Prevention) Act, 1967 confers power on the Government to declare an association to be unlawful, if, in the opinion of the Government the association disclaims or disrupts the sovereignty and territorial integrity of India. The reasonableness of restriction imposed by s. 3 was upheld by the Supreme Court on the grounds that declaration made by the Government depends on the adjudication of a tribunal to which Government must make a reference to determine whether or not there is sufficient cause for declaring the association unlawful.[43f]

4. Where discretion is conferred to regulate the freedom of movement and residence:

Article 19(1) (d) of our Constitution guarantees to every citizen the right to move freely throughout the territory of India. Under Article 19(1) (e) of the Constitution every citizen has right to reside and settle in any part of India. By virtue of clause (5) of the same Article, the State can made laws imposing reasonable restrictions on these rights in the interest of the general public or for the protection of the interests of any scheduled tribe. These Constitutional provisions guarantee to the Indian Citizens the right to go or to reside wherever they like within the Indian territory. A series of cases have occurred involving the

question of validity of laws conferring discretion on the executive to restrict the right under Article 19(1) (d) of (e).

A. Externment cases:

These Articles have been invoked frequently to challenge the validity of an externment order served by the executive on a citizen requiring his to leave a State or a district or any particular place where he resides. It is usual for the States to enact laws authorising the executive to extern a person from a particular area in the interest of public peace and safety. There has not been uniformity in the statutory enactments authorising the executive to restrict the movement of a person or persons. For example in some cases, any person whose activities are dangerous to public peace can be externed, but in other cases the category of persons liable to be externed has been specified. Again, in some cases a person externed from an area (sometimes the State itself) is free to choose any other place for his stay while in some cases the place to which he can go has to be specified by the executive. So for as the procedural safeguard is concerned, it is usual to provide an opportunity of being heard. In some cases it is provided that order by the competent authority can be made only on previous approval of the State Government on an appeal may lie to the State Government against the order of the competent authority. In some cases there is a provision for an advisory committee to consider the representation of the affected person. The scheme of the statutes is usually such that an externment order can be made only for limited period. It can be better illustrated through some of the decided cases:

In **Jeshing Bhai Ishwar Lal** Vs **Emperor**[44] the District Magistrate, Ahmedabad acting under section 2(1) of the Bombay Police Security Measure Act, 1947, which enables the Provincial Government:

> "If it is satisfied that any person was acting
> or is likely to act in a manner prejudicial
> to the public safety, the maintenance of public
> order, or the tranquility of the Province or
> any part thereof to make an order."

served an order to the petitioner that he should not be in any area in the district of Ahmedabad, except with the permission of the District Magistrate, Ahmedabad. This order of the District Magistrate was challenged as violative of Article 19(1) (d) and (e) of the Constitution. Delivering the majority judgment of the Full Bench, Chagala C.J. observed that the legislature had left the matter of making an externment order to the Provincial Government whose satisfaction was final and the statute had not laid down any obligation on part of the authority making the order to hear the person affected by the order and neither it provided duration of the externment order nor did it make it clear whether the person against whom the order was made, had to live or go. Under section 21, the Provincial Government had been given power to delegate any of its powers and duties to any officer or subordinate authority and thus right of a citizen could be affected by the satisfaction of subordinate authorities. Thus it was held that section 2 of the Act conferred an arbitrary power upon the authority making the externment order. While giving the dissenting judgment Shah J. observed that constitution does not authorise the court to declare a piece of legislation void merely because, the legislature thought it expedient to provide that the satisfaction of the executive officer instead of court should be a condition precedent to the issue of an order intended to protect either the security of the State or the interest of general public. The order of externment was not unlimited in duration because it was for the executive officer to know about the emergent situation and if the officer satisfied that circumstances justified he might revoke the order. Inspite of it, the Act under which the order was made, was of temporary nature so the order of externment could not remain in force more than the period of Parent Act. The learned Judge further said that absence of provision for hearing before or after making the order did not make the provision void because constitution has not provided for hearing before imposing restrictions on a fundamental right. It is submitted that dissenting judgment is wrong because statute which authorises the making of externment order is invalid in as much as it imposes unreasonable restriction both from substantive as well as procedural point of view. From substantive point of view the duration of externment order is unlimited whereas from procedural point of

view there is no provision for hearing before making the order. Thus the majority judgment declaring the provision as invalid appears to be correct. But a statute which provides for a right to be heard and authorises the person against whom the order is made to appeal to the Provincial Government against the order of the District Magistrate cannot be declared as invalid merely because it leaves continuance of the externment order to the discretion of the District Magistrate, because it would be very difficult for the authority making the order to know how long the emergency would last and how long the danger would last, if the authority has satisfied that danger does not exist he may revoke the order under General Clauses Act.[45]

In **Dr. N.B. Khare** Vs **State of Delhi**[46] the District Magistrate Delhi, acting under the East Punjab Safety Act, 1949, served an externment order on the petitioner, President of All India Hindu Mahasabha, asking him to immediately remove himself from Delhi and not to remain there for three months The Act empowered the State Government or the District Magistrate to make an order of externment on being satisfied that such an order was necessary to prevent a person from acting in any manner prejudicial to the public safety or maintenance of public order. The satisfaction was 'final' and not open to judicial review. A District Magistrate's order could not remain in force for more than three months while that of the Government could remain in force for an indefinite period. The order was challenged on the ground that it had left the matter purely on the subjective satisfaction of the executive without providing any procedural safeguard against the arbitrary exercise of power which infringed the right under Article 19(1) (d) and (e). The majority of the Supreme Court through Kania C.J. observed that the desirability of passing an individual order of externment against a citizen must necessarily be left to an officer as the element of emergency requires taking of prompt action to prevent apprehended danger to public order. The District Magistrate could not extern a person from his district and the Government could not extern a person from the State but the externment could be made from one place to another within the same district or the same State as the case might be. This was held to be a great safeguard; the Act was to remain in

force only for two years. The grounds on which an externment order could be made has to be communicated to the externee by the authority making the order and if the order was to remain in force for more than three months, he had a right to make a representation which was to be referred to an advisory board constituted under the Act. The learned Chief Justice further said that the abuse of power might occur but validity of the law could not be questioned on such an apprehension. Even in the minority judgment delivered by Mahajan and Mukherjee JJ. It was observed that the vesting of the authority in particular officers to take prompt action entirely on their own responsibility or personal satisfaction was not necessarily unreasonable. The learned judges however, deviated from the majority on the point that under the statute the State Government could make order for an indefinite period and the fact that the Act was to remain in force for two years was not relevant. It is submitted that this part of the minority judgment is not appealing because if the parent Act itself has to remain in force for a limited period how the order of externment that is made under the said Act would remain for indefinite period.

The above situation i.e. which arose in **Dr. Khare's** case[47] may be distinguished from that which arose in **V.G. Row's** case[48] mainly on two grounds. Firstly that externment of individuals like preventive detention is to a great extent precautionary and based on suspicion of the authority concerned whereas in cases where restrictions are put on freedom to form associations it cannot be said that such a restriction is based upon suspicion and therefore, both the cases appear to be decided correctly if we consider the decisions keeping in view this very factor i.e. factor of suspicion. Secondly that there is an element of emergency in the first situation requiring prompt steps to be taken to prevent apprehended danger to public peace and tranquility. Vesting of authority in particular officer to take emergent action in extra-ordinary circumstances was realised even by the judges who delivered the minority judgment in this case **(Dr. Khare's case)** contrary to this in the second situation the position was entirely different.

A statute which provides for making an externment order without any procedural safeguards, in general terms can be declared as invalid. In Re Shantibai

Rani Benoor[49], the Additional District Magistrate, Poona, made an order under section 9(1) of the Bombay Prevention of Prostitution Act, 1923, directing the petitioner to remove herself from the area of Poona City and to go any place beyond the limits of a radius of five miles from the Poona City Post Office. This order was challenged as arbitrary and violative of the fundamental rights of the petitioner under Article 19(1) (d) and (e) of the Constitution. Chagala C.J. for the court observed that rights guaranteed under Article 19(1) (d) and (e) might be restricted in public interest but there would be no prejudice to public interest if the person sought to be affected were given an opportunity to be heard and if that person was ordered to remove herself, the place where she would to go must be indicated in the externment orders. It was not sufficient for the police officer to tell the person affected that she must go. In the words of Chagala C.J.:

> "the Dominion of India is very vast and radius of five miles outside the Poona City is a very vast territory indeed and no place is indicated, as to whether woman has to go in obedience to this order. Therefore, if this order was to be enforced, it will be impossible for a police officer to know where this woman would have to be taken and deposited."

In **Khagendra Nath De** Vs **District Magistrate West Dinajpur**,[50] the District Magistrate, West Dinajpur, acting under section 21(1) (a) of the West Bengal Security Act, 1950, served an order upon the petitioner that he should remove himself within the 24 hours of service of this order, from the district of West Dinajpur, because 'he is doing a subversive act'. This order was challenged on the ground that order of externment was procedurally so unreasonable that it was ultravires to Article 19(1) (d) & (e). The High Court through Harries C.J. observed that a man served with an externment order should be told with reasons or grounds on which the order was made so that he could made some representation. In the instant case order of externment contained that he was doing some subversive acts but what were those subversive were not mentioned. Under

the Act the State Government could delegate its power to any officer, even in any event to an officer totally unfitted i.e. of subordinate status without any procedural safeguards. So order of externment and provisions of statute which conferred such an absolute power without any procedural safeguards were declared as ultravires. It is submitted that this judgment is sound because order of the District Magistrate was in general term that he had committed some subversive acts, and statute did not provide any right of hearing before the making of order. Thus the statute conferred a power that could be exercised in a arbitrary manner. Similarly in another case of Calcutta High Court[51] the petitioner was ordered by the Joint Secretary of the Home Department to leave the district of 24 Parganas for an indefinite period though later on that period was specified for three months. The Act under which the said order was made, did not provide any opportunity for hearing before the order could be made nor there was any provision for review or reconsideration of the order. The High Court declared the order as violative of fundamental right of the petitioner on the grounds-firstly that there was no provision for hearing; secondly that the order of the Joint Secretary was final and was not subject to review by any superior authority; thirdly that the temporary nature of the statute under which the order was made would not justify the restriction on the fundamental right.

In **Dr. Khare's** case[52] as pointed out earlier the Supreme Court made it clear that mere vesting the authority in a particular officer to make an order on its subjective satisfaction was not unreasonable and in that very case inspite of the fact that the externee had no remedy for three months, as he could neither approach the higher authorities nor was provided with the right to be heard, the majority of the Supreme Court held the order as valid providing for the rider of emergent circumstances. Though **Dr. Khare's** case was followed in **Janab Tazammal's** case[53] yet the externment order was held to be violative of Article 19(1) (d) and (e) because in **Dr. Khare's** case when the order was for more than three months, there was a provision for consultation of an advisory board but no such provision or protection was available in this case, **(Janab Tazammal's case)**. In the instant case the authority concerned was free to pass and withdraw as

many orders for three months as he liked. This fact would indicate that they (authorities concerned) were not wholly alive to the very great responsibility and they might exercise their power in an arbitrary manner without any safeguard. But where a statute provides provisions for communicating the grounds of the order to the externee and the externee has a right to make a representation which has to be considered by an advisory board has been treated as adequate safeguards satisfying the test of reasonableness.[54]

In **Gurbachan Singh** Vs **State of Bombay**[55] the Commissioner of Police made an order directing the petitioner to remove himself from Greater Bombay. Under Section 27(1) of the City of Bombay Police Act, 1902 the Commissioner could make order only if he was of the opinion that the movements or acts of persons in Greater Bombay were calculated to cause danger or harm to person or property of another person. The person could either be externed from the State of Bombay itself or such place within the State as might be specified. In this case the person was asked to go to a specified place within the State of Bombay but outside Greater Bombay. The order was challenged as violative of Article 19(1) (d) and (e) of the Constitution. The Supreme Court through B.K. Mukherjee J. declared the provision valid because it satisfied both substantive as well as procedural reasonableness. As regards substantive reasonableness, order of externment was limited for a period of two years which was not unreasonable. As regards procedural reasonableness, the law in question provided that before making an order of externment against a person, the Commissioner should inform him in writing the general nature of the material allegation against him and give him a reasonable opportunity of explaining these allegations. The externee could appear through an Advocate, file a written statement and examine witnesses for the purpose of explaining his character. The learned Judge said that the procedure was not unreasonable even though the suspected persons were not allowed to cross examine the witnesses because in exceptional and extra-ordinary circumstances where there was great urgency, this right of cross examination would frustrate the very object of the statute conferring the power. The learned judge further said that power to initiate proceedings under the Act had been vested

in a very high and responsible officer who was expected to act with caution and impartiality while discharging his duties under the Act. The provision was made to protect the public against dangerous and bad characters. The witnesses might not like to depose against bad characters for fear of violence against them and therefore, giving of right to cross examine witnesses might frustrate the purpose of the Act. So the learned judge declared the provision bestowing power on the Police Commissioner to serve an externment order for a period of two years, as valid. Similarly in **Anant Reddy** Vs **State of Hyderabad**[56], the Commissioner of city Police ordered the petitioner to remove himself from Hyderabad and to go to another place as specified in the order (at Trimulgherry). This order of the Commissioner was challenged as violative of Article 19(1) (d) and (e). The Court observed that a provision making a person to reside in a particular area could not be regarded as unreasonable. The order of the Commissioner which directed the petitioner to remove himself from Hyderabad and to go to Trimulgherry could not be treated as unreasonable restriction on the right of petitioner because it was the satisfaction of the Commissioner of Police which was final about the activities and conduct of the petitioner and it was not the function of the Court to examine the materials on which the authority had satisfied. However, the Court emphasised that the satisfaction of the authority concerned to the fact that the conduct of the petitioner was prejudicial to the public safety etc, was final without any emphasis for an opportunity of hearing before making the order.

In **Hari Khemu** Vs **Deputy Commissioner of Police, Bombay**[57] section 57 of the Bombay Police Act, 1951 was challenged which authorised any of the officers specified (Police Commissioner, District Magistrate, Sub-Divisional Magistrate) to extern certain convicted persons from the area within his jurisdiction if he had reasons to believe that any of such persons was likely to commit any offence similar to that he was convicted. In this case the petitioner was ordered to remove himself from Greater Bombay. He appealed to the State Government against the order of the Police Commissioner but was dismissed. Upon this he moved to the Supreme Court and contended that under section 57 the police had been vested with unlimited power because they could make an

externment order against the persons whom they suspected or against whom they had reason to believe, not only from any particular area like Greater Bombay but from the entire State of Bombay. It was also contended that there was no provision for an advisory board to examine the reasonableness of an order passed and provisions for hearing and appeal to the State Government were illusory. Delivering the majority judgment of the Supreme Court on behalf of S.R. Das C.J. Venkataramma Ayyar and Imam J.J., Sinha J. observed that under section 57 the Commissioner of Police could make an order of externment from the areas for which a Commissioner might be appointed, similarly other authorities specified under the section could make an order for area or areas for which they were appointed by the State Government. So none of those Officers or authorities had power to direct the person affected to remove himself from the State of Bombay. The situation for making an order of removal from the limits of entire State of Bombay would not ordinarily arise because the idea underlying the provisions of sections 55 to 57 was dispersal of gangs, and removal of persons convicted of certain offences, unless the conduct of the person was such that for the public safety and peace removal from entire State was necessary. Thus the substantive part of the restriction was held to be reasonable. As regards procedural reasonableness, it was said that there was no universal rule that absence of an advisory board would necessarily make such legislations unconstitutional.[58] Again power to make an externment order had been vested in public officers i.e. Commissioner of Police, District Magistrate etc. of higher ranks and they could proceed only when investigation about facts and circumstances had been brought by criminal investigation Department. The Court also rejected the argument that the proceeding was initiated by the Police and it was the police who was to judge the case because proceeding could be initiated by Inspector of Police, the order of externment could be made only by the Commissioner of Police.[59] The fact is that evidence against a person would actually be collected by the Officer of lower rank in the police department but the order of externment would be passed by the Commissioner of Police. Further, it was observed by the Supreme Court that externee had a right of hearing before the order of externment could be passed

against him and a lawyer could appear on his behalf. There was also another safeguard i.e. right to appeal against the order of Commissioner and it could not be said that right of appeal to the State Government was illusory because it was expected that the State Government which had been charged with the duty of examining the material with a view of being satisfied that circumstances existed justifying a preventive order of that nature would discharge its function with due care and caution. Thus in this case restrictions were held to be reasonable both from substantive as well as procedural point of view. While giving dissenting judgment in this case Jagannadha Das J. said that the procedural point of law might be said as reasonable but could not be said the same about the substantive part of law because "the previous commission of an offence of the category specified without any reference to the time, environment and other factors has no rational relation to the criterion of reasonableness in the interest of public and the exercise of power not being limited by the consideration of non-availability of witnesses is also not rationally related to the criterion of reasonableness in the interest of public"[60]. Under the said Act (as mentioned above) there arose **Bhagubhai Dullabh bhai Bhandari** Vs **Deputy Commissioner of Police Greater Bombay**,[61] which is also an important and interesting decision of the Supreme Court in this connection. In this case section 56 of the said Act was questioned The material difference between section 56 and section 57 was that under section 56 any person whose activities were causing or were likely to cause danger or harm to property or person etc. could be externed. The safeguards under both the sections were the same as has been discussed in **Hari Khemu's** case. The Supreme Court upheld this provision. Jagannadha Das J. (who delivered the dissenting judgment in **Hari Khemu's** case) was of the opinion that the vesting of a power to extern a person out of his home for so long period (two years) without the obligation to review the order at some stated intervals, say, once in three months or six months, was primafacie unreasonable because though on the face externment might not appear to be as serious interference with the personal liberty of an individual as detention, yet in actual practice it might produce a more serious injury to person concerned.

In **Kishori Lal** Vs **The State**[62] section 238 of the Cantonments Act authorises externment of convicts or persons indulging in disorderly behavior after a magisterial inquiry in which the person concerned may participate and rebut the allegations against him. On receipt of information that the petitioner Kishori Lal was a disorderly person, having been convicted more than once of gaming, the magistrate at Ferozepur instituted an inquiry and summoned Kishori Lal to appear and show cause why he should not be removed from the Cantonment and be prohibited from re-entering. While the inquiry was going on the petitioner raised the constitutional validity of Section 238 of the Cantonments Act and the learned Magistrate referred the matter to the High Court. It was contended that section 238 did not impose any limitation on the powers of the officers regarding the period during which such person was to remain externed. The Division Bench of the High Court through Tech Chand J. held that provisions of section 238 satisfied the test of reasonableness from the substantive as well as procedural point of view. Under section 238 the person against whom the order was made had opportunity to meet and rebut the allegations before the magistrate. If he was unsuccessful he had a right to appeal before the District Magistrate under section 274 read with schedule V. Even after that he could apply to the Officer Commanding the station to grant him permission to return to the Cantonment. Thus from the procedural point of view, law gave to such a person adequate opportunity not only to present his case before the magistrate but also to contest the validity of the order in appeal. As regards substantive side it was said that though the period for which a person was externed was unspecified yet the person against whom the order was made, might apply to the officer commanding the station for permission to return to the Cantonment. Thus it could not be said that on that score impugned section infringed the bounds of reasonableness. The learned Judge said that "the mere possibility of an abuse of provision enacted in the interest of the security of the State or interests of the general public cannot be a ground for holding a provision void.[63]"

If the statute prescribes certain procedure to which an order of externment must conform then in any case if an order does not conform to the procedure then

it is the order of externment and not the provisions of law under which the order was made which should be declared as void.[64]

The C.P. Goondas Act, 1946, provided for the control of goondas and for their removal from one place to another in the interest of public peace and tranquility. A goonda was defined as meaning a hooligan, rough or vagabond and as including a person who was dangerous to public peace or tranquility. The District Magistrate in the area, proclaimed to be disturbed by the State Government, was authorised to direct a goonda that he should not remain within or enter into a specified part of the district, if he was satisfied that there were reasonable grounds for believing that his presence or movement was prejudicial to the interests of the general public or if a reasonable suspicion existed that he was likely to commit acts calculated to disturb the public peace or tranquility. A few procedural safeguards were provided such as giving to the person concerned grounds on which the order was sought to be made against him and providing with him an opportunity of being beard and a right to make representation to the State Government against the order. In State of **M.P.** Vs. **Baldev Pd.** The petitioner by an order passed by the State of Madhya Pradesh under section 4(a) of the C.P. and Berar Goondas Act, 1946, was externed from a district. This order was challenged as violative of Article 19(1) (d) and (e) of the Constitution. The Supreme Court through Gajendragadkar J. said that under section 4 the District Magistrate could proceed against a person without being required to come to a formal decision as to whether a said person was a goonda or not and in any event no opportunity was intended to be given to the person to show that he was not a goonda. The failure of the section to make a provision in that behalf constituted a serious infirmity in its scheme.[66] Thus the court found two infirmities in the scheme of the Act, firstly, though the primary condition precedent for taking action under the Act was that the person was a goonda, there was no requirement for the magistrate, before taking action, to come to a formal decision as to whether the person concerned was a goonda or not. The Court held that the Act must have imposed an obligation on the magistrate to apply his mind to the question as to whether the person against whom action was proposed to be taken was a goonda

or not. Secondly, the definition of a 'goonda' afforded no assistance in deciding as to which citizen could be kept in that category. It was an inclusive definition and it did not indicate which tests had to be applied in deciding whether a person fell in the first part of the definition. The court held that the Act must have clearly indicated by a proper definition or otherwise, when and under what circumstances a person could be called a "goonda". The Act had left it to the unguided and unfettered discretion of the magistrate to treat any citizen as a 'goonda'[67]. So, the court declared the Act invalid. This case cannot be easily reconciled with some of the earlier cases. In the earlier cases, any person whose activities were prejudicial to public peace or safety could be externed and when such a wide power could be upheld it seems somewhat inconsistent to declare invalid a provision where the legislature tried to put at least some restrictions on the executive power to extern only a goonda. Even assuming that any person could be defined as a goonda, still the statute required an opportunity of being heard as to the grounds of the order (that is his undesirable activities). At the most the executive in this case had the same power of externment of any person as in other cases discussed earlier.

Upon an analysis of **Thakur Bharat Singh** Vs **State of M.P.**[68] it appears that the judiciary has taken a somewhat liberal approach in favour of the externee in a circumstance where externees are after their their externment compelled to reside in a specified area only. In this case in exercise of power conferred under section 3 of the M.P. Public Security Act, 1959 a District Magistrate or the State Government could extern a person from any place in Madhya Pradesh and require him to remain in a place in the State specified in the order of externment, if the authority concerned was satisfied that his activities were or likely to be prejudicial to the security of State or maintenance of public order. In the instant case the District Magistrate ordered the petitioner to remove himself from the Raipur district and to reside within the municipal limits of Jhabua town district Jhabua and asked him to notify his movements and also report himself personality every day at 8 A.M. and 8 P.M. This order of the State Government (District Magistrate) was challenged as violative of Article 19(1) (d) and (e) of the Constitution. The safeguard provided was that the State was to disclose the grounds for making the

externment order and also to place the order and the ground therefore along with any representation received from the person concerned before an advisory board. The State was required to act in accordance with the opinion of the Board. Nevertheless externment order for a particular place was held invalid. It was said by the High Court that though an order of externment from a specified area might be reasonable on account of the prejudicial activities of the externee in that area, yet it would be unreasonable to ask him to reside only in a particular area, where he might be a complete stranger or where the climate and other conditions might not suit him. If his activities were extensive, the area of exclusion might be enlarged, but there was no reason why he should bad no choice to select his place of residence in any part of the rest of the country. The High Court also set aside the order of the Government to notify his movements every day at 8 A.M. and 8 P.M. On appeal by the State of Madhya Pradesh the Supreme Court through Shah J. declared[69] the law to be unreasonable to the extent it required any person to reside in any place, for the person concerned was not given a hearing before selecting a place for him. The place selected may be one in which he might had no residential accommodation and no means of subsistence. No provision had been made for providing the person concerned with any residence, maintenance, or means of livelihood in the place selected for his residence. In the opinion of the court, the person might not be able to get means of livelihood in the place selected and the place to be inhabited, and there was no provision in the statute that the person would be provided with any residence or means of livelihood. It may be submitted that the **Baldev Prasad** and the **Bharat Singh's** cases indicate judicial rethinking on its earlier liberalism towards the laws concerning externment of persons.[70]

In another case **Balu Shivling Bombey** Vs **Divisional Magistrate, Pandharpur and another**[71], section 56 of the Bombay Police Act, 1951, authorises the externment of a person outside the area within the local limits of the jurisdiction of the authority making the order and contiguous thereto. The court said that these words, however, could not be so interpreted as to enable the authority to extend the area of externement without reference to the purpose of the

externemnt. Though there was provision for appeal and person concerned was given an opportunity to be heard before making the order yet the court quashed the externment order because in the opinion of court the authority could not extend the area of externment without reference to the purpose of the externment. This decision shows that the High Court was of the opinion that a restriction to be reasonable under Article 19(5) area of externment is restricted to the requirement created by the movements or acts of the person to be externed.

The **Baldev Prasad**[72] and **Bharat Singh's**[73] cases when compared with **Guru Bachan Singh**[74] and **Hari Khemu's**[75] cases, however, denote a hardening of judicial attitude towards the permissible limits within which the restrictions on the right under Article 19(1) (d) and (e) can be imposed. In **Baldev Prasad's** case, the restriction had a much more limited scope than the one in the **Guru Bachan Singh** and in other Bombay cases; for while in the former case, the restriction could be imposed only in an area declared to be disturbed and only on a 'goonda', there was no such limitation in the latter cases as the Act in question was a permanent measure and under it any person could be externed, and this was much broader than the term 'goonda', however, vaguely it may be defined. Nevertheless, the Court declared the Madhya Pradesh Act invalid. That is why Professor Jain has said that Madhya Pradesh cases are the precursor of a trend that the courts would now be somewhat more strict concerning administrative powers to restrict the right of movement or residence than what they had been so far.[76]

The strict approach in the matter of externment depicted in ***Baldeo Pd.*** And ***Bharat Singh*** is discernible in the later Supreme Court case, ***Prem Chand V. Union of India.***[76a] The court regarded externment of a person as amounting to "economic hara-kiri and psychic distress". The court emphasised that externment provisions have to be read strictly and that any "police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon creditable material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence."[76b]

The decisions mentioned above make it clear that while a law may authorise the executive to extern a person in its subjective satisfaction, the law to

be valid should contain some procedural safeguards. A necessary procedural safeguard is that the person concerned be supplied with the grounds of externment and be given an opportunity to a representation even if it be before an executive officer. It will not be incorrect to say that the Supreme Court has permitted the Legislature to concede, on the whole, a large amount of discretion to the executive to extern a person from a local area and, thus, tamper with the individual liberty of movement and residence in India.

From the discussion of above externment cases it is clear that an executive officer may by law be authorised to extern a person upon its subjective satisfaction, provided that there is some procedural sageguard available to the externee. Procedural safeguards which have been treated as sufficient are that the person concerned should be supplied with the grounds of exernment and he be given an opportunity of making a representation or of being heard. The courts have to a great extent shown satisfaction even in cases where the externee was heard by higher executive authority or could make representation to the higher executive authority instead of an independent board or the judiciary. Therefore, the courts do not regard the presence of an advisory board as necessary. As against this in case of the right of association even the existence of an advisory board was not found sufficient and there was insistence on reference to a judicial tribunal for declaring an association unlawful. To some extent, it may be said that right of "association" needs a much greater protection than the right of movement and residence for whereas the former is the base of a democratic society, the latter affects only the individual.[77] But even then the right of movement and residence needs a better protection than it has received at present and the forceful dissent of Mukherjee J. in the **Dr. Khare's**[78] case in an index of unsatisfactory features present in this area.

Constitutionality of section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956:

There are certain kinds of externment cases which have arisen under section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956[79] where constitutionality of this section has been challenged on the ground that it

confers an uncontrolled and arbitrary power upon the magistrate to interfere with the fundamental right under Article 19(1) (d) and (e) of the Constitution. Different High Courts have interpreted this section in different ways. Some of them have interpreted in the affirmative whereas some of the High Courts have taken a contrary view. In **Smt. Kaushiliya** Vs **State**[80], the City Magistrate Kanpur, ordered petitioner to remove herself from the city of Kanpur. The proceedings against this order were started in the Court of the City Magistrate, Kanpur. During the course of proceedings, the petitioner filed revision petitions to the High Court where constitutional validity of section 20 of the Act was contended. W. Broom J. of the High Court said that the encroachment made by section 20 on the fundamental rights of residence and free movement of the individual far outweighed the benefit likely to accrue to the public at large and could not, therefore, be deemed to be reasonable. Further no principles had been provided for the guidance of the magistrate concerned and the circumstances in which action should be taken under the section being left entirely to his subjective determination. Moreover, uncontrolled power had been delegated to the executive and delegation of unfettered and unguided power to a subordinate magistrate also amounted to an infringement of the right to equality, as there was nothing in the Act to guide the magistrate in the exercise of his discretion when deciding the cases of individual prostitutes.[81] The section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, was also questioned in a similar case – **Smt. Degum** Vs. **The State**[82]. The Bombay High Court through Patel J. said that portion of section 20 of the said Act which enabled a magistrate to direct a prostitute to remove herself from the place where she was living to a place without the local limits of his jurisdiction, unreasonably encroached upon the fundamental rights guaranteed by Article 19(1) (d) and (e) of the Constitution and was, therefore, invalid. The rest of the section could not be struck down and was valid.[83] The learned judge further said that the discretion given to the magistrate under section 20 was not unguided and undefined. The words "in the interest of general public" appearing in sub-section 3 of section 20, were intended to have application in the circumstances similar to those created by sections 7, 8 and 18 of

the Act. It was only when it was found that a prostitute was carrying on her trade, in such place and in such manner as to affect the morale of young and unwary who had frequently to use the locality where she was carrying on her activities or hurt the susceptibilities of large number of even grown up persons having occasion to be in the locality and it could be said that it was necessary "in the interests of general public" that such woman or girl should be required to remove herself there from. In the view of the limited meaning of the words "in the interests of general public" it could not be said that discretion was arbitrary, and looking to the object to be achieved it could not be said that the section made excessive invasion on the rights of the prostitutes to move freely and reside wherever she liked.[84] The section 20 of the Suppression of Immoral Traffic in Woman and Girls Act, 1956, was declared valid by Andhra Pradesh High Court in **Vanga Seetharamamma** Vs **C. Sambasiva Rao and another**[85]. Kumarayya J. of the Division Bench said that although power conferred by section 20 of the Act might appear as uncontrolled but it could not be said as untrammeled and undefined because it was bounded by the limitation and dictates of interest of the general public and such power was necessary to advance the purpose of the Act. The power so conferred had to be exercised by a judicial authority. Though there was no provision, it could not on that account be said an arbitrary exercise of the power, as the discretion had to be exercised judicially and it was always subject to revisionary jurisdiction of the High Court.[86] The section has enacted did not give any scope for arbitratiness in making or revoking the order. Before any order prejudicial to a woman was made, a detailed procedure had to be followed. The procedure prescribed afforded full opportunity to the woman to make her representation and to effectively meet the case against her. The magistrate had to be satisfied that the woman was a prostitute and her removal from the place was necessary in the public interest. The satisfaction was objective and based on evidence and required scrutiny. The inquiry was judicial and entrusted to a judicial body and thus section 20 of the Act could not be held as violative of Article 19(1) (d) and (e) of the Constitution. The dictates of interest of general public which 'controls the power', were said to be an elastic and had got its own

natural meaning and those limitations could not be transgressed by the magistrate. The power thus limited was in no sense untrammeled. The conflicting interpretation of section 20 of the impugned Act, given by different High Courts was settled by the Supreme Court in **State of U.P.** Vs **Kaushiliya**.[87] Upholding the constitutional validity of the section K. Subha Rao J. (as he then was) said:

> "..... Once it is held that the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, are so subversive of public morals and so destructive of public health that it is necessary in public interest to deport her from that place, the restrictions should be held to be reasonable.[88]"

Thus the power given under section 20 of the aforesaid Act, to a magistrate to order a prostitute to remove herself from the place where she is residing, has been held to be a reasonable restriction on the rights of the person concerned under Article 19(1) (d) and (e) as there were adequate procedural safeguards available to her by way of enquiry, notice, hearing etc. before such an order is made. Thus the Supreme Court followed the observation of Andhra Pradesh High Court in **Seetharamamma** Vs **Sambasiva Rao** case.[89]

B. Expulsion from India:

Article 19(1) (e) guarantees to a citizen the right to reside and settle in any part of India. Under Clause (5) reasonable restrictions may be imposed upon a citizen's right to reside and settle in any part of the territory of India. A citizen of India returning to India from a foreign country may, accordingly, be reasonably required to produce a permit[89a] or passport[89b] (under the Passport Act) before he can be allowed to enter the country and may also be convicted for breach of the provisions of the Passport Act or the Rules made there-under.[90] But removal of a citizen from India amounts to a virtual forfeiture of his citizenship; hence a law which provides that on conviction for an offence for breach of the passport regulations a citizen can be removed from India virtually takes away the

fundamental right conferred by Article 19(1) (e) upon a citizen and cannot, accordingly, be justified as imposing a reasonable restriction under clause (5) of that Article. The removal of a citizen from India on the subjective satisfaction of the executive without giving him an opportunity of showing cause is an unreasonable restriction upon the right guaranteed by Article 19(1) (e) of the Constitution. In **Mohammd Hanif** Vs **State of M.P.**[91] the Constitutional validity of the Influx from Pakistan (Control), Ordinance, 1948, and section 7 of the Influx from Pakistan Control) Act, 1949, were challenged as violative of Article 19(1) (e) of the Constitution. Section 7 of the said Act authorised the Central Government by general or special order, to direct the removal from India of any person who had committed or against whom a reasonable suspicion existed of having committed an offence under the Act, viz. to enter India without a permit or on an invalid permit or committing a breach of a condition of the permit. In sustaining the validity of these provision the High Court said that the petitioner was liable to be deported from the Indian Union. The introduction of the permit system amounts to imposition of restrictions on the exercise of the right conferred by Article 19(1) (d). This restriction was imposed in the interests of the general public consequent on the partition of the country. It is submitted that this argument is totally wrong. The system of permit conferred discretionary power on the executive authorities to refuse to issue a permit in cases where they were satisfied that such permits should not be issued. It would, therefore, be obvious that in such cases the refusal of the permit negatived the right of the citizen to reside and settle in Indian territory, and the power to impose restrictions on the exercise of the fundamental right does not include the power to destroy the right altogether. However, this decision of the Nagpur High Court was not followed by the Allahabad High Court in **Shabbir Husain** Vs **State of U.P. and other**.[92] The applicant who was a resident of village Kalyanpur, police station Nagina district Bijnor, in the U.P. from his birth, went to Lahore in 1948 in connection with his business. The permit rules happended to be introduced during his stay there and he wanted a permit for permanent settlement in India. The authorities just issued a temporary permit which was valid upto 1.11949. The applicant represented his

case to the U.P. Government for permanent resettlement in India. He was given to understand that his case had been rejected by the State of U.P. and the State had passed an order that he be removed from India and sent back to Pakistan under section 7 of the Influx from Pakistan (Control) Act, 1949. In furtherance of this order he was confined in the District Jail Bijnor since 21.7.1950. The main contention of the applicant was that as a citizen of India he could not be ordered to be removed from India and that the order of removal was violative of fundamental freedoms under Article 19(1) (d) and (e) of the Constitution. It was said by Reghubar Dayal J. that a citizen of India cannot be ordered to be removed from the territory of India and the orders for the removal of applicant were illegal and thus his arrest and detention for removing him from the country were also illegal. In the opinion of the High Court Rule 19 of the Permit System Rules 1949 and section 7 of the aforesaid Act along with the order of the Central Government issued there under were invalid in so far as they were applicable to the citizens of India and inconsistent with the fundamental rights guaranteed to them under Article 19(1) (d) and (e) of the Constitution, as it was left upon the Central Government to order the removal of a person from India. The Court put a basic question i.e. how was the authority concerned to find out whether the presence of a particular person was undesirable in the interest of general public? There was no provision in the Act or in the Rules made there under for the guidance of the authority concerned.

The constitutionality of some of the provisions of the influx from Pakistan (Control) Act, 1949, was again raised in **Ebrahim Vazir and others** Vs **State of Bombay and others**,[93] section 3 of the said Act prohibited entry of any person into India from Pakistan without a valid permit and section 7 of the Act authorised the Central Government by general or special order, to direct the removal from India of any person who had committed or against whom a reasonable suspicion existed of having committed an offence under the Act namely to enter India without a permit or an invalid permit or committing a breach of a condition of the permit. The aforesaid Act applied both to citizens as well as non-citizens. It was contended tht section 7 conferred upon the Central Government an unfettered

power to direct removal from India not only of a person who had committed an offence punishable under section 5 of the Act but also one against whom reasonable suspicion existed that he had committed such an offence. The majority of the Supreme Court through Ghulam Hasan J. said that the question whether an offence had been committed was left entirely to the subjective satisfaction of the Government. The inference of a reasonable suspicion was also left upon the arbitrary and unrestrained discretion of the Government and before a citizen was condemned all that the Government had to do was to issue an order that a reasonable suspicion existed in their mind that an offence under section 5 had been committed. The section did not provide for the issue of a notice to the person concerned to show cause against the order nor was he afforded any opportunity to clear his conduct. This was nothing short of a travesty of the right of citizenship. The learned Judge further made it clear that a law which subjected a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit regulations or upon a reasonable suspicion of having such a breach could hardly be justified upon the ground that it imposed a reasonable restriction upon the fundamental right to reside and settle in the country in the interest of the public. This argument that section 7 was consequential to section 3 and that if section 3 controlling an admission by means of a permit was valid section 7 must also be held to be equally valid was held to be fallacious. Because section 7 was by no means wholly consequential to section 3. The first part no doubt rendered the person concerned liable to removal upon conviction under section 5, but further empowered the Central Government to pass the same order independently of those provisions even where there was no conviction and a reasonable suspicion existed that an offence had been committed. Assuming, however, section 7 was consequential to section 3 it gave no opportunity to the aggrieved person to show cause against his removal. There was no forum provided to which the aggrieved party could had recourse in orde to vindicate his character or meet the grounds upon which it was based. Neither the Act nor the rules framed there under indicate what procedure was to be followed by the Government in arriving at the conclusion that a breach of section 3 or the

rules made under section 4 had taken place. A citizen of India who returned to the country without a valid permit did not commit such a grave offence as to justify his expulsion from the country. The object of the Act was not to deport Indian nationals committing a breach of the permit or passport regulations, but merely to control admission into and to regulate movements in India of persons from Pakistan and therefore, there was no substance in the argument that section 7 was intended to achieve the objective of expelling Indian citizens, by and large, if they brought themselves within the mischief of the section.

While giving dissenting judgment Das J. observed that the act authorised by Section 7 was in essence a purely executive act for implementing the provisions of section 3. Without such a provision, it would had been impossible for the State to control the admission into India of persons from Pakistan and to prevent the concomitant of dangers. The act authorised by the section being an executive act, discretion had perforce to be left to the executive Government which by reason of the information available to it, was in a much better position than the Courts to know and judge the antecedents of such a person and his ultimate purpose. Thus provisions of section 7 were necessary and reasonable restrictions in the interests of general public. The learned judge was also of the view that a person entering India from any place in Pakistan must be in possession of a permit or a valid passport or be exempted from such requirements. There was an implicit suggestion in his (Jagannadha Das J.) argument that the right of the Government to issue a permit to enter was discretionary and could, therefore, be refused by the Government on the ground of the safety of the State. If this interpretation of the argument be correct, then it is obvious that it has no foundation at all. The right of an Indian citizen to reside and settle in any part of the territory of the Republic is subject only to reasonable restrictions in the interests of the general public or for the protection of the interests of a Scheduled Tribe. It is an essential corollary of the right that an Indian citizen living abroad has an absolute right to enter the territory of the Republic, and such a right could not be subjected to the discretionary authority of the Government.

It is submitted that the view taken by the majority of the Supreme Court is fully in accord with the constitutional law and practice of almost all democratic States. Under the common law, the executive has no authority to expel a British subject from the Dominion of the Crown. The Plea of an Act of State is not available against a subject of the Crown. The same law obtains in the United States.[94]

The power to expel a citizen is such an extra-ordinary and unusual power that there can be no presumption that the executive authorities of the Republic can exercise such a power or even that the Union Parliament can confer such a power on the executive Government in the absence of an express provision in the constitution.

C. Internment cases:

As discussed earlier in externment cases a person is ordered to remove himself from a particular area or locality if his activities are prejudicial to the maintenance of public order, safety etc. The externment order cannot stand and amounts to an unreasonable restriction under Article 19(5) unless there are adequate safeguards against the arbitrary exercise of power under which the order is made. Similarly in internment cases a person whose activities or movements are prejudicial to the maintenance of public order safety etc. is ordered not to go out of the limits of a particular locality or is compelled to reside in a particular area where he lives and not move outside that area. The restrictive order cannot stand unless it is saved by Article 19(5) of the Constitution and the power under which the order is made is arbitrary if there are no adequate safeguards whether procedural or otherwise against the arbitrary exercise of power. In internment cases also the person whose movements or rights under Article 19(1) (d) and (e) are affected should be given an opportunity to be heard and making representation in his defence.

In **Braj Nandan Sharma** Vs **State of Bihar**[95], the applicant petitioner made an application under Article 226 of the Constitution for a writ preventing

the Government from enforcing an order under clause (b) of sub-section (1) of Section 2 of the Bihar Maintenance of Public Order Act, 1949, restricting the petitioner's movements by forbiding him from going to any place in the districts of Singhbhum and Manbhum. It was contended that the order of the Government was violative of fundamental rights guaranteed under Article 19(1) (d) and (e) of the Constitution. The Patna High Court through Meredith C.J. observed that the power to make an internment order under section 2 (1) (b) of the said Act was based not on any reasonable grounds but upon the satisfaction of some individual and there was no provision on the basis of which the court could examine the reasonableness or otherwise of orders passed. The court was also of the opinion that there could be no presumption that an executive official would always act reasonably. There might be a presumption that he could act bonafide but that was different thing. The test was not what was actually done under the law but what the law enabled to be done. If the law enabled orders to be passed which were unreasonable and yet were consistent with the terms then that could not be called a law operating to impose only reasonable restrictions. The court did not apply any subjective test. There is an objective test of reasonableness and this test was applied by the court in this case. The court applied the test of a "reasonable man" – a well recognised legal means of examining the question of reasonableness which was essentially an objective test and thus the court allowed the application. It may be said that the approach of the court is right because it applied an objective and not a subjective test in judging the reasonableness of the restriction imposed. Similarly **Ismail and another** Vs **State or Orissa**,[96] the petitioners were citizens of India and had extensive business and agricultural land with head quarters in Nawapar Sub-Division. On 17.7.1949 the then District Magistrate of Sambalpur (within whose jurisdiction Nawapar Sub-Division was then included) in exercise of power conferred on him by section 2(1) (c) of the Orissa Maintenance of Public Order Act, 1948, served two orders on petitioners that they should not move out of Nawapar Sub Division for a period of six months from the date of the orders. The order of the District Magistrate was challenged under Article 19(1) (d) and (e) of the Constitution. The Division bench of the High

Court said that the Act did not impose any obligation on the part of the authority concerned to communicate the grounds of internment to the person affected nor there was any obligation to give an opportunity of being heard or making representation against the order. Moreover there was no provision for referring the whole matter to an impartial tribunal such as an advisory council. In the Act an order of internment for a period of six months could be made without consulting an advisory body and without giving the internee an opportunity of making a representation. But if it was desired to extend the period of internment for a further term, consultation with the advisory council was made mandatory and the internee was given a statutory right of making representation. The Court declared the impugned provision of the section as void because it conferred arbitrary power without any procedural safeguards and made the persons aggrieved for a period of six months without any remedy. Thus the provision was procedurally unreasonable. These two cases indicate that though orders for internment can be passed yet the aggrieved persons must be given an opportunity of making representation and before the passing of the order copy of the grounds must be supplied with. Thus it may be said that the judiciary has made an attempt to reduce arbitrariness on the part of the authorities in making the internment orders also.

5. Where discretion is conferred to regulate the freedom of profession, occupation, trade or business :

Under Article 19(1) (g) all citizens of India have the right to practice any profession or to carry on any occupation, trade or business but under Article 19(6), the State can impose reasonable restrictions on the exercise of this right in the interests of the general public. A law nationalising any trade or business is also not hit by Article 19(1) (g)[97].

The trade commerce and business is day by day coming under effective administrative control and regulation and large powers to regulate trade and commerce have been conferred on administrative authorites through various Acts,

rules and Regulations. Some of the methods of control operating in the area are licensing, price fixing, requisitioning of stocks, regulating the movement of commodities, partly due to the shortage and scarcity of essential commodities, partly because of the economic regeneration of the country, partly of discourage some immoral and illegal trades, and partly to check unethical professional activates of private enterprise.

The general principle as regards the quantum of discretionary power in this area is that the power conferred on the executive should not be arbitrary, unregulated by any rule or principal[98], and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority. Generally discretion is not unregulated or arbitrary if the circumstances in, or the grounds on which it can be exercised are stated or if the law lays down the policy to achieve which the discretion is to be exercised, or if there are enough procedural safeguards in the law to provide security against the misuse of the discretion. In **Chintaman Rao** Vs **State of M.P.** sections 3 and 4 of the C.P. and Berar Regulation of Manufacture of Bidis, Act, 1948, authorised the Deputy Comissioner to prohibit the manufacture of bidls in the villages during the agricultural season. No person residing in the villages was to employ any person, nor engage himself in the manufacture of bidis during the agricultural season. The object of the provision was to ensure the supply of adequate labour for agricultural purposes in the bidi manufacturing areas of the State. The prohibition was held to be unreasonable because it was in excess of the object in view and was arbitrary and drastic in nature. The bidi manufacturer could not even import labour from outside and so had to suspend manufacture of bidis during the agricultural season. Even those villagers who were incapable of being engaged in agriculture, like the old people, women and children etc. and many petty shop keepers, non-agriculturists etc. who supplemented their income by making bidis in their spare time, were prohibited from engaging themselves in bidi manufacture without any reason. Mr. Justice Mahajan, on behalf of the Court laid down that the restriction should have a reasonable relation to the object in view and that it should not be'arbitrary or "excessive" beyond the requirements of the interests of

the public Legislation which does not strike a harmonious balance between the individual's freedom under Article 19(1)(g) and the social control permitted by Article 19(6) is unreasonable[100]. This formulation of the test of reasonableness is flexible in that it leaves considerable scope for judge to apply their "social philosophy" and "scale of values" to appropriate areas of judicial decision-making. However, the efficiency of this principle in controlling State regulation and subjecting administrative discretion to judicial scrutiny would largely depend on the judicial attitude at a particular time.[101]

The right to carry on business or trade does not mean to carry on such trade or business in a particular locality or premises. A discretion may be conferred on the administrative authority to regulate and allot premises where the business is to be carried on keeping in view public health and administrative efficiency[102] etc. Similarly when an Income Tax Commissioner transfers cases of tax assessment from one Income Tax officer to another for achieving the object of the statute i.e. tax collection, does not exercise his power in an arbitrary manner and power given to him has been held as not violative of the right to carry on any trade or business. Such power has been held not as naked because it is guided by the purpose of the Act and the Income Tax Commissioner keeping in view the administrative efficiency may transfer cases from the jurisdiction of one Income Tax Officer to another. The restriction thus imposed is not unreasonable because there is no fundamental right to an assesses to be assessed in a particular area or locality.[103]

Where the law providing for grant of permission confers a discretion upon the administrative authority which is regulated by rules, principles or conditions (whether express or implied) and exercisable in consonance with rules of natural justice, the discretion so conferred cannot be said as uncontrolled or arbitrary.[104] Similarly if there is provision for appeal the exercise of discretion has been held as valid.[104a] Similar provisions were also made under the Mysore Rent Control Act. So the Court held that powers conferred on the competent authority to fix fair rates for board, lodging and other services given to the hotel or lodging houses, were not uncontrolled, and the restriction imposed was not unreasonable as the

court found these safeguards present. In spite of above safeguards the order of the competent authority should be in writing and supported by reasons.[105] However, it is not necessary that all the above mentioned safeguards should be present in a particular case. the only requirement is that there must be some adequate safeguard against the arbitrary exercise of discretionary power conferred upon the authority concerned. What constitutes adequate safeguards will differ from case to case and upon judicial interpretations.

In a Welfare State of today the Government regulates trade, business or occupation by putting its effective control over essential commodities, by fixing minimum wages and prices by granting licenses for such business, trade or occupation and so on. Each of these methods of State regulation has been discussed separately as below :-

A. Control Of Essential Commodities :

Since the days of the World war, the growing volume of the commodity control has generated an administrative process in an important sector of the socio-economic life of the community. The present law, namely the Essential Commodities Act, 1955, replaced the earlier temporary legislation, the Essential supplies (Temporary Powers) Act, 1946. Under it an authority is given in respect of control of production, supply and distribution of, and trade, commerce in essential commodities. Under the Act the Central Government is given extensive regulatory power including authority to make rules to provide for licensing and other means of control.

The general principles is that the power conferred on the executive to regulate trade or business should not be arbitrary, unregulated by any rule or principle and that it should not be left entirely to the discretion of any authority without any check or control by any superior authority. A law or order which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable.[106] In **Nath Mal** Vs **Commissioner of Civil Supplies, Rajasthan and others**[107] the stock of bajra of the petitioner was frozen by the

Commissioner of Civil Supplies and others and purchased by them at prevailing market rates under the Rajashtan Foodgrains Control order, 1949 issued under the Essential Supplies Act, 1946. No reason had been assigned and no principles had been laid down in the order for freezing and requisitioning of stocks of food grains with any dealer. This action of the Commissioner of Civil Supplies was challenged as violative of Article 19(1)(g) of the Constitution. Wanchoo C.J. of the High Court declared clauses 25 of the Rajasthan Foodgrain Control order, 1949, void because it gave arbitrary power to various officers mentioned therein to freeze any stocks of food grains held by any person without assigning any reasons thus it completely paralysed the trade or business. Therefore, the restriction imposed was held as unreasonable. The State of Rajasthan appealed to the Supreme Court against this decision of the High Court but the appeal was dismissed by the Supreme Court.[108] It was pointed out by Ghulam Hassan J. that the freezing of the stocks of foodgrains under clause 25 of the said order was reasonably related to the object which the Essential Supplies (Temporary Powers) Act, 1946, was intended to achieve. So the first portion of the clause could not be held as void under Article 19(1)(g), but last portion of the clause was declared as void as it was left entirely to the Government to requisition stocks at rate fixed by it and dispose of such stocks at any rate in its discretion. This vested in the opinion of the court an unrestrained authority to requisition the stocks of food grains at an arbitrary rate of price. This observation of the Supreme Court was followed by various High Courts is similar cases.[109]

Where an order issued under the Essential Supplies (Temporary Powers) Act, 1946, or the Essential Commodities Act 1955 required the authority mentioned therein to grant, refuse or renew licences for carrying on business but it neither prescribed any principle, guidance, or conditions precedent for the exercise of discretion by the licensing authority nor did not prescribe any provision for hearing before refusing or renewing the licences, the order has been declared as absolute and uncontrolled discretionary power upon the authority and thus infringing Article 19(1)(g).[110] In **M/S Dwarka Pd. Lakshmi Narain and others** Vs **State of U.P. and other,**[111] the Supreme Court through Mukherjee J.

laid down the proposition that a law conferring arbitrary and unguided powers on administrative authorities will be invalid under Article 19(1)(g). The U.P. Government issued the U.P. Coal Control Order, 1953, under the Essential Supplies (Temporary Powers) Act, 1946. Clauses 3(1) of the order required a licence for stocking, selling, storing or utilising coal. Clause 3(2)(b) authorised the Coal Controller to exempt any person from the licensing provisions. Clause 4(3) authorised the licensing authority to grant, refuse to grant, renew or refuse to renew, suspend, cancel, revoke or modify any licence for reasons to be recorded. The Area Rationing Officer Kanpur accused the petitioners of committing of a number of irregularities in connection with the carrying on of the coal department and latter on the District Supply officer cancelled the licence of the petitioners. The constitutionality of the said order was challenged under Article 19(1)(g). The Supreme Court held clause 3(1) as constitutional, for it was reasonable to regulate the sale of essential commodities through licensed vendors to ensure their equitable distribution and availability at fair prices. The power to grant or with hold licences and exercise of some amount of discretion would necessarily have to be vested with administrative authorities. Clauses 3(2)(b) was, however, held invalid because the grounds on which an exemption could be granted were nowhere mentioned. The controller had been given an unrestricted power to make exemptions and there was no check and no way to obtain redress if he acted arbitrarily or with improper motives. Clause 4(3) was also held invalid because it gave to the licensing authority an absolute power to grant, revoke or suspend a licence. In the words of Mukhejree J. :

> "No rules have been framed and no directions given on these matters to regulate or guide the discretion of the Licensing Officer. Practically the order commits to the unrestrained will of a single individual the power to grant, with hold or cancel licences in any way he chooses and there is nothing in the order which could ensure a proper execution of the power to operate as a check upon injustice that might result from improper execution of the same."[112]

Rejecting the contention of the respondents that the requirements of recording of reasons by the licensing authority, affored a sufficient safeguard against abuse of powers by him, the learned judge observed:

> "This safeguard…… is hardly effective; for there is no higher authority prescribed in the order who could examine the propriety of these reasons and revise or review the decision of the subordinate officer. The reasons, therefore, which are required to be recorded are only for the personal or subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person."[113]

The Coal Control Order also consisted of a rule authorising the administrative authority to fix prices of coal in accordance with a formula given in schedule III of the order consisting of eight items, in only two of which some amount of discretion was left with the authority The formula was held valid because the discretion left under it was not limited or unfettered. Though it is submitted that the principles of law laid down in the case are sound, yet the court might in the light of the facts of the case safely declare clause 3(2)(b) and clause 4(3) as valid because- firstly, it could have been held that the grant or refusal of a licence was a quasi-judicial function and the recording of reasons for the action taken further strengthens that view. The fact that no appeal was provided for, from such quasi-judicial decision would still leave such decision open to the supervisory jurisdiction of the court by certiorari and by appeal under Article 136. Secondary it does not appear to have been argued before the Court that the impugned order was passed under section 3(2) of the Essential Supplies Act, 1946, and that the discretion of the Controller was to be guided by the policy underlying the Act, a view later expressed by the Supreme Court in **Rajasthan** Vs **Nath Mal.**[114] Similarly it can also be said that this case overlooked the guidance to be derived from the policy underlying sections 3 of the Essential Supplies Act, 1946, and to that extent the case was wrongly decided.[115]

Both the **Dwarka Pd.** and the **Nath Mal** cases typify a judicial attitude which would not brook State Control of Private Trade greater than what the

exigencies of a particular situation warranted. They also laid down the proposition that administrative authorities must not be vested with unqualified discretionary powers without standards and procedural safeguards. The aftermath of these decisions reveals a shift in judicial thinking. The test of reasonableness has become more flexible and less demanding and the trend generally shows a judicial deference to legislative and executive action in construing the reasonableness of restrictions under Article 19(6) of the Constitution.[116]

The authority of Dwarka Pd. was weakened and unsettled by the Supreme Court through Mahajan J. in **Harishanker Bagala** Vs **State of M.P.**[117] The Cotton Textiles (Control of Movement) order, 1948, required a permit issued by the Textile Commissioner for Transportation of Cloth by rail, road, sea or inland navigation by any person. The constitutionality of the order was challenged on the ground that it conferred an unregulated and arbitrary power to grant or refuse a permit. The Supreme Court, however, upheld the order. Unlike the **Dwarka Prasad** case the court found as furnishing sufficient guidance for the exercise of the power from the general policy of the order which was to regulate the transport of corton textiles in a manner that would ensure an even distribution of the commodity in the country and to make it available at fair price. The **Dwarka Pd.** case was held as not having a bearing on the present case as there was no analogy between them.[118] However, this may, be justified by saying that perhaps in the opinion of the court a licence to trade stood son a different footing from permits to regulate transportation or movement of goods. Because in the former case a person could not carry on a trade at all without a licence being first obtained and in the latter case only a restriction was imposed on one aspect of the total trade, leaving the rest as free. Thus the court draw a distinction between prohibition and restriction whereas in some case court has said that restriction includes prohibition e.g. in case of dangerous or noxious trades.[119] The principles laid down by Mahajan J. in **Harishankar Bagala's** case was followed by Bose J. in **Madhya Bharat Cotton Association Ltd.** Vs **Union of India and another**[120] where he said that the exercise of discretion is regulated by the general policy of the order.

There is a presumption that public authority will act honestly and reasonably in the exercise of its statutory power and that presumption is enhahced where it is superior and responsible officer.[121] Under the Essential Commodities Act, 1955, certain control orders had been issued and persons could not carry on their business in commodities in respect of which orders were issued unless they had obtained permit or licence from the authorities named in the orders. Where in a case the authority named was the State Government or any other superior officer of higher rank, it was held that there was a presumption that he would not abuse the power and the conferring of discretionary power on such officers to regulate the business or to grant or refuse to grant licence was held as not bad provided that discretion was guided by the object and policy of the Act.[122] Similarly in **Chinta Lingam and others** Vs **Government of India and others.**[123] crtain control orders viz. (i) The Rice Southern Zone movement Control order, 1957 (ii) The Southern States (Regulation of Exports of rice) order, 1964) (iii) The Andhra Rice and Paddy order, 1965, introduced a permit system for sale of rice and paddy. This was challenged on the ground that it conferred arbitrary powers in the matter of issuing or with holding of permit and there was no provision for appeal or revision against refusal to grant a permit. Rejecting this argument the Supreme Court through Grover J. stated that the permits were to be issued by the State Government or the District Collectors. These High ranking officers were expected to discharge their duties in a reasonable and responsible manner. The **Dwarka Pd.** case was distinguished on the ground that there the power of licensing could be conferred on any person. The absence of a provision for appeal was held as not bad because an affected person could always approach the State Government to review the matter when a permit was refused by a District Collector.[124]

In **Mohammad Anjar Hussain** Vs **State of Bihar,**[125] an order of demand made under the Bihar Agriculturists Levy order 1950, was served on the petitioner requiring him to deliver a certain quantity of paddy to a person at a place named in the order. The petitioner did not comply with the order and was in consequence prosecuted. The order was challenged under Article 19(1)(g). The Court held that substantive provision of the order which required to deliver certain quantity of

paddy as mentioned in the order, did not impose unreasonable restriction as restriction imposed was in the interest of public. Though there was some risk of abuse of power yet constitutionality of a law could not be contested on the ground of such an apprehension. Similarly where stock, requisitioning order prescribed the maximum quantity which a producer could possess and sell the excess quantity to the Government at a price fixed by it, could not be held as invalid on the ground that the order imposed unreasonable restriction for the restriction was in the interest of general public.[126] But as opposed to this where an Stock Requisitioning Order did not fix the maximum quantity of stock which a producer could hold or possess and left the matter entirely on discretion of the Government was held as invalid because it did not prescribe any indicia which would be the basis for the Government to fix the maximum quantity which a producer could possess and thus the order was in the nature confiscatory. Therefore, the restriction imposed was not reasonable and power conferred to fix the maximum stocks was arbitrary and uncanalised.[127]

Lord Krishan Suagr Milla Vs **Union of India**[128] provides an illustration as to how the court was divided in its view in deciding on the validity of another piece of economic development legislation. In this case the petitioner challenged the constitutionality of the Sugar Export Promotion Act, 1958 which empowered the Central Government to make compulsory purchases of sugar for export. Export quotas were allotted to each Sugar Mill on a proportionate basis of production. The petitioner contended, inter alias, that the Act was void under Article 19(6). Hidayatullah J. on behalf of the majority upheld the constitutionality of the Act. Examining the reasonableness of the restrictions, his lordships observed :

> "The foreign export served the national interest by stabilising the sugar market so that the production of sugarcane may be maintained at a reasonable level. It also stablished national economy by earning foreign exchange. The loss, if any, was comparatively small and was spread over many factories. Apart from the very real possibility of

its being recouped by sales in the country, the loss itself was so small as not to amount to an unreasonable restriction."[129]

K. Subha Rao J. in separate judgment,[130] agreed with the majority on the validity of the impugned legislation but disagreed on the principle that in ascertaining the reasonableness of restrictions imposed by a statute on a fundamental right, it was permissible to rely on a notification issued by the Government under another Act unconnected with the impugned one.[131]

Sarkar J. who dissented from the majority held the Act invalid. The restrictions, in his view, were unreasonable. Firstly, because the validity of the Act cannot depend on what the executive might do or undo at any time, and secondly, because it was not reasonable to compel a person to sell goods at a loss. In the words of the learned judge :

> "I will agree that earning of foreign exchange is essential for the country. But I do not see that justifies the enactment of a legislation which imposes a loss on a sugar manufacturer. It is not as if foreign exchange could not be earned without inflicting loss on the manufacturer of sugar… I also think it clear that an object, however, laudable, cannot by itself and without more, make a restriction put on a citizen's right to carry on a trade for attaining that object, reasonable. A restriction on a person's right to carry on his trade does not become reasonable, simply because it has been imposed on him to achieve an object of great necessity and undoubted merit."[132]

The majority and minority views seem to agree to this extent that it would be unreasonable under Article 19(1)(g) for the Government to compel a person to sell his goods at a loss. The majority, in the instant case, however, concluded that the loss arising from the scheme of sugar export had been compensated, although the minority did not share this conclusion.

Similar rationales based on the overall economic situation in the country were responsible for the court's decision in the case of **Glass Chatons Importers and Users** Vs **Union of India**[133] **and Daya** Vs **Joint Chief Contoller of Imports and Exports.**[134] The Glass Chatons case involved the constitutional validity of

clause 6(h) of the Imports (Control) order, 1955, which canalised the imports of glass chatans through the State Trading Corporation. Consequently the petitioners were denied licences to import glass chatons. Rejecting such canalization of imports as unreasonable restriction on the right to trade, Das Gupta J. observed:

> "The burden on the person challenging that the Government of the Country is not right in its estimate of the effects of a policy as regards imports in the general interests of the public will be very heavy indeed and when the Government decides in respect of any particular comoodity that its import should be by a selected channel or through selected agencies the court would proceed on the assumption that the decision is in the interests of the general public unless the contrary is clearly shown."[135]

Similarly in Daya's case canalization of exports through the State Trading Corporation was sustained by the Court against an attack under Article 19(6). The petitioner, owner of manganese mines, was refused licence to export manganese ore on account of the allotment of export quotas to State Trading Corporation. As a result, he could neither export nor sell in the internal market. Therefore, he as forced to sell only to those who held the export quotas at prices dictated by them. The majority of the Supreme Court through Ayyanagar J. followed the **Glass Chatan** decision. Subba Rao J., who gave dissenting judgment was of the view that the Government under the colour of canalizing exports cannot cripple the trade of the petitioner. He suggested that under the scheme of canalization of exports there must be definite rule-making provision for giving stability and guarantee of fair treatment to all concerned in ordinary times as well as in times of emergency. By way of illustration, he pointed out that quotas may be fixed for each mine-owner on the expected total quantity of export with regard to the quality and the quantity of manganese produced. Similarly in **M/S. Rajchand Jagdish Chandra Vs Union of India and other**,[136] under the Export Promotion Scheme Petitioners exported art silk goods to Singapur and had earned net foreign exchange of the value of Rs. 707,709,55/- and they were entitled to import licences for art silk yarn for that amount. But they were granted licence of import

of art silk goods for the value of Rs. 3,19,354. The petitioners after making an infructuous demand for a licence for the goods exported, filed petition under Article 32 of the Constitution for "directing the Chief Controller of Imports and Exports to grant to the petitioners an import licence equivalent to 100% of the goods exported." It was contended that power granted under clause 3 of the Imports (Control) Order was an uncanalised power in the matter of fixing percentages and so imposed unreasonable restriction on the right guaranteed under Article 19(1)(g) of the Constitution. While rejecting the contention the Supreme Court pointed out that there was no right created in favour of the exporter to obtain a licence for the value of the commodity exported. The clause invested the Controller with authority, it did not imposed an obligation upon him enforceable at the instance of the exporter to issue la licence for the amount claimed by the exporter. In the words of Shah J :

> "The authority to grant or refuse to grant licences is conferred upon the high officers of the State and the grant of licences is governed by the import trade policy which is issued from time to time, and detailed provisions are mare in the Imports (Control) Order setting out the grounds on which the licences may be refused, amended, suspended or cancelled (clau. 6 to 9 of the order). Provisions to afford a hearing to the licensee before action is taken under clause 6 to 9 is also made. It cannot, therefore, be said that power conferred is uncallised or arbitrary."[137]

From the analysis of above case it is clear that in relation to control of essential commodities the Supreme Court found sufficient guidance for the exercise of discretion from the preamble and policy of the Act.

B. Fixation of minimum wages :

The minimum wages Act, 1948, provides for fixing the minimum wages which an employer should pay to his employees. This Act and the power to fix minimum wages there under has been attacked both by the employer as well as the employees on the ground that it infringes their right to carry on business trade

or occupation. The employers have contended that it violates their freedom guaranteed under Article 19(1)(g) because of the fact that it compels them to pay a minimum wages to their employees and on the other hand the employees have contended that it puts a hurdle in their way to negotiate with their employers in matters of wages and thus curbs their freedom of contract to a great extent. But judiciary has rejected the contention if both the sides.

In **Bijay Cotton Mills** Vs **State of Ajmer**,[138] the validity of the Minimum Wages Act, 1948 was challenged on the ground that it put unreasonable restriction on the employers (who could not carry on their trade without paying minimum wages) and the employees (who could not work on terms mutually agreed upon between them and their employers) and that the procedure to fix minimum wages was arbitrary as it left everything to the unfettered discretion of the Government. The Supreme Court held the Act Valid. Securing the living wages to labourers is in the interest of the general public for they ensure not only bare physical subsistence but also the maintenance of health and decency. To prevent the labourers from exploitation, it is necessary to curb their freedom of contract. As regards the abuse of the power the Court was of the opinion that though the powers enjoyed by the Government are wide yet there are sufficient safeguards namely, the Government is to take into consideration before fixing the minimum wages advice of the committee or representations of the people so affected.[139] Consultation with advisory bodies is obligatory for revision of minimum wages. There is a Central Advisory Board to advise the Central and State Government in the matter of fixing and revision of minimum wages and to act as a co-coordinating agency for different advisory bodies. Each Committee or advisory body is to consist of an equal number of representatives of employer and employees with a few independent persons who could take a fair and impartial view of the matter. There was no provision for review of the Government decision but that did not make the Act unreasonable as there are adequate safeguards therein against any hasty or capricious decision by the Government. Similarly in **Express News Papers Ltd**. Vs **Union of India,**[140] decision of Wage Board constituted under the Working Journalists (Conditions of Service) and

Miscellaneous Provisions Act, 1955, was challenged on the ground that it permitted the Board to follow any arbitrary procedures in fixing of wages, grant of gravity etc. without regarding the capacity of the industry to pay. The Supreme Court through N.H. Bhagawati J. upheld the validity of the statute. It was said that major and important criteria had been specifically enumerated in the Act which the Board was to take into account in fixing the wages etc. and as it was not possible for legislature to enumerate all the factors, the matter was left to the Board to determine the relevancy of those circumstances but it did not permit the Board to adopt an arbitrary procedure because the Board was constituted of equal number of members amongst the representatives of the employer and the employees, and they could take into account all the relevant circumstances apart from those which were specifically enumerated in the section. Further, the Central Government was given power to make rules regarding procedure to be followed by the Board and subject to those rules the Board might follow the same power and procedure as an Industrial Tribunal Constituted under the Industrail Dispute Act, 1947, exercises or follows for the purpose of adjudicating an industrial dispute referred to it. This provision provided an important safeguard against the arbitrary procedure adopted by the board.

C. Fixation of prices :

Price control and fixation of essential commodities is yet another area of administrative discretion. A significant regulatory power given to the administration regarding trade and commerce is that of prices fixing. Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply. Such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it could be unprofitable to carry on business at the fixed rate:[141]

In **Jagadish Patel** Vs **Patel Tobacco and Co. G.C. Shankar**,[142] the petitioners had been prosecuted for contravention of the provisions of the Orissa Kendu leaves (Control and Distribution) Order, 1949 which was an offence

punisheable under section 10 of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947. The Petitioners aggrieved by the said order of 1949 in respect of Kendu trees challenged its validity under Article 19(1)(g). The court held that fixation of price was a matter for the executive discretion and conferment of discretionary power was not uncontrolled where there was provision for examining the truth by a superior authorities. In words of Narasimham J. "If the District Magistrate in a particular district confers monopoly and fixes abnormally low price it may be a matter for the consideration of executive authorities. But it cannot justify holding the impugned order to be ultravires." Thus restriction imposed was reasonable. Similar view was been taken by the Rajasthan High Court:[143]

> "it would have been both unwise and impractical for the legislature to anticipate all such details and thereby fetter the discretion of the local authorities who were more competent to fix fair prices. The assertion that average prices prevailing in the locality during a specified period should have been laid down as the criterion may no have met the requirements of a particular situation. The section, therefore cannot be held to offend Article 19(1)(g)." [144]

But authority of Jagdish Patel was weakened by the Full bench of the Madhya Pradesh High Court in **State Vs Haidar**.[145] It was said that price fixation relates to some basic period and on some basis foundation, circumstances, and factors which must be indicated in the order and in absence of it fixation of price totally depends on the authority without any safeguards. Thus in this case the power conferred was described as arbitrary and naked.

The observation of the Madras High Court in Jagdish Patel was also not followed by the Supreme Court in Dwarka Prasd's Case.[146] there the Coal Control Order, 1953 which authorised the administrative authority concerned to fix prices of coal in accordance with a formula laid down in schedule III to the order was in question. The formula consisted of eight items, in which some element of discretion was left with the authority only in respect of two items. The formula

was held valid, for the discretion left under it was not unlimited or unfettered. In another case- **Diwan Sugar Mills** Vs **Union of India**,[147] question relating to fixation of price of an essential commodity namely sugar was involved. In this case the Sugar (Control) Order, 1955, promulgated by the Central Government under section 3(2) of the Essential Commodities Act, 1955, was questioned. Clause 5 of the said order authorised the Central Government to fix the prices of Sugar. Different prices could be fixed for different areas or factories, or different types or grades of sugar. In fixing the prices the Government was to give due regard to the prices fixed for sugarcane, maunufacturing costs, taxes, reasonable margin of profit for the producer/trader and other incidental charges. The Supreme Court through Wanchoo J. (as then was) declared the provision valid. The various factors mentioned in the order for fixing prices by the Government were considered to be enough check on the power of the Central Government against abuse of power. In the eyes of the Court, there was no necessity of any further safeguard by way of appeal or otherwise against the order of the Central Government. The order did not confer uncanalised power to fix prices of Sugar. The learned judge interpreted Section 3(2)(c) of the Essential Commodities Act, 1955, as empowering the Government to fix price of an essential commodity at any of the three stages namely, production, whole-sale and retail and thus he rejected an affidavit filed by the Sugar Mills showing that prices fixed was below than their production costs. In **Union of India and others** Vs **M/s Bhanamal Gulzarimal**,[148] a very wide power to fix prices of iron and steel was upheld. Clause 118 of the Iron and Steel order, 1941, issued by the Central Government under the Essential Commodities Act, authorised the Iron Controller to fix maximum prices to sell iron. Such prices could differ from iron and steel obtainable from different sources and could include allowances for contribution to, and payment from, an equalisation fund established by the controller. No more guidance was given to the Controller, yet the order was held valid by the Supreme Court on the ground that power of the Controller was not uncanalised or unbridled as the policy had been laid down in section 3 the Parent Act (the Essential Commodities Act, 1955) under which the order was made. As regards the

petitioner's plea that the price fixed was unreasonable. Gajendragakar J. of the Supreme Court observed that in considering the validity of the impugned notification it was not enough to show that a particular registered stock holder suffered loss, but if "…… it is shown that in a large majority of cases, if not all, the impugned notification would adversely under Article 19(1)(f) and (g). that may constitute a serious infirmity in the validity of the notification".[149] It was argued that in **Dwarka Prasad's case** there was a price fixing formula which the court had upheld but there was no such formula in the instant case and so the clause in question could not be valid. The court ruled that it would be unreasonable to suggest that in the absence of provisions as were to be found in the **Dwarka Prasada's** case. Clause 11B of the Iron Control Order should be stuck down.[150]

From the analysis of these cases of the Supreme Court i.e. **Dwarka Prasad**[151], **Diwan Sugar Mills**[152] and M/S. **Bhanamal**[153] it is clear that the court has progressively conceded more and more discretion to the administration in the matter of price fixing. In **Dwarka Prasad** case a limited discretionary formula was held valid, in **Diwan Suagar Mills**, the various factors to be considered for price fixing were laid down. But in **Bhanamal** case, there was nothing of the kind and a very general statement of policy that too not in the order but in the parent Act was held valid and was accepted as a sufficient safeguard against arbitrary exercise of administrative discretion. It may be said that the (Essential Commodities Act, 1955) parent Act applied not only for iron but to very large number of commodities and thus the policy therein was found to be general which could hardly guide the administrative discretion in respect of a single specific commodity for which some specific considerations specially applicable there to might be necessary. In **Bhanamal Case** a very broad discretion was conferred on the Controller to fix prices. The relevant considerations to be taken into account were not laid down nevertheless it (order) was upheld by the Supreme Court.

The statutory provisions often confer power on the executive to fix prices of essential commodities. These provisions have usually been upheld. Thus, in

Dwarka Pd., the Coal (Control) Order had given power to the concerned authority to fix prices of coal. For this purpose, a detailed statutory formula was laid down which left only small scope for administrative discretion. The provision was accordingly upheld by the Supreme Court on the ground that the discretion under the formula was neither unfettered nor unlimited. In ***Diwan Sugar Mills*** *v.* ***Union of India***[153a] was challenged the validity of Cl. 5 of of the Sugar (Control) Order, 1955 which authorised the Central Government to fix prices of sugar: different prices could be fixed for different areas or factories, or different types or grades of sugar: in fixing the prices, the Government was to give due regard to the price fixed for sugarcane, manufacturing costs, taxes, reasonable margin of profit for the producer/trader and any incidental charges. The provision was held to be valid. The various factors mentioned in the order for fixing prices were considered to constitute adequate check against the Government abusing its power. In the opinion of the court, there was no need for any further safeguard, by way of appeal to the court, against the Government's order. In ***India v. Bhanamal Gulzarimal***,[153b] a very wide power to fix prices of iron and steel was upheld. Cl. 11-B of the Iron and Steel (Control) Order, 1941 authorised the controller to fix maximum prices for sale of the commodity. The prices could differ for iron and steel obtainable from different sources and could include allowances for contribution to and payment from, an equalisation fund established by the Controller. The Controller's power was held not to be uncanalised, unbridled or unguided as the policy had been laid down in s. 3 of the parent Act (the Essential Commodities Act) under which the order was made. It was argued that while in *Dwarka Pd.* There was a price-fixing formula, there was no such formula here. The court held that it would be unreasonable to suggest that, in the absence of such provisions as were to be found in *Dwarka Pd.* cl. 11-B of the Iron and Steel (Control) Order should struck down.

In ***Premier Automobiles v. Union of India,***[153c] the Supreme Court considered the concept of fair price under s. 18-G of the Industries (Development and Regulation) Act, 1951, in relation to fixation of car prices. The Court explained that it "takes in all the elements which make it fair for the consumer

leaving a reasonable margin of profit to the manufacturer without which no one will engage in any manufacturing activity." In this case, the court asked the Government to review car prices every six months. In ***Shree Meenakshi Mills*** *v.* ***Union o India***,[153d] a case dealing with fixation of yarn prices, the court refused to intervene because the price fixed had not been shown to be "arbitrary" or "so grossly inadequate that it not only results in huge losses but also is a threat to the supply position of yarn." Merely because some producers lose some money for some time, the price fixed does not become unreasonable, for the purpose of price-fixation is not only to consider the profit of the manufacturer but also to hold the price line. Trade and commerce undergoes periods of prosperity and adversity because of economic, social or political factors. In *Saraswati Syndicate*,[153e] the court again rejected the writ petition challenging an order fixing ex-factory price of sugar. The order was issued under Cl. 7 of the Sugar (Control) Order, 1966. Under Cl. 7, certain elements have been laid down to be taken into consideration in fixing sugar price. The court ruled that the price fixed was not shown to be inadequate. The court would not interfere if the basis adopted for fixing the price is not shown to be so patently unreasonable as to be in excess of the price-fixing power.

An order gave power to the Controller to fix the control price of ice. The order contained a formula for the purpose containing four items, *viz.:* (i)_ cost of raw materials; (*ii*) procession charges; (*iii*) establishment and other incidental charges; (*iv*) reasonable margin of profit. The court upheld the formula on the ground that it gave enough, clear and effective guidelines to the controller to fix pries.[153f]

The Superintendent of Sub-Divisional Hospital issued an advertisement inviting application from intending medical shop owners to open medical stores inside the premises of a hospital which shall be kept open 24 hours for the convenience of the patients. The respondents having their medical stores, challenged the aforesaid advertisement on the ground that their business will perish on opening of such a medical stores inside the premises of the hospital. The

Supreme Court upheld the validity of the aforesaid advertisement and it was held that Government policy in public interest overrides the individual interest.[153g] A policy decision which gives preference to public sector undertakings in the matter of purchase of certain medicines would not be construed as arbitrary so as to give rise to an intention of violation of fundamental right under s. 19(1)(g) of the Constitution of India as it would partially affect sale to goods of Company.[153h]

In ***Khode Distilleries Limited***[153i] it was held that a citizen has no fundamental right to do trade or business in liquor hence trade or business in liquor can be completely prohibited by the State Government in view of Art. 47 of the Constitution of India. However, it has been held that State cannot prohibit trade of business in medicinal preparation containing liquor, alcohol or industrial alcohol. Under s. 4 of Central Provinces Regulations of Manufacture of Bidies Act, 1948, the Dy. Commissioner passed an order forbidding the persons residing in certain villages for engaging in manufacture of bidies. The aforesaid order was held to be void being in contravention of Art. 19(1)(g) of the Constitution of India.[153j]

A law which give uncanalized power to an authority to refuse licence to carry a normal trade on its subjective consideration, without provision for review by the superior authority, has been held to be an unreasonable restriction.[153k]

On the whole, it appears that in the matter of price-fixing, the administration enjoys a good deal of flexibility and it is extremely difficult to challenge successfully in a court a price-fixing order. Wide and vague factors laid down in the statutory provisions for the guidance of the administrative authority have been upheld. Even a general statement of policy in the parent Act was accepted in *Bhanamal* as providing a sufficient safeguard against administrative discretion. The basic reason for this appears to be that considerations entering into the area of price-fixing are mainly economic in nature which the courts can evaluate only superficially and most of the time they defer to administrative judgment in this regard.[153l] It may also be conceded that there is less danger of

abuse of power by the executive and of administrative discrimination in the case of price-fixing which is an order of general applicability than in the case of licensing where the administrative action is individualised.

D. Regulation through licensing :

A licence includes a permit, certificate, sanction, permission or registration, and licensing means the process and the proceedings in connection with grant, renewal suspension or cancellation of a licence. A licensing has long been known as a means of regulation of industry, trade and profession. The use of licensing as an instrument of economic regulation and control of production distribution, movement and consumption is wide spread. It is quite reasonable to regulate trade in essential commodities through licensing of dealers to whom quotas are allotted in specific quantities requiring to furnish particulars of stocks held by them and to sell goods at fixed prices.

Licensing is a quasi-judicial business. A licensing authority is vested with a wide discretion in matters pertaining to grant, refusal, renewal or cancellation of a licence. The power, however, is required to be exercised in accordance with the conditions contained in the Act, Rules, and appropriate orders made for the purpose. The authority should not act arbitrarily in compliance with the directions and instruction of the Government or a superior public authority. An application for grant or renewal of licence should not be rejected without being considered. The order of rejection of an application should not be arbitrary.[154] It should be a speaking order and should be communicated to the applicant.[155] A licence should not be revoked or cancelled except for stated and good reasons and without hearing.[156] The order of cancellation should be a speaking order and should be reviewable or appealable.[157]

The conferment of discretionary power on the licensing authority is not bad or uncontrolled where order of the authority granting or refusing a licence is in writing and is published on the notice board. An order refusing a licence should state the grounds on which it is refused. Again if there is a right of appeal to the

superior authority the refusal or grant of licence is not bad.[158] The proposition that licensing power is not unfettered where (i) the statute conferring discretion lays down the various conditions which are necessary, and important considerations to be taken into account (ii) the licensing authority is to communicate grounds is writing when it refuses to grant a licence and (iii) there is provision for appeal to higher authority, has been indicated by A.N. Ray C.J. also.[159]

But it is not possible to dictate all the relevant considerations which are to be taken into account in granting the licence. So, conferment of discretionary power is justified (i) where it is difficult or impracticable to lay down a definite or comprehensive rule (ii) where licence is to be granted having regard to the personal fitness of the applicant and (iii) where the grant of licence relates to a business the carrying on of which is harmful to the public interest.[160]

Dwarka Pd. v. State of U.P.[160a] is the first leading case which laid down the proposition that a law conferring arbitrary and unguided powers on the administrative authorities will be invalid under Art. 19(1)(g). The case involved the U.P. Coal (Control) Order, 1953 issued under the Essential Supplies (Temporary Powers) Act, 1946. Cl. 3(1) of the order required a licence for stocking, selling, storing or utilizing coal. Cl. 3(1)(*b*) authorised the coal controller to exempt any person from the licensing provision. Cl. 4(3) authorised the licensing authority to grant, refuse to grant, renew or refuse to renew, suspend, cancel revoke or modify any licence for reasons to be recorded. The court held Cl. 3(1) as quite unexceptionable, for it was reasonable to regulate sale of essential commodities through licensed vendors to ensure their equitable distribution and availability at fair prices. Section 3(2)(*b*) was held invalid because the grounds on which an exemption could be granted were nowhere mentioned; the controller had been given an unrestricted power to make exemptions, and there was no check on him and no way to obtain redress if he acted arbitrarily or from improper motives. Cl. 4 (3) was also held bad for it gave to the licensing authority an absolute power to grant, revoke, or suspend a licence. No rules were framed to guide his discretion and the matter was committed to the unrestrained will of a single

individual. There was nothing to ensure a proper execution of the power, or to operate as a check against injustice resulting from its improper exercise. The requirement to record reasons was not an effective safeguard for no authority was appointed to examine the propriety of these reasons and revise or review the decision of the subordinate officer. The reasons required to be recorded were only for the subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person.

Some cases subsequent to *Dwarka Pd.* weakened its authority as regards the licensing power, but then several other cases rehabilitated it. In the first category falls *Hari Shankar Bagla v. State of M.P.*[160b] It involved the question of validity of the Cotton Textiles (Control of Movement) Order, 1948 which required a permit from the Textile Commissioner for transportation of cloth by any person. It was argued that the order conferred an unregulated and arbitrary power to grant or refuse a permit. The Supreme Court, however, upheld the order. Unlike *Dwarka Pd.*, the court found sufficient guidance for the exercise of the power in the general policy of the order which was to regulate transportation of cotton textiles in such a manner as to ensure its even distribution in the country and make it available to all at a fair price. The *Dwarka Pd.* case was held as having no bearing on the present case as there was no analogy between the two perhaps, what the court meant by this was that a licence to trade stood on a different footing from permits to regulate transportation or movement of goods. Whereas, in the former case, a person could not carry on a trade at all without a licence, in the latter case, a restriction was imposed only on one, aspect of the total, trade, leaving the rest free. In ***Kishan Chand Arora*** *v.* **Commissioner *of Police***[160c] was involved s. 39 of the Calcutta Police Act, 1866 which empowered the Commissioner of Police to grant licences in his discretion to the keepers of eating houses and places of public resort and entertainment. The Commissioner could, with the permission of the State Government, insert in any such licence a condition for securing good behavior of the keepers of, and prevention of drunkenness and disorder among the persons using, these places. The Supreme

Court, by a three to two decision, held the power of the Commissioner as not unguided or arbitrary. The purposes for which conditions could be imposed in the licences, as mentioned in the statute, were held to provide a policy for guiding the Commissioner's discretion. Even the lack of procedural safeguards-the applicant was not to be given a hearing, nor was the Commissioner required to communicate the reasons for refusing the licence-could not persuade the majority to hold the section unconstitutional. As against this, the minority view was that the section was bad as "arbitrariness is writ large" in the manner of exercising the discretion.

Certain control orders issued under s. 3(2)(*d*) of the Essential Commodities Act, 1955 introduced a permit system for sale of rice and paddy. This was challenged on the ground that it conferred arbitrary powers in the matter of issuing or withholding of permits and there was no provision for appeal or revision against refusal to grant a permit. Rejecting the argument, the court stated that the permits were to be issued by the State Government or District Collectors. These high ranking officers were expected to discharge their duties in a responsible manner. The ***Dwarka Pd***. case was distinguished on the ground that there the power of licensing could be conferred on any person. The absence of a provision for appeal was held as not bad because an affected person could always approach the State Government to review the matter when a permit was refused by a District Collector.[160d]

A few cases which follow the philosophy of *Dwarka Pd.* may now be mentioned. In ***Chandrakant*** *v.* ***Jasjit Singh***,[160e] the Supreme Court considered the validity of the Customs House Agents Licensing Rules, 1960 issued under s. 202 of the Sea Customs Act, 1878. The section provided for licensing of clearing agents, and the rules prescribed the conditions for the issue of such licences. One of the rules provided that the Customs-Collector could reject an application for the grant of a licence if "the applicant is not otherwise considered suitable." Declaring the rules unconstitutional the court stated: "In our opinion, if a candidate is found fit under the other Rules and has successfully passed the examination, he should

only be rejected under a rule which requires the Customs-Collector to State his reasons for the rejection and the rules must provide for an appeal against that order...."[160f] In ***Hari Chand Sarda*** *v.* ***Mizo District Council***,[160g] the Mizo District Council framed regulations which provided that a non-tribal would not carry any trade in the District without a licence issued by the council. If a licence was refused, the grounds for refusal were to be recorded by the council. The power of granting licences was delegated to the Executive Committee of the council by rules. The Supreme Court struck down the regulations as they did not provide any principle or standards on which the committee was to act. There was no provision for appeal to any superior authority against refusal to grant or renew a licenec, and no civil court could adjudicate against any such order of the committee. The committee was no doubt required to record reasons for the refusal but that was considered as "hardly a safeguard against an arbitrary refusal." The power conferred on the committee was held to be unbridled and unrestrained and bad under Art. 19(1)(*g*). In another case, the Supreme Court again struck down a licensing provision because it conferred an unguided power on the executive. The Gold (Control) Act, 1968 provided for the licensing of dealers in gold and gold ornaments. The Administrator (an office created under the Act) was empowered to grant or renew licences having regard to such matters, *inter alia*, as the number of dealers existing in a region, anticipated demand, suitability of the applicant, and public interest. The Supreme Court held that all these factors were vague, uncertain and unintelligible. The region was nowhere defined in the Act. The expression "anticipated demand" was a vague one. Similarly, the expression "suitability of the applicant" and "public interest" did not provide any objective standard or norm.[160h]

It is clear from the above cases that if safeguards are provided against arbitrary exercise of power to grant or cancel licences, the law may be upheld. A few cases may be mentioned to support this proposition. An Act conferred power of granting licences on a market committee which was a representative body and was required to give reasons in writing and supply a copy to the person affected.

Further, for refusal, cancellation or suspension of licences certain conditions and requirements were laid down. There was also hierarchy of tribunals before whom the question of refusal or cancellation of a licence could be agitate. The Punjab High Court held the Act valid as there were ample safeguards against the exercise of power.[160i] Cl. 9(*a*) of the Imports (Control) Order, 1955 authorises the Chief Controller of Imports and Exports to cancel any licence if it has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation. Cl. 10 lays down that no action under Cl. 9 shall be taken unless the licensee has been given a reasonable opportunity of being heard. In ***Fedco*** *v.* ***Bilgrami***,[160j] the Supreme Court held that Cl. 9(*a*) read with Cl. 10 was a reasonable restriction in the interest of the general public on the exercise of a citizen's right under Art. 19(1)(*g*). In view of the safeguards, there was no case of unbridled authority to cancel a licence: there was no scope for arbitrary action. The Bihar Mica Act, 1948 introduced a licensing system to regulate the possession and transport of, and trading in, mica in the State. Section 25 authorised the State Government to cancel a licence on the grounds mentioned therein. To cancel a licence it was necessary to furnish the licensee with grounds for such cancellation and to afford him a reasonable opportunity to show cause against the proposed cancellation. The Supreme Court in ***Mineral Development Ltd.*** *V.* ***State of Bihar***[160k] held the restriction reasonable. The power was entrusted to the highest executive in the State which ordinarily could be relied upon to discharge its duties honestly, impartially and in the interest of the public without an extraneous consideration. The section provided clearly ascertainable standards for the State Government to apply to the facts of each case. The discretion of the State Government was hedged in by the important restriction of giving a reasonable opportunity to the licensee to show cause.[160l]

Suspensino of a trading licence, pending cancellation proceedings, has been upheld as it was an interim measure (maximum period of suspension being 90 days), there had to be specified reasons for suspension, and there was a provision for appeal to the higher officer against the order of suspension.[160m]

The ***Dwarka Pd.*** proposition can be seen working in a few other situations. By an amendment in 1976 of the Industrial Disputes Act, 1947 it was provided that if an employer was intending to close down his factory, he had to obtain the previous approval of the Government which could refuse to give the permission if it was of the opinion that the reasons for the closure were not sufficient or the closure was prejudicial to public interest. In ***Excel Wear*** *v.* ***Union of India***,[160n] the amendment was struck down, *inter alia*, on the ground that the authority could whimsically and capriciously refused permission to close down the factory and the order was not subject to any scrutiny by any authority or tribunal either in appeal or revision.

Where the conditions for the grant or renewal of lincences are uncertain, vague and unintelligible and consequently wide and unfettered power is conferred upon the statutory authority in the matters of grant or renewal of licence, it can be held as an unreasonable restriction on the fundamental right to carry on business. The Gold (Control) Act, 1968, provided for the licensing of dealers in gold and gold ornaments. The administrator (an office created under the Act) was empowered to grant or renew licenses, having regard to the matters, inter-alia, the number of dealers existing in a region, anticipated demand, suitability of the applicant, and public interest. The Supreme Court held that all these factors were vague uncertain and unintelligible. The region was no where defined in the Act. The expression "anticipated demand" was a vague one. Similarly, the expression "suitability of the applicant" and "public interest" did not provide any objective standard or norm.[161] With respect to cancellation of licences, principles of natural justice apply. In **Sinha Govind ji** Vs **Deputy Chief Controller**.[162] cancellation of an import licence was quashed because while the Imports (Control) order, 1955, required an opportunity of hearing to be given to the licensee, no real opportunity had been given to the licensee in question. But the norms of fair hearing are flexible and depend on the varying facts and situations. In **M/s Fedco (P) Ltd. And another** Vs **S.N. Bilgrami and others**,[163] the import and export licences of the petitioners were cancelled by the Chief Controller of Imports & Exports as there was 'reason to believe' that these licences had been obtained by

fraud. Clause 9 of the Imports Control order, 1955, under which licences were cancelled,was challenged under Article 19(1)(g). The Supreme Court through Das Gupta J. has held that clause 9(a) read with clause 10 constitutes a reasonable restriction in the interest of general public on the exercise of citizens' right under Article 19(1)(g). There is no case of unbridled authority to cancel a licence. The entire scheme of regulation and control of imports by licences is on the basis that the licence is granted on a correct statement of relevant facts. That basis disappears if grant of licence is induced by fraud or misrepresentation and it will be absolutely unreasonable to allow a licence to continue when its grant has been induced by fraud or misrepresentation. The order provides an opportunity for hearing as clause 10 lays down that no action under clause 9 shall be taken unless the licensee has given a reasonable opportunity of being heard.

(a). Licensing cases relating to dangerous things:

In order to determine the reasonableness of restrictions, the nature of business and the conditions prevailing therein are important factors to be considered. All these factors differ from trade to trade an no hard and fast rules concerning all trades can be laid down. In cases of trades which are illegal, dangerous, immoral or injurious to the health, morality and welfare of the public, though they fall within the purview of Article 19(1)(g), yet the same standard and factors are not applied as in cases of normal trades. In case of such trades a greater discretionary authority may be left with the executive than is permissible in normal trades:[164]

But where trades are lawful statutes authorising the issuing or with holding of licences without being controlled or guided by any rules or specified conditions which the authority concerned should follow must be regarded as unconstitutional. In such cases arbitrary power on the high public officials be justified when it is difficult or impracticable to lay down a definite or comprehensive rule provided the discretion is to be exercised with respect to personal fitness of the applicant. The judiciary has been reluctant a statutes when

the arbitrary and uncontrolled power relates merely to matters involving the exercise of discretion as to details in enforcing valid statutes.[165]

It is not proper to give an unguided and arbitrary discretion to an administrative authority in the matters of grant or revocation of licences and when licence is cancelled on the ground of any breach of condition or irregularities or on any other ground the party affected must be given a hearing by the authority concerned.[166] The position is clearly indicate by majority judgment of the Supreme Court in **Hari Chand Sarda** Vs **Migo District Council.**[167] The executive Committee of the Lushai Hills District had been given power to grant or refuse to grant or renew trading licence to a non-tribal by a regulation made by the District Council. A non-tribal carrying on trade for several years on the basis of a temporary licence renewed every years was asked to wind up his affairs and renewal of his licence was refused. Declaring the regulation unreasonable, the Supreme Court has pointed out that it gave no right of appeal to any authority against a refusal grant or renew a licence. No power has been given to Civil Court to adjudicate against any such order of the executive committee and a non-tribal trader had no remedy whatsoever against refusal to renew his licence. Though the Committee had to record its reasons for resufal, yet that was hardly a safeguard against an arbitrary refusal as there was no superior authority to review the order. No principles or standards had been provided according to which the executive committee was to act in granting or refusing a licence. The power of granting or refusing a licence was thus entirely unguided, uncontrolled and arbitrary. The trade was left entirely at the mercy of the Committee and without any remedy. But in the dissenting opinion delivered by Bechawat J. it was pointed out that power to grant or refuse to grant a licence was vested in the District Council- a high ranking body and protection of interests of scheduled tribes was the guiding policy regulating the exercise of discretion of the District Council in matter of granting or withholding trading licences. It is submitted that minority view is not sound because there was no remedy to the person affected when his licence was withhold and there was no procedural protection against the arbitrary exercise of power by the Committee. The observation of Mukherjee. J. in Dwarka Prasad's

case that recording of reasons did not provided adequate sarguards against the arbitrary refusal of licence i.e. arbitrary exercise of power was reiterated by the majority of the Supreme Court in **Hari Chand Sarda's Case** and also followed by the Calcutta High Court in **Nimal Chand Bhabok** Vs **State**.[168]

The decision in respect or the Control of Drugs which can conveniently be grouped under the dangerous things, have not been uniform, in **M/s Rasik Lal** Vs **Inspector of Drugs**[169], it was held that the discretion given to the authority under rule 62-A of the Assam Drug Rules, 1945, to grant or refuse to grant a licence was uncontrolled as there were no direction laid down for the guidance of the licensing authority or authorities as the cases may be, in granting or refusing a licence and there was check provided against the order of cancellation or suspension of licence by providing for an appeal against such an order. Thus the restriction imposed was unreasonable. The same view was taken in **Shambu Nath & Sons** Vs **Punjab**[170] with reference to r.r. 27 and 30 of the Punjab Manufacture of Drugs Rules, 1932. This decision was however, reversed on appeal. Thus in Punjab Vs **Shambu Nath & Sons**[171] the provision in the Act enabling an authority to grant or refuse a licence without disclosing his reasons could not be held invalid because (i) the drugs in respect of which the power was exercised were dangerous (ii) the personal suitability of the licence was important (iii) it could not be assumed tghat the officer would exercise his powers improperly and without applying his mind to all the relevant consideration. Similarly in **Natwar Lal Amba Lal** Vs **Bombay,**[172] the court held that the nature of the business was relevant in considering the discretionary powers, that drugs were not ordinary articles which could be sold at will in the market, that the Act and the rules disclosed policy underlying the Act and that the discretion in granting or refusing a licence would have to be exercised in light of that policy. Thus the discretionary power to grant or refuse a licence has been upheld not only on the ground that it must be exercised in the light of the policy underlying the law which confers such power, but also on the ground that the discretionary power is accompanied by safeguards and is not unfettered.

From the above analysis it is clear that the courts have been liberal in matters of grant of discretionary powers in favour of the executive authorities in cases where the commodity is dangerous to the community.

(b) Eating House's licensing Cases:

Conferment of large discretion has not been held bad if there is policy to be inferred from the Act which can govern the exercise of that discretion.[174] In **Kishan Chand Arora** Vs **Commissioner of Police** section 39 of the Calcutta Police Act, 1866, empowered the Commissioner of Police, at his discretion to grant licences to the keepers of eating houses and places of public resort and entertainment. He could insert in a licence any such condition as he, with the sanction of the State Government could order for securing good behavior of the keepers of such places and prevention of drunkenness and disorder among the persons using these places. It was contended that section 39 of the said Act gave naked and uncanalised power to the Commissioner to grant or refuse a licence and no criteria had been laid down in the Act to guide his discretion, and no provision was made for a hearing before the grant or refusal of a licence. By a majority of 3 to 2, Wanchoo J. for himself Kapur and Gajendragadkar J.J. held that the discretion conferred by section 39 was not absolute and unfettered and did not violate Article 19(1)(g). Their Lordships added. :

> "We see no unfairness or unreasonableness in reading the section to mean that the that Commissioner shall satisfy himself (i) the person applying for a licence is the keeper of an eating house, meaning thereby that he has a place where he can carry on the business or trade and that he actually and effectively has control and possession of that place (ii) that the keeper is a person of good behavior so that the eating house may not become a resort of criminals and persons of ill-repute. And (iii) that the keeper is in a position to prevent drunkenness and disorder among those who come to the eating house. This section appears in the police Act, the purpose of which is to maintain law and order and that is why we find that the two

objects to be secured when granting licence are good behavior of the keeper himself and the prevention of drunkenness and disorder among those who frequent the eating house."[175]

If the conditions mentioned above were satisfied, it was not open to the Commissioner to refuse to grant a licence. The mere fact that there were no provisions for giving a hearing to the person applying for licence did not necessarily constitute an unreasonable restriction on the fundamental right. Subba Rao J. for himself and Sinha C.J. delivered the dissenting judgement and said that arbitrariness was writ large in section 39, that as a matter of construction the absolute discretion of the Commissioner was not cut down by the conditions referred to in that section, and that even if the two conditions could be read into the first part of section 39, even so without deciding the question whether the discretion was judicial or executive, the absence of an obligation to give hearing and the absence of any provision for an appeal led to the conclusion that the restriction on the right to carry on trade or business was an unreasonable restriction. It is noted that majority judgment falls into two parts, that dealing with the nature of the discretion exercised by the Commissioner and that dealing with the omission in the Act to provide for a hearing. On the first part it is submitted that the majority judgment is correct when it finds the principles for guidance in the Act; though its observation would suggest that this was being particularly because the Act was pre-constitution Act.[176] But it may be said that this observation of the learned author does not appear sound and the minority dissent expressed by Subha Rao J. is the correct position. The majority view expressed by Wanchoo J. appeared to labour to discover the factors which controlled the licensing authority while conceding that the exercise of discretion vested in the authority. It would, therefore, appear that all the alleged restrictions on the exercise of discretion mentioned by Wanchoo J. are really illusory. On the second part it is submitted that the decision is in correct and the reference to Nakkuda **Ali's case**[177] was unfortunate because in India Licence is not a privilege but a matter of right.

The majority view on the first part of the above mentioned case has been followed by several High Courts[178] and also by the Constitution Bench of the Supreme Court in **John Mohd Noor Mohd**. Vs **State of Gujrat**.[179]

(c). Miscellaneous licensing cases:

The principles laid down by the Supreme Court in **Dwarka Prasad's case**[180] that there should not be an arbitrary and unguided power on licensing authority in matters of granting or revoking the licenses, were also applicable in few other situations. In **R.M. Seshadri** Vs **D.M. Tanjore**,[181] the petitioner was an owner of a permanent cinema theatre. The licence was granted for one year and was renewable from year to year. A rule requiring a cinema owner to show at each performance approved film of such length and for such length of time as the Government might direct was held by the High Court to be reasonable but was held to be unreasonable by the Supreme Court[182] as the length of film and period of time had not been specified. The Government was vested with an unregulated discretion to compel and exhibitor to show a film of any length. There was no principle to guide the licensing authority and it might lead to a total loss of his business itself for it was open to the Government to require the exhibitor to show approved films of such length as would consume the whole time for such performance. Similarly, another rule prescribing a "minimum" length of 2000 ft. of one or more approved films to be shown at a performance was held bad for no maximum was prescribed, thus making the discretion of the authority unrestrained and unfettered which might lead to an unjustifiable interference with the right of the licensee to carry on his trade. The Bihar Mica Act, 1948, introduced a licensing system to regulate the possession and transfer of, and trading in mica in the State. Section 25 of the Act authroised the State Government to cancel a licence on the grounds mentioned therein. To cancel a license it was necessary to furnish the licence with the grounds for such cancellation to afford him reasonable opportunity to show cause why his licence should not be cancelled. The Supreme Court in **M/S Mineral Development Ltd.** Vs **State of Bihar**,[183] held the restriction reasonable. The power was entrusted with the highest executive in the

State which ordinarily could be relied upon to discharge its duty honestly impartially and in the interest of the Public without any extraneous considerations. The section provided clearly ascertainable standards for the State Government to apply to the facts of each case. The discretion of the State Government was hedged in by the important restriction of giving a reasonable opportunity to the licensee to show cause. The power given to the State Government was exercisable on the objective tests and in accordance with the principles of natural justice. The order cancelling the licence was, however, quashed, in the instant case as it did not fulfil the conditions laid down in section 25 of the Act and the authority cancelling the licence was biased against the licensee.

In **Chandra Kant Krishna Rao Pradhan** Vs **Collector of Customs**,[184] the Customs Housing Agents licensing Rules, 1960, issued under section 202 of the Sea Customs Act, 1878, lay down the restrictions for issue of licences to customs house agents. A condition that the number of such licences would be restricted and applications for the same were to be made only when invited, was held valid for "even a profession or trade has sometimes to be limited in the public interest" as for example porters in a railway station, taxi cabs etc. the rule requiring the applicant for a licence to furnish tax clearance certificate, satisfactory evidence as to his respectability, reliability and financial status and as to his ability to muster sufficient clientele and business, was held valid. The word financial status do not mean that the applicant has to be wealthy, but only that he should not be financially embarrassed and should be in easy circumstances and the restriction about clientele is designed to eliminate such persons as are unable to do any business. The rule requiring an examination of the applicant was held valid. Even though the curriculum prescribed for the examination was extensive yet the knowledge thus acquired would enhance the agent's efficiency. The rule authorising the customs Collector to reject an application for licence if the applicant was not otherwise considered suitable, was however held to be invalid for it "is to general that it leaves to the discretion of the Customs collector to reject a candidate for trumpery reasons (which he need not state) even though the candidate may be otherwise suitable" A fee of Rs. 50/- initially for fresh

application was not unreasonable as the Government incurred expreses in scrutinising applications, holding examinations etc. but the same fee for renewal was held excessive as there were no services being rendered at this stage and that "under the guise of a fee there must not be an attempt to raise revenue for general funds of the State". The rule authorising the Customs Collector to cancel a license for failure of the licensee to comply with the rules was also held valid for the rules were made for compliance and not for breach, and there was the safeguard of an appeal to the higher Customs authority.

In another case **Corporation of Calcutta** Vs **Trawavs Co. Ltd.**[185] a provision in the Calcutta Municipal Act, required a licnece for use of a premises for a purpose which in the opinion of the Corporation was made conclusive as it could not be challenged in a court. The provision was declared to be unreasonable under Article 19(6) as it put carrying on of a business entirely at the mercy of the corporation.

In **Arunchela Nadar** Vs **Madras,**[186] the Madras Commercial Crops Act, 1933 was impugned as violating Article, 19(1)(g). The Madras High Court upheld the validity. However, section 5(4)(a) which conferred on the Collector an unlimited and uncontrolled discretion to grant or refuse a licence was held void on the ground that a provision which made the exercise of a fundamental right dependent on the absolute discretion of administrative authorities was unconstitutional. This, however, did not invalidate the whole licensing system but only meant that all applicants were entitiled to obtain a licence on the payment of a prescribed fee. In dismissing the appeals from this decision the Supreme Court held that the impugned Act was the result of a long exploratory investigation by experts and was anacted to regulate the buying and selling of commercial crops by providing suitable and regulated markets, by eliminating middlemen and bringing face to face the producer and the buyer so that they might meet on equal terms, thereby eradicating or at any rate reducing the scope for exploitation in dealings. Such an Act could not be said to impose unreasonable restriction on the right to carry on business unless it was clearly established that its provisions were too

drastic, unnecessarily harsh and over reached the scope of the object to achieve which it was enacted.

E. Search and Seizure :

In a Welfare State of today the powers of search and seizure are assuming importance gradually and gradually. Such powers of search and seizure have been conferred on the executive by various statutes for law enforcement. Section 18 of the Central Excises and Salt Tax Act, 1944, Section 132 of the Income Tax Act, 1961, are only a few amongst a horde of statutory provisions authorising the respective authorities under them to exercise the power of search and seizure.[187] The power of search and seizure is of a drastic nature as its exercise constitutes a serious invasion of the rights under Article 19(1)(f) and (g), as a search of residence of a person disturbs his quiet user and employment there of and search of business premises and seizure of accounts books may affect his right to carry on business.

In **Seniram Doonkar Mal Agency (P) Ltd**. Vs **K.E. Johnson**[188] under section 37(2) of the Income Tax Act, harsh and coercive measures were taken against the petitioner by sudden search or the petitioner's premises. It continued from 10 A.M. till 11 P.M. in which 683 items were seized. This was challenged on the ground that under section 37(2) of the Act power of search and seizure was exercised in an abirtrary and high handed manner which violated the right of the petitioner under Article 19(1)(g). Majority of the Full Bench of the Assam High Court through Nayadu J. declared the section 37(2) void because it gave naked and uncanalised power to the income tax authorities to carry on search and seizure without any safeguard. There was no indication in section 37(2) in respect of which persons and whose premises the power in question was to be exercised. There was no indication as to when an in what circumstances the power in question was to be exercised; there was no provision for hearing or making any representation and notice. Therefore, it was held that the power so conferred was naked and arbitrary. It was characterised by the Court as "an example of High handed use of power to order search and seizure". But **M.P. Kanna Cuilancdy**

and another Vs **State of Kerala**,[189] a contrary view was taken by the Full Bench of the Kerala High Court. The Court held that mere possibility of the abuse of power was not to be taken into account in demining the reasonableness of restrictions imposed by law.

In **Abdul Waheb and Co** Vs **Assistant Commissioner of Commercial Taxes Intelligence Bengalore**[190] the Mysore High Court relied **Saniram Dookar Mal Ajency (P) Ltd's case** and declared section 28 of the Mysore Sales Tax Act, 1957, which authorised the search and seizure as void on two grounds. Firstly the section did not prescribe the guidance regarding the circumstances in which and person against whom the power of seizure might be exercised Secondly, the section did not provide for any previous atuthorisation by a superior officer on an objective examination of the facts placed error him, nor did it provide for any check over or correction of the action of a subordinate by another superior officer. Thus the power conferred was naked and arbitrary.

In **Board of Revenue** Vs **R.S. Jhaver**,[191] Similar section 28 of the Mysore Sales Tax Act, 1957, section 41(2) of the Madras General sales Tax Act, 1959 provides that all accounts, registers records and other documents maintained by a dealer in the course of his business, the goods in his possession and his officers, shops, godowns, vessels or vehicles shall be open to inspection at all reasonable times by the concerned officers. A proviso to this section stipulates that no residential accommodation (not being a place of business-cum-residence) shall be entered into and searched by an officer except on the authority of a search warrant issued by a magistrate having jurisdiction over the area and all searches under the sub-section shall so far as may be, be made in accordance with the provisions or the Code of Criminal Procedure. Section 41(3) of the Act provides that if any officer has 'reason to suspect' that any dealer is attempting to evade payment of any tax under the Act, he may, for reasons to be recorded in writing, seize such accounts, registers etc. It was contended that these provisions of section 41 were capable of being construed as authorising search and seizure and thus were violative of Article 19(1)(f) and (g). The High Court held section 41(2)(3)(4)

unconstitutional. On appeal by the State of Madras the Supreme Court through Wanchoo C.J. upheld their validity. The Court said that although the word "search" was not mentioned in section 41(2), the power of "inspection" of the offices etc. and of accounts amounted to giving the officers concerned the powers to enter and search the offices without warrant, except that a purely residential place could not be searched without a search warrant from a magistrate. Referring to the proviso to section 41(2) the Court came to the conclusion that the provisions of the Cr. P.C. relating to searches were made applicable not only to a search of residential place mentioned in the earlier part of proviso, but to all searches made under section 41(2). If any authorised officer had reasons to suspect that any dealer was attempting to evade the payment of any tax, then he could for reasons to be recorded in writing, seize the accounts etc. As there were adequate safeguards against the arbitrary exercise of search and seizure the power was not arbitrary.

In **Badri Pd and others** Vs **Collector of Central Excise**,[192] the petitioner who was a money lender advanced money to large number of persons who pledged ornaments made of gold or containing other precious stones or silver. Under the Gold Control Act, 1968 the Collector of Central Excise has power to search and seize the ornaments and other articles of gold if he has reason to believe that provisions of the Act have been violated. The petitioner's gold ornaments etc. were seized by the inspector of excise under the authority of Collector of Central Excise. This was challenged under Articles 19(1)(f) and (g). the Supreme Court through G.K Mitter J Siad :-

> "There does not seem any justification for an order of confiscation of gold under section 71 of the Act merely because of a failure to comply with section 16 of the same Act relating to declaration. It is no doubt true that the owner is to be given a hearing in terms of section 79 and he has a right of appeal under section 80 but the provision of section 73 which allows the levy of a fine in lieu of confiscation not exceeding twice the value of the thing in respect of

> which confiscation is authorised appears to be unduly harsh. In case of Gold in respect of which no declaration has been made under section 16 or the factum of pawn of which has not been communicated in writing to the Administrator, the owner ipso factor becomes liable to pay an unconscionably high penalty. Section 71 therefore, appears to place and unreasonable restriction on the right of a person to acquire, hold and dispose of gold, articles or gold ornaments. It may be applied indiscriminately and cannot therefore be upheld as saved by clauses (5) and (6) or Articles 19 of the Constitution."[193]

Therefore, the court declared the section 71 of the Act as void, Similarly in **Pooran Mal** Vs **Director of Inspection**[194]. The Constitutionality of sections 132, of Income Tax Act which authorises search and seizure was challenged under Article 19(1)(f) and (g). The Constitution Bench of the Supreme Court through D.G. Palekar J. upheld the validity of the sections and pointed out that the provisions were directed against the persons who were believed on good grounds to have illegally evaded payment or tax on their income and property. Drastic Measures to get at such income and property, with a view to recover Government dues, were justified in themselves. In the interests of the community it was right that fiscal authorities should have sufficient powers to prevent large scale tax evasion; the powers were vested in the highest officers and there were sufficient safeguards for the exercise of the powers. In the instant case power was vested in the Director of Inspection or Commissioner and not below the rank of Income Tax officer.

From the above discussion it is clear that in relation to search and seizure the courts insisted on some procedural safeguards so that there should not be an abuse of power but there is no uniformity in this regards. In Search and seizure taking of immediate and swift action is necessary otherwise the whole idea underlying it would be useless. So in some cases courts have conceded the recording of reasons an important safeguard because it gives an opportunity for

the courts to examine the matter but such a stipulation can be imposed only when the statute in question itself makes the necessary provision or makes the provision of the Cr. P.C. applicable to a search under it.[195]

The question as to how much discretion can be conferred on the executive to control and regulate trade and commerce has been raised in a large number of cases. The general principle in this connection is that the power conferred on the executive should not be arbitrary, unregulated by any rule or principle, and that "it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority". "A law or order which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable."[4] Generally speaking, discretion is not unregulated or arbitrary if the circumstances in, or the grounds on, which it can be exercises are stated, or if the law lays down the policy to achieve which the discretion is to be exercised, or there are enough procedural safeguards in the law to provide security against the misuse of the discretion.[5] In the case of trades which are illegal, dangerous, immoral or injurious to health and welfare of the people, same standards do not apply as to, and a greater discretionary authority may be left with the executive to regulate such trades than is permissible in, normal trades.[196]

References

1. A.I.R. 1952 Saurashtra 57 (F.B.)
2. A.I.R. 1954 Ass. 193 (S.B.)
3. A.I.R. 1954 Bom. 508.
4. A.I.R. 1959 A.P. 572
5. A.I.R. 1954 Ass. 193
6. A.I.R. 1959 A.P. 572
7. Gopal Vinayak Godse Vs Union of India A.I.R. 1971 Bom. 56
8. A.I.R. 1957 S.C. 896
9. Ram Naraina and others Vs State of M.P. A.I.R. 1970 M.P. 102
10. A.I.R. 1953 Raj. 101.
11. A.I.R. 1956 Alld. 571.
12. Harnam Singh Vs Punjab A.I.R. 1958 Punj. 243 and Comrade Chanam Singh Secretary District Kishan Subha Ferozepore Vs Union of India A.I.R. 1961 Pun. 272.
13. (1970) 1 S.C.C. 780
14. (1970) 1 S.C. 780 at P. 789

14a. O.K. Ghosh Vs E.X. Joseph A.I.R. 1963 S.C. 812

14b. A.I.R. 1956 Alld. 481.

14c. A.I.R. 1957 Pun. 1

14d. A.I.R. 1957 Pun. 1 at 5

14e. Commission of Sales Tax Vs Radha Krishan A.I.R. 1979 SC 1588: (1979) 2 SCC 249

14f. A.I.R. 1981 SC 783: (1981) 2 SCC 93, Para 6.

14g. (2009) 10 SCC 689 para 110: 2009 (12) JT 1.

14h. A.I.R. 1978 SC 851 : (1978) 1 SCC 405

14i. (2010) SCC 600, para 45 : 2010 (2) Crimes 414.

14j. A.I.R. 1971 SC 481 : (1970) 2 SCC 780.

14k. Union of India V.K.M. Shankarapa, (2001) 1 SCC 582 para 7: A.I.R. 2000 SC 3678

15. Mathal Vs State A.I.R. 1954 I.C. 47

16. AIR 1959 Pat. 428.

17. AIR 1959 Pat. 425 at P. 428

18. AIR 1959 Mad 63.

19. Ibid at P. 66

20. Ibid at P. 67

20a. AIR 1960 Mys 57

20b. AIR 1964 J and K 23

21. Ibid at P. 25

22. Ibid at 25

23. A.I.R. 1973 S.C. 87

24. AIR 1973 SC 87 at 95

25. Ibid

26. Ibid at P. 96

27. Seervai H.M. Constitutional Law of India (1975) Vol. I P 378

28. AIR 1973 S.C. 87 at P. 98

29. Ibid at P. 102

30. AIR 1973 SC 87 at P. 106

30a. AIR 1961 S.C. 484

30b. AIR 1968 Alld. 100

30c. AIR 1969 SC 966

30d. Shaikh Pire Bux (dead) v Kalandi Patil, AIR 1970 SC 1885 Para 14: (1969) 2 SCR 563

31. A.I.R. 1951 Mad. 147 F.B.

32. A.I.R. 1952 Mad. 253.

33. Jain, M.P. Administrative Discretion and Fundamental Rights Vol.I, IILI (1959) 223 at P. 232.

34. A.I.R. 1963 Raj. 136.

35. Ibid at P. 141

36. Ibid at 140
37. U.P. Shramic Mahasangh Vs U.P. AIR 1960 Alld 45
38. AIR 1965 Cal. 389
39. AIR 1962 Pat. 292
40. Section 144(6) read as "No order under this section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety or likelihood of a riot or an affray the State Government by notification in official Gazzette otherwise directs".
41. State of Bihar Vs K.K. Mishra AIR 1991 S.C. 1667 at P. 1674.
42. Ibid at P. 1669
43. Ibid

43a. AIR 1971 SC 2486

43b. AIR 1961 SC 884

43c. U.P. Shramik Mahasangh V State of Uttar Pradesh, AIR 1960 All. 45 ERE Congress V General Manager E. Rly. AIR 1965 Cal. 389

43d. Damyanti Naranga V Union of India, A.I.R. 1971 SC 966: (1971) 1 SCC 678 paras 6, 7, 8.

43e. Madhubhai Amathalal Gandhi V Union of India, A.I.R. 1961 SC 21, paras 6. 7, 8, 15 and 16 : (1961) 1 SCR 191

44. A.I.R. 1950 Bom. 363.
45. Abdul Rahman Shamsuddin Vs Emperor AIR 1950 Bom. 374
46. AIR 1950 SC 211
47. Ibid
48. A.I.R. 1952 S.C. 196.
49. A.I.R. 1951 Bom. 337.
50. A.I.R. 1951 Cal. 3
51. Janab Tozammal Khundel Sahaji Vs Joint Secretary of Govt. of West Bengal A.IR. 1951 Cal. 322.
52. A.I.R. 1950 S.C. 211
53. A.I.R. 1951 Cal. 322
54. Bodi Alam and another Vs State of Bihar and other AIR 1952 Pat 376

55. AIR 1952 SC 221.
56. AIR 1954 Hyderabad 221.
57. A.I.R. 1956 SC 559
58. Ibid at P. 561.
59. Ibid at P. 567.
60. Ibid at P. 571.
61. AIR 1956 S.C. 585.
62. AIR 1957 Pun. 244
63. A.I.R. 1957 Pun 244 at P. 253.
64. See also in Thakkikkarantavila Bomban and others Vs Island Inspecting officer, Malabar and others, AIR 1957 Mad. 433.
65. A.I.R. 1961 SC 293.
66. Ibid at P. 297.
67. Ibid at P. 298.
68. AIR 1964 M.P. 175.
69. State of M.P. Vs Bharat Singh AIR 1967 S.C. 1170.
70. Jain and Jain, Principles of Administrative Law (1973) P. 280.
71. AIR 1969 Bom. 351.
72. AIR 1961 SC 293.
73. AIR 1967 SC 1170
74. AIR 1952 SC 221.
75. AIR 1956 SC 559.
76. Jain M.P. Indian Constitutional Law (1970) reprinted 1974 P. 543
76a. AIR 1981 SC 613 at 616: (1981) 1 SCC 639
76b. AIR 1981 SC 613 at 616: (1981) 1 SCC 639
77. Jain and Jain Principles of Administrative Law (1973) P. 281.
78. AIR 1950 S.C. 211.
79. Section 20 of the Act reads: "(1) A magistrate on receiving information that any woman or girl residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such woman or girl requiring her

to appear before the magistrate and show cause why she should not be required to remove herself from the place and be prohibited from re-entering it. (ii) Every notice issued under sub-section (1) shall be accompanied by the copy of the record aforesaid and the copy shall be served along with the notice on the woman or girl against whom the notice is issued."

80. AIR 1963 Alld. 71
81. Ibid at P. 73.
82. Ibid at P. 20.
83. Ibid.
85. A.I.R. 1964 A.P. 400.
86. Ibid at P. 407.
87. AIR 1964 S.C. 416
88. Ibid at P. 422.
89. AIR 1964 A.P. 400
89a. Embrahim Vazir V Bombay AIR 1954 S.C. 229.
89b. Abdul Rahim V State of Bombay AIR 1959 S.C. 1315
90. Abdul Rahim V State of Bombay AIR 1959 S.C. at P. 1316
91. A.I.R. 1951 Nag. 185.
92. AIR 1952 Alld. 257.
93. A.I.R. 1954 S.C. 229.
94. Fong Yue Ting Vs United States, 149 U.S. 698.
95. A.I.R. 1950 Pat. 322.
96. A.I.R. 1951 Orissa 86.
97. Inserted by the Constitution (First Amendment) Act 1951
98. Din Dayal Vs State A.I.R. 1956 All. 520.
99. A.I.R. 1951 S.C. 118.
100. Ibid at P. 119.
101. Alice Jacob, Public Control of Private Enterprise, Judicial Process and policy perspectives, J.I.L.I. Voo. 9 (1967) No. 2 P. 172-173.
102. Buddhu Vs Municipal Board, Allahabad, A.I.R. 1952 Alld. 753.

103. M/S. Panna Lal Binjraj & others Vs Union of India, AIR 1957 S.C. 397.
104. A.N. Prasuram & others Vs State of Tamilnadu AIR 1972 Mad. 123.
104a. A.N. Prasuram & others Vs State of Tamilnadu AIR 1972 Mad. 123.
105. Gyan Prakash Gupta Vs State of Mysore, AIR 1968 Mys. 61.
106. Dwarka Pd. Lakshmi Pd. Vs State of U.P. AIR 1954 S.C. 224
107. AIR 1952, Raj. 74.
108. State of Rajasthan Vs Nath Mal AIR 1954 S.C. 307
109. M/S A.K. Appanna Shetty & Sons & others Vs State of Mysore and other AIR 1970, Mys. 289.
110. R. Balkrishnan Vs State of Madras A.I.R. 1952 Mad. 462 Banawari Lal Vs Cloth Controller, Bihar, A.I.R. 1954, Pat. 325. Rameshwar Pd. Vs D.M. A.I.R. 1954 Alld. 144.
111. AIR 1954 SC 224.
112. Ibid at 227
113. Ibid
114. AIR 1954 S.C. 307
115. Seervai, H.M. Constitutional Law of India (1975) P. 427.
116. Alice Jacob, Public Control of Private Enterprise J.I.L.I.Vol. 9 (1967) No. 2 P. 171 at P. 174-175.
117. A.I.R. 1954 S.C. 465, Folled in Chunni Singh Bihari Lal Vs. Union of India A.I.R. 1968 Delhi 196.
118. Jain & Jain, Principles Administrative Law (1973) P. 288.
119. Cooverji Vs Excise Commissioner, A.I.R. 1954 S.C. 220.
120. A.I.R. S.C. 634 also in M/S. Chanan Ram and others Vs. Punjab A.I.R. 1965 Pun. 74.
121. B. Eswariah Vs State of A.P. A.I.R. 1958 A.P. 288, see also in State of Orissa Vs Harinarayana A.I.R. 1972 S.C. 1816.
122. Bankidass Moolraj and others Vs State of Rajasthan A.I.R. 1966. Raj. 165. Valley Noor Mohd & anothers Vs State of Gujrat and others A.I.R. 1974 Guj. 31.
123. A.I.R. 1971 S.C. 474.

124. A.I.R. 1971 SC 474 at P. 476.

125. AIR 1952 Pat. 220.

126. Baldeo Banshi Vs State of M.P. & others 1966 M.P. 273.

127. Pratap Singh Kadian VS State of Punjab & others AIR 1975 Pun. 324.

128. A.I.R. 1959 S.C. 1124.

129. Ibid at 1134

130. Refer to the reasons set forth by Subba Rao J (as he then was), regarding the validity of the Act:

"The object of the legislature is to provide for the export of sugar in public interest. It cannot be, and indeed it is not, denied that at the time the Act was passed there was a sincere and serious national effort to industrialise our country with the a vowed object of raising the economic standards of our people. One of the necessary conditions for industrialising our country is to start heavy industries, and that cannot be done unless the country earns foreign exchange to enable it to import plants for starting the same..... The object of the interest....." ibid at 1140.

131. The notification was issued under the Essential Commodities Act 1955, increasing the internal sale price of sugar by 50 paise per maund in order to compensate the loss on account of export.

132. AIR 1959 SC 1124 at P. 1142-43

133. AIR 1961 SC 1514

134. AIR 1962 SC 1796

135. AIR 1961 SC 1514 at 1516.

136. AIR 1963 S.C. 563

137. Ibid at P. 566

138. A.I.R. 1955 S.C. 33

139. Similar Protection is also gives in Vishnu Dayal & other Vs U.P. AIR 1974 S.C. 1489

140. AIR 1958 SC 578.

141. Narendra Kumar Vs Union of India, A.I.R. 1960 S.C. 430.

142. A.I.R. 1952 Orissa 260.

143. Thanmal Saran and others Vs Union of India & others A.I.R. 1959 Raj. 206.

144. Ibid at P. 208. Same view was taken by the Allahabad High Court in Bhagawati Saran Vs State of U.P. A.I.R. 1959 Alld. 332 and Andhra Pradesh High Court in Srikrishna Rice Milla Tedepulligudum Vs Deputy Director of Food (Govt. of India) A.I.R. 1960 AP 431.

145. A.I.R. 1957.

146. A.I.R. 1954 S.C. 224.

147. A.I.R. 1959 S.C. 626.

148. AIR 1960 SC 465

149. Ibid at P. 482.

150. Also in Bhagwati Saran V UP AIR 1961 SC 928

151. AIR 1954 S.C. 224

152. AIR 1959 S.C. 626

153. AIR 1960 S.C. 465

153a. AIR 1959 S.C. 626: 1959 Supp (2) SCR 123

153b. AIR 1960 SC 475: 1960 2 SCR 627

153c. AIR 1972 SC 1690: (1972) 4 SCC (N) 1

153d. AIR 1974 SC 366 (1974) 1 SCC 468

153e. Saraswati I. Syndicate V Union of India, AIR 1975 SC 460:)1974) 2 SCC 630

153f. New India Industrial Corp. Ltd. V Union of India AIR 1980 Del. 277.

153g. State of Orissa V Radha Shyam Mehar (1995) 1 SCC 652, para 6: AIR 1995 SC 855.

153h. Indian Drugs and Pharmaceutical Ltd. V. Punjab Drugs Manufacturers Association, AIR 1999 SC 1626, para 16: (1999) 6 SCC 247.

153i. Khode Distilleries Limited V. State of Karanataka, (1955) 1 SCC 574 para 60: (1994) 6 JT 588. See also, Mohan Meaking Ltd. V. State of H.P., (2009) 3 SCC 157, para 25: 2009 (1) JT 599.

153j. Chintaman Rao V. State of M.P., AIR 1951 SC 118: 1950 SCR 759, paras 8,9.

153k. Harichand Sarda V. Mozo District Council, AIR 1967 SC 829: (1961) 1 SCR 1012, para 10.

153l. A conspicuous example of the court's reluctance to interfere with a price control measure is provided by Prag Ice and Oil Mills V. Union of India, AIR 1978 SC 1296 at 1297 : (1978) 3 SCC 459, the court mentioning "the extreme indivisibility of any interference by any court with measure of economic control and planning as maximizing general welfare." See also, Welcome Hotel V. State of Andhra Pradesh, AIR 1983 SC 1015 (1983) 4 SCC 575.

154. Ghaio Mal V State of Delhi AIR 1959 SC 63

155. Nathumal V State of M.P. AIR 1966 SC 43

156. Sri Kant Lal Vs. State of Bihar, A.I.R. 1958 Pat. 496.

157. State of U.P. Vs. Jasawant Singh sarana, A.I.R. 1968 All. 383

158. T. Venkata Subbiah Setty Vs Corpn. Of City of Bangalore A.I.R. 1966 Mys. 296 also in A.I.R. 1968 Mys. 296.

159. A.N. Ray C.J. in Mangalore Ganesh Beedi Works etc. Vs. Union of India A.I.R. 1974 S.C. 1832.

160. Lumsden Club Vs Punjab AIR 1957 Pun. 20 at P 23

160a. AIR 1954 SC 224: 1954 SCR 803

160b. AIR 1954 SC 465 : 1995 1 SCR 380.

160c. AIR 1961 SC 705: (1961) 3 SCR 135

160d. C. Lingom Vs. Union of India, AIR 1971 SC 474: (1970) 3 SCC 768.

160e. AIR 1962 SC 204: (1962) 3 SCR 108

160f. AIR 1962 SC 204 at 208-09: (1962) 3 SCR 108

160g. AIR 1967 SC 829 : (1971) 1 SCR 1012

160h. H.R. Banthia V. Union of India, AIR 1970 SC 1453 : (1969) 2 SCC 166.

160i. Ram Rachhpal V. Union of India, AIR 1960 Pun. 439.

160j. A.I.R. 1960 SC 415: (1960) 2 SCR 408.

160k. AIR 1960 SC 468: (1960) 2 SCR 609.

160l. Also Mohd. Hameed V. Collector, Hyd. AIR 1974 A.P. 119.

160m. Sukhwinder Pal Bipon Kumar V. State of Punjab, AIR 1982 SC 65 : (1982) 1 SCC 31.

160n. AIR 1979 SC 25 : (1978) 4 SCC 224.

161. H.R. Banthia Vs Union of India (1969) 2 SCC 166.

162. (1962) I.S.C.R. 541

163. AIR 1960 SC 415

164. Cooverjee Vs Excise Commissioner A.I.R. 1954 S.C. 220 Allah Noor Vs D.M. Chittorgarh A.I.R. 1956 Raj. 153 Dhani Ram Vs J & K. A.I.R. 1959 J & K. 83. Birendra Singh V. Excise Commr. A.I.R. 1956 M.B. 21. Ranchhor LAlji Vs Rev. Divi. Commr. A.I.R. 1960 Ori. 88

165. Lumsden Club Vs. Punjab A.I.R. 1957 Pun. 20
Babulal Gupta Vs Cantonment Board, A.I.R. 1961 M.P. 361
Arjan Das Duggal Vs State of Punjab AIR 1958 Pun. 400
Sri Ram Nath & another Vs Union Territory of Chandigarh A.I.R. 1975 P & H. 138.

166. Shukhlal Sen Vs Collector A.I.R. 1969 M.P. 176.
M/S. Bhagwat Singh Vs State of Punjab and others A.I.R. 1975 P.H. 236 (FB)

167. A.I.R. 1967 S.C. 829.

168. AIR 1955 Cal. 974.

169. AIR 1960 Ass. 94.

170. AIR 1959 Pun. 526.

171. AIR 1959 Pun. 606.

172. 58 Bom. L.R. 221.

173. See also in Sunder Dumanna Shetty V. K.D. Billimoria AIR 1959 Bom. 346.

174. (1961) 3 SCR 135

175. Ibid at P. 144-5

176. Seervai H.M., Constitutional Law of India (1967) 389

177. (1951) A.C. 66.

178. Commr. of Police Vs Lakshmi Chand AIR 1962 Cal. 556.
179. A.I.R. 1966 S.C. 583.
180. AIR 1954 SC 224.
181. AIR 1952 Mad. 120.
182. AIR 1954 SC 747
183. AIR 1960 SC 468
184. AIR 1962 S.C. 204
185. AIR 1964 SC 1279
186. AIR 1959 SC 300.
187. Jain and Jain, Principles of Administrative Law (1973) 249
188. AIR 1964 Ass. 1
189. AIR 1966 Ker. 143 (F.B.)
190. AIR 1968 Mys. 100
191. AIR 1968 S.C. 59
192. (1971) I.S.C.C. 1
193. Ibid at P. 12
194. A.I.R. 1974 S.C. 348
195. Jain and Jain, Principles of Administrative Law (1973) 256.
196. In Krishan Kumar Narula v. State of J & K, AIR 1967 SC 1368: (1967) 3 SCR 50, it was held that dealing in liquor is trade and business and a citizen has a right to carry on the same but the State can impose reasonable restrictions on this right. This view underwent change in Noshirwar v. State of Madhya Pradesh, AIR 1975 SC 360 : (1975) 1 SCC 29. The Supreme Court held that there is no fundamental, right to carry on trade in liquor: JAIN, INDIAN CONSTITUTIONAL LAW 474 (1978).