CHAPTER V

CONTROL OVER EXERCISE OF ADMINISTRATIVE DISCRETION IN THE LIGHT OF STATUTORY LIMITS

5.1 INTRODUCTION:

The study presented in the previous chapter has revealed that the fundamental rights guaranteed by Articles 14, 15(4), 16(4), 19, 21 and 22(5) constitute important legal limitations over the exercise of discretion. Under these articles the Supreme Court and the High Courts have tried to ensure that discretion vested in the authorities is not misused but is exercised by them in accordance with the guiding norm, policy, standard, object or principles. However, there may be situations where the exercise of discretion may not directly affect any fundamental right of an individual, or where the applicability of fundamental rights may be doubtful, protection against misuse or abuse of administrative power in these situations is equally important. Therefore, in addition to the control in the light of constitutional limits, the Indian Supreme Court and the High Courts have also invoked the other method of control over exercise of administrative discretion, namely the control in the light of statutory limits. Legal control over
the exercise of discretion in the light of statutory limits also acquires significance during the period of declaration of emergency when Articles 14, 19 or 22 may be suspended\(^1\). While the control in the light of statutory limits during normal times is discussed in the present chapter, the control during Emergency has been discussed in the next chapter.

In India, the idea of controlling the exercise of discretion in the light of statutory limits is based on the Doctrine of *ultra vires*, developed by the English Courts. Therefore, in this area development of the law is similar to that of England\(^2\).

In England the rule of law and the sovereignty of Parliament combine to produce the doctrine of *ultra vires* which is the main principle on which almost all the court's interventions are founded\(^3\). To a large extent the British Courts have developed the subject of control over exercise of administrative discretion by extending and refining this principle. Similarly in India, the concept of 'Rule of Law' and the basic principle of Parliamentary democracy recognised in the Constitution seems to be the theory for application of *ultra vires* principle. Application of this doctrine is not restricted only to situations where the statute provides express limits (which is very rare), but it also covers the
most common situations where the discretion is conferred on
the authority in very wide or in absolute terms. In such
situations it is presumed that Parliament did not intend to
authorise abuse or misuse of power and that certain safe-
guards against abuse must be implied in the Act. These are
matters of general principle embodied in the rule of law
which govern the interpretation of statutes. Parliament is
not expected to incorporate them expressly in every Act that
is passed. They may be taken for granted as part of the
implied conditions to which every Act is subject and which
the courts extract by reading between the lines, or (it may
be truer to say) insert by writing between the lines. These
implied conditions are taken to be part and parcel of the
Act, just as much as express conditions. Any violation of
them, therefore, renders the offending act ultra vires⁴.

The implied limits thus evolved have been expressed
in very well known propositions. These are: statutory powers
must be exercised reasonably and in good faith i.e., for pro-
per purposes, by taking into account relevant considerations,
by proper application of mind, by the authority in whom the
the power is vested, to the merits of the case. All these
propositions or principles can be grouped under the heading
of substantive ultra vires⁵.
In addition to the substantive limits over the exercise of discretion, the procedural limit of fairness or natural justice has also been implied in the statute under the doctrine of procedural ultra vires. It is assumed that Parliament when conferring power intends that power-discretion to be used fairly and with due consideration of the rights and interests adversely affected. Therefore, a violation of fairness or natural justice in the exercise of discretion will render the administrative act ultra vires. Fairplay in action has been one of the law's notable achievement\(^6\) which supplements the express procedural safeguards in the statute (if any). Violation of procedural requirement in any statute may be called as procedural ultra vires.

An act which is for any reason in excess of power (or ultra vires) is often described as being outside jurisdiction, or power, of the authority and is liable to be set aside\(^7\).

The statutory limits mentioned above have also been applied by the Indian Supreme Court and the High Courts, an attempt has therefore, been made here to study, analyse and critically evaluate the approach of the Indian Courts since independence in controlling the exercise of discretion under the doctrine of ultra vires. For this purpose the subject has been divided into four two broad headings, namely, control
under the doctrine of substantive ultra vires; and control under the doctrine of procedural ultra vires.

5.2 CONTROL UNDER THE DOCTRINE OF SUBSTANTIVE ULTRA VIRES:

As mentioned above, the substantive limits over the exercise of discretion are: (i) discretion must be exercised reasonably; (ii) and discretion must be exercised in good faith. The statutory requirement to act reasonably means that the discretion must be exercised for proper purpose; by taking into account relevant consideration and by not taking into account irrelevant considerations; by the authority in whom the power is vested; by applying his mind to the merit of the case before him. The requirement to act in good faith means that the authority must not act malafide, or in bad faith or with malice. Any violation of these substantive limits is considered beyond the power or jurisdiction or ultra vires. These grounds are not distinct from each other but overlap or run into one another, this is very well illustrated by the famous observation of Lord Greene K.R. in his wellknown judgement in Associated Provincial Picture House Ltd. v. Wednesbury Corporation, wherein while pointing out how the principle of reasonableness may cover these categories, he observed:
"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion, must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head⁹.

While judging reasonableness of exercise of discretionary power, courts do not substitute their view of what is reasonable, but if any of the above requirements is violated
then action is held to be an unreasonable exercise of *ultra vires*. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion\(^10\).

A critical analysis of application of the above principles under the doctrine of substantive *ultra vires* by the Indian Courts with a comparative view of English position on important aspects is presented below. The discussion has been divided into two parts (i) General Principles relating to the approach; (ii) Categories of Substantive Limits.

5.2.1 **General Principles Relating to the Approach**:

Detailed study of the cases indicates that a few general principles, have influenced the approach of the courts. These principles are discussed below:

5.2.1.1 **Courts do not go into the Merit of the Exercise of Discretion**: While entering into the legality of exercise of discretion it has been emphasised by courts very often that they do not go into the merit of the exercise of discretion\(^11\). They are not concerned with the question whether the discretion has been exercised rightly or wrongly or whether there were sufficient grounds or reasons for formation of subjective satisfaction. The extent of review power of the court is very well summarised in the following:
observation of Raja ropala Ayyangar, J. of the Supreme Court in Partap Singh v. State of Punjab, wherein he observed:

".....the court is not an appellate forum where the correctness of an order of Government could be canvassed and, indeed, it has no jurisdiction to substitute its own view as to the necessity or desirability of initiating disciplinary proceedings, or for the entirety of the power, jurisdiction and discretion in that regard is vested by law in the Government. The only question which could be considered by the Court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose for which the power was vested, or whether the proceedings have been initiated malafide for satisfying a private or personal grudge of the authority against the officer. If the act is in excess of the power granted or is an abuse or misuse of power, the matter is capable of interference or rectification by the Court."

The principle of not going into the merit of exercise of discretion has been very well illustrated by the recent decision of the Supreme Court in Excise Commissioner, U.P. v. Prem Jeet Singh (1963). In this case while exercising discretion under U.P. Excise Act, the excise Commissioner rejected the highest bid offered for licence of certain liquor shops
on the ground that the price offered was much less than the notional value arrived at by him. He arrived at the notional value by applying the particular formula which he considered more reasonable than the one canvassed by the bidder, and directed reauction. The Allahabad High Court quashed the order of the Commissioner on the ground that the Commissioner's approach was wrong and directed the Commissioner to accept the bid. Reversing the High Courts decision, O. Chinnappa Reddy, J. speaking for the court, (consisting of himself and E.S. Venkataraman, J.) held that the High Court could not in the exercise of writ jurisdiction, quash the order of the Commissioner on the ground that Commissioner's approach was wrong. Similarly in State of Gujarat v. Adam Kasam Bnaya (1981) the Supreme Court reversed the decision of the Gujarat High Court holding the order of preventive detention as invalid on the ground of insufficiency of material for reaching genuine satisfaction. Speaking about the extent to which the courts can go, Banarul Islam, J. (for himself and A.P. Sen, J.) pointed out that the High Court in its writ jurisdiction under Article 226 of the Constitution is to see whether the order of detention has been passed on any material before it. If it is found that the order has been based by the detaining authority on material on record then the court cannot go further and examine whether the material was adequate or not, which
is the function of an appellate authority. It can examine
the material on record only for the purpose of seeing whether
the order of detention has been based on no material (or
irrelevant material). The satisfaction is of detaining autho-

However, the fact that the administration is free to
exercise its discretion rightly as well as wrongly does not
mean that it is absolutely free to do whatever it likes in
the garb of its expertise. The following principles try to
keep a curb on the tendency of an absolute power going berserk.

5.2.1.2 There is no Unfettered or Absolute Discretion in
the Administration: Recognition of their inability
to go into the merit of exercise of discretion by the courts
does not mean that they concede absolute or unfettered discretion in the administrative authorities. The notion of absolute
or unfettered discretion, though pronounced very often by the
administrative authorities, has been generally rejected by
both the English and Indian Courts. The legal conception
of discretion has been very aptly explained in the following
observation of Lord Halsbury in Sharpe v. Wakefield:

"... 'discretion' means, when it is said that
something is to be done within the discretion
of the authorities, that that something is to
be done according to the rules of reason and
justice, not to private opinion: *Rooke's Case* (1), 5 Co.Rep. at p.100a; according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself.19

A bold application of the above principle is illustrated by the modern leading case of the House of Lords in Padfield *v. Minister of Agriculture, Fisheries and Food*20 (1988). In this case the House of Lords was considering a dispute under the milk marketing scheme established under the Agricultural Marketing Act 1958. Under this scheme the producers were required to sell their milk to the Milk Marketing Board, which fixed the price to be paid to them. Different price was paid to producers in each of the regions of England and Wales. The reason for this was that the cost of transporting milk from farm to consumer varies between regions. The differential between the southeast and the far west regions was 1.19d per gallon. The milk producers of southeast region complained that this differential was too low and it should be increased reflecting increased cost of transport.

As the Board consisted of representatives of various
regions, and acted by a majority of its members, the south-
east producers, being in minority, were unable to get the 
board to favour their proposals.

Since S.19 of the Act provided a method to seek 
remedy against the Board's action by complaining to the 
minister and the minister was given a discretion to refer 
this complaint to the committee of investigation, Padfield 
(one of the officers of the southeast regional committee 
of the board) made a formal complaint on the question of 
differentials to the minister and requested him to refer it 
to the committee of investigation. The minister refused to 
refer the complaint and therefore Padfield applied for an 
order of mandamus. The main questions were, how the discre-
tion vested in the minister was to be exercised? What was 
the nature of discretion vested in the minister?

According to the phraseology used in the section the 
Investigation Committee was to investigate a complaint "if 
the minister in any case so directed". As these words in the 
Act vested the power in the minister without any qualification, 
this probably prompted him to make a bold claim of possessing 
absolute or unfettered discretion in the matter. However, even 
in the face of such unqualified conferment of power the House 
of Lords rejected the claim of unfettered or absolute discre-
tion. The court held that the Minister cannot act in a way which thwarts the policy of the Act; and as the policy of the Act was to provide an alternative machinery in the case where the normal democratic machinery failed, and the whole object of the minister's overriding power was that he might correct the 'normal democratic machinery' where necessary, he could not refuse to refer the complaint on irrelevant or bad reasons. It was his duty not to exercise his discretion to frustrate the policy of the Act. The minister gave two reasons for not referring the complaint, that (i) since the producers were represented on the Board they should be content with 'the normal democratic machinery', (ii) that if the committee made a favourable report the minister might be expected to take action on it otherwise it may invite criticism in Parliament. Both these reasons were rejected by the House of Lords as irrelevant. Consequently Mandamus was granted to compel the minister to act as the law required.

Speaking about claim of 'unfettered or absolute discretion' Lord Upjohn observed,

"First, the adjective nowhere appears in Section 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save
to emphasise what he had already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the minister rather than by the use of adjectives"\(^21\) (emphasis supplied).

The above observation of Lord Upjohn clearly points out that even the use of word absolute or unfettered in the statute would not have empowered the minister to flout the well known legal limits to the exercise of discretion. Similarly the other law lords also rejected the argument of unfettered discretion\(^22\).

An important Indian illustration of rejection of claim of absolute or unfettered discretion is provided by the recent decision of the Supreme Court in Baldev Raj Chadha v. Union of India\(^23\), (1981). The statutory provision involved in this case was Fundamental Rule 56(j), which
provided that

"..... the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any government servant...."

The petitioner was compulsorily retired in the exercise of discretion under this rule. The legality of the order was challenged on the ground that the authority acted on irrelevant considerations and omitted relevant considerations. It was contended by the Government that since the statutory provision conferred absolute discretion the exercise of discretion could not be questioned before the court. Rejecting this argument, Krishna Iyer, J. speaking for the Court, (consisting of himself and Pathak, J.) observed:

"The right to retire is not absolute, though so worded. Absolute power is anathema under our constitutional order. 'Absolute' merely means wide not more. Naked and arbitrary exercise of power is bad in law".

Applying the above principle of negation of absolute discretion, the Court held that while exercising the discretion the appropriate authority must form the requisite opinion that retirement of the person concerned is in 'public interest'. The
power cannot be exercised for personal, political or other interest. The appropriate authority can pass the order after forming the requisite opinion objectively on relevant material.

Negation of absolute or unfettered discretion also gives rise to following inter-related principles relating to the approach of the court.

5.2.1.3 **Duty to Act Legally Coupled with Discretion**: The discussion of the above cases reveals that discretion conferred in howsoever absolute terms is not without limits and the administrative authorities are not at liberty to do whatever they like. They are always under a legal duty or obligation to exercise their discretion in furtherance of the policy or object of the statutory provision, by applying their mind to the case before them and the relevant material relating to it. In this sense all the discretionary powers are coupled with duty. For example in the leading case of Padfield v. Minister of Agriculture, Fisheries and Food\(^\text{25}\), the House of Lords held that the minister had a duty as well as a power to consider the complaint of Padfield and that he could not frustrate the policy of the Act and ultimately **mandamus** was granted to enforce this duty.

This principle that discretionary powers are coupled
with the duty to act legally in accordance with the statutory limits, expressly mentioned in *Redfield's case*, has been recognised by the Indian Supreme Court and the High Courts from the very beginning since Independence. This is evident from the fact that inspite of the restrictive attitude towards the scope of writ of *quashing* and non-availability of it in cases of Administrative functions, relief was given in various cases against illegal exercise of administrative discretion by granting *mandamus* or giving other direction under Article 226\(^26\). For example in *State of Bombay v. K.P. Krishnan*\(^27\) (1960) it was held by the Supreme Court that if the court is satisfied that the reasons for refusing to refer an industrial dispute are extraneous and are not germane to the object of the Industrial Disputes Act the court can issue a writ of *mandamus* even in respect of such an administrative orders.

Recently in *Ikhlaq Mohamed v. Union of India*\(^28\) (1983) the recognition of the principle that all discretionary powers are coupled with the duty to act legally has enabled the Himachal Pradesh High Court to give relief to the petitioner against illegal, negligent and perhaps deliberate inaction on the part of passport authority. In this case the petitioner applied for passport on 8th January 1981 but no action was taken by the authority, the passport was neither granted nor refused.
All reminders of the petitioner fell on deaf ears. Ultimately exhausted with administrative machinery he approached the court. The court held that whenever an application is made to passport authorities they are bound to apply their mind to it and act in accordance with the policy or object of the Act. Since there was no reason found on record for not granting him the passport the court directed the authorities to issue a passport to the petitioner within two weeks.

Negation of absolute discretion and recognition of the duty to act legally, coupled with all the discretionary powers has given rise to the very important inter-related principle of disclosure of reasons to the court. This principle has enabled the courts to probe deeper into exercise of discretion in more and more areas of exercise of power, as is illustrated by the following discussion.

5.2.1.4 Disclosure of Reasons or the Material on which the Decision was based to the Courts: Disclosure of reasons helps the courts to probe deeper into the exercise of discretion and enables them to know whether the authorities have exercised their decision on irrelevant considerations, for ulterior purpose or have acted arbitrarily or discriminately without properly directing and applying their mind to the case in hand. In this sense requirement to disclose
reasons can be said to be the part of the doctrine of substantive ultra vires and it constitutes a part of review process into the exercise of discretion in the light of substantive limits. It differs from the procedural requirement of making speaking order which requires reasons to be accompanied with the order so that they may be known to the party.

Disclosure of reasons to courts also differs from the disclosure of reasons to the party for the proposed action which forms a part of requirement of 'notice' under the rule of audi alteram partem of natural justice. Disclosure of reasons to the party for the proposed action also forms a part of procedural requirement. While disclosure of reasons as a part of procedural requirement has been discussed in the latter part of this chapter under the heading of Procedural ultra vires, the development of the principle requiring disclosure of reasons to court is the subject matter of present discussion.

Emphasis on the principle of disclosure of reasons to the court as a natural corollary to the principles of negation of absolute discretion and duty to act legally within legal limits has been another "potentially significant" aspect of the Padfield case. In this case the House of Lords unanimously rejected the argument advanced on behalf of the minister that as he was not bound to disclose reasons and could
have avoided the court's control by not disclosing reasons, he should not be put in the worst position just because he disclosed the reasons to the court, or in other words he should not be punished for disclosing reasons when he was not bound to do so and his action should not be held invalid. Speaking on this question Lord Upjohn, aptly observed: that "he is a public officer charged by Parliament with discharge of a public discretion affecting Her Majesty's subjects, if he does not give any reasons for his decision it may be, if the circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reasons for reaching that conclusion".30

This observation of Lord Upjohn makes it clear that if the minister had not shown any reasons for his action then also the court could have come to the conclusion that he had no relevant reasons for his decisions and could have held the impugned action as invalid. Similar opinions were expressed by other judges.31

The case of Padfield highlights the fact that the disclosure of reasons to the court is a necessary requirement for determining the question whether the authority acted on irrelevant consideration or for some ulterior or collateral
purpose and not for the purpose or policy of the statute. The close relationship between disclosure of reasons to the above grounds of control also becomes evident from the fact that during fifties and early sixties, the Supreme Court and High Courts in India felt no hesitation in quashing administrative order on these grounds, in cases where either reasons were available to them because the statute so required or reasons were voluntarily given, but in cases where there was no such statutory requirements nor reasons were given voluntarily, generally administrative orders were upheld. Thus, in cases of preventive detention where various statutes required reasons to be given, the exercise of discretion has been invalidated on the ground of taking into account irrelevant or extraneous matters. Similarly in the cases of refusal to refer industrial dispute under S. 12(5) of Industrial Disputes Act, read with S. 10(1) of the same Act, the Supreme Court felt no difficulty in striking down the order of refusal by Government because S. 12(5) requires the Government to give reason for such an action.

Knowing the importance of disclosure of reasons or the material to court, on which the exercise of discretion has been based, the Supreme Court started developing this principle slowly but steadily. The development of this
principle has been traced in the following discussion with
the help of the leading cases. The first statement relating
to requirement of disclosure of reasons to the courts was
made by the Supreme Court by way of an obiter in Collector of
In this case, while pointing out the safeguards provided in
Section 46(2) of the Income-Tax Act, 1922, in the context
of the question relating to conferment of discretion, Imam, J.
speaking for the court (consisting of himself, S.R. Das, C.J.,
S.K. Das, Govinda Menon and Sarkar, JJ.) observed:

".....the collector must have reason to
believe that the defaulter is wilfully
withholding payment or has been guilty of
fraudulent conduct in order to evade pay-
ment. The Collector therefore, must have
some material upon which he bases his
belief - a belief which must be rational
belief - and a court may look into that
material in appropriate cases in order to
find out if the condition laid down in the
section have been fulfilled or not"37
(emphasis supplied)37.

The principle of disclosure of reasons propounded by
the Supreme Court in the Collector of Malabar has been followed
38 in the subsequent cases where the discretion under the
statute was to be exercised on "reason to believe". In such cases courts have been insisting upon disclosure of reasons or material to court in order to know whether the belief of the authority has been based on relevant reasons or not. For example in *S. Narayanaappa v. Commissioner of Income Tax* 39 (1967) speaking about S. 34 of the Income Tax Act, Ramaswami, J. held for the Supreme Court (consisting of himself, J.J. Shah and V. Bhargava, JJ.) that the expression "reason to believe" in Section 34 of the Income Tax Act does not mean a purely subjective satisfaction on the part of the Income Tax Officer; and it is open to the court to examine the question whether the reasons for the belief have a rational bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. In *Assistant Controller of Customs v. The New Central Jute Mills Co. Ltd.* 40 (1973), the Calcutta High Court held that although under the term "reason to believe" in Section 105(1) of Customs Act, the customs officer is not bound to give reasons for his order (or make a speaking order), but when challenged as having no reasons, he must disclose to the court the material on which his belief was based. The court can examine the material to find out that whether a honest and reasonable person can base his reasonable belief upon such material.
Recently the exercise of discretion under S. 147(a) of Income Tax Act was challenged in M/s. Ganga Saran & Sons Pvt. Ltd. Calcutta v. The Income Tax Officers and others (1981). This section concerns power of reopening of income tax assessment on the Income Tax Officer if he has "reason to believe" that the income of the assessee escaped assessment due to failure on the part of assessee to disclose fully and truthfully all material facts necessary for assessment. While interpreting this section Bhagwati, J. speaking for the Supreme Court (consisting of himself and Venkataraman, J.) held that before the Income Tax Officer can assume jurisdiction under Section 147(a), first he must have "reason to believe" that the income of the assessee has escaped assessment and secondly, he must have "reason to believe" that such escape ment is due to omission or failure on the part of the assessee to disclose fully and truthfully all material facts necessary for assessment. The Court pointed out that the important words under Section 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of reasons, but the court
can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain belief before he can issue notice under S. 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe.

On facts as the reasons disclosed by the Income Tax Commissioner were found irrelevant, the Court held that there were no reasons for the belief of the Income Tax Commissioner that the petitioner was under-assessed due to deliberate default on his part to make full disclosure.

The term "reason to believe" generally occurs in the statutory provisions conferring power of search and seizure. The courts interpret it as a condition precedent to the exercise of power. Thus in the cases decided in this area it has been held that before the concerned officer exercises his power of search and seizure, he must show to the court that relevant material existed for his belief. He cannot carry on a fishing expedition by first seizing and then finding reason.

The Supreme Court and the High Court found it rather easier to require disclosure of reasons to themselves in above
cases, because in these cases the statute itself provided that the discretion was to be exercised by the administrative authority when he had "reason to believe". However, all discretionary powers are not conferred by using this phrase, there are powers which are to be exercised if in the "opinion" of the authority certain circumstances exist, or the authority "thinks fit", to do so in public interest or if the authority "is satisfied" or there are other powers which are not qualified by any such words and the power is simply conferred on the authority. The question is: whether the principle of disclosure of reasons or material to courts has also been insisted upon for the purpose of legal control on these powers? This question may be answered in the affirmative in view of the various cases. The obiter of the Supreme Court in Krishan Chand Arora v. Commissioner of Police (1961) may be taken as the starting point in this direction. In this case the Commissioner of Police could grant or refuse a licence to an eating house or a place of public entertainment "at his discretion" subject to such conditions as he may specify for securing good behaviour, prevention of drunkenness and orderly conduct in such public places. This section was challenged under Article 19(1)(g) as vesting absolute discretion on the ground that no procedural safeguards of audi-alteram partem and speaking order were provided. The section was held
valid on the ground that enough guidelines were provided for the exercise of discretion, because while exercising discretion the Commissioner was to satisfy himself about three conditions (i) that the person applying is a keeper of an eating house, (ii) that the keeper is a person of good behaviour, (iii) that the keeper is in a position to prevent drunkenness and disorder among those who come to eating house. In view of these guidelines, while holding that mere absence of procedural safeguards of audi alteram partem and speaking order did not render the section unconstitutional under Article 19(1)(g), K.N. Wanchoo, J. speaking for the majority⁴⁵ (consisting of himself, J.L. Kapur and P.B. Gajendragadkar, JJ) observed:

"The person applying knows that under the law there are three conditions.....which the Commissioner has to consider in granting or refusing licence. If he thinks that he fulfils the three conditions and the Commissioner has acted unreasonably in rejecting his application he is not without a remedy; he can apply to the High Court under Article 226 and compel the Commissioner to disclose the reasons for refusal before the court and if those reasons are extraneous or are not germane to the three matters arising under S. 39, the High Court will compel the Commissioner
to act within the scope of S.39⁴⁶(Emphasis supplied).

The above observation of Wancnlo J emphasises that when a challenge to exercise of discretion is made on the ground of taking into account irrelevant or extraneous considerations the authorities must disclose reasons to the court. In this case though the powers were vested in very wide terms, still the principle of disclosure of reasons to the court was emphasised. The principle of Kishan Chand Arora has been applied by the Calcutta High Court in Pannalal v. Police Commissioner⁴⁷ (1977) while controlling exercise of discretion under S.39 of Calcutta Police Act, (the same statutory provision which was involved in Kishan Chand Arora). In this case the petitioner challenged the order under S. 39 on the ground that the Commissioner acted unreasonably without applying his mind to relevant considerations. As the Commissioner did not disclose reasons in the affidavit and the material on which the exercise of discretion was based, the order was quashed.

Another important observation requiring disclosure of reasons to the court was made by the Supreme Court in P.J. Irani v. State of Madras⁴⁸ (1961). In this case S. 13 of Madras Buildings (Lease and Rent Control) Act, 1949, was involved. Like the statutory provision in the Padfield case,
this section also vested discretion apparently, without any restriction. Under this provision, the State Government was empowered to exempt any building from the operation of the Rent Act. While holding that the discretion under the provision could only be exercised for furtherance of policy of the Act "namely to protect the interest of the tenant", the majority held the exercise of discretion as violative of Article 14 on the ground that the Government failed to show that while exercising its discretion in choosing or classifying the premises of the appellant for the purpose of exemption, it acted on relevant considerations and in furtherance of the guiding policy of the Act. Speaking in this context, N. Rajagopala Aiyyangar, J. made the following general observation regarding disclosure or reason to court aimed at controlling discretion in the light of statutory limits:

".... when the legality of the order is challenged, its intra vires character could be sustained only by disclosing reasons which led to the passing of the order."49.

Then came the leading case of Barium Chemicals Ltd. v. The Company Law Board50 (1967), which clearly established and applied the principle of disclosure or reasons to the court and after this case this principle has been consistently
applied\textsuperscript{51} and also developed further\textsuperscript{52}. This case involved investigatory order issued by the Central Government against the company under S. 237(b) of the Companies Act, 1956. Under this section discretion to order investigation into affairs of a company was to be exercised, if "in the opinion" of the Central Government, there were certain circumstances suggesting fraud or misfeasance or misconduct towards the company on the part of management\textsuperscript{53}. The order of investigation passed under S. 237 (b) was challenged on the ground that the authority acted on irrelevant consideration. It was argued on behalf of the Government that the entire function is subjective and the 'opinion' which the authority has to form is that circumstances suggesting what is set out in sub clause (i) to (iii) of clause (b) exist and, therefore, the existence of those circumstances is by itself a matter of subjective opinion. The legislature having entrusted that function to the authority, the court cannot go behind its opinion and ascertain whether the relevant circumstances existed or not.

The argument of the Government was rejected by the Supreme Court by a majority of 3 : 2. The majority consisting of Hidayatullah, Bachawat and Shelat, JJ. held that though the formation of opinion regarding the necessity to order investigation is based on subjective satisfaction, it must be shown to be based on relevant considerations, therefore Court
can go into the question whether the authority had taken into account the relevant circumstances suggesting fraud etc. on the part of management, or it has based its decision on extraneous considerations; and when the action of the Government is challenged on the ground that no circumstances suggesting fraud etc. existed and it acted on extraneous circumstances, the Government must show to the court that relevant circumstances existed. On the principle of disclosure of reasons to Court Hidayatullah, J. observed:

"No doubt the formation of opinion is subjective but the existence of circumstances relevant to inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out......: It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on the circumstances which it thinks exist...... 54 (emphasis supplied).

The above principle of disclosure of reasons or material to court was not supported in the minority judgement of Mudholkar, J. delivered by him on behalf of himself and
and Sarkar, J. wherein he held that the court should not ask the authorities to disclose material, however if the grounds are voluntarily disclosed the court can examine them for considering whether they are relevant.

It is submitted that the approach adopted in the minority judgement is not proper, because in the absence of disclosure of reasons or material to courts, protection provided by the principle that the authorities must act on relevant considerations and for the purpose and policy of the Act is rendered futile, as in most of the cases, the administration can avoid the court's scrutiny into legality of its action by not disclosing the reasons or basis of its exercise of power. If the individual is required to show that the administration acted on irrelevant considerations or against the policy or purpose of the statutory power it would be impossible for him to discharge that burden since all the relevant materials are always with the administration and he cannot lay his hands on it. It is because of this practical difficulty that the subsequent cases have supported the majority in Barium Chemicals and not the minority. A few leading illustrations of the subsequent cases are given in the following paragraphs.

S. 17(4) of the Land Acquisition Act provides that the appropriate Government "may direct" that the provisions
of S. 5A shall not apply in case of any land to which, in its 'opinion' the provisions of sub-section(1) or (2) of S.17 are applicable. Under this provision the appropriate Government had a discretion to dispense the inquiry in case of acquisition of any land specified in S.17(1) or 17(2) which was required urgently. In Narayan v. State of Maharashtra (1977), where the inquiry was dispensed with, by the appropriate authority, Supreme Court struck down the notification because no reasons were disclosed to the Court showing that the authority acted on relevant considerations. While interpreting Section S.17(4), M.H. Beg, J., speaking for the unanimous Court (consisting of himself, Ray, C.J., and Jaswant Singh, J.) held that mere existence of urgency under S.17(1) or S.17(2) does not automatically dispenses with S. 5A. The mind of the officer or authority has to be applied to the question whether there is an urgency of such a nature that even the summary proceedings under S. 5A of the Act should be eliminated. "It is not just the existence of urgency but the need to dispense with an inquiry under S. 5A which has to be considered". About disclosure of reasons he pointed out that though the question of existence of such an urgency which necessitates dispensation of inquiry, depends upon the subjective satisfaction of the concerned authority, but where
the exercise of discretion has been challenged on the ground that the authorities did not direct their mind to the above question and acted on irrelevant or extraneous consideration, the authority must disclose reasons or facts to the court which are especially within their knowledge. Following the law laid down in Narayan, the Bombay High Court in Yesho Nathu Mahajan v. State of Maharashtra (1980) held that when dispensation of inquiry in the cases of urgency has been challenged, the minimum expected from the State is a disclosure of the circumstances or the reasons that weighed with it in making an order under Section 17(4).

Section 18AA of Industries (Development and Regulation) Act, confers power on the Central Government to take over the management of an Industrial undertaking without investigation, if from the documentary or other evidence in its possession, the Government "is satisfied" in relation to an Industrial undertaking that (a) the person in charge of such Industrial undertaking have by reckless investments or creation of encumbrances on the assets... or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced, and that immediate action is necessary to prevent such a situation, or, (b) it has been closed for a period of not less than 3
months....and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the company owning the undertaking and condition of the plant and machinery are such that it is possible to restart the undertaking and such restarting is necessary in the interest of general public.

In Swadeshi Cotton Mills v. Union of India (1981)\(^5\)\(^9\), the words "is satisfied" in Section 18AA of the above statute came up for interpretation; while interpreting this phrase the Supreme Court equated these words with "in its opinion" occurring in Barium Chemicals, and held that satisfaction of the Central Government under this section is not purely subjective and when questioned the Government must disclose reasons or material for its satisfaction to the court. The view of the Delhi High Court that the satisfaction is purely subjective was held to be wrong. Speaking on this point Sarkaria J, (for himself and D.A. Desai, J.) observed:

"It cannot be laid down as a general proposition that whenever a statute confers a power on an administrative authority and makes the exercise of that power conditional on the formation of an opinion by that authority in regard to the existence of an immediacy, its opinion in regard to that preliminary fact is not open to judicial scrutiny at all."
while it may be conceded that an element of subjectivity is always involved in the formation of such an opinion, but, as was pointed out by this Court in Barium Chemicals..... the existence of circumstances from which the inferences constituting the opinion, as the sine qua non for action, are to be drawn, must be demonstrable and the existence of such "circumstances" if questioned, must be proved at least prima facie"\textsuperscript{60} (emphasis supplied).

Applying this principle, the court held Section 18AA (1)(a) in terms requires that "satisfaction" of the Government in regard to the existence of the circumstances or condition precedent set out above, including the necessity of taking immediate action must be based on evidence in possession of the Government, and if it is not shown by the Government that it acted on relevant consideration, its action would be liable to be quashed for being based on no evidence, or irrelevant evidence or on extraneous consideration. The further observation of Sarkaria J. supports the view that the Supreme Court may require disclosure of reasons to court even in the cases where power is conferred without any condition precedent or without any qualification. He observed:

"Even where the statute conferring the
discretionary power does not, in terms, regulate or hedge around the formation of the opinion by the statutory authority in regard to the existence of preliminary jurisdictional facts with express checks, the authority has to form that opinion reasonably like a reasonable person.\textsuperscript{61}

Recently, applying the principle of disclosure of reasons to the courts laid down in \textit{Swadeshi Cotton Mills}, in \textit{Vasantrao Dattaji Dhanwatey v. Union of India}\textsuperscript{62} (1984), the Bombay High Court struck down the order of the Government taking over the management of the Industrial undertaking under Section 18AA (1) (b) for non-disclosure of reasons or material to the court. The court pointed out that the question for consideration was whether there was any material or evidence documentary or otherwise, before the Central Government for its satisfaction that (i) the closure of the undertaking was prejudicial to the Scheduled Industry concerned, (ii) the financial condition of the firm owning it was such that it was possible to re-start the undertaking and (iii) the re-starting was in the interest of general public. As in spite of specific allegation that the Governmental order was not based on any relevant material, no documentary or other evidence of material was produced before the court, the order was held illegal.

Section 10(5) of the \textit{Indian Passport Act}, 1967 requires
the authorities to record brief reasons and communicate them to the person affected on demand. However, the provision confers a discretion on the authorities to refuse the disclosure of reasons to the person if "it is of the opinion" that it will not be in the interest of sovereignty and integrity of India, security of India, friendly relations of India, with any foreign country or in the interest of general public. In *Maneka Gandhi v. Union of India*\(^6^3\), where the central government refused to give reasons to the petitioner on the ground that it was not in the interest of general public, the Supreme Court held that if the passport authority refused to give reasons in the exercise of their discretion under Section 10(5) they will have to satisfy the court by placing reasons or material before the court that it would not be in the interest of general public to give reasons.

About the nature of reasons to be disclosed to the court, the recent decisions of the Court clearly show that disclosure must be of the real or informal reasons, or the basic facts and material, and not of the formal reasons. In order to know the exact reasons for the exercise of administrative discretion, the Court has now started looking into the administrative records and files. This is a clear step forward by the Court from the old approach\(^6^4\), under which
used to refuse to go behind the affidavit of the authorities while deciding the question of ultra vires. This approach is well illustrated by Baldev Raj Chadha v. Union of India\textsuperscript{65} (1981). In this case while deciding the question whether the compulsory retirement order was passed in 'public interest' the Supreme Court looked at the confidential reports of the petitioner and the order was quashed because the relevant considerations, that the appellant had crossed the efficiency bar and reached the maximum of his scale in his 14 years of continuous service, and for five years immediately preceding retirement there was no adverse entry against him, were ignored; and the obsolete or irrelevant consideration that long ago his efficiency was poor, was taken into account. While giving his judgement for the Court Krishna Iyer, J. found the above to be the real reason for the order, inspite of the fact that the reason for compulsorily retiring Mr. Chadha was given in the affidavit that "his work was found to be below average".

The view that for going into the question of legality of exercise of discretion the Supreme Court may try its best to go to the real reasons or basis for the exercise of discretion, instead of insisting upon the formal reasons, has been strengthened by the recent case of S.P. Gupta v. The President
of India (1982) where it was held by the Supreme Court that although the Government need not disclose formal reasons for dropping out or transferring a particular judge since the reasons form a part of advice tendered by the Council of Minister to the President and are protected under clause (2) of Article 74 of the Constitution, but the Court could discover the real reasons from the correspondence and the communication made in the process of consultation which must be disclosed.

It is submitted that the above approach towards the requirement to disclose reasons or material to the court, is a welcome step as it enables the courts to probe deeper into the question as to whether the discretion has been exercised by the authority for the purpose for which it is vested, by taking into account relevant considerations and by applying its mind to the problem in hand.

The principle of disclosure of reasons or material to court has also been applied under Articles 14 and 16 of the Constitution, in order to ensure that the authorities do not act arbitrarily or discriminatorily; similarly under Article 21 disclosure of reasons for exercise of discretion has been required. This aspect of the law has already been discussed in the previous chapter.
Disclosure of reasons for preventive detention is a mandatory requirement under Article 22(5) of the Constitution. In view of this, all the statutes passed on the subject have provided for disclosure of grounds or reasons. The effect of this mandatory requirement has further been strengthened by the approach of the Supreme Court, in going to the records or material before the authority and by requiring their disclosure as a part of the formal grounds or reasons.\textsuperscript{68}

In few cases it has been held that the delay in consideration of representation or supply of documents must be explained by disclosing reasons to the court otherwise right under Article 22(5) is defeated. This aspect has also been discussed in the previous chapter.\textsuperscript{69}

In addition to the requirement of Article 22(5) the Supreme Court has required disclosure of reasons to court in the cases where there was a time lag between the detention order and actual arrest of the person and if no reason was disclosed to the court, the detention was held invalid for non-application of mind by the detaining authority.\textsuperscript{70} The important decision of the Supreme Court in \textit{Sadhu Roy v. State of West Bengal}\textsuperscript{71} indicates that even without invoking Article 22(5) the Court may require disclosure of material or reasons to the court under the requirement to act bonafide, on relevant grounds or for proper purpose. In this case a preventive
detention order was passed against the petitioner under MISA by a magistrate. The ground for detention alleged that he had committed two robberies. However, it may be noted that on the same ground a criminal prosecution against him was dropped. This order of preventive detention was challenged by the petitioner on the ground that while passing the order the magistrate did not take into account relevant consideration and exercised his power callously on illusory or extraneous circumstances and therefore the exercise of power was a colourable exercise. While upholding the contention of the petitioner Krishna Iyer, J. speaking for the Court, (consisting of himself and Sarkaria, J.) pointed out that subjective satisfaction is actual satisfaction and a sham satisfaction is no satisfaction at all. Therefore when a habeas corpus petition has been filed under Article 32 the material, which was before the magistrate should be revealed to the court in a proper return in the shape of an affidavit. He further pointed out that affidavit revealing material must be filed by the person who passed the order, in the cases where the subjective satisfaction has been challenged on the ground of colourable exercise, or for taking into account extraneous matters, because, subjective satisfaction is a mental fact or state which can be best established by author's affidavit.
As no material was disclosed in this case the order of detention was struck down. By going to the records of the criminal case the Court found that the case against the petitioner was dropped because his name was not in F.I.R. The Court also noted that the claim of the authorities that the criminal case was dropped because witnesses were afraid was also unfounded because in this case witnesses were public servants. While noting these facts, Krishna Iyer J. pointed out that these were relevant facts which should have been taken into account by the magistrate and as he has not shown that he took into account these facts his order constituted a colourable exercise of power.

It is submitted that the decision in Sadhu Roy was an important pronouncement because it propounded the principle of disclosure of reasons to the court in order to control exercise of discretion. For this no reliance was placed on Article 22(5), but it was claimed as a necessary ingredient of substantive ultra vires doctrine. This could have enabled the courts to control exercise of discretion even during emergency when Article 22 could be suspended. However, the pronouncement of the Supreme Court in the subsequent case of A.D.M. Jabalpur v. Shukla, seems to have negatived the efficacy of this case. This aspect is discussed in detail in the next chapter.
The above cases reveal that the principle of disclosure of reasons or material is now a well established norm. There could be two impediments to this principle, namely, the question of burden of proof and the question of Governmental privilege not to produce documents. However, in fact they have not constituted an impediment to this principle as is evidenced by the following discussion.

a) **Is the question of onus of proof an impediment to the principle of disclosure of reasons or material to court?** The principle of disclosure of reasons or material to court is very closely related with the question of onus of proof. Under the question of onus of proof the real dispute is whether it is the petitioner who has to prove that the authority did not act in accordance with the statutory limits, or whether it is the administration which has to prove that it acted in accordance with the policy of the statute directing its mind properly, to relevant considerations. At the initial stages of the development of the law relating to control over exercise of discretion the courts were rather reluctant to place the burden to prove legality on the administration, therefore they could exercise control only in the matters where reasons were available to them under the statutory requirement or otherwise. However, realising that this approach restricted the legal control only to very few matters,
slowly the courts started requiring the administration to disclose to them the reasons or material on which the exercise of discretion was based. Recently the courts have also started going to the records behind the affidavit to find real reasons or basis of decision under the principle of disclosure of reasons. Thus the real burden of proving the legality of exercise of discretion has been placed on the administration where it should really rest, because the relevant material is always with the administration and not with the individual. The question of burden of proof was neither raised nor decided in majority of these cases. However, in Narayan v. State of Maharashtra the principle of disclosure of reasons or material to the court has been tried to be explained by the Supreme Court vis-a-vis the question of burden of proof under the Evidence Act, because in this case this question was specifically raised. This is the only comprehensive pronouncement, so far, on the question of onus of proof in actions challenging exercise of discretionary powers. A notification was published by the Maharashtra Government through the Commissioner of Bombay under Section 4 of the Land Acquisition Act, notifying their intention to acquire certain lands. The public purpose recited in the notification was "development and utilisation of the said land as a residential and industrial area." The notification also stated
that in the opinion of the Commissioner the said lands were waste or arable lands and their acquisition was urgently necessary; and therefore the Commissioner was 'pleased to direct under S. 17(4) of the Act that provisions of S. 5A of the said Act shall not apply to the said lands'.

In a challenge to the exercise of discretion under S. 17(4), excluding the inquiry procedure under S. 5A of the Act, the Bombay High Court quashed the notification dispensing with the inquiry under S.17(4), holding that the burden of proving urgency, at least prima facie, was on the Government which it failed to discharge. The court pointed out that while the petitioner had repeatedly asserted in the petition that the inquiry has been dispensed under Section 17(4) without any valid reasons, the government in its affidavit never stated any facts whatsoever and brought no material on record on which its satisfaction was based.

Speaking in terms of the Evidence Act, the High Court held that when the exercise of discretion is challenged on the ground that the authority did not satisfy itself on relevant material, the burden is on the Government to prove that it acted on relevant material because S.106 of the Evidence Act requires that where certain facts are especially within the knowledge of a particular party it must prove them. The High Court also opined that the presumption of regularity
attached to an order containing technically correct recital, under S.114 illustration (e) of the same Act did not apply where S.106 was applicable.

The Government appealed to the Supreme Court. This appeal was dismissed by the Supreme Court through a detailed judgement of M.H. Beg, J. for a bench of three judges. The Court held that in view of the facts and circumstances of the case, the burden of proof was on the Government to establish that it acted on relevant material. As it could not discharge this burden by disclosing to the court the relevant facts and material, its action could not be said to be based on relevant material and the exercise of discretion was invalid as being beyond the power or ultra vires S.17(4) of the Land Acquisition Act. Thus, the Supreme Court agreed with the High Court on its ultimate decision, and also on the point that the real dispute was relating to the burden of proof. However, it differed from the High Court in its approach towards the question of burden of proof.

Unlike the High Court it refused to lay down a very broad and general rule that whenever exercise of power is challenged, the burden of proof is on the Administration to prove legality of its action under Section 106 of the Evidence Act; and Section 114 illustration (e) of the same Act has no application in these cases.
In his judgement Beg, J. referred particularly to S.101 and 102, 106 and S.114 illustration (e) of the Evidence Act. Section 101 and 102 embody the general rule relating to an overall onus of proving the case. These sections provide that a party who desires to move the court must prove all facts necessary for that purpose. S. 106 which is an exception to this general rule provides about the onus of proof relating to particular facts. This section provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. S.114 illustration (e) raises a presumption of fact that official acts have been regularly performed.

About the presumption of fact under S.114 illustration (e) of the Evidence Act, Beg J. pointed out that though an order or notification, technically correct raises a presumption of fact, this presumption is a rebuttable presumption and can be displaced by circumstances indicating that the power vested in an authority has not been exercised in accordance with law. On this point he made the following observation:

"....even a technically correct recital in an order or notification stating that the condition precedent to the exercise of a power have been fulfilled may not debar the court in a given case from considering the
question whether, in fact, those conditions have been fulfilled, and a fortiori, the court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case.... If it appears upon an examination of the totality of the facts in the case, that the power.... has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that the exercise of power could only serve some other or collateral object, the court will interfere. 

The above observation lays down the principle that inspite of the presumption of fact under Section 114 illustration (e) the court can go into the question of legality of exercise of discretion. Thus establishing the principle of judicial review, Beg, J. went to the question of burden of proof and inter-relation between S.101, 102, 106 and S. 114 illustration (e).

On the question of General or overall onus he observed:

"We think that the original or stable onus laid down by S. 101 and S. 102 of the Evidence Act cannot be shifted by the use of S.106 of the Evidence Act, although the
particular onus of proving facts and circumstances laying especially within the knowledge of the official who formed the opinion which resulted in the notification under S. 17(4) of the Act rests upon that official." 77.

About the inter-relation of S.114 illustration (e) and S. 106 he observed,

"The recital, if it is not defective may obviate the need to look further. But there may be circumstances in the case which impel the court to look beyond it. And, at that stage S. 106 of the Evidence Act can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital 78.

About the question what may constitute the defective recital and what is its effect Beg, J. held that where the recital in the order or notification was defective as not indicating material or circumstances on which the order was based, the presumption under S. 114 illustration (e) will stand displaced and the petitioner may be said to have discharged his general onus. The burden then rests upon the State to remove the defect by showing that some exceptional
circumstances existed which necessitated the elimination of an enquiry under S. 5A.

Applying the law laid down above to the facts of the case Beg. J. pointed out that all schemes relating to development of industrial and residential areas must be urgent in the context of the country's need for increased production and more residential accommodation. Yet, the very nature of such schemes of development does not appear to demand such emergent action as to eliminate summary enquiries under Section 5A of the Act. There is no indication whatsoever in the affidavit filed on behalf of the State that the mind of the Commissioner was applied at all to the question whether it was a case necessitating the elimination of the enquiry under Section 5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under Section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on the need to dispense with the enquiry under Section 5A of the Act. It is certainly a case in which the recital was at least defective. The burden, therefore rested upon the State to remove the defect, if possible by
evidence to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5A of the Act and that the mind of the Commissioner was applied to this essential question. In view of these circumstances he observed:

"It seems to us that the High Court correctly applied the provisions of Section 106 of the Evidence Act to place the burden upon the State to prove those special circumstances, although it also appears to us that the High Court was not quite correct in stating its views in such a manner as to make it appear that some part of the initial burden of the petitioners under Sections 101 & 102 of the Evidence Act had been displaced by the failure of the State to discharge its duty under Section 106 of the Act. The correct way of putting it would have been to say that the failure of the State to produce the evidence of facts especially within the knowledge of its officials, which rested upon it under Section 106 of the Evidence Act, taken together with the attendant facts and circumstances, including the contents of recitals, had enabled the petitioners to discharge their burdens under Section 101 and 102 of the Evidence Act.\textsuperscript{79} (emphasis supplied)
The above observation of the Court indicates that though the overall burden of proving his case before the court may lie on the individual challenging the exercise of discretion, the discharge of this burden may be made easier by requiring the administration to disclose the material or reasons to the court, as they are especially within the knowledge of administration; and the presumption of fact under Section 114 illustration (e) can be easily discharged by holding the recital in order or notification as defective by strictly applying the requirement of the statutory provision. For example, in the instant case notification was held to be defective, since it did not disclose clearly that the concerned authority applied its mind to the need of dispensing inquiry.

There have been various cases\textsuperscript{80} after Narayan wherein disclosure of reasons to court was insisted upon. In some of these cases the Supreme Court specifically stated that once illegality of an action is alleged, it is for the administration to prove legality of its action by disclosure of material or reasons to the court. In these cases again no reference has been made specifically to the question of burden of proof. For example, in Manager Government Branch Press v. D.B. Belliappa\textsuperscript{81} (1979) it was held that where there was a specific charge of arbitrary discrimination, it was
incumbent on the authority to explain the same by disclosing reasons for the impugned action.

In *Swadeshi Cotton Mills v. Union of India* 82 (1981) it was held that existence of the circumstances on which the authority must be satisfied under S. 18-XX of the Industries (Regulation) Act, if questioned "must be proved at least prima facie".

These cases indicate that the courts are prepared to give relief in more and more cases by means of principle of disclosure of reasons or material to the court without entering into the question of burden of proof.

However, in the cases where malice or ill will is alleged on the part of a particular officer, the courts specifically refer to the question of burden of proof and place the burden on the individual challenging the administrative action. Perhaps this might have been the unstated reasons for Beg,J's refusal to lay down a general principle that in no case burden may be on individual.

The above discussion shows that the question of burden of proof under Evidence Act has not hampered the principle of disclosure of reasons to court and the courts have generally required disclosure of reasons or material to them by placing the real burden of proving legality of action on
the administration.

In addition to provision relating to burden of proof, there is one more provision in the Evidence Act, which confers privilege on the Government not to disclose material on record if it relates to affairs of State. This provision also could have hampered the development of principle of disclosure of reasons to courts, but this has not happened in fact. What has been the approach of the court towards this principle? This question has been discussed below.

b) Can the Claim of Governmental Privilege not to produce document defeat the Principle of Disclosure of reasons to the court? Section 123 of the Evidence Act 1872 provides that "no one shall be permitted to give any evidence derived from unpublished records relating to any affairs of the State, except with the permission of the officer at the head of the department concerned who shall give or withhold such permission 'as he thinks fit". This section, on its face, seeks to confer a very broad immunity on the Government. As a result of this provision a document which is material and relevant could be allowed to be withheld from the court and the principle of disclosure of reasons or material to the court could be easily defeated. However, in fact, this has not happened because, simultaneously with the
development of the principle of disclosure of reasons of material to the courts, another principle was also developed, namely, the principle that the Government has no absolute privilege under Section 123 and the courts can inspect or go through the documents with respect to which privilege has been claimed. Therefore, a brief account of the development of law relating to Governmental privilege, showing as to how the courts claimed to inspect the material, even in face of a claim of privilege may not be out of place.

In the beginning the courts used to hold that if the head of the department or the concerned officer claimed a privilege not to produce document in public interest his decision was final and the court would not inspect the documents. The rationale behind this approach was that where a conflict arises between public interest in non-disclosure and private interest in disclosure, the latter must prevail. The test for determining public interest in these cases was: that the concerned officer may be satisfied either (i) by having regard to the content of the particular document in question or (ii) by the fact that document belongs to a class, which irrespective of their content must be withheld in public interest. However, the existence of public interest was a matter to be conclusively decided by the officer or the Minister concerned. Since many challenges to Governmental action could
be thwarted by a claim of privilege this approach was severely criticised.

Then came the leading English case of Conway v. Rimmer (1968) which has been regarded as a historical judgement in this area both by English and Indian Courts. In this case the House of Lords changed the very rationale of the previous approach and held that in case of a claim for Crown privilege the conflict is not between public interest and private interest, but there are two aspects of public interest clashing with each other. There is the public interest that harm shall not be done to the nation or public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. The court has to decide which predominates. The court should investigate the Crown's claim and disallow them if on balance the need for secrecy was less than the need to do justice to litigant. For this purpose there is a residual power in the court to inspect the document and the statement of the Minister in affidavit cannot be accepted as conclusively preventing a court from ordering production of any document.

The House of Lords in this case severely criticised the overworked argument that the whole classes of official
documents should be withheld at whatever cost to the interest of litigants, for the sake of 'freedom and candour' of communication with and within the public service. They pointed out that though certain class of documents ought not to be disclosed whatever their content may be, such as cabinet proceedings, criminal investigation, national defence, or foreign affairs, but there is a difference between such documents and routine reports. The court can decide whether the document in question ought to be produced in evidence and to decide this, the judge may see the document without showing it to the parties. This shows that the House of Lords could order production even in face of a class claim. The principle in Conway v. Rimmer has been followed in subsequent English cases. Following the above principle, in a recent English case an injunction was refused against publication of Crossman Diaries, since the Cabinet materials contained in them were about 10 years old and no longer required protection of public interest. This development in England seems to be influenced by the ideal of open Government, propounded in the Frank Committee Report.

The recent trend set by Conway v. Rimmer has been followed by the Supreme Court of India in State of U.P. v. Raj Narain (1975). In this case Ray, C.J., speaking for (himself and Alagiriswami, Sarkaria and Untwalida, JJ.); and
Mathew J. in his concurring opinion held that the basis of the doctrine of privilege is injury to public interest, i.e., if certain documents are disclosed then it may injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice. The court should have the fullest access to all relevant materials while balancing these two interests. Unless a document belonged to a class by the very nature of which it deserved immunity, the court have a power to inspect a document to satisfy itself whether it needs to be protected in public interest.

It seems that the Supreme Court in Raj Narain, still obsessed by the class doctrine, was hesitant to lay down a rule that the courts can look into document where a class claim is made. However, the misgivings about class claims have been clarified recently by Bhagwati, J. (as he then was) in S.P. Gupta v. President of India\textsuperscript{92} (1982) (popularly known as the Additional Judges case). In this case Bhagwati, J. has brought the law in India on par with the recent trend in England and America. The instant case involved the exercise of executive discretion in the matter of appointment and transfer of the judges of the High Courts under Article: 222, 217 and 224 of the Constitution. Although the observations
on the point of privilege were made with respect to the exercise of power of appointment of or extension of additional judges, these were also made applicable to the cases of transfer of the High Court judges.

In the appointment of an additional judge of the High Court and in his continuance after the initial period of two years, the Chief Justice of the concerned High Court and the Chief Justice of Supreme Court have to be consulted by the President. In the instant case some correspondence took place between law minister and the two Chief justices. The relevant question was whether the correspondence between the law minister and the Chief Justices ought to be produced in the Supreme Court so as to enable it to judge the validity of the non-continuance of an additional judge in the Delhi High Court. Government claimed class immunity with respect to this correspondence under S.123 of the Indian Evidence Act. It was argued that the correspondence between the law minister and the Chief Justices and notings made by them belonged to a class which was immune from disclosure in national interest, and for maintaining public confidence in judiciary. The Supreme Court rejected the Government's claim to privilege. The majority consisting of Bhagwati, Gupta, Tulzapurkar, Desai, Pathak and Venkataramaiah, JJ. held that correspondence must be disclosed to the court. The principle opinion on the
question was delivered by Bhagwati J. with whom the other judges concurred. Bhagwati, J. held that the court has power to inspect the documents in question and then decide whether exclusion of the document is in public interest. This necessarily involves a balancing of the public interest in the administration of justice and the public interest served by non-production of document. So far the holding of Bhagwati, J. is a reiteration of law laid down in Raj Narain's case, but he went further and clearly held that the government did not enjoy immunity from production of document merely on the basis of class doctrine. Even in the case of a claim for immunity on the basis of 'class' the court has to perform a balancing act between two competing aspects of public interest - whether public interest which requires production of document is more or less than the public interest in denying its production. About the claim of class immunity Bhagwati, J. made the following weighty observation:

".....the law must now be taken to be well-settled that the immunity is not absolute. The public interest in non disclosure of a document belonging to this class may in an appropriate case yield to the public interest..... in the administration of justice, the
court should have the fullest possible access to every relevant document and in that event, the document would be liable to be disclosed even though it belongs to the protected class. The executive cannot by merely invoking the scriptural formula of class immunity defeat the cause of justice by withholding a document which is essential to do justice.

...... for otherwise the doctrine of class immunity would become a frightful weapon in the hands of the executive for burying its mistakes, covering up its inefficiencies and sometimes even hiding its corruption. Every claim for immunity in respect of a document, whatever be the ground on which the immunity is claimed and whatever be the nature of document, must stand scrutiny of the court with reference to one and only one test namely, what does public interest require disclosure or nondisclosure. The doctrine of class immunity is no longer impregnable, it does not any more deny judicial scrutiny, it is no more a mantra to which the court pays obeisance" 93 (emphasis supplied).

The above observation reveals that now even in face of 'class' claim the court can examine the document though they may not be disclosed to the party. Thus claim of
Governmental privilege does not hamper the principle of disclosure of reason or material to the court in any way.

About the approach which should be adopted by courts in dealing with class claim Bhagwati, J. rightly pointed out that the class claims should be upheld very rarely and the court must move in the direction of attenuating the protected 'class' or 'classes' of documents, because by and large secrecy is the badge of an authoritarian Government.

About the need for disclosure of material or document to Court in the present case he pointed out that non-appointment of an additional judge for a further term can be assailed only on two grounds firstly, that there was no full and effective consultation by the Central Government with the Chief Justices of the Supreme Court and the concerned High Court, secondly, that decision is malafide or based on irrelevant considerations. These two grounds cannot be made good by the petitioner unless correspondence between Law Minister, Chief Justice of India and Chief Justice of the High Court and the relevant notings are disclosed. Apart from these documents there would be no other documentary evidence available to the petitioner to establish that there was no full and effective consultation
or that the decision of the Central Government was based on irrelevant considerations. To accord immunity against disclosure to these documents would be tantamount to summarily throwing out the challenge against discontinuance of the additional judge. It would have the effect of placing the Union of India, whose decision is challenged, in an unassailable - almost invincible position where it can, by claiming 'class' immunity in respect of these documents, ensure the rejection of writ petition. The harm that would be caused to the public interest in justice by non-disclosure would in the circumstances far out weigh the injury which may possibly be caused by their disclosure. The discontinuance of an additional judge, if malafide or based on irrelevant grounds, is a serious matter as it would tend to affect the independence of judiciary95. He rejected the argument of possible injury to public interest based on the ground that it may inhibit those in authority to express views with candour. In this respect he observed that the Chief Justices of High Court and the Supreme Court are made of much sterner stuff and they would not flinch and falter in expressing their frank and sincere views only because there is a chance of the document being made public sometimes in future96.
It may be noted that Fazal Ali, J., who gave a separate judgement on the point of governmental privilege, did not agree with the approach of Bhagwati J. towards 'class' claims. He also expressed his dissent on the ultimate decision of the majority that the correspondence must be disclosed in the present case. However, in spite of his dissent he held that the court can look into documents for deciding claim of privilege, once the correspondence has already been produced before it.

Thus in view of above discussion it can be said that Governmental privilege under S. 123 of the Evidence Act does not constitute an impediment to the principle of disclosure of reasons or material to the court. In addition to above privilege there is one more important provision in Article 22(6) of the Constitution which confers privilege on the administrative authority to refuse disclosure of the facts or material in public interest in the area of preventive detention. The question is what could be the effect of this provision on the principle of disclosure of reasons developed under Article 22(5) of the Constitution. As the administration has not invoked this privilege in majority of cases in this area, the question of inter-relation between Article 22(5) and 22(6) of the Constitution has not
been decided so far. However, in view of the above development of law relating to Governmental privilege, it is possible to predict that when such question arises in future, the courts may not attach finality to the Government's claim of public interest under Article 22(6) and may demand disclosure of material to themselves.

The above discussion reveals that for the purpose of controlling exercise of discretion the courts have developed some general principles regarding their approach. These principles which are inter-related very closely with each other are: (i) There is nothing like unfettered or absolute discretion; (ii) every discretion is coupled with the duty to act legally; (iii) In order to show that the administration has acted legally and not absolutely it must disclose reasons or material on which exercise of discretion is based to the court. These principles have not been defeated by the principles of Evidence Act relating to burden of proof or Governmental privilege. With the development of the above three principles the scope of legal control over exercise of discretion has been tremendously increased. This is evident from the fact that in the recent cases the Supreme Court has shown its readiness to review even the exercise of discretion by the President of India in the matter of transfer and
appointment of judges of the High Court98, in the matter of grant of pardon99 and in the matter of dissolution of State Assemblies and imposition of President's Rule under Article 356 of the Constitution100. In view of the similar judicial approach in England, H.W.R. Wade has rightly made the following observation:

".....it makes no sense to ask whether there may be unreviewable administrative action. Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion, at any rate in the case of statutory powers. The question which has to be asked is what is the scope of judicial review"101.

The above observation indicates that today the more important questions are: how the legal controls under the substantive statutory limits operate; and to what extent do the courts go in giving relief against abuse or misuse of discretionary powers, and what should be the extent to which the courts should go in giving relief to an individual? It has been attempted to answer these questions with the help of judicial pronouncements, under the well-known heads of the substantive limits on the exercise of discretion mentioned in the beginning,
5.2.2 Categories of Substantive Limits:

In several cases, Courts have used the substantive limits to control the exercise of discretion. These limits can broadly be divided into eight heads and are discussed below.

5.2.2.1 Exercise of Discretion for Improper Purposes:
Exercise of discretion as a power for achieving any purpose other than the one for which the power has been given by the statute is known as the exercise for improper, collateral or extraneous purpose. Sometimes it is also called as colourable exercise of power. The exercise of discretion for improper purpose is liable to be struck down as invalid because it is beyond the power of the authority.

In some cases the exercise for improper purpose may be apparent from the administrative order itself. In these cases there is no need to go to the real reasons for the exercise of power and the order can be struck down by the court only after the interpretation of the purpose of the statute. For example, in the case of Ram Manohar Lohia v. State of Bihar 102 (1966) the Supreme Court struck down an order of preventive detention which was passed for the purpose of maintenance of 'law and order', while the relevant statute
provided for passing of such an order only for maintenance of 'public order'103.

Recently the Karnataka High Court struck down a grant of land by a Corporation for the purpose of construction of an auditorium, while the land was reserved for the purpose of public garden104. However, such cases wherein the order itself shows that it was for improper purpose are very few, generally the administrative orders look on their face to be for proper purpose, because of the broad phraseology used in the statute while vesting the power, and if the claim of the administration as acting for proper purpose, would have been taken on its face value, then the relief under the above heading would have been limited to very rare cases. But this has not happened in fact. To determine the real purpose of exercise of discretion in case of challenge on the ground of improper purpose the courts have gone to the real reasons or material on record before the administrative authorities. In cases where by going through the material on record the court finds that the authority had no relevant reasons or material for exercising discretion for the apparent purpose for which power has been claimed to be exercised, it strikes down the administrative order on the ground of improper purpose. For example, in
Smt. S.R. Venkataraman v. Union of India\textsuperscript{105} (1979) an order of compulsory retirement was struck down by the Supreme Court on the ground that it was passed for improper purpose. In the instant case P.N. Singhal, J. held on behalf of the Court (consisting of himself and O. Chinnappa Reddy, J.) that an order of compulsory retirement under Fundamental Rules 56(j)(i) must only be in public interest which is the statutory purpose, and as the record of the case did not reveal any reason to show that the retirement was in public interest the power was exercised for unauthorised or collateral purpose. Similarly in Achhelal Singh v. State of Bihar\textsuperscript{106} (1980), the Patna High Court struck down a land acquisition order on the ground that it was not for 'public purpose' but a colourable exercise of power, because the concerned authority did not consider the relevant administrative instructions; and the fact that the villagers were ready to give another equally suitable site was also not considered by them. Similarly, an order requisitioning a house apparently for accommodating a Government servant was struck down by the Nagpur High Court, on the ground that it was really passed for the purpose of ejecting a tenant because of the religious susceptibilities of the land lady\textsuperscript{107}. An order requisitioning the property ostensibly for State requirement was struck down by the Punjab and Haryana High Court on the ground that it was really requisitioned
for a co-operative society. Recently in Elgin Properties v. State of West Bengal (1983), an order of requisitioning of certain property, ostensibly for the benefit of public was struck down by Calcutta High Court on the ground that it was really passed for the purpose of enabling a private company to occupy the premises at cheap rate, even though a decree of eviction was passed against this company by the civil court. In this case after a detailed examination of the material on record the court came to conclusion that there was no material to justify the opinion that the property was required for public purpose. However, the court refused to hold the Government order as malafide or passed in bad faith.

In the area of preventive detention, it has been held by the Supreme Court in some cases that the statutory power for the purpose of preventive detention cannot be used as a substitute for a normal criminal prosecution. For example in Srilal Shaw v. State of West Bengal (1975) a bench of the Supreme Court consisting of Chandrachud, M.H. Beg and A.C. Gupta JJ. quashed the preventive detention order on the ground of colourable exercise of power because the power was exercised not for the purpose of preventive detention but as a substitute for criminal prosecution. The main ground on which the order of preventive detention was
based was that he had stolen the Railway property. By going through the material on record the court found that on the same ground a criminal prosecution was dropped against him because he had certain evidence to show that property was not stolen. The Court held that this showed that preventive detention order was passed as a substitute for criminal prosecution. Similarly in the recent case of *Vijay Narain Singh v. State of Bihar*¹¹⁴ (1984) Venkataramaiah, J. (speaking for himself and O. Chinnappa Reddy, J.) stated:

"It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirement of the legal provisions authorising such detention"¹¹⁵.
In the instant case as the material available was found to be irrelevant, the order of preventive detention was struck down as being for improper purpose, and based on irrelevant considerations.

The discussion of above cases reveals that the exercise of discretion for improper purpose has been struck down by the Supreme Court and the High Courts on the ground that it was beyond the power of the authority. For this the principle disclosure of reasons or material has enabled them to find out the real purpose of the exercise of power. Another inter-related principle of control, which has been used in more number of cases is as follows.

5.2.2.2 **Exercise of Discretion based on Irrelevant Considerations, and not on relevant Considerations:** While exercising a discretionary power the concerned authority must take into account only relevant considerations and must not act upon irrelevant considerations. If the authority takes into account irrelevant considerations then such an exercise of discretion is invalid being *ultra vires* or beyond the statutory power.

Sometimes the relevant considerations have been expressly provided in the statutory provision in the form of guidelines. In cases where these guidelines have not been
taken into account, the exercise of discretion has been struck down by the courts. For example in *J.P. Kulshrestha v. Allahabad University*\(^ {116} \) (1980), the appointment of some persons to the post of Readers in English Department of Allahabad University was struck down by a bench of the Supreme Court (consisting of Krishna Iyer, A.D. Koshal and O. Chinnappa Reddy, JJ.) because the statutory guidelines were not followed. In the instant case the minimum qualifications for Readers were laid down by Ordinance 9(2) under S. 32(2) of Allahabad University Act, according to which the persons holding First Class or High Second Class Master's Degree were eligible for appointment and this qualification was not relaxable by Selection Committee under the relevant provisions. The Selection Committee appointed some persons having the percentage of only 52.2%, 49.3%, 53.8%, 54.5%. This was held to be violative of the statutory powers of the Selection Committee. Speaking for the Court Krishna Iyer, J. pointed out that this qualification was the essential minimum which should have been followed by the Selection Committee while exercising its discretion in the matter of appointment of persons. He also rejected the argument on behalf of the University that the Court should not interfere with the judgement of academicians when the dispute relates to educational affairs and pointed out that
".....University organs, for that matter any authority in our system, is bound by the rule of law and cannot be a law unto itself"\textsuperscript{117}.

The recent case of \textit{Master Ashwini Kumar v. Board of School Education} \textsuperscript{118}, (1984), decided by the Himachal Pradesh High Court constitutes another important illustration on the point. In this case, the principle of following relevant statutory guidelines, together with the court's approach of going to the records, enabled the court to give relief to a bright High School student who would have suffered a great deal of injustice through the highhandedness of the concerned authorities. The facts of the case were like this: the petitioner who secured the total of 832 marks stood first in the High School in the State of Himachal Pradesh. The second respondent, who secured 825 marks got second position. The 2nd respondent applied for revaluation of marks, in the paper of Urdu, one of the subjects offered by both of them. As a result of this revaluation, his marks were increased in Urdu from 59 to 70. Consequently the merit list was reversed and the second respondent was given first rank. The revised merit list was challenged by the petitioner on the ground that (i) the revaluation was secured through undue influence of second respondent's father who was Deputy District Education Officer and had a great influence
in the Board of School Education and (ii) that the revaluation was based on irrelevant considerations. The High Court asked the authorities to produce the answer books of the two students and required the concerned examiners to revaluate them in the court's presence. The revaluation of the answer book of the second respondent in the court revealed that he was given inflated marks. In the first revaluation he had secured 68 and 71 from the two concerned examiners, whereas in the second revaluation before the court he got only 60½ and 63½ which were less than the petitioner's 65 marks which remained the same in revaluation before the court. The examiners explained discrepancies in the second respondent's marks by saying that the relevant guidelines were not made available to them at the time of first revaluation of his paper. In view of this the court held that since the revaluation was done by examiners without following the relevant statutory guidelines the revised list was liable to be quashed. Thus the principle of relevant consideration together with the court's approach of going through the record and examining the concerned examiners enabled it to find out the illegality. Although in the instant case the court did not base its decision on the ground of undue influence or malafide, it felt constrained to observe that the case looked more a case of
calculated move and conspiracy among certain persons in authority to deprive the petitioner of his well earned position in the merit list. The court made a scathing attack on the working of the educational authorities and examiners; and pointed out that it is beyond one's imagination as to how the omission on the part of the authorities in not supplying the prescribed guidelines could escape the notice of either of two examiners. Again when there was an increase of 18% in marks then why the authorities of the Board did not consider it advisable to enquire into the matter when rules required such an action.

The case of Master Ashwini Kumar constitutes a great hope to the affected students in the prevailing situation in the country where many cases of misuse of money power and other power, tampering with the merit lists of the examinations do occur.

The exercise of discretion in fixing the price of sugar, an essential commodity was struck down as illegal because it had not been fixed by the authorities by taking into account the relevant guidelines\textsuperscript{119}. However, these guidelines are not held to be exhaustive and other relevant considerations may also be taken into account while fixing price\textsuperscript{120}.

Similarly an order rejecting a tender for the grant
of exclusive privilege for supply of country liquor was struck down as the discretion was not exercised in accordance with the relevant guidelines provided in the conditions of the contract under the U.P. Excise Act 121.

The cases mentioned above related to the statutory provision where relevant considerations for the exercise of discretion were provided, however, it may be noted that such statutory provisions are very few, and in general the discretionary powers are conferred in very broad terms. If the courts had refused to review the exercise of discretion under these widely worded statutes then the scope of legal control would have been very limited, but this has not happened because the courts have not adopted such a restrictive attitude. In the cases where the statute does not fully spell out relevant considerations the courts do determine the question whether the administrative authorities have acted on extraneous or irrelevant considerations, or whether they omitted to take into account relevant considerations. To answer this question the courts interpret the statutory provision under which the power was exercised in the light of purpose, policy and tenor of the statute as a whole; and do not confine themselves only to the wordings in that particular provision. As the relevant considerations which must be taken into account constitute a statutory limit on the exercise of power, and
the power of statutory interpretation lies with the court, the say of administration on this point has not been regarded as final. The approach of the courts in this respect is well illustrated by the Supreme Court decision in R.L. Arora v. State of Uttar Pradesh\(^{122}\) (1962). In this case a piece of land was acquired by the Government under Section 40 & 41 of the Land Acquisition Act for a private company for construction of a textile machinery parts factory. Under Section 40 of the Act Government could give its consent for acquisition for a private company if it was satisfied that such acquisition is for "some work which is likely to prove useful to the public". The Government gave consent on the ground that the product of the company will be useful to the public as the public shall be able to go upon the works for the purpose of business. This was held to be an irrelevant consideration. The majority (consisting of Gajendragadkar, Wanchoo and Rajagopala Ayyangar, JJ.) struck down the order on the ground that while giving consent under the concerned section the Government was to be satisfied about the fact that the "work was directly useful to public" and not about the fact that work was going to be indirectly useful to public.

\textit{State of Bombay v. K.P. Krishnan}\(^{123}\) (1960) constitutes another important example on this point. In this case a five
judges bench (consisting of B.P. Sinha, C.J., J.L. Kapur, P.B. Gajendragadkar, K. Subba Rao and K.N. Wanchoo, JJ.) of the Supreme Court struck down the order of the Government refusing to refer an industrial dispute under Section 12(5), read with Section 10(1) of the Industrial Disputes Act and granted a mandamus against the Government directing it to reconsider the case on relevant considerations. The Government had refused to refer the Industrial Dispute for the reason that the workmen 'resorted to go slow during the year 1952-53'. While holding this reason as irrelevant, Gajendragadkar, J. (as he then was) speaking for the Court, pointed out that when the Government considers whether or not it should exercise its power to make a reference it would not be open to them to introduce and rely upon wholly irrelevant or extraneous consideration under the guise of expediency. Even in dealing with the question as to whether it would be expedient or not to make the reference, Government must not act in a punitive spirit but must consider the question reasonably and take into account only relevant facts and circumstances. As in this case Government acted in punitive spirit against the workmen for resorting to go slow tactics during certain period, its action was not in accordance with the requirement of the section. Giving some examples of relevant and irrelevant considerations he stated that it
may for instance be open to the Government to inquire whether the dispute raises a claim which is very stale, or which is opposed to the provisions of the Act, or is inconsistent with any agreement between the parties. But it would not be legitimate for the Government, for instance, to say that it does not like the appearance, behaviour or manner of secretary of the union, or even that it disapproves of the political affiliation of the union which has sponsored the dispute. Such considerations which would be wholly extraneous must be carefully excluded in exercising the wide discretion vested in the Government. The principle in K.P. Krishnan has also been followed in other subsequent cases relating to refusal of reference of industrial disputes. In the recent case of Ram Avtar Sharma v. State of Haryana (1985) a bench of the Supreme Court (consisting of D.A. Desai & Ranganath Misra JJ) struck down the Government's refusal to refer an industrial dispute and directed them by mandamus to reconsider the question of reference of dispute. In the instant case the Government refused to refer the case of the petitioner to the Industrial Tribunal for the reason that his services were terminated only after the charges against him were proved in a domestic inquiry. Speaking for the Court Desai, J. pointed out that the assumption underlying the reasons assigned by the Government is that the enquiry was consistent with the
rules and the standing orders, that it was fair and just and that there was unbiased determination and punishment was commensurate with the gravity of misconduct. He held that these were the considerations which were irrelevant for the exercise of power by the Government because while deciding the question of expediency in referring a dispute the Government cannot decide upon the merit of the case and come to the conclusion that it need not be referred. Section 10 requires the appropriate Government to be satisfied that the Industrial Dispute exists or is apprehended. This may permit the Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus and not for justice or industrial peace and harmony, but this does not entitle the Government to adjudicate on the dispute which is the function of the Tribunal. Thus by acting on the above reasons Government acted on irrelevant consideration.

The above cases illustrate that the exercise of discretion may be struck down on the ground that Government acted on irrelevant considerations. In addition to it, the exercise of discretion may also be struck down on the ground that some important relevant consideration was omitted to be considered and the weightage was given to less important facts. For example in Rampur Distillery Co. v. Company Law
Board\textsuperscript{126}, the decision of Company Law Board under S. 326 of Company Act 1956 was held invalid by the Supreme Court on the ground that it omitted to take into account the relevant consideration. In this case the Board refused to give its approval for renewing the managing Agency of a Company which had been the managing agent of Rampur Distillery since 1943. Section \textsuperscript{5} 326 confers a very broad discretion on the Board to refuse the approval if in its opinion the proposed managing agent is not a fit and proper person. The reason given by the Board for refusing approval was that a commission of enquiry headed by Justice Vivian Bose had severely criticised the dealing of managing director of the managing agent. In the view of the commission, the managing director of the managing agent was guilty of grossly improper conduct in relation to various companies in the year 1946-47. Although the Court did not dispute that the past conduct of the managing agent was a relevant circumstance in considering the question of fitness, but it pointed out that the board should also have taken into account the present acts and activities of the managing agent. Since the Board did not take into account these more important considerations, its action was held bad. Similarly in the recent case of Baldev Raj Chadha v. Union of India\textsuperscript{127}, (1981) a bench of the Supreme Court consisting of Krishna Iyer and R.S. Pathak, JJ. held that an order of compulsory retirement
against Baldev Raj was invalid because while passing this
order the Government took into account a remotely connected
fact that long ago his efficiency was not good and omitted
to take into account the proximate consideration that dur-
ing his 14 years of service he was allowed to pass efficiency
bar and also during the period of five years immediately pre-
ceding the order in question there was no adverse entry against
him.

The principle requiring administration to take into
account the relevant considerations and not to act on the
irrelevant considerations has been applied by the Supreme
Court and the High Courts in the various areas involving exer-
cise of broad discretionary powers. On this point, some
illustrative cases are as follows. It has been held that the
Government's satisfaction under Section 17(4) of the Land
Acquisition Act, in dispensing the inquiry under Section 5A
must be based on the relevant considerations and not upon
irrelevant considerations. Thus, the need for acquisition
of a property for the development of an area as 'for indus-
trial and residential purposes' by itself has been held to
be irrelevant for arriving at the subjective satisfaction
under S.17(4), unless coupled with such other considerations
which show an urgent need to dispense with the statutory
inquiry.
Similarly mere need to acquire land for the 'planned development of Delhi', the need of land 'for housing landless workers and for extention of gaothan' have been held as irrelevant, and as the considerations showing the emergent or urgent need to dispense with the inquiry were not taken into account the orders under S. 17(4) were struck down. The subjective satisfaction about the need for acquisition of a particular property for a public purpose must be based on relevant consideration, thus an order of acquisition of certain land, for rehabilitating flood victims, passed without taking into account the relevant report of inspecting officer pointing out that there were other equally suitable and cheaper lands was struck down. Investigation into affairs of a company under S.237(b) of the Companies Act cannot be ordered on irrelevant considerations, thus, an order of investigation into affairs of a company on the ground that 'there was delay faulty planning resulting in double expenditure and losses to the company causing fall in its share price and resignation of eminent persons from Board of directors', was struck down as being based on consideration irrelevant to formation of opinion about existence of circumstances suggesting fraud on the part of managing director of the company; similarly the fact that there were several complaints of misconduct against one of the leading
directors of the appellant company in relation to other companies under his control for which he was prosecuted is not relevant for ordering investigation under S. 237(b) of the Companies Act. \(^{133}\) R. 422 of Telegraph Rules empowered disconnection of a telephone on existence of an emergency under this rule disconnection of a telephone on the ground of 'use for satta' was held to be based on irrelevant consideration. \(^{134}\) A final list prepared by the Director under R.2 of Kerala Education Rules, 1959, determining the areas where new schools were to be opened or existing schools were to be upgraded could be reviewed by the State Govt, if the Director omitted to take into account various relevant matters such as need of locality with respect to habitation, backwardness of area, distance between existing schools, the strength of several standards, and other matters relevant and necessary in that connection. An order of review by the State Government of a final list made by director without taking into account the question whether above relevant facts were considered by director or not was held to be based on matters not relevant for exercise of power of review. \(^{134a}\)

In an authorisation for search and seizure under S.105 of the Customs Act, 1962, the spaces requiring particulars of the goods, documents and things which would be useful for or and or relevant to any proceedings under the Act, were left
entirely blank. Also no particulars of intended proceedings were given, the name of the suspected person for alleged offence did not appear on authorisation form. It was held that the authorisation was given by the Assistant Collector of custom without applying his mind to relevant considerations. Reassessment of income-tax cannot be ordered on irrelevant considerations and must be based on relevant considerations. Where the account books of the proceeding and the succeeding years showed much more amount of turnover than the relevant year and the assessee did not produce the account books for the relevant year in spite of repeated notices, the initiation of reassessment proceeding under S. 21 was held proper as these facts were relevant to the formation of the belief of assessing authority that part of the turnover of the assessee had escaped assessment. Refusal to consider the application of the Government for admission to post graduate Medical Course on the ground that officer had not taken prior permission of the Government nor his application was forwarded by the State Government was held improper based on irrelevant considerations, since there was nothing in the concerned Government Officer which provided that the Government servants could not be admitted to post graduate courses without Government's permission. The relevant considerations for fixing minimum wages is the minimum requirement of workers, other considerations such as capacity to pay is not a relevant
consideration. The appointment of the principal by the State Government can be made only on relevant considerations and not on the irrelevant political considerations of keeping its promise to teacher's association. Under U.P. Controlled Cotton Cloth and Yarn Dealers Licencing Order, 1948, renewal of a licence of a dealer cannot be refused on the irrelevant consideration that the applicant dared to approach the court against the executive authority on a previous occasion. Permission cannot be given to landlord to file a suit for ejectment against a tenant on irrelevant consideration that presence of tenant may cause embarasment to landlady.

In the area of preventive detention it has been held in various cases that the subjective satisfaction of the detaining authority must be based on relevant considerations and not on irrelevant considerations. If a ground of detention is not rationally connected with the purpose of detention then it is irrelevant. Even if one of the grounds or reasons is irrelevant to the purpose or object of detention the whole order of preventive detention is vitiated, because the courts have no power to assess in what manner and to what extent each ground or reason for detention operated on the mind of appropriate authority and contributed to the creation of the satisfaction. To say that the other ground which still remains is quite sufficient to sustain the order would be to substitute
an objective judicial test for the subjective decision of
the executive authority. In the light of the above
principles the Supreme Court and the High courts have
struck down various orders of preventive detention even if
one or two grounds out of all grounds of detention has been
found to be irrelevant. For example in the cases of prevent-
tive detention for the purpose of maintenance of public order
it has been held that the term 'public order' covers the acts
of such a nature which cause disturbances of a serious nature,
affecting the even tempo of community at large, and not the
instances of minor disorder affecting some specific individuals
only. Therefore, the ground of assault against a particular
individual or molestation of girls of one family are irrele-
vant to maintenance of public order; similarly the grounds of
being member of an organisation and entertaining its member
or attending its meeting, committing theft, gambling,
excessive drinking and assault, murderous assault on a person,
use of abusive language against the chief justice of a state,
occurrences like arrest for serving whisky in his restaurant
or for alleged recovery of revolver with live cartridges from
the hotel run by petitioner, or a complaint of wife and sister
of a murdered man as to their apprehended danger to their lives
are irrelevant for the purpose of maintenance of public order.
Similarly mere peaceful protest does not disturb public order.
On the other hand a highway robbery using daggers\textsuperscript{151}, murder by member of extremist party with the promoting of party cause\textsuperscript{152} are relevant to the maintenance of public order.

In the same way, mere stocking of huge quantity of diesel does not amount to disruption of essential supplies\textsuperscript{153} or a single act of theft of railway\textsuperscript{154} property is irrelevant to the maintenance of essential supplies. On the other hand engaging in large scale operations of theft of railway property affecting proper running of trains has been held as relevant to the maintenance of essential supplies\textsuperscript{155}.

Grounds not reasonably proximate in time have also been held to be irrelevant for arriving at subjective satisfaction in the matters of preventive detention. For example an order of preventive detention, passed in 1968, based on incident which happened in 1965, was held invalid because it was based on the stale ground\textsuperscript{156}. It may be noted, however, that the test of proximity is not rigid or mechanical and the opinion of the judges may vary on the question as to what is reasonable proximity in a case. This is well illustrated by the two recent cases, namely, \textit{Kamlakar Prasad v. State of Madhya Pradesh}\textsuperscript{157} and \textit{Vijay Narain Singh v. State of Bihar}\textsuperscript{158}. In \textit{Kamlakar Prasad v. State of Madhya Pradesh}\textsuperscript{159} (1984), the majority of the Supreme Court consisting of Vardarajan and O. Chinnappa
Reddy, JJ. quashed the preventive detention order under the National Security Act, 1980, on the ground that the satisfaction arrived in 1983 was based on certain incidents of 1978 and 1980 and as these were stale incidents they constituted irrelevant grounds. On the other hand, Desai, J. in his dissenting opinion held that the grounds of 1978 and 1980 were not stale or stray incidents but they provided genesis of prejudicial activities engaged in 1983. Similarly in *Vijay Narain Singh v. State of Bihar*¹⁶⁰ (1984), certain instances of 1975 and 1982 were held as stale and therefore irrelevant by the majority consisting of Venkataramaiah and O. Chinnappa Reddy, JJ. and on the other hand the same instances were not regarded as irrelevant by A.P. Sen, J. in his dissent. These cases illustrate that it is very difficult to predict which ground may be regarded as irrelevant because of lack of proximity. It appears that the judicial intervention on the ground seems to have been influenced by the nature of the case before them and the feeling of a particular judge about the injustice involved in the case. Thus in *Firat Razakhan v. State of Uttar Pradesh* (1982) wherein the order of preventive detention passed in 1981 was based on two incidents one in 1980 and another in 1981, it was held that the incidence of 1980 was not remote and showed a tendency to incite communal violence. It seems, in this case,
as the case involved a serious matter of communal violence, the Court upheld the order and was not inclined to strike down the order for lack of proximity.

Although there is no bar from passing a preventive detention order on the same fact on which a criminal prosecution was launched or could be launched against a person\textsuperscript{161}, but while applying his mind to need of detaining a person the Magistrate must apply his mind to the facts showing that such prosecution was dropped, or the person was discharged or acquitted, or that the confessional statement of the person was retracted\textsuperscript{162}, etc; and if the subjective satisfaction was arrived at without taking into account these relevant considerations, the order of preventive detention stands vitiated\textsuperscript{163}. For the purpose of judging the question whether the concerned authorities arrived at satisfaction after taking into account relevant material the court can probe into the material before the authority. If discharge or acquittal proceeds on the footing that the charge is false or baseless, preventive detention on the same condemned facts may be vulnerable on the ground that power has been exercised in a malafide or colourable manner.

The fact that at the time of passing of order the person is in jail and cannot engage in prejudicial activities is also a relevant fact and an order passed without taking
into account this fact is invalid.\textsuperscript{164}

Above mentioned cases show that the "relevant considerations" constitute a very important ground of legal control over exercise of discretion in various areas. By its very nature the question of 'relevant considerations' takes the court very close to the merit of exercise of discretion, because it requires them to go into the material or reasons forming the basis of the decision and pronounce upon the question whether the material before the authority was relevant to the purpose of the exercise of power or not. In fact a very thin dividing line seems to remain between the question of relevancy and sufficiency of material. Generally this thin dividing line has been maintained and the judicial intervention on this ground certainly falls short of pronouncing upon merit. However, in some cases the dividing line between merit and legality has been so much blurred that the courts seem to be going into the question of merit by deciding upon sufficiency of material. This may be illustrated by the decision of the majority constituted by Hidayatullah, Shelat and Bachawat, JJ. in Barium Chemicals Ltd. v. The Company Law Board. This case involved the exercise of power under Section 237(b) of the Companies Act, 1956. Under this section the order of investigation can be made by the Central
Government, if in its opinion there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud its creditors or members etc; (ii) that the person concerned in the formation of the company or its management have been guilty of fraud, misfeasance or other misconduct towards the company or any of its members; (iii) that the members of the company have not been given full information about the affairs of the company. The basis of the order of investigation was that there had been delay and faulty planning resulting in double expenditure and continuous losses to the company, as a result of which the value of its shares had gone down considerably; and that some eminent persons had resigned from the board of directors. This basis was held to be irrelevant by the majority. Interpreting the section, the majority pointed out that the circumstances showing fraud must exist as these circumstances did not show fraud they were not relevant. However, the minority constituting of Mudholkar, J. and Sarkar, C.J., thought that the circumstances were not extraneous and they could be taken to be suggesting fraud; and as long as some circumstances for formation of opinion existed the court should not interfere.

In this case since the Government did disclose the circumstances showing some mismanagement in the company
it was open for the majority to hold that there were some circumstances which could arise either as a result of fraud or as a result of misjudgement or miscalculation, and therefore they indicated that the Government arrived in its opinion on the relevant material, however, the majority did not follow this approach, but went further and demanded that before ordering any investigation the circumstances clearly showing fraud must be shown to exist and as these circumstances did not show fraud clearly they were not relevant. This, as well, amounted to saying that the circumstances before the Government were not sufficient. It may be noted, however, that the majority denied that it was going to sufficiency of circumstances and repeated the well known principle of not going to merit.

5.2.2.3 No Evidence Rule: In some cases where the authorities are not able to show any material or relevant material for their subjective satisfaction the exercise of discretion may also be struck down on the ground that the subjective satisfaction was based on no material or no evidence. For example in the recent case of Homesh Kumar v. V.G. Aligarh Muslim University (1985) the Allahabad High Court quashed the order of the University cancelling the petitioner's admission as being illegal and arbitrary and based on no material on the ground that the University authorities failed
to disclose any material before the court on which its
subjective satisfaction that the student secured admission
through fraudulent means was based.

5.2.2.4 Non-application of Mind: Many a times, while striking
down the exercise of discretion on the ground of taking into
account irrelevant consideration, or on the ground of omitt-
ing the relevant consideration, the authorities are said
to be acting without application of their mind\textsuperscript{167}. In these
cases non-application of mind has been inferred from the
fact that the authorities acted on irrelevant reasons or
consideration. However, in some cases the term 'non applica-
tion of mind' has been used to denote the sheer casualness
of the authorities which may be visible many a times from
the order itself. In such cases the administrative action
has been struck down on the ground of non-application of
mind without going into the question whether the authority
took into account irrelevant considerations or omitted rele-
vant considerations. For example in \textit{Jagannatha Misra v.
State of Orissa}\textsuperscript{168} (1966) the Supreme Court struck down an
order of preventive detention for non-application of mind
because the order showed the casual approach of the authority.
In the instant case the order was passed on six grounds men-
tioned in the Rule 30(1)(b) of Defence of India Rules, but
the affidavit of the Minister mentioned only two grounds;
and the various grounds for detention, mentioned in the order were joined by the word 'or' instead of 'and'.

Wanchoo, J. (as he then was), speaking for an unanimous bench of five judges (consisting of himself, P.B. Gajendragadkar, C.J., M. Hidayatullah, V. Ramaswami and P. Satya Naryana Rao, JJ.) held that the discrepancy between affidavit of Minister and the order; and the use of the word 'or' in the order for connecting various grounds clearly showed that the satisfaction of the minister was not arrived at after proper application of mind, but the order was passed following a casual approach. The same principle was followed in Kishori Mohan v. State of West Bengal\(^{169}\) (1972) where an order of preventive detention stating that "it is necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to public order or security of the State," was struck down by the Supreme Court for non application of mind. The Court pointed out that if the authority was satisfied regarding both it would have used conjunctive 'and' not the disjunctive 'or'. Where 'or' is used it would mean that the detaining authority did not apply its mind to the question whether such activities fell under one head or other and merely reproduced the language of the S. 3(1)(a)(ii) of MISA mechanically.
Similarly the **Board of Revenue, Madras v. R.S. Jhaver** (1968)

the Supreme Court struck down a search warrant on the ground of non application of mind by the authority, because while issuing it the authority did not strike out irrelevant portions in the printed form which ought to have been struck down and did not fill up the gaps which should have been filled.

The above cases indicate that 'non application of mind' has been used as an independent ground in a few cases.

5.2.2.5 **Discretion must be Exercised by the Person or the Authority in Whom it is Vested by the Statute**: If the discretionary power is vested in some specific officer or authority by the statute, it means that the legislature has deposed its trust in the capability of the specified officer or the authority, to take discretionary decision in the matter. Therefore, the power vested in him cannot be delegated to some other authority or person. Any action in violation of this principle has been struck down as *ultra vires*.

For example in **Omprakash v. Union of India** (1975) the Supreme Court, (consisting of V.R. Krishna Iyer, R.S. Pathak and A.C. Gupta, JJ.) quashed an order of terminating the services of appellant, a temporary Government servant, because it was not passed by the Director General of Geological Survey of India, who was the authorised person under the relevant
statute. The Director (Administration) who passed the impugned order was held, not to be an authorised person. Similarly in *Dharam Dev Mehta v. Union of India* 172 (1980) an order of compulsory retirement under R. 56(j) was struck down by the Supreme Court (consisting of Krishna Iyer and R.S. Pathak, JJ.) because the order was not issued by the authorised person, namely the Comptroller and Auditor General, but by the Director of Commercial Audit who was not the authorised person.

In the recent case of *Vibhu Kapoor v. Council of I.S.C. Examination* 173 (1985) a full bench of the Delhi High Court held that the decision of the Awarding Committee, cancelling the result of the petitioner was void and illegal because under the relevant rules it had no power to pass such a decision. The court pointed out that only the Council of I.S.C. was the authorised person, and as it did not pass the impugned order, but illegally delegated its function to the committee, the whole action in withholding the result of the petitioner was ultra vires. This principle has also been applied by the other High Courts 174.

The above cases reveal that where discretion is vested in some specified authority then its exercise by some one else is ultra vires. This principle is based on the maxim 'delegatus non potest delegare'. However, it may be noted that
this maxim has not found an unqualified, inflexible or rigid application in the area of administrative discretion, and knowing the exigencies of the modern administration the courts have limited its scope to the cases where the authority who was to exercise discretion was clearly specified. Even in these cases it has been recognised that although the discretion may be exercised by the specified authority, but the ministerial functions may be delegated to other persons. Thus the following qualifications have been recognised to the above principle:

1) There is difference between delegation of power and taking assistance: In Union of India v. P.K. Roy a five judge bench of the Supreme Court (consisting of K.N. Wanchoo, C.J., R.S. Bachawat, V. Ramaswami, G.K. Mitter and K.S. Hegde) held that what cannot be delegated is the ultimate responsibility for the exercise of discretion, therefore, if the administrative authority named in the statute retains in its hand general and final control over the activities of the person to whom it has entrusted some work relating to exercise of power, there is in the eye of law, no delegation at all; and the maxim 'delegatus non potest delegare' does not apply. In other words, if a statutory authority empowers a delegate to undertake, preparatory work and make initial recommendation in the matter, but retains in its hand the
final power to take decision then it cannot be said that statutory authority has delegated its power.

2) President of India: When a statute or some specific Constitutional provision formally vests power in the President, ordinarily the action can be taken in the normal manner in which executive business of the Government is carried on and it is not necessary that the President should be personally satisfied in these matters.\textsuperscript{176}

3) Governmental decisions or Institutional Decisions: Various statutes enacted by Parliament or State Legislatures confer power on the Government. Since Government is not a specific person but an institution, it can only act through its officers in the manner prescribed by the rules of business. Therefore the action taken by its officials under rules of business is the action of Government and there is no delegation of authority.\textsuperscript{177}

4) Where the statute itself authorises sub-delegation then the action taken by the delegate is not ultra vires.\textsuperscript{178}

5.2.2.6 Acting under Dictate: Another principle, closely related to the principle requiring the exercise of discretion only by the person in whom the authority is specifically vested is: that the person or the authority in whom discretion is specifically vested must not act under dictate of some other
authority, but apply its mind independently to the case before him. Any action in violation of this principle is ultra vires and liable to be struck down. For example, in *Commissioner of Police, Bombay v. Gordhandas Bhanji*¹⁷⁹ an order of cancellation of licence was held illegal by the Supreme Court because the discretion to grant or cancel licence for the construction of a Cinema theatre was vested in the Commissioner of Police under the Bombay Police Act, 1902, but he cancelled the licence of the respondent at the discretion of State Government. Similarly in *Purtabpore Company Ltd. v. Cane Commissioner of Bihar*¹⁸⁰, the Supreme Court quashed an order of the Cane Commissioner excluding 99 villages from the area reserved by him in favour of appellant company because in doing so he followed the dictate of the Chief Minister. Following the same principle an order of cancellation of Fishery licence by Collector, passed under the direction of State Government was quashed by the Madras High Court¹⁸¹. Similarly the action of the Hyderabad Municipal Corporation in giving a contract of construction work to a person on the direction of the State Government was held ultra vires by Andhra Pradesh High Court¹⁸².

A significant application of the principle of acting under dictate is the recent decision of the Delhi High Court in case of *Raj Prakash Varshney v. A.D.M., New Delhi*¹⁸³ (1978).
In this case the petitioner, who was director of planning commission (metallurgy expert), was preventively detained under MISA on the ground that his activities were detrimental to the security of India. The allegation against him was that he supplied secrets to CIA. A case was also pending against him under the Official Secrets Act and the Indian Penal Code. By invoking Section 16-A of the MISA the Government refused to give the grounds of detention to the detainee. The detention was challenged on the ground that A.D.M. did not apply his mind to the case before him, but acted on dictate of Home Ministry and Delhi Administration and the Superintendent of Police. While dealing with this challenge a full bench of the Delhi High Court held that although Section 16-A of the MISA dispensed with the necessity of communication of the grounds for the period of proclamation of Emergency, yet there is no warrant in law for the grounds of detention not being in existence. By going through the record the High Court found that no grounds or material was on record before the detaining authority to show that the involvement of the petitioner in the alleged criminal activity would be detrimental to the 'security of India'. The Court found that there were only some letters of certain officers of Home Ministry of Government of India, Home Department of Delhi Administration, and
the Superintendent of Police, requesting the A.D.M. to detain the petitioner and suggesting that Section 16-A should be invoked as it was not possible to supply grounds; the communication to the A.D.M. also stated about some confessional statement by petitioner to the effect that he was removing secrets, however, what these documents were and how they adversely affected the "security of India", was neither placed before the detaining authority, nor it tried to supply its mind to this question. In view of this the court struck down the detention order on the ground that the detaining authority acted under the dictate of the Home Ministry, Government of India, the Home Department of the Delhi Administration and the Superintendent of Police C.I.D.

Reiterating the principle against acting on dictate the High Court observed:

"An authority entrusted with power of discretion must not in the purported exercise of that power act under the dictation of another body or person. It may be true that sometimes authorities entrusted with statutory discretion or power may be obliged to take considerations of public policy and in some context the policy of a Minister or of the Government as a relevant factor in weighing those considerations but this does
not absolve them from their duty to exercise their personal judgement in individual cases.\textsuperscript{183a}

The case of Raj Prakash is very important because in this case the court also rejected the contention on behalf of the administration that the satisfaction had to be on the basis of whatever material was available to the detaining authority irrespective of its relevancy; and had gone to the record to find whether there was any relevant material before the authority on which its independent satisfaction could be said to be based. This was done inspite of Section 16-A which prohibited giving of grounds.

The principle of not acting on dictate of someone else does not mean that the concerned authority cannot take advice of other authorities. However, where the advice comes from the senior authority the court seems to be careful in dealing with the argument that the authority did not act under dictate, but was only given an advice. For instance in Mount Corporation v. Director of Industries\textsuperscript{184}, the Mysore High Court quashed the decision of the Director of Industries rejecting the petitioner's application for essentiality certificate on the ground that he acted on the dictate of the minister. In this case the discretion to grant certificate was vested in the Director of Industries. The State Govern-
ment constituted a Committee consisting of a deputy minister as the Chairman, the Director of Industries and two other officers as members. This committee rejected the essentiality certificate. In a challenge on the ground that Director acted on dictate of the minister, it was argued that committee was only an advisory body. Rejecting this argument the court pointed out that since the deputy minister was the Chairman of the committee, it was not possible for the director to disregard its decision.

5.2.2.7 Discretion must be Exercised by Considering the Merit of each Case: It is a fundamental rule for the exercise of discretionary powers that the authorities must not fetter their discretion and must exercise the discretion by applying their mind to the case before them. As a matter of fact the very purpose of vesting the discretion is the need for necessary individualisation. However, this does not mean that the administrative authorities should not have any guiding norm or policy for exercise of their discretion. In fact the need for a guiding norm or policy has been recognised by the courts in various cases as an important means of curbing abuse or misuse of power. This aspect has already been discussed in Chapter III. The only requirement of this general rule is that the guiding policy or
norm should not be converted into a rigid or inflexible rule, or that it should not be followed mechanically by the concerned authorities. Without applying its mind, if it does so then its action is invalid.

There are a number of decisions by the English Courts on this point, for example in A.G., ex rel Tilley v. Wansworth\textsuperscript{185} L.B.C. (1981) it was held that a local authority cannot resolve to refuse all applications for housing children of families considered to be 'intentionally homeless', since the power to provide housing implies a duty to consider the different circumstances of each child. Similarly in Bromley L.B.C. v Greater London Council\textsuperscript{186}(1982), the House of Lords held that the Greater London Council cannot proceed to make a large subsidy to the London bus and underground services by considering itself bound rigidly by its policy in election manifesto. It was their duty to exercise their discretion under the statute by considering all the relevant interest and demand of the situation.

The above principle also gives rise to need of hearing the affected person. For example in British Oxygen Co. Ltd. v. Minister of Technology\textsuperscript{187}(1971), it was held by the House of Lords that, although a minister having a discretion may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good adminis-
tration requires it, provided that he listens to any applicant who has something to say. In India this principle was applied by the Delhi High Court in *Kumkum v. Principal Jesus and Mary College* 188 (1976). In this case the petitioner and some other students were detained by the Principal of the College from appearing in examinations on the ground of shortage in attendance. This action was taken in pursuance of a policy not to grant permission in such cases. The action was challenged by petitioner that she fell ill and due to this her attendance fell short and without considering her case, she was detained illegally. Holding the action to be invalid the court pointed out that the Principal could not fetter her discretion by strictly observing the policy which was only made for keeping discipline, and she should have exercised her discretion by applying her mind to each case and while doing that she was bound to hear affected students.

The above principle has been applied by the Supreme Court in *Coal Mines P.F. Commissioner v. J.P. Lalla* 189 (1976). In this case Ray, C.J. speaking for the Court (consisting of himself, M.H. Beg and Jaswant Singh, JJ,) held that while exercising his discretion in imposing damage for default in payment of provident fund under Section 10 F of the Coal Mines Provident Fund and Bonus Schemes Act, 1948, the Commissioner is not applying a rigid formula but he is exercising a dis-
cretion; and therefore, he must apply his mind to facts of each case which he must decide after giving an opportunity of being heard to the person concerned.

The above cases illustrate as to how the principle of not fettering the discretion has been applied in India for implying the requirement of fair hearing in some cases where question of natural justice was also involved. However, it seems that in the cases where no question of natural justice may be involved the courts may not take very strict view of this principle. An indication of this approach has been provided by the Supreme Court decision in Shri Rama Sugar Industries v. State of Andhra Pradesh. In this case the Government was given power to exempt from payment of tax any new sugar factory or a substantially expanded sugar factory under Section 12(3) of A.P. Sugarcane (Regulation of Supply and Purchase) Act, 1961, the appellant who substantially expanded certain factories, applied for exemption, his application was rejected by a letter which stated: "that the Government have given careful consideration to your application..... The present policy of Government is to grant exemption from payment to new and expanded sugar factories in the cooperative sector only". The letter also pointed out that besides the appellant factories there were other private factories who also substantially expanded and if he was
granted exemption, the other private units could not be
denied same; and as financial position of Government did not
permit to be so generous therefore his application was regret-
fully rejected.

The action of refusal by Government was challenged on
the grounds that Government fettered its discretion by a
rigid policy. This challenge was rejected by the majority
consisting of Ray, C.J., H.R. Khanna and Alagiriswami, J.J.
Alagiriswami, J. speaking for the Court held that the letter
of the Government showed that the Government applied its
guiding policy only after considering the application of the
appellant. Therefore it cannot be said that the Government
fettered their discretion. However, in his dissenting opinion
Mathew, J. speaking for himself and Bhagwati, J. did not
agree with the majority and held that the Government did
not apply their mind to the appellant's case and felt rigidly
bound by their policy.

The majority decision in Rama Sugar Industries indi-
cates that though the rule against fettering of discretion
has been recognised as a fundamental rule in the area of
discretionary powers, but this has not become an absolute
principle; and the courts may try to balance it with the
need to have guiding principle for the exercise of discretion.
The recent recognition of the equitable doctrine of promissory estoppel in the area of discretionary power also qualifies the rule against fettering of discretion. This aspect has been discussed later, in a subsequent chapter\textsuperscript{191}.

The above grounds of legal control over exercise of discretion do not require proof of dishonest intention, and the action of an officer, even taken in good faith, if suffers from any of the defects mentioned above is liable to be struck down as \textit{ultra vires}. However, in addition to the above grounds the ground of \textit{mala fide} or bad faith also forms the part of doctrine of \textit{ultra vires} because the legislature or Parliament can never intend that the authorities should exercise discretion dishonestly or in bad faith. Approach of the courts under this ground is discussed below.

5.2.2.8 \textbf{Exercise of Discretion in Bad Faith or Malafide}: In some cases the term \textit{malafide} has been used in broad sense denoting the exercise of power for extraneous or irrelevant reasons or for improper purpose\textsuperscript{192}. For example in \textit{State of Punjab v. Ramjilal}\textsuperscript{193}, where the respondent's right of pre-emption was excluded by a notification, issued by the State Government without satisfying itself on the relevant material, it was held by a bench of the Supreme Court consisting of J.C. Shah, Hegde and Grover, JJ. that the notification was not issued in good faith and therefore it was \textit{malafide}. 


In another case the Supreme Court observed:

"malafide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended".\(^{194}\).

The above cases involve legal malice or malice in law. It may be pointed out, though at the cost of repetition, that in the cases of legal malafide, the real burden of proving legality is on the Government and not on the party, this is indicated by the observation of J.C. Shah, J. in Ramjilal, wherein while rejecting the argument of State Government that lack of bonafide on the part of State Government must be proved by the party, he observed:

"The State Government has undoubtedly to act through its officers. What matters were considered, what matters were placed before the final authority and who acted on behalf of the State Government in issuing the order in the name of the Governor, are all within the knowledge of the State Government and it would be placing an intolerable burden in proof of a just claims to require a party alleging malafides of State action to aver in his petition and to prove by positive evidence that a par-
ticular officer was responsible for mis-
using the authority of the State by tak-
ing action for a collateral purpose".194a

The above observation indicates that a person alleg-
ing legal malafides, i.e. extraneous circumstances or extra-neous purpose need not prove what were the matters before
Government or which officer acted for collateral purpose,
but it is for the Government to show that it acted legally
by filing a proper affidavit. As in this case the State
Government filed no affidavit explaining the circumstances
in which the order came to be passed, the order was struck
down.

However, in the present discussion the term malafide
is not being used in the broadsense, but in the narrow sense
which means the exercise of discretionary power with dis-
honest intent or bad motive. The term malafide in this sense
includes the cases of personal animosity, spite, vengeance,
personal benefit to the authority itself or its relations
or friends195. Any malafide action on the part of adminis-
trative authorities is also ultra vires because, it can never
be the intention of the legislature that the power conferred
by it should be used dishonestly or malafide. In the cases
where a charge of dishonesty or personal spite etc. is
made against any administrative officer or Minister, the burden lies on the individual to prove it because the charge of dishonest intention against any officer is very serious charge; and the failure of administration to establish legality of its action may not entitle the individual to get relief on the ground of malafide or bad intention.

Since it is very difficult to establish a bad intent or dishonest motive of any officer or minister, the relief has been given in very few cases on the ground of malafide. In these cases the circumstances of the case were such which prima facie showed a dishonest intent, and in addition to this there was no affidavit from the minister or the officer charged with malafide denying the charges of malafide.

For example in Partap Singh v. State of Punjab, the Supreme Court upheld the claim of the appellant that the disciplinary action against him was started for satisfying a personal grudge of the then Chief Minister. In this case, the appellant who was a civil surgeon in the employment of the State Government was initially granted leave preparatory to retirement. However, subsequently the leave was revoked and he was placed under suspension and a disciplinary action was started against him on the charge that he had accepted
a bribe of Rs.16/- from some patient just before going on leave preparatory to retirement. The appellant challenged the disciplinary proceeding on the ground that, it was initiated at the instance of the chief minister, because he did not oblige him by yielding to the illegal demands, made by him and his wife. To prove his point he pointed out certain sequence of events and produced certain tape recordings of his talk with the Chief Minister. From the above evidence and from the fact that no affidavit was filed by the Chief Minister and his wife denying the charges of the appellant the majority consisting of S.K. Das, Subba Rao and N. Rajagopala Ayyangar, JJ. held that the charge of malafide was established. However, the minority consisting of Raghubar Dayal and Mudholkar, JJ. refused to share the view of majority and required stricter proof of malafide. From the facts of the case it seems that the majority was influenced, to a great extent by the fact that inspite of clear charges showing a prima facie case of malafide against them, the Chief Minister and his wife did not file any affidavit before the Court denying the same. This approach of the majority in Partap Singh has been followed in subsequent cases where relief has been given on the ground of malafide. In G. Sadanandan v. State of Kerala, a five judge
bench (consisting of P.B. Gajendragadkar, C.J., K.N. Wanchoo, M. Hidayatullah, J.C. Shah & S.M. Sikri, JJ.) held a preventive detention order under Rule 30(1)(b) of Defence of India Rules as malafide. In this case the petitioner who carried on a Kerosene Oil wholesale business as Esso dealer at Trivandrum, was detained under the Defence of India Rules by a detention order dated 20th October 1965 for preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to community. Challenging this action before the Court, the petitioner alleged that the detention order was malafide because it was passed at the instance of the Deputy Superintendent of Police (Civil Supplies Cell) who made some false reports against him in order to eliminate him from the business as he was a trade rival to some of his close relatives. For showing that his continued detention was malafide the petitioner relied on the fact that on 24th October 1965 the Kerala Kerosene Control Order came into force and that he could not do business without obtaining licence from that date and as no licence was granted to him under the said order, he could not trade in Kerosene, then how could it be said that his activity as a Kerosene dealer was prejudicial to maintenance of essential supplies. He contended that this factual situation showed that the detaining authority did
not apply his mind to the necessity of detaining him and simply acted for the personal benefit of the Superintendent of Police. In view of this fact, and the fact that the D.S.P. filed no affidavit to controvert the specific charges against him the Supreme Court held the order to be malafide. In the instant case, although the Court agreed that the malafide intent of the D.S.P. who was the reporting authority could not be attributed to the detaining authority, but at the same time it pointed out that for availing this principle the detaining authority must show that it applied its mind carefully to all the relevant material before it. As the affidavit of the Home Secretary was vague and ambiguous, the Court held that the malafide of the D.S.P. could be attributed to the authority as well.

The recent case of State of Punjab v. Gurdial Singh (1980) furnishes one more important instance of the above approach. In this case a bench of the Supreme Court consisting of Krishna Iyer and Pathak, JJ. refused to grant special leave to appeal to the State Government against the decision of the Punjab and Haryana High Court, holding the exercise of discretion under the land acquisition act as malafide. The facts of the case were like this: Way back in 1962, a site was selected, as best suited, for the grain market and a
foundation stone was laid by the then Chief Minister of Punjab. Notification under Section 4, and a declaration under Section 6 were issued for acquisition of the same land. However, as this land belonged to a cousin of one Mr. Bajwa, then a Minister, the acquisition proceedings against this land were denotified and immediately in 1971 the lands of the respondents, were notified for acquisition. This acquisition proceeding was held bad because of malafide by the High Court. The same lands were again sought to be acquired in 1977. This time urgency clause under Section 17(4) was also used. The respondents again assailed the acquisition as fuelled wholly by personal vendetta. The High Court struck it down for malafide. Then the matter came before the Supreme Court under Article 136. The details furnished by the respondents in their affidavit showed that there were two political factions in the area; one was led by Bajwa and the other was supported by the 21 respondents. When Bajwa became a Minister the land of his cousin was saved and the land of respondents was sought to be acquired, to wreck personal vengeance, even though this land was least suited for the purpose in 1971. These acquisition proceedings were quashed as being malafide. Later as a M.L.A. of the party in power in 1977, Mr. Bajwa again influenced the land acquisition authority to acquire the same land.
This order was again quashed by the High Court on the ground of *malafide*.

While holding the exercise of power as *malafide*, Krishna Iyer, J. emphasised the following grounds which established *malafide* in the case:

(i) that Shri Bajwa did not file an affidavit denying the charges of moral turpitude against him; (ii) the High Court took an unusual step of quashing the acquisition proceedings twice on the ground of *malafide*; (iii) the land of the respondents was termed as the least suited for the avowed purpose, namely the establishment of grain market, this fact was clearly pointed out by the Selection Board; (iv) that the resort to the emergency power under Section 17(4) was indefensible because it was not visible how a project pending for years suddenly became so urgent, so as to do away with the minimum safeguard of Section 5A.

Speaking about the way in which the emergency power under Section 17(4) were used Krishna Iyer, J. observed:

"The indefensible resort to Section 17 is evidence of the length to which the executive would go to come to terms with men wielding political power."\(^{199}\)

In his concurring opinion Pathak, J. also emphasised absence of affidavit of Shri Bajwa. He specifically pointed
out that in the absence of any denial of allegations from Shri Bajwa, despite of an opportunity offered to him by Court, and having regard to the history of the case the conclusion was irresistible that averment in writ petition alleging *malafide* must be accepted.

In *B. Krishna Bhatt v. Superintendent of Police* (1980), the exercise of power in the matter of investigation and prosecution by the police under Section 159 of Cr. P.C. was held to be *malafide*. In this case a number of cases were filed against the petitioner by the police at the instance of a Minister and as there was no affidavit from the Minister against whom malicious intention was alleged, the action of the police was held to be *malafide*. This case acquires significance in the present time, because of the large scale political corruption prevailing in the police.

The above cases establish that once the individual *prima facie* establishes *malafide* either by clear description of facts in affidavit, and/or by some other evidence and such clear allegations have not been specifically denied by the person against whom such charges have been made, the courts will be inclined to hold the exercise of discretion to be *malafide*. Thus in the cases where circumstances *prima facie* showed personal grudge, intent to favour a police officer's relative, political vendetta; and the officer or the
Minister concerned made no affidavit personally denying the allegations against him *malafide* was held to be established. However, in the cases where clear allegations regarding the charge of *malafide* has not been made or where these allegations have been specifically denied, the exercise of discretion has not been struck down on this ground\textsuperscript{201}. Because of difficulty in establishing *malafide* this ground has been rarely invoked by the persons affected by the illegal exercise of power. Sometimes the courts also refuse to go into this ground, if illegality of exercise of discretion has been established under other grounds of control\textsuperscript{202}.

A *malafide* intent may not necessarily arise simply because an order of preventive detention is passed on the same grounds on which a criminal prosecution has been launched although such a circumstance requires a closer scrutiny into exercise of power\textsuperscript{203}.

The above discussion reveals that like English Courts, the Indian Courts have also tried to control the exercise of administrative discretion under the various substantive limits implied by them in the statutes; and any action in violation of these limits have been held as *ultra vires* or beyond the power or jurisdiction of the concerned authority. The legal limits, thus recognised and applied are: (i) that the discretionary power must be exercised reasonably, i.e., for proper purpose; on relevant considerations, by the person
authorised, by considering the merits of each case before him, (ii) that the power must be exercised in good faith and not malafide. In addition to these statutory limits there is one more important statutory limit recognised by the courts namely, the authorities must act fairly or in accordance with fair procedure. This aspect has been discussed below under the doctrine of procedural ultra vires.

5.3 CONTROL UNDER THE DOCTRINE OF PROCEDURAL ULTRA VIRES

Sometimes the statute may expressly lay down some procedural requirements. These procedural requirements may be categorised as directory or mandatory by the courts. In India the statutory procedural requirements for exercise of administrative discretion have generally been regarded as mandatory, because they constitute an important safeguard against abuse or misuse of power. Thus non-compliance with the statutory requirements of natural justice, namely, notice and an opportunity of being heard\textsuperscript{204} have rendered the exercise of discretion invalid. Similarly non-observance of the statutory requirement of publication\textsuperscript{205}, consultation with other authorities\textsuperscript{206}, inquiry before taking action\textsuperscript{207}, recording of reasons\textsuperscript{208}, and of passing speaking order\textsuperscript{209}, has rendered the exercise of discretion invalid or ultra
vires. In the same way the statutory procedure requiring
an open auction for granting a contract was held mandatory;
and the grant of contract by Government by a private negotiation
was held void.\(^{210}\)

In the area of preventive detention also the statutory
requirements have been always held mandatory. For instance
in a case where the grounds were not served within the time
specified in the statute the order of detention was struck
down.\(^{211}\) Similarly supply of grounds beyond the normal
period of five days, without recording the reasons for the
delay was held to be violative of section 8(1) of MISA which
required recording of reasons in such cases.\(^{212}\) In a case
where the Advisory Board did not submit its report within the
prescribed period of ten weeks the detention order was held
void.\(^{213}\) In addition to this it may be noted that the consti-
tutional requirements under Article 22(5) have always been
regarded as mandatory procedural requirement, in this area, the
development of law under this Article has already been dis-
cussed in detail in Chapter IV which deals with the control
under the Constitutional limits.

Some of the important cases, interpreting the statutory
procedural safeguards, have been analysed below:

In **State of Uttar Pradesh v. Lalai Singh**\(^{214}\), an order
of the State Government forfeiting a book under Section 81:99A
of Cr. P.C. (Old) was held void by the Supreme Court.

Section 99A authorises the State Government to forfeit a publication on its subjective satisfaction that the matter in it promotes or is intended to promote feelings of enmity or hatred between different classes of citizens of India. The section also requires the Government to state the reasons or ground on which its opinion is based. In the present case, the Government failed to state the grounds expressly in the order for forfeiting the concerned book but in the appendix to the order in question in a tabular form the particulars of the relevant pages and the lines were set out. It was argued on behalf of the Government that the reasons could be implied from order read as a whole. Rejecting this argument Krishna Iyer, J. observed for the Court, (consisting of himself, Bhagwati and S.M. Fazal Ali, JJ.):

"when the section says that you must state the grounds it is no answer to say that they need not be stated because they are implied. You do not state a thing when you are expressively silent about it. To state 'is to declare or to set forth, especially in a precise, formal or authoritative manner, .....' The conclusion is inescapable that a formal authoritative setting forth of the grounds is statutorily mandatory"215.
He observed further:

"Where there is a statutory duty to speak, silence is lethal sin." 216

The statutory requirement to record reasons before exercising the administrative discretion has been held to be a mandatory requirement by the Supreme Court in Raja-
mallaiah v. Anil Kishore 217 (1980). In this case Rule 12 of the Andhra Pradesh Excise Rules 1969, empowered the Collector to change the groupings of the arrack shops made by the Commissioner for giving in auction under certain circumstances. The rule, however, required the Collector to record reasons for disturbing the earlier grouping of the shops. The Collector regrouped the arrack shops without recording reasons and held the auction of the regrouped shops. The order of the Collector was quashed. While holding the requirement of recording reasons as a condition precedent for taking action, O. Chinnappa Reddy, J. speaking for the Court, (consisting of himself and A.P. Sen, J.) observed:

"The object of the insistence upon the recording of reasons is to eliminate arbitrariness. Reasons, if given, substitute objectivity for subjectivity. It is common experience that when reasons are set down in writing greater thought goes
into it and greater objectivity is attained.\textsuperscript{218}

He further pointed out that although it is true that the Government is the exclusive owner of all rights and privileges in regard to intoxicants and no citizen has any right in regard to them, but that was not the question here; the question was whether it is open to the officer entrusted with the task of conducting the auction to vary terms and conditions publicly announced earlier without assigning any reasons when the statutory rules required recording of reasons.

The argument that the reasons could be recorded contemporaneously or soon after the auction was also rejected by the Court on the ground that the statute required them to be recorded before the action.

When the statute requires reasons to be recorded, generally it does not make it clear that whether they are to be disclosed to the persons affected or not. In the leading cases of Union of India v. M.L. Capoor\textsuperscript{219} (1974) and Ajantha Industries v. Central Board of Direct Taxes\textsuperscript{220} (1976), where the statute required recording of reasons, the Supreme Court held that the order of the authority must disclose the clear and not the rubber stamp reasons to the party. In other words in these cases the requirement to record reason was converted into a requirement to make a speaking order. In the case of
M.L. Capoor, the statutory provision was Regulation 5(5) of the Indian Administrative Service which vested discretion in the Selection Committee to revise and review the seniority list. The committee could drop any name from it for the reasons to be recorded by it. Speaking about giving of reasons under this provision, Beg, J. held that while exercising discretion affecting members of a public service, who are entitled to just and reasonable treatment by reason of protection conferred upon them by Articles 14 and 16 of the Constitution, it was incumbent on the Selection Committee to have stated reasons in a manner which would disclose how the record of each officer superseded stood in relation to records of others. The reason given for superseding the petitioner that on an overall assessment, the records of the officers were not such as to justify their appointment were held to be rubber stamp reasons.

In the Ajantha Industries v. Central Board of Direct Taxes the Supreme Court has gone ahead of M.L. Capoor, since in this case the statutory requirement to record reasons was held to be a mandatory requirement to make speaking order, although, unlike M.L. Capoor, this case involved no fundamental rights. The instant case involved exercise of discretion under Section 127 of the Income Tax Act, 1961. This section empowers the Central Board of
Direct Taxes to transfer any case from any income tax officer to any other officer, after giving the assessee a reasonable opportunity of being heard, and after recording the reasons for doing so. The order passed by the Board stated no reasons, therefore, it was quashed by the Supreme Court. P.K. Goswami, J. speaking for the Court, (consisting of himself, K.K. Mathew, N.L. Unwalla, JJ.) held that the section laid down a mandatory requirement that the reasons for the order must be communicated to the assessee concerned or in other words the authorities must pass a speaking order; and mere recording of reasons in file is not sufficient. He pointed out that safeguard of recording reasons was provided to enable the assessee to challenge the order in the High Court under its writ jurisdiction and if the reasons were not available to him, the only safeguard available to the assessee would be rendered nugatory and he will be helpless against an order of transfer of his assessment case which may not only cause him inconvenience but even monetary loss.

In the recent case of K. Yadaiah and others v. Government of Andhra Pradesh (1984), the Andhra Pradesh High Court held that even though the fundamental right to property has been deleted since 44th Amendment, it does not entitle the Government to act illegally. The procedural requirements of Land Acquisition Act under S.4(1) read with S.5A are mandatory and must be followed strictly before
acquiring any land. In the instant case as the publication was not in accordance with S.4(1) of the Act, the order of land acquisition was struck down.

Other statutory procedural requirements have also been held mandatory, for example the statutory requirement to give pay and allowance for the notice period simultaneously with the termination of services of a temporary Government servant was held mandatory in Rajkumar v. Union of India\textsuperscript{223}. In this case the order of termination of services of a temporary Government servant was quashed by the Supreme Court because the payment of pay and allowance was not made simultaneously with the termination order.

The above cases reveal that the statutory procedure has been held mandatory in most of the cases. However, it may be noted that the statutory provisions which expressly provide for procedural safeguards are very few and generally the discretionary powers are vested without mentioning anything about procedure. It is in these areas that the implied requirement of \textit{fair procedure} has been invoked by the courts under the doctrine of procedural ultra vires. The implied procedural requirement of acting fairly generally means that the procedural safeguards contained in the concept of natural justice or \textit{fair play in action} must be observed by the administrative authorities while exercising their discretion.
Natural justice plays the same part in Indian and British law as does the 'procedural due process' of law clause in the United States. Since in view of the recent developments there is nothing like an absolute discretion, the requirement of duty to act fairly under the concept of natural justice cannot be negated by the argument that administration is vested with wide discretion.

Generally the term 'acting fairly' and natural justice have been used as synonyms of each other, but in a few cases relating to exercise of administrative discretion the requirement to act fairly has also meant the requirement to give reasoned decision or speaking order. It may be noted, however, that so far this principle has not established itself in this area. It may also be interesting to note that the few cases which applied the principle of reasoned decision, did not apply it as a part of natural justice, but treated it as an independent principle of 'fair procedure'. Therefore, it may be said that the principle of speaking order does not form a part of concept of natural justice.

As the concept of natural justice has been the main requirement of the fair procedure, implied in the statutes, the present discussion first attempts to deal with the application of the concept of natural justice; and then with the few cases relating to speaking order.
5.3.1 Exercise of Discretion and the Concept of Natural Justice:

"Good administration demands fair play in action and this simple desideratum is the fount of natural justice".\textsuperscript{226}

Natural justice is a

"great humanising principle intended to invest law with fairness and to secure justice".\textsuperscript{227}

The above observations from the leading cases of the Supreme Court indicate that the concept of natural justice as used in the area of administrative discretion has been assigned a flexible meaning; and that is why it has also been called as 'fair play in action'.\textsuperscript{228} since it is always in action, moulding itself in accordance with the requirements of the situation in hand. However, by saying that the natural justice is a flexible concept, it is not meant that it is devoid of some of its essential requirements, and has been applied in haphazard manner. There have been various cases in this area wherein the certain contents of this concept have been emphasised and there have been various criteria on which this concept has been applied. In view of this, the present discussion attempts to respond to the following main questions in this area: (i) What are the criteria on which the courts apply the concept of natural justice?; (ii) What is the content of the concept of natural justice?; (iii) Are there general principles excluding the application of natural justice?;
(iv) Are there any areas where the courts have followed the policy of non-interference?; (v) What is the effect of non observance of rules of natural justice: whether it renders the action void or voidable?

However, before trying to answer the above questions a brief discussion of the general trend of development of the law in this area, since independence, seems necessary, for a better and clear understanding.

5.3.1.1 General Trend of Development: During the period of one and half decade since independence, the Indian Supreme Court and the High Courts generally refused to apply the concept of natural justice in the area of administrative discretionary powers\textsuperscript{229}. The Indian courts, during this period, were influenced by the contemporary decisions of the English Courts which refused to apply the principles of natural justice in the area of exercise of administrative discretion and confined their application only to quasi-judicial or judicial functions\textsuperscript{230}. The characteristic features of the court's approach during this period were: that whenever a question of applicability of principles of natural justice to an administrative action was raised, the court first resorted to classification of the function performed by the authority; and while classifying the administrative action they applied the test of "acting judicially".
It was said that requirement to act judicially must be superimposed on any administrative action then only it can be called as quasi-judicial, and then only the principles of natural justice are applicable. This was probably due to confusion prevailing during that period which intermixed the two questions, namely the question of applicability of principle of natural justice and the question of availability of the writ of certiorari. It has been rightly commented about the confusion prevailing during this period that 'it is a tautology to say that function is quasi-judicial if it is to be done judicially', because the question still remained how is one to ascertain whether an authority is required to act judicially?

The first step in the direction of clarifying the above confusion was taken in the historical pronouncement of the House of Lords in Ridge v. Baldwin. In this case, Lord Reid, one of the majority judges, thoroughly dealt with the old cases of English law on the subject of natural justice and pointed out that the principle of audi alteram partem (one of the principle of natural justice) is a deep rooted principle of English law. In doing so he relied mostly on the cases dealing with the exercise of administrative discretion and pointed out that the term acting 'judicially' was used in the case for the purpose of applying natural
justice. He attacked the problem at its root by demonstrating how the term 'judicial' has been misinterpreted as requiring some superadded characteristic over and above the characteristic that the power affected some person's rights. He pointed out that mere fact that the power affects rights or interests is what makes it 'judicial', and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised 'judicially' i.e. fairly, and the fact that the power is administrative does not make it any the less judicial for this purpose.

The contribution of the above holding was that the principle of natural justice could be applied to the areas of exercise of administrative discretion affecting the rights of persons, by classifying them as quasi-judicial. The same approach was followed by Lord Morris of Borth-y-Gest. Thus both the law lords did not delink the question of applicability of natural justice from the necessity of classification of the function as quasi-judicial.

However, Lord Hodson in his concurring judgement went ahead than the approach of Lord Reid and Lord Morris and delinked the question of applicability of natural justice from the question of classification of administrative functions. Referring to the argument that the authority was acting in administrative capacity be observed:
"...the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity....The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice."236.

In the instant case the House of Lords by majority of 4:1 struck down the order of dismissal passed against the chief constable of Brighton by Brighton Watch Committee on the ground that while exercising its discretion in the matter of dismissal the watch committee was, bound to observe principles of natural justice as it was performing quasi-judicial function.

After the decision of the House of Lords in Ridge v. Baldwin the English & Indian Courts started applying the principles of natural justice to the cases involving exercise of administrative discretion by classifying them as quasi-judicial237. Thus it may be said that Ridge v. Baldwin, classified the confusion with respect to the use of the term 'acting judicially' for classifying the administrative functions as quasi-judicial for the purpose of application of natural justice. The question of application of natural
Justice however remained linked with the need of classification. This indicates that the need to describe most of the administrative functions as quasi-judicial was not still eliminated. But very soon this shortcoming was removed by Lord Parker, C.J. in Re H.K. (An Infant)238 (1967). In this case an immigration officer at London Airport had refused to admit a boy from Pakistan on the ground that he appeared to be well over the age of sixteen, under which age only he could be allowed to enter with his father. In a challenge to this action Lord Parker, C.J. held that even if an immigration officer was not acting quasi-judicially, but was performing an administrative function, he must act fairly. He must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. Salmon, L.J. and Blain, J. also held the immigration officer to be bound to act fairly.

While requiring the immigration authority to observe norms of fair procedure, Lord Parker, C.J. made the following important observation which completely delinked the question of applicability of natural justice from the question of classification. Thus, admitting that the immigration officer was not acting judicially or quasi-judicially, he
observed;

"That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, not merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative frame work under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.\(^{239}\)

The above observation of Lord Parker supplied such a simple and attractive basis for application of rules of natural justice in the area of exercise of administrative discretion that it has been followed 'with alacrity',\(^{240}\) in various subsequent cases decided by English and Indian Courts\(^{241}\).

In India the trend of applying the principle of natural justice to the exercise of administrative discretion, under the requirement of 'duty to act fairly' was started from 1967 since the Supreme Court decision in State of Orissa v. Dr. Binapani Dei\(^{242}\) (1967). In this case the date of birth of Binapani Dei was refixed by the concerned administrative authority on the basis of an anonymous letter, without giving her an oppor-
tunity of being heard. This was held to be a nullity on the ground of violation of natural justice. J.C. Shah, J., in his judgement for the Court, (consisting of himself and G.K. Mitter, J.) pointed out that an order by the State to the prejudice of a person may be made only in accordance with the basic rules of justice and fairplay; and since this is a basic requirement of any State action even an administrative order which involved civil consequences must be made consistently with the rules of natural justice\textsuperscript{243}.

In Binapani Dei, although the Court admitted that the function was administrative, yet it applied the principle of natural justice under the rule of fair play. This trend of admitting the function to be administrative and even then applying the principles of natural justice has been constantly followed after Binapani Dei's case.

In the leading case of A.K. Kraipak v. Union of India\textsuperscript{244} (1970) the Supreme Court specifically followed the judgement in Binapani Dei and in \textit{re} H.K. (An Infant) and held that even in the exercise of administrative discretion the principle of natural justice must be followed under the 'duty to act fairly'. In the instant case, a person who was himself a candidate, sat as a member of the Selection Committee for selecting suitable persons to fill several Government posts. This was challenged as violating the rule against bias. The Supreme Court upheld this challenge. Speaking for the Court, Hegde, J. proceeded
on the assumption that the power exercised was an administrative power, and held that even in case of exercise of administrative discretion, the concerned authority was bound to act fairly. He pointed out that if the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should not be made applicable to administrative powers²⁴⁵.

The decision of the Supreme Court in Kraipak is very important, because it clearly established and reiterated the proposition that for the purpose of application of principle of natural justice it is not necessary to classify a function as quasi-judicial; and even in the cases of exercise of administrative discretion the principles of natural justice is applicable under the requirement to act fairly. That is why in India Kraipak is regarded as an epoch-making decision²⁴⁶.

In another leading case of Maneka Gandhi v. Union of India²⁴⁷ (1978) where the exercise of discretion in the matter of revocation of passport under Section 10(3)(c) of Passport Act, 1967 was involved, the Supreme Court held that the concerned authority was bound to give to the petitioner an opportunity of being heard. However, in view of the urgency that may be necessary in impounding passport, the Court held that a post-decisional hearing will be sufficient. After going through the leading Indian and English
cases relating to the applicability of principle of natural justice, Bhagwati, J. (as he then was), speaking for the majority, (consisting of himself, Fazal Ali and Untwalia, JJ.) observed:

"The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involved civil consequences, the doctrine of natural justice must be held to be applicable."\(^{248}\)

A similar view was expressed by Beg, C.J. and Chandrachud, J. (as he then was) in their concurring judgements.

Similarly in Mohinder Singh Gill v. Chief Election Commissioner\(^{249}\) (1978) Krishna Iyer, J. observed:

"the dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after Kripak."\(^{250}\)

Also, while emphasising the need for observance of natural justice in the area of exercise of administrative powers, he made the following weighty observation:

"We consider it a valid point to insist on observance of natural justice in the area of administrative decision making so as to avoid devaluation of this prin-"
ciple by administrators, already alarm-
ingly insensitive to the rationale of
audi alteram partem. 251

In the recent cases of *S.L. Kapoor v. Jagmohan* 252 (1981) and *Liberty Oil Mills v. Union of India* 253 (1984), O. Chinnappa Reddy, J. also reiterated the above views.

Following the above approach, the principles of natural jus-
tice have been applied in various cases of exercise of
discretionary powers. Thus it has been held that while
exercising discretion in the matter of declaring an area as
slum area, or clearance area, the authority must give an
opportunity of being heard to the affected persons 254 that
the Registrar of Co-operative Societies must not be biased,
before ordering supersession of its Managing Committee 255;
that a local body or Municipality should not be superseded
by the Government without giving it an opportunity of being
heard 256; that a President of a village Panchayat cannot
be removed from office without giving him an opportunity of
being heard 257; a village Sarpanch cannot be suspended
without giving him an opportunity to make representation 258;
that a person cannot be black-listed without giving him an
opportunity of being heard 259; that an order of dismissal
of the employee of a statutory body, cannot be passed with-
out giving him an opportunity of being heard 260; that an
order of cancellation of a grant, 261, Contract, patta, lease 263, licence 264 or revocation of passport 265 must be
not be passed against a person without giving him an opportunity of being heard; that the pension of a Government servant cannot be withheld or reduced without giving him an opportunity of being heard; that renewal of a licence cannot be refused without giving an opportunity of being heard; that management of an industrial undertaking cannot be taken over, without giving an opportunity of being heard to the affected persons. While exercising its power of exempting any sugar factory from the liability to pay additional price to cane growers an opportunity of being heard must be given to cane growers and producers. The period for which the industrial undertaking was taken over cannot be extended without giving a reasonable opportunity of being heard to the management; a person who is a candidate for a post cannot sit in the Selection Committee; result of a student cannot be withheld or cancelled without giving him an opportunity of being heard; a student's admission to the University cannot be cancelled on the ground that he secured it through fraud of impersonation without giving him an opportunity of being heard. An interim order of suspension against grant of licence or quota under Import & Export rules cannot be passed without giving an opportunity to the person affected. A notification under R. 126 AA of Defence of India Rules fixing adhoc cost of living allowance of workers in a number
of employments, declared to be essential service, without giving the employers an opportunity to represent, was held to be violative of natural justice. An inquiry commission appointed under Commission of Inquiry Act, must act in accordance with natural justice. Similarly, the Collector holding an inquiry under Land Acquisition Act must follow natural justice.

5.3.1.2 Criteria for Application of Natural Justice:
Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not, depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power. Though these various factors are taken into consideration by the courts whenever the application of the natural justice is invoked before them, generally the decisive factor out of these has been the effect of the exercise of power. Therefore, it is proposed to discuss the criteria for application of natural justice in the light of effect of exercise of power.

The courts have invoked the application of natural justice often by observing that an administrative order which affects rights or interests of a person adversely or
ensues civil consequences to him or affects his legitimate expectation has to be in accordance with the rules of natural justice, since the administration has a duty to be fair towards the persons affected. These criteria are not mutually exclusive on the contrary, many a times they have been used simultaneously. However, it is proposed to study each of them separately since each of these criteria has its own importance and sometimes a sole criterion out of these have formed the basis for the application of natural justice.

(1) Right Privilege dichotomy: Application of the rules of natural justice in the cases where any right of an individual is affected has been an established principle. However, the difficulty arose in the cases where application of natural justice was refused on the ground that the exercise of discretion only affected the privilege and not the right. Now what is generally meant by the term privilege and what is its relationship with natural justice!

Modern government is the holder of large resources, which are important for human existence. For example, it enters into contract, grants various types of licences, leases, pensions, gives passport, gives permission to alien to stay in the country, it is also the largest employer, dispensing services in various Government departments, public undertakings and educational institutions. Grant or refusal
to grant or revocation of contract, lease, licences, passports etc is the privilege of the Government or the administration. According to Hohfeld's analysis of jural relations, whenever X has a privilege or liberty to do something or not, Y has no correlative right or claim in that thing. Therefore, it has been said that the individual has no right to get contract, lease, licence, grants, passports etc. from Government. The Government can grant or refuse to grant or revoke or cancel these benefits, in its discretion.

The jural opposite of privilege is duty. It means that if one person has privilege to do something or not he cannot at the same time have a duty to do or not to do that thing. However, it may be noted the jural opposition between duty and liberty (privilege) does not mean that one cancels out the other. They will only have that effect when content of one is irreconcilable with the content of the other. Therefore it may be said that a person who has a privilege to do some thing or not, may regulate this privilege or liberty by putting some limits on it and this restriction is perfectly valid. Probably it is because of this reason that the courts have not found any difficulty in implying the limit of natural justice or other limits discussed above, by imputing intention on legislature or parliament in the statute, or under the fundamental rights. Since by implying these limits, the Government privilege to grant or refuse to grant or revoke certain benefit was not converted into its opposite, i.e. the
duty to grant or revoke etc, the court could very well say that the discretion in granting these privilege must be exercised in accordance with the rules of natural justice. Therefore, right and privilege dichotomy looses much of its value as a test for application of natural justice. If the exercise of discretion was likely to affect a person adversely, or might have resulted into civil consequences to him, the concept of natural justice can be and should be applied to the exercise of discretion irrespective of the fact that it related to matters of privilege and not of right. It is heartening to note that the courts in India have generally come to recognise that simply by saying that the exercise affected merely a privilege, natural justice may not be denied, and have applied the concept of natural justice in various cases of privilege.

The courts used to refuse to apply the principle of natural justice to the cases relating to privilege in the beginning, on the ground that no one has a right to a privilege. Thus in Punnen Thomas v. State of Kerala (1969) where the petitioner was black listed for ten years from entering into contract with the Government without giving him an opportunity of meeting the allegation against him, and even without letting him know the allegation against him, it was held by majority of the Kerala High Court that since the petitioner had no claim as of right to be given Government contract, it was not necessary on the part of the Government to give him
an opportunity to be heard. In arriving at this conclusion the court was influenced by the argument that to enter into a contract with the Government is a privilege and not a right. However, this right—privilege dichotomy was disapproved by Justice Mathew in his powerful dissent wherein he emphasised the point that the essence of the question is not whether it is right or privilege, but it is that the exercise of discretion which must be fair in all the circumstances. The powerful dissent of Mathew, J. in Punnan Thomas became the law of the land in Erusion Equipment and Chemicals Limited v. State of West Bengal (1975) where the same question of black-listing was involved. In this case the Supreme Court held that though no one has right to enter into contract, the Government is a Government of laws and not of men. The activities of the Government have a public element and therefore there should be fairness and equality. Ray, C.J., speaking for the Court (consisting of himself, Mathew and Untawalia, JJ.) pointed out that black-listing of a contractor deprives him of his opportunity to compete with his fellow contractors on equal footing and results into civil consequences, and affects his legitimate expectation that he will not be deprived of this opportunity illegally. Therefore, the State has a duty to act fairly which means duty to observe certain aspect of natural justice. The law laid down in Erusion Equipment case was followed by the Supreme Court in J. Vilangandan v. Executive Engineer (1978).
The protection of the concept of natural justice or 'duty to act fairly' has been given in some other areas of privileges for example in cases of impounding a passport, cancellation of licences, cancellation of government grants, patta and leases\textsuperscript{288}. In these cases as the Government was free or at a liberty to grant, refuse or revoke licence, passport, Governmental grant etc., no person could claim these benefits as of right.

When the Government has granted a licence, lease, passport etc. to an individual in the exercise of its privilege or liberty to grant or not to grant these benefits, then such person is said to be holding a privilege and when such privilege is revoked or taken away, it may result in civil consequences or may affect his legitimate expectation. This seems to be the rational of applying natural justice to cases of revocation or cancellation of these benefits. But, in case of refusal to grant these benefits it has been said that no expectation of the persons has been affected or civil consequences ensue, therefore, in these cases generally natural justice has not been applied. However, in the recent case of \textit{Raj Restaurant v. Municipal Corporation}\textsuperscript{289} (1982), while quashing an order of non renewal of licence, D.A. Desai, J. speaking for a bench of the Supreme Court, (consisting of himself and Balkrishna Eradi, J.) made the following observation which indicates that in some situations the refusal to
grant may also be covered by rules of natural justice. He observed:

"Where, in order to carry on business a licence is required, obviously refusal to give licence or cancellation or revocation of licence would be visited with both civil and pecuniary consequences and as the business cannot be carried on without licence it would also affect the livelihood of the person. In such a situation before either refusing to renew the licence or cancelling or revoking the same, the minimum principle of natural justice of notice and opportunity to represent once case is a must" (emphasis supplied).

It is submitted that the view expressed in this case is justified, because in a case where refusal to grant may affect the business prospects of an individual there is nothing wrong in giving him opportunity to represent his case before the authority or to disabuse the authority about any misunderstanding entertained by the authorities against him.

The above cases indicate that while dealing with the application of natural justice, generally the courts have not been influenced by the right-privilege dichotomy. There is, however, one exception to this and that is the area of liquor licensing. In this area so far the courts have not extended the protection of natural justice; and for this they resort to right-privilege dichotomy even now. For example in the recent case of Chingleput Bottles v. M/s.
Majestic Bottling (1984), a bench of the Supreme Court (consisting of A.P. Sen and Varadarajan, JJ.) held that where a grant of exclusive privilege of liquor shop was involved, natural justice is not applicable. While holding this, two broad and general observations were made by A.P. Sen, J. in his judgement. He observed that 'grant of licence is a purely administrative function', therefore natural justice is not available; and that natural justice is available where rights are affected and not where mere privileges are involved. These observations tend to revive the sterile controversy of administrative and quasi-judicial and also of right and privilege which have generally been held to be outmoded dichotomies in various leading cases. It is submitted that the courts should refrain from using such terminology for denying natural justice and instead of using outmoded distinctions they can very well say that the nature of power involved and the public interest protected by this power is so important that the concept of natural justice need not be applied in the present situation. It may be noted however that as the Singleput Bottles case related to liquor licencing, it can very well be distinguished on facts in future and may not hamper the general application of natural justice in the area of exercise of administrative discretion. It may also be noted that the above observations in the case were in the nature of obiter, because in
this case the real question was not about the applicability of natural justice, since the opportunity to represent was in fact given to the person affected, by the Collector, enquiring into the antecedents of the applicants for liquor licence, but about the content of natural justice, namely the disclosure of inquiry report to the parties.

As the dichotomy of right and privilege has generally been avoided in recent cases as a test for application of natural justice and the Chingleput Bottles case is an exceptional case, it may be said that: Right/privilege dichotomy is too crude for application as a criterion for denying the application of natural justice. Simply by saying that the person has no right to get Governmental privilege, the application of minimum rules of fairplay cannot be avoided. Jurisprudentially also there is nothing wrong in implying the limits of natural justice in the area of privilege, because this does not turn the discretion to grant Governmental privilege into a duty to grant or refuse. The real question is not whether the person has a right or privilege but whether the minimum requirements of fair procedure must be observed where exercise of discretion results into civil consequences or affects his legitimate expectation or affects him adversely.

(2) Legitimate expectation: The words 'Legitimate expectation' were used in 1969 by Lord Denning M.R. in Schmidt v.
Secretary of State for Home Affairs, where he observed:

"...that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representation. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

In India this criterion was applied in *Erusion Equipment and Chemicals Ltd. v. State of West Bengal* by the Supreme Court. In this case the question of black-listing a contractor came before the Supreme Court. Holding the principle of audi-alteram partem to be applicable, Ray, C.J. speaking for the Court observed,

"A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality."

Acting legally in this case meant "duty to act fairly" meaning thereby a duty to observe certain aspects of rules of natural justice. The same principle is followed in *State Bank of India v. Kalpaka Transport Co. (1974)* where the Bombay High Court held that although the respondents who were Government Contractors, so far, and do not have positive
right against the Government, but they have a right to entertain a reasonable expectation of being able to deal with the State and they should be treated fairly, and therefore, before black listing them the State should give them an opportunity of being heard.

In the recent case of S.L. Kapoor v. Jagmohan \(^{297}\) (1981) it was held that since the Municipal Committee had a legitimate expectation to serve its full term it could not be dissolved arbitrarily without observing the principles of natural justice.

However, it is worth noticing that criterion of 'legitimate expectation' has not still operated independently. For example in Erusion Equipment and Kalpaka Transport it was accompanied with the criterion of civil consequences. Similarly in S.L. Kapoor it was coupled with 'official status and rights of the committee'.

It is submitted that in the recent case of S.P. Gupta v. President of India \(^{298}\) (1982) there was a good opportunity for the Supreme Court to apply the criterion of legitimate expectation. Though the petitioner, a temporary additional judge, in this case did not have any right to appoint to the High Court either as a permanent or as additional judge, on the expiry of his term, he certainly could entertain a 'legitimate expectation' that he will be considered for fresh appointment and will not be dropped out capriciously or unfairly on some secret charges, without being given an opportunity to explain and disabuse the authorities about the
adverse reports relating to him. Such expectation was possible because the concerned judge's position was different from that of a fresh person, because he had held the post for two years immediately before the question of fresh appointment came up and there was a prevailing convention to give preference to such judges in any appointment in the High Court. Acknowledging this position of the additional judges, the three judges Tulzapurkar, Pathak, Gupta, held that the additional judge was entitled to fair play which was to be implied and applied in consultation process, because he had a 'legitimate expectation'. However, as the four judges constituting the majority did not hold the observance of natural justice as necessary in case of an additional judge: and while doing so, did not refer to the criterion of 'legitimate expectation' it can be said that this criterion, though referred to in some cases has not as yet become an independent criterion.

In addition it may be interesting to note that the term 'legitimate expectation' has not been interpreted to mean 'any' expectation of any person, but it must be a 'legitimate expectation' which can only cover the cases where the person held some right - interest or any benefit under Government and expects that he would continue to enjoy it. Recently in Extrusion Processes Pvt. Limited
v. The Chief Controller of Import and Export (1983),
while refusing to apply the principles of natural justice
in requiring the concerned authority to give an opportu-
nity of being heard to a third party, who was not the
person immediately concerned in the matter of grant of
Import licence, Sujata Manohar, J. of the Bombay High
Court observed:

"..... 'expectation cases' are those cases
where a person had previously acquired some
interest or right and had a reasonable ex-
pectation that such a right or interest
would be continued or confirmed."

It is clear from the above discussion that the
courts have invoked criteria of right or interest, and legi-
timate expectation in order to imbibe the exercise of
discretion with fairness. Generally with the use of all or
any of the criteria mentioned above the courts have been
using an all pervasive criterion of 'civil consequences'.

3) Civil Consequences: This is the criterion with the help
of which the courts have been extending the scope of the
concept of natural justice in various new areas. First case
in this respect was State of Orissa v. Binapani where
the administration changed the date of birth of Dr. Binapani
Dei on the ground that the birth date given by her was false,
without giving a notice and opportunity to represent her case
which resulted in her early retirement, the Supreme Court held
that the administration was under a 'duty to act fairly'.

Speaking for the Court, Shah, J. observed:

"It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence"\textsuperscript{301a}(emphasis supplied).

This principle was reiterated in A.K. Kraipak v. Union of India\textsuperscript{302} and more clearly expounded in Maneka Gandhi v. Union of India\textsuperscript{303} by the Supreme Court, wherein, while holding the Government to be bound by the 'duty to act fairly' in case of revocation of passport, Bhagwati, J. observed,

"The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable"\textsuperscript{304} (emphasis supplied).

The law thus settled by the Supreme Court has been followed in various cases involving the exercise of discretion in different areas. For example, black-listing of contractor\textsuperscript{305} unilateral change of price of the liquor to be supplied to the Government\textsuperscript{306}, cancellation of permission to lift timber
under a contract, cancellation or cut in pension, cancellation of licence, cancellation of election, impounding of passport, dissolution of Municipal Committee, declaration of certain area as slum clearance area and consequent acquisition of the area declared to be such, taking over the management of a company or mill by the government, acquisition for the purpose of the company. The above cases reveal that 'civil consequences' is a wider expression which can cover within itself the cases under the criteria of right by interest, legitimate expectation, and also the other cases. This is evident from the definition of this term given by Krishna Iyer, J. in Mohinder Singh Gill v. Chief Election Commissioner in the following words:

"Civil consequences undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence."

In this case while laying down the law under Article 141, for the election commission the Supreme Court observed that the election commission, while exercising its power under Article 324 was bound by the concept of natural justice which meant that notice and opportunity must be given to the affected candidate before ordering cancellation
of poll, since in a democracy every candidate has an interest in properly conducted election. A democratic right in free and fair election, if denied, results into civil consequences.

The Court adopted a two-fold strategy in this case:

(i) it recognised right of a candidate in free & fair election thus widened the coverage of right.

(ii) gave a very wide interpretation to the criterion of 'civil consequences' covering 'every thing that affects a citizen in his civil life'.

The term 'civil consequences' has served as an independent criterion in some important decisions of the Supreme Court though the specific question of 'civil consequences' serving as independent criterion was neither raised nor dealt with by the Court. However, an important observation was made by H.L. Anand, J. of Delhi High Court in this respect, in Mohinder Singh v. Union of India(1977) wherein while holding the Government to be bound by the rule of audi-alteram partem while black-listing of a contractor he observed:

"The obligation of the State to act in a just and fair manner in relation to its citizens and to conform its action to well established principles of natural justice
is independent of any fundamental right of a citizen or to any right that a citizen may claim to any property or to any legal character.\textsuperscript{321}

It is worth noting that this observation was made by the learned judge in face of an argument that since the fundamental rights are suspended and the petitioner has no right under Article 14 or 19, natural justice cannot be implied. This emphasises that the 'duty to act fairly' may be independent of any right and the administration is bound to observe certain principles of natural justice under it if it results into civil consequences to an individual.

The courts have applied the concept of natural justice to the cases where a person was prejudicially or adversely affected by the exercise of administrative discretion.\textsuperscript{322} These cases can be covered under the criterion of 'civil consequences' in view of the meaning given to it by the Supreme Court in Mohinder Singh Gill's case.

The above discussion reveals that the courts have tried to apply principles of natural justice to various situation in order to control the exercise of discretion using criteria of right or interest, legitimate expectation, civil consequences, out of which the term civil consequences, have been given a very wide coverage. Now the question arises that what has been the content of concept of natural
justice in various areas of exercise of discretion where it has been applied. This question is discussed below.

5.3.1.3 **Content of the Concept of Natural Justice**: In the area of exercise of administrative discretion, the 'capsulised' concept of natural justice which is also referred to as 'fairplay in action' mainly consists of two principles (1) rule against bias, (2) *audi alteram partem* (fair hearing). The rule of giving speaking order or a reasoned decision has not been so far recognised as a requirement of natural justice in this area, although, it has become an established principle of natural justice in the area of exercise of quasi-judicial powers.

(1) **Rule Against Bias**: The fundamental principle of the common law that 'no man should be a judge in his own cause', *(nemo judex in causa sua)* was laid down by Lord Coke in Dr. Bonham's case. This was further developed with a view to strengthening the public confidence in the administration of justice in conformity with the principle that justice should not only be done but manifestly and undoubtedly seem to be done. Although most of the cases where rule against bias has been invoked and applied by the courts belong to the area of exercise of quasi-judicial powers, its application in the area of exercise of administrative discretion cannot be ruled out, because while exercising the discretionary power, administrative
authority also must not prejudge the issue, or be prejudiced against an individual or act in furtherance of his personal interest. Therefore bias has been considered to be a disqualifying factor in some important cases in this area also. For example in the leading case of A.K. Kraipak v. Union of India[970] Hegde, J. speaking for the Supreme Court applied this component of natural justice, where the exercise of discretion by the selection committee in the matter of selection for Indian Forest Service was involved and held that a candidate could not sit as a member of the selection committee.

Following the approach in Kraipak, the Himachal Pradesh High Court struck down the select list for promotion on the ground of bias[928]. It held that rule against bias is applicable to administrative bodies, because their function must be discharged in just and fair manner.

In the recent case of S.P. Kapoor v. State of Himachal Pradesh[929] (1981), the Supreme Court struck down a selection exercise by a selection committee for departmental promotion on the ground of violation of rule against bias. In this case Dr. 'G' made annual confidential reports relating to several doctors working under his administrative charge. In a departmental promotion exercise, 'G' himself was a candidate competing with several of these doctors. The selection committee took into account the confidential reports
made by 'G'. The court held that it was not 'fair' for the selection committee to take into account the reports made by 'G', since he was himself competing with the doctors whose confidential reports he made.

The above cases lay down that a person who is personally interested in some benefit under the Government cannot sit as a member of an administrative body exercising its discretion in that matter.

Rule against bias has also been applied in a case where the concerned officer could be prejudiced against a person. Thus in Wing Commander J. Kumar v. Union of India\(^{330}\) (1981), the Supreme Court restrained the two officers from sitting in Departmental Selection Board on the ground that against them an appeal was filed by the petitioner, who was a candidate and therefore, it was likely that they would be prejudiced against him.

In Jose Kuttiyani v. Registrar Cooperative Societies\(^{331}\) (1982) Kerala High Court quashed an order of supersession of the managing committee of a district Co-operative bank on the ground of prejudging an issue. In this case the Registrar acted on the receipt of the report from the Enquiry Officer that certain irregularities of serious nature exist in the working of the concerned bank; and he did not independently try to assess the facts and seemed to have taken a firm decision to supersede the committee. The High
Court held that even though the power was to be exercised on subjective satisfaction, the registrar should have acted in accordance with natural justice and should not have prejudged the issue. However, in a case where the Registrar was himself a member of the Committee which he superseded, it was held by the Orissa High Court that no bias was involved in such a case\textsuperscript{332}.

Applying the rule against bias in S. Gajender Singh v. Union of India\textsuperscript{333} (1981) Sikkim High Court held that the Government could not be a judge in its own cause and therefore, it could not itself determine the sum due to it; and then adjust it against the petitioner under Clause 67 of General Conditions of Contracts (Military Engineering Service). There should be an independent determination of the sum due.

About the test to be followed in holding the exercise of discretion as vitiated by bias, it has been pointed out by Hegde, J. in Kraipak that the real question is not whether the authority was in fact biased but the question is whether there was a 'reasonable likelihood of bias'\textsuperscript{334}. This test has been followed by the Himachal Pradesh High Court in D.K. Khanna v. Union of India\textsuperscript{335}, where it quashed the select list because there was a 'reasonable likelihood of bias'. This seems to be the test of determining bias in other cases also, even though it has not been specifically mentioned in these cases.
In *Tilak Raj v. Chandigarh Administration* (1976), Punjab and Haryana High Court, refused to strike down the exercise of discretion on the ground of bias. In this case a notice for cancellation of petitioner's tea stall was challenged as violative of natural justice, on the ground that since the estate officer, prior to issuance of impugned notice, had participated in a meeting in which a decision had been taken to issue impugned notice he was biased. Rejecting this contention the court held that the rule against bias is not available in such cases where the authority has been empowered to implement statutory provisions and to see that provisions are complied with. Here the estate officer was not personally interested in the subject matter therefore it could not be said that he was biased.

The above case indicates that in the area of exercise of administrative decision, the rule against bias may be applicable only in cases of personal bias and not in cases of official bias.

(2) **Fair Hearing (Audi alteram partem)**: Most of the cases relating to application of the concept of natural justice relate to the application of the rule of 'audi alteram partem' to the exercise of discretion. In *Maneka Gandhi v. Union of India* (1985), it was observed by Bhagwati, J. that the *audi alteram partem* rule is not cast in a rigid mould
and judicial decisions establish that it may suffer situ-
ation modifications for example in some cases it may require the administration to give a detailed notice and oral hearing, and in other cases only a post-decisional hearing may be enough. The core of it must, however, remain, namely, that the person affected must have a 'reasonable opportunity' of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. Now what is meant by 'reasonable opportunity' of being heard? There can be no uniform answer to this question as admittedly the content of the rule of 'audi alteram partem' is a dependent variable which is dependent upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of the sanctions involved therein.

However, as pointed out by Krishna Iyer, J., in Mohinder Singh Gill v. The Chief Election Commissioner \(^{339}\) (1970), \(^{339}\) "(i) 'notice' and (ii) 'opportunity' are its very marrow".

It is important to note that the content of the rule of fair hearing has not been extended beyond these two requirements in the cases of exercise of administrative discretion. What is the exact requirement of 'notice and opportunity' varies with the situation in hand.

(1) **Notice**: What are the necessary components of notice? Different answers to this question have been provided by the courts depending upon the circumstances
of the case. In the cases where generally no urgency was involved, it has been held that all the grounds or reasons for the proposed action, and what action is contemplated by the authority against him must be made known to him through notice. On the other hand, in the cases where prompt or emergent action was involved it has been held that the notice should only indicate the case of the State, so as to enable the person affected to make his representation. For example, in J. Vilangandan v. Executive Engineer 340 (1978) where the notice to a contractor did not clearly mention that he was proposed to be blacklisted, the Supreme Court held the notice to be inadequate and violative of natural justice. Similarly in the recent case of Vasantrao Dattaji Dhanwatey v. Union of India 341 (1984) the Bombay High Court held that before taking over the management of an Industrial undertaking the owner must be informed clearly of the proposed action against him. Similarly, in the cases where the notice did not mention any one of the ground or reason for the proposed action then the exercise of discretion was held to be violative of natural justice. For instance in a recent case of Vibhu Kapoor v. Council of I.S.C. Examination 342 (1985) a full bench of the Delhi High Court struck down an administrative order reducing to only 25 marks the original marks of the petitioner, a 10th class student, who originally secured a high percentage of marks, because
in this case the petitioner was not informed about the charges or the grounds on which the action was taken against him. The court held that the authorities could not act upon mere suspicion. While pointing to the manner in which the education authorities functioned, the court noted that the student was made to suffer at his tender age apparently for no fault of his, simply because his answer book resembled closely with that of another student whose roll number was not close to his. The court also pointed out that the facts of the case indicated that the other student was helped to copy from the answer book of the petitioner by some unscrupulous persons. Similarly in 

_Homesh Kumar v. V.C. Aligarh Muslim University_ 343 (1985), the Allahabad High Court struck down an order cancelling the admission of a student because in this case, the order of cancellation was made on the ground that he secured admission through fraud and impersonation and the petitioner was not informed anything about this charge and was given empty opportunity of making a representation against the proposed cancellation of admission without having any knowledge of charge against him. It was argued by the University that as the admission could be cancelled by the admission committee for 'any reason', the court could not interfere into exercise of power. Rejecting this contention the court held that the term 'for any reason' did not mean that the concerned
authority could act in any manner it liked. It's action must be rational and based on relevant material and in accordance with the rules of natural justice.

In the recent case of Liberty Oil Mills v. Union of India\(^{344}\) (1984), O. Chinnappa Reddy, J. speaking for the Supreme Court (consisting of himself, and Venkataramaiah and A.P. Sen, JJ.) held even in the cases where a prompt and emergent interim action is required to be taken the person affected must be informed about the skeletal allegation against him so that he can make a post-decisional representation which the Government must consider. He rejected the argument that as the relevant section authorised the authorities to pass the interim order 'without assigning any reason' nothing should be informed to the petitioners. In this respect he held that "without assigning reasons" only meant that there is no obligation to formulate reason for the order and pass a reasoned decision, but the skeletal allegation against the petitioners must be communicated to them.

About the time factor nothing has been laid down specifically. The only requirement has been that the individual must get 'reasonable opportunity' which has meant in some cases that an hour's notice may be sufficient, or in a crisis even a telephone call, may suffice\(^{345}\). Similarly about the mode of giving notice, though generally it has been
held that the person against whom the order is proposed to be made must be informed personally, in cases where mainly the question of policy is involved a general notification has been held to be a sufficient notice.\textsuperscript{346}

The above cases indicate that the court's main concern is not to burden the administration with unnecessary procedural formalities but at the same time it must be ensured that the individual had been given a proper idea about the action proposed to be taken against him. This requirement has been tried to be fulfilled by adopting the flexible approach and adjusting the requirements of natural justice according to the situation in hand. The approach adopted by the courts in this respect is a balanced approach, and therefore it cannot be suggested here that some more formal requirements of notice must be laid down rigidly.

In some cases where an administrative inquiry preceded the final action it has been argued that the report of the enquiry officer must be communicated to the person affected. However, this has not been so far regarded as a necessary ingredient of notice. In Kesava Mills Co. v. Union of India\textsuperscript{347} (1975) where an order of taking over the management of the Textile Mills was passed under Section 18A of the Industries (Development and Regulation) Act 1951, it was contended on behalf of the mill that since a copy of investigating committee's report was not submitted to it, the rule of natural justice was violated. Rejecting this
contention, the Supreme Court held that the disclosure of the investigation report was not necessary in the circumstances of the case. Speaking for the Court A.K. Mukherjee, J. observed,

"In our opinion it is not possible to lay down any general principle on the question as to whether the report of an investigating body or of an inspector appointed by an administrative authority should be made available to the persons concerned in any given case before the authority takes a decision upon that report. The answer to this question also must always depend on the facts and circumstances of the case. It is not at all unlikely that there may be certain cases where unless the report is given the party concerned cannot make any effective representation about the action that Government takes or proposes to take on the basis of that report." (emphasis supplied).

The above observation clearly indicates that the court may require the disclosure of inquiry report in the cases where an effective representation may not be possible unless the inquiry report is disclosed to the concerned party. However, till today the disclosure of inquiry report has not been required by the court for the making of effective representation. In the recent case of M/s. Chingleput Bottles Co. v. M/s. Majestic Bottles (1984),
the Supreme Court refused to hold the exercise of discretion by the Excise Commissioner in the matter of grant of liquor licence as violative of rules of natural justice because a preliminary enquiry report was not shown to the appellant.

It may be noted that even in the area of exercise of quasi-judicial power, disclosure of inquiry report has not become an established rule of natural justice; therefore it seems most unlikely that this rule will be insisted upon in area of administrative discretion. However, it is suggested that if the main allegations are contained in the enquiry report then at least the substance of such allegation must be communicated to the person concerned, although the report as such may not be given formally, otherwise it would be difficult for the person concerned to make an effective representation.

(ii) **Opportunity to be Heard**: The second limb of 'fair hearing' is opportunity to be heard. What is meant by 'opportunity to be heard'? Does it mean that in all cases oral hearing and opportunity to cross examine witnesses must be given; or whether he must be allowed to be represented by a *lawyer*. It is attempted here to try to find out an answer to these questions.

(a) **Oral Hearing**: In most of the cases in this area it has been held that an opportunity of being heard does not
mean a oral hearing\textsuperscript{350}. As a matter of fact oral hearing does not seem to be considered a necessary requirement of audi alteram partem rule, even in the area of quasi-judicial powers\textsuperscript{351}. Therefore, the administrative authority may either give oral hearing or allow a written representation, depending upon the circumstances of the case and it appears that generally the courts may not disturb the exercise of discretion, if any type of hearing has been given.

(b) **Cross Examining the Witness**: In none of the cases in this area the opportunity to be heard has meant an opportunity to cross examine witnesses. The important pronouncement on this point has been given in the leading English case, *In re Pergamon Press Limited*\textsuperscript{352}, where the directors of a company claimed that they should have been allowed to peruse the evidence and cross examine the witnesses, it was held by the Court of Appeal that they were not entitled to a right to see the evidence and cross examine the witnesses. The fair play required that only 'sufficient information' should be given to the persons affected so that they may be able to explain themselves against the action proposed. In the recent case of *A.K. Roy v. Union of India*\textsuperscript{353} (1982), Chandrachud, C.J. held that the requirement of natural justice, does not mean that the detainee should be given a right to cross-examine witnesses.
(c) **Representation by a Lawyer**: The right to be represented by a lawyer has not been recognised as a part of concept of natural justice in the area of exercise of administrative discretion. Even in the area of quasi-judicial powers representation by a lawyer has not been considered to be a necessary ingredient of natural justice\(^{354}\). Therefore, it seems unlikely that in the area of administrative discretion the courts will insist upon the right of representation by a lawyer. This approach is evident from the recent case of **A.K. Roy v. Union of India**\(^{355}\) (1982), wherein the Supreme Court refused to imply the right to a representation by a lawyer, before the Advisory Board, in the National Security Act, as a necessary ingredient of natural justice.

(d) **Post-Decisional Hearing**: Generally opportunity of being heard is to be given before the proposed action is taken against a person. But in some situations where a prompt action is required, the courts have provided for post-decisional hearing.

The idea of post decisional hearing is not new in the area of exercise of administrative discretion. Article 22 of the Constitution, and various enactments relating to "Preventive Detention" provide for post-decisional hearing to the detenu. However, the principle of post-decisional hearing was applied for the first time, by the Supreme Court in **Maneka Gandhi v. Union of India**\(^{356}\), wherein passport
of the petitioner was impounded by the Central Government under the apprehension that the petitioner was likely to leave India causing an impediment to the enquiry, ordered by it. In a petition against the Government on various grounds, one of them being, the violation of Natural Justice, the Court held that the *audi alteram partem* rule could not be excluded merely because the power to impound passport might be frustrated if prior notice and hearing were given. Since the rule of *audi alteram partem* is not cast in rigid mould and is amenable to situational modification, in this situation, requiring prompt action, it must be observed, though "A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice". The underlying idea to this approach has been made clear by Bhagwati, J. when he observed:

".....it must be remembered that this is a rule of vital importance in the field of administrative law and.....The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case".\(^{357}\)

The situation in *Maneka Gandhi* justified the resort to post-decisional hearing. As observed by de Smith, "A prior hearing may be better than a subsequent hearing, but a subsequent hearing is better than no hearing at all".\(^{358}\)
It is submitted, however that the principle of post-decisional hearing though important cannot be a substitute for prior hearing. While emphasising this Dr. S.N. Jain has pointed out certain negative aspects of a post-decisional hearing\(^{359}\) which are worth being mentioned:

(1) As a summary action is to be taken promptly without hearing an individual, it is likely to be based on incomplete information. This increases chances of administrative error; (2) Because of necessity to take immediate action a greater reliance may be placed on subordinate staff which may result in lack of care and attention on the part of administration; (3) Once a summary action is taken there will be a tendency to stick to it even after hearing, this increases risk of bias; (4) The injury inflicted by summary action by destruction of deprivation of his property, or adversely affecting his reputation or right may be such that a subsequent hearing may be meaningless; (5) The power of summary action may be used as instrument of coercion by the administration; (6) Once a summary action is taken there is no pressure on the administration to hear expeditiously; (7) Where the property is destroyed through summary action it leads to the very annihilation of evidence. In such situation a post-decisional hearing becomes a sham or useless.

The subsequent decisions of the Supreme Court indicate that the courts have been aware of the role which they have
to play in balancing the interest of an individual with the interest of administrative urgency. Thus in Mohinder Singh Gill v. Chief Election Commissioner\textsuperscript{360}, V.R. Krishna Iyer, J. gave an indication of the limited scope of the post-decisional hearing to very urgent cases such as the case of fleeing persons whose passport has to be impounded, lest he should evade the course of justice, or a dangerous nuisance which needs immediate abatement\textsuperscript{361}. Applying this approach to the case in hand he observed that a candidate should be given a pre-decisional opportunity before cancellation of poll by the Election Commission although such a hearing need not be formal, but can be an informal hearing. He pointed out that though cancellation of poll was an urgent matter, but it was not so emergent, so as to do away with a pre-decisional hearing. Similarly in Swadeshi Cotton Mills v. Union\textsuperscript{362} of India, Sarkaria, J. held that taking over the management of an industry under Section 18AA of the Industries (Regulation and Development) Act, 1951, did not involve such a grave urgency so as to exclude the hearing before decision. For this he relied upon the above observation of Krishna Iyer, J. in Mohinder Gill, noted above. Similar view was expressed by Chinnappa Reddy, J. in S.L. Kapoor v. Jagmohan\textsuperscript{363}.

Above cases indicate that the Supreme Court is not prepared to forego the requirement of pre-decisional hearing in favour of post-decisional hearing; and post-decisional
hearing may be considered as a sufficient compliance only in cases involving emergencies, such as, a case of fleeing person or removal of a nuisance or natural calamities such as floods, earthquakes etc. Therefore it may be said that when an argument favouring a post-decisional hearing on ground of urgency is advanced, the courts will not simply accept it on its face value, but they will go into the question whether urgency is of such a nature which may require dispensing with pre-decisional hearing. What may be cases of 'such an urgency' in which only post-decisional hearing may be required, besides the cases of natural calamity. The law seems to be in developing stage in this respect. Recently in Liberty Oil Mills Limited v. Union of India364, while reiterating that the post decisional hearing should be given in cases where the danger to be averted or act to be prevented is imminent or where action to be taken can brook no delay, G. Chinnappa Reddy, J. speaking for the Supreme Court, held that the action of the Government in issuing abeyance circular requesting the licencing authorities to keep in abeyance the applications for import licence, custom clearance permit etc. of certain persons involved in the beef tallow controversy, under clause 8B of the Import Control Order, involved such an urgency, so that only a post-decisional hearing was enough.

The above discussion reveals that generally the con-
tent of the concept of natural justice in the area of administrative discretion are two (i) that the exercise of discretion must not be vitiated by personal bias; and (ii) that while exercising discretion the authorities must give a notice and an opportunity of being heard to the persons concerned.

The notice must generally contain the charges or grounds of reasons for the proposed action and must mention about what action is proposed against a person. However, the requirement to give notice does not include the requirement to show the report of inquiry officer.

Hearing need not be an oral hearing, and an opportunity to make a written representation has been regarded as a sufficient compliance with natural justice in many cases. The right to be represented by a lawyer and a right to cross-examine has also not been regarded as a part of requirement of being heard. It has been held in a recent case in the area of preventive detention that if the Government is allowed to be represented by a lawyer before the Advisory Board then the person affected must also be allowed to be represented by a lawyer. However, it may be noted that the representation by lawyer, in such cases has been insisted upon under the principle of equality, enshrined in the Article 14 of the Constitution and not under the doctrine of natural justice. The rationale behind this case was that
if Government is allowed to justify detention through a lawyer then the fundamental right to equality of a detenu demands that he should be treated equally and be allowed to be represented by a lawyer.

It is submitted that as the very rationale of exercise of discretionary powers by the administrative authorities is an informal approach to be problem in hand, the introduction of formality of hearing through lawyer and cross-examination of witnesses should not and also cannot be introduced in this area and the approach of the courts is proper in refusing to insist upon it.

Generally the hearing required under the concept of natural justice has to be pre-decisional, however, in few cases, involving an urgent or emergent situation which requires taking of an immediate action or which brooks no delay then a post-decisional hearing may also be sufficient. This approach adopted in some recent case, shows that the courts are ready to extend the requirement of 'fair play' even to the cases of administrative discretion which belonged to prohibited area previously. This recent trend raises a question: Are there any general principles excluding natural justice? This question has been discussed below:

5.3.1.4 Are there any Principles Excluding Natural Justice?
In the leading case of Maneka Gandhi v. Union of India\textsuperscript{366}, Bhagwati, J. (as he then was) made an important observation on
behalf of majority consisting of himself, Fazal Ali and Untawalia, JJ. wherein he pointed out that the flexible concept of natural justice achieves the universalization of applicability of the rule of fair hearing and therefore, use of the word exception, to denote some situations where it may not be applicable, is a misnomer. He emphasised that in few cases, the audi alteram partem rule was held inapplicable not by way of exception to fairplay in action, but because nothing unfair could be inferred by not affording an opportunity of being heard in the situation involved.

Since Maneka Gandhi the concept of natural justice has been generally applied by the Supreme Court even in the cases where it was previously considered to be excluded and the arguments putting forward the exclusionary rules which were previously recognised, have been expressly rejected. The approach of the Supreme Court towards some of the previously recognised exclusionary rules is given below, which shows that these rules or principles are no longer considered good enough for excluding the concept of natural justice.

(i) Where the Statute in question expressly provides for observation of rules of natural justice for certain purpose but imposes no procedural requirements in case of exercise of power for other purpose; This principle was applied in some of the previous cases for excluding natural justice. However, since Maneka Gandhi
this principle has been expressly rejected. For example in the leading case of *S.L. Kapoor v. Jagmohan*\(^{368}\) (1981) the contention of the Attorney General that since Section 16 of the Punjab Municipality Act expressly provided for hearing to the members concerned and Section 238(1) did not provide for such an opportunity, the natural justice stands excluded in case of exercise of discretion under Section 238(1), was rejected by the Supreme Court.

O. Chinnappa Reddy, J. speaking for the court observed:

"It is not always a necessary inference that if opportunity is expressly provided in one provision and not so provided in another, opportunity is to be considered as excluded from that other provision. It may be a weighty consideration....but the weightier consideration is whether the administrative action entails civil consequences"\(^{369}\).

Following *S.L. Kapoor*, in *Swadeshi Cotton Mills v. Union of India*, Sarkaria, J., speaking for the Supreme Court, rejected the argument that Section 18A of the Industries (Regulation and Development) Act, 1951, which expressly provided for a detailed procedure before taking over management, excluded the concept of natural justice under Section 18 AA of the Act which provided for taking over of management in certain urgent situations.

In the recent case of *Liberty Oil Mills v. Union of*
India\textsuperscript{370} (1984) the Supreme Court, (constituted by O. Chinnappa Reddy, E.S. Venkataramaiah, A.P. Sen, JJ.) again rejected the argument that Clause 8 A of the Import control order, 1955 which expressly provided for an opportunity of being heard before suspension in certain circumstances, of an import licence, impliedly excluded the natural justice from exercise of power of keeping in abeyance application for licence etc. under Clause 8 B. O. Chinnappa Reddy, J. again reiterating the principle of Maneka Gandhi, observed:

"We do not think that it is permissible to interpret any statutory instrument so as to exclude natural justice, unless the language of the instrument leaves no option to the court. Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties. It may be that the opportunity to be heard may not be pre-decisional; it may necessarily have to be post decisional....."\textsuperscript{371}

(2) **Prompt Action**: Another principle, commonly claimed for excluding the applicability of natural justice was that the authorities are called upon to take prompt action, but now since Maneka Gandhi the claim of prompt action no longer absolves the authorities from complying with the requirement of concept of natural justice because even in these cases a post-decisional hearing is now being insisted upon in various leading cases. This aspect has already been discussed
in detail under the heading 'post-decisional hearing'.

(3) **Interim Measure**: In some cases natural justice was excluded on the principle that it is not applicable to ad-interim measures. However, this exclusionary rule has also been rejected in the recent case of *Liberty Oil Mills v. Union of India*\(^373\), wherein O. Chinnappa Reddy, J. held that the fact that exparte interim orders may be made does not mean that natural justice is not attracted and at least a post-decisional hearing must be given in such cases. Speaking about the rationale of applying the concept of natural justice he observed:

"Some orders of that nature, intended to prevent further mischief of one kind, may themselves be productive of greater mischief of another kind. An interim order of stay or suspension which has the effect of preventing a person, however, temporarily, say, from pursuing his profession or line of business, may have substantial, serious and even disastrous consequences to him and may expose him to grave risk and hazard. Therefore.....there must be observed some modicum of residual, core natural justice, sufficient to enable the affected person to make an adequate representation"\(^374\).

(4) **Plurality of Interest**: In *Mohinder Singh Gill v. Chief Election Commissioner*\(^375\), Krishna Iyer, J. expressed his reservation about the general exclusionary rule that
where plurality of interest is involved natural justice may be excluded. Following this approach of Mohinder Singh Gill in the recent case of Dr. (Mrs.) M. Sushma and Others v. Osmania University the Andhra Pradesh High Court held that an order of the University authority cancelling the examination of M.D. Gynecology and Obstetrics, Part II was violative of natural justice because the successful students were not given an opportunity of being heard. In this case the examinations were held and results were declared in accordance with rules. Also there were no malpractices of mass copying etc. involved in the case. In view of this the High Court held that it would be against natural justice to punish the successful candidates just as the instance of few students who failed, on the ground that there were certain irregularities in conducting examination, without giving them an opportunity of being heard on the point. The case of Bihar School Examination Board v. Subhas Chandra Sinha, wherein a general and broad observation indicated that the principle of plurality of interests may exclude natural justice was also distinguished by the High Court on facts, saying that whereas in that case a large scale mass copying was established by a committee, in the present case there were no such mal practices involved.

(5) Where broad policy decisions involved: In the areas involving laying down of a general or broad policy, an
inroad was made by the important Supreme Court decisions even before Maneka Gandhi. However, unlike Maneka Gandhi these decisions did not specifically emphasise the idea of a universal concept of natural justice. Probably due to this these decisions have not been recognised as trend setter. Inspite of this fact their importance in the area of applicability of natural justice cannot be overlooked, since they emphasise and support the above trend set by Bhagwati, J. in holding that there is nothing like general exclusionary principles or exceptions to the concept of natural justice. The leading case on this point is State of Assam v. Bharat Kala Bhandar\textsuperscript{378} (1967). In this case the State Government issued notifications under Rule 126 AA (1) and (4) of Defence of India Rules, declaring a large number of employments to be essential services, fixing minimum wages and ordering payment of ad-hoc cost of living allowance. In a challenge to these notifications by certain employers, the Supreme Court, while striking down these notifications, held that since the notifications affected the interest of employer and the settled relations between employer and employee, the interest concerned must have been consulted before taking such action. Wanchoo, J. speaking for the court (consisting of himself, Bhargava and Mitter, JJ.) pointed out that the consultation need not be in a manner of quasi-judicial tribunal proceedings, some kind of collec-
tions of data, a kind of conference with the interest concerned, will suffice. It may be pointed out that though the Court did not expressly mention the term natural justice, in this case, the law laid down contained the very soul of concept of natural justice i.e., an opportunity of being heard.

Similarly in Government of Mysore, v. J.V. Bhat\(^{(379)}\) (1975) it was held by the Alagiriswami, J. on behalf of the Supreme Court that before declaring an area as a slum area, slum clearance area, and acquiring it under a slum area improvement and clearance policy, the Government must give an opportunity to the affected persons.

(6) The argument that natural justice may be denied when its observance would make no difference, because the person concerned could have nothing to say or because the same decision may follow even after hearing the person so that person may not be in fact prejudiced by not allowing him an opportunity, has been rejected as pernicious argument by the Supreme Court. In S.L. Kapoor v. Jagmohan\(^{(380)}\), speaking on this point, Chinnappa Reddy, J. observed:

".....natural justice know of no exclusionary rule depending on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced"\(^{(381)}\).
The above observation indicates that the courts do not insist upon natural justice on the basis that some detriment or loss to the party has been caused but on the basis that, taking of unfair administrative decision is itself a prejudice to him, because he has an interest in a fair administrative process.

The above discussion reveals that since Maneka Gandhi, the courts have been generally applying the concept of natural justice in various areas of exercise of administrative powers; and the various arguments based on the general principles, which were previously recognised as prima facie excluding natural justice, have been rejected. This shows that the concept of natural justice has thus become an established norm in the area of exercise of discretion; and application of this concept is a rule and its non-applicability is a very rare exception. The exception to natural justice are not based on general principle but on the situation in hand or the nature of the case involved. Therefore, the real question is as to what are the areas of cases or situations where the courts have not applied natural justice so far? and should the court apply norms of natural justice in these areas?

5.3.1.5 Few Situations where the Concept of Natural Justice not Extended so far: The non-application of natural justice in these situations does not seem to be based on any
general exclusionary principle, or the attitude of the judge deciding the case, namely, whether he is interventionist or traditional type, but it seems to be based on the fact that in these situations harm to the individual's interest was not considered so severe as compared to the harm to the public interest which was involved and due to this the courts did not want to interfere in these areas. The rational of non-interference in these situations have been aptly pointed out by the Patna High Court in Raghunath Pandey v. State of Bihar\textsuperscript{382} (1982). In this case the petitioner, a member of the erstwhile municipality challenged a notification of State Government, by which the municipality of Muzaffarpur was merged with certain other areas in order to constitute a Municipal Corporation, on the ground that as he suffered civil consequences by this order, he should have been given an opportunity of being heard. Rejecting this contention the court held that no doubt there were civil consequences on members of Municipality, however, civil consequences to few should give way to advantage of general public. The approach of the courts regarding non-application of natural justice in the following areas illustrates this point.

(1) \textbf{Compulsory Retirement}: Compulsory Retirement of Government Servant is one of the areas where the Supreme Court has been consistently refusing to apply the principle
of natural justice. The important cases on this point are *Union of India v. J.N. Sinha*383 and *Union of India v. M.E. Reddy*384. In the case of *J.N. Sinha*, Hegde, J. of the Supreme Court, who had himself actively applied the concept of natural justice or 'fair play in action' in the area of exercise of administrative powers in the leading case of *Kraipak*, refused to apply the concept of natural justice to the case of compulsory retirement. By taking into consideration the whole situation and the idea behind vesting this power in the Government, he came to the conclusion that natural justice should not be applied in these cases because power of compulsory retirement which is conferred on the Government under Section 56(j) holds a balance between the right of the individual government servant and the interests of the public. While a minimum service up to the prescribed period is guaranteed to the government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. He pointed out that though the compulsory retirement is bound to have some adverse effect on the government servant who is compulsorily retired, but it does not involve civil consequences as he does not lose any of his rights acquired by him before retirement, or he gets his pension and other benefits. Also no penal
action is taken against him and no stigma is attached to him. He also pointed out that the person concerned is not completely left without any remedy and he can challenge the Government's action if it is based on irrelevant considerations or has been taken for collateral purpose. The same approach has been followed by Fazal Ali, J. in *Union of India v. M. E. Reddy*385 (1980) who was one of the majority judges with Bhagwati J. in applying and reiterating the universality of the concept of natural justice in *Maneka Gandhi*.

However, as pointed by Heyde, J. in *J. N. Sinha*, the area of compulsory retirement is not completely beyond the judicial review and in some recent leading cases the Supreme Court has struck down the exercise of discretion in this area, under the doctrine of substantive ultra vires on the ground of acting on irrelevant considerations and collateral purpose. This aspect has already been discussed386.

(2) **Exercise of Discretion under Article 311(2) Second Proviso Clauses (a), (b) & (c)**: Recently, in *Union of India v. Tulsiram Patel*387 (1985) an approach similar to that of compulsory retirement has been followed by the Supreme Court in the matter of exercise of discretion by the Government under Article 311(2) Second Proviso Clauses (a), (b) & (c) of the Constitution. The five judge bench presided over by Y.V. Chandrachud, C.J., gave the decision by 4 to 1 with M.P. Thakkar, J. dissenting.
D.P. Madan, J. who wrote the judgement on behalf of the majority, pointed out that although the law is strongly in favour of natural justice and natural justice is generally applied even to the exercise of administrative powers, but it cannot be implied under constitutional exceptions to Article 311(2) because these exceptions expressly exclude natural justice on public policy and public interest. While rejecting the argument on behalf of the affected Government servant that the charge-sheet or at least a notice informing the Government servant of charges against him and calling for his explanation thereto was always feasible, Madan, J. observed that the concept of natural justice is a magnificent thoroughbred on which this nation gallops forward towards its proclaimed end, its destined goal of justice, social, economic and political. This thoroughbred must not be allowed to turn into a wild and unruly horse, unsaddling its rider, and bursting into fields where the sign of no trespassing is put up. In view of this the Court rejected a large number of petitions by dismissed officials of Central Industrial Security Force, Madhya Pradesh District Police Force etc. who were dismissed for their involvement in riot and violent activities. Thus, the decision of the Supreme Court in Tulsiram Patel indicates that the Court is not prepared to imply the concept of natural justice where it
has been expressly excluded in the interest of public policy. It may, however, be noted that in the case covered by second proviso to Article 311(2) substantive safeguard requiring that the decision of the authority must not be malafide have been held to be applicable in this case. Besides, in cases of exercise of discretion under Cl. (b) of the Second Proviso to Article 311(2) an additional safeguard of recording reasons provided in the Constitution has been held to be mandatory. Although it may be difficult for the Court to imply natural justice in the face of express exclusionary constitutional provision, it is submitted that the use of the drastic powers under Article 311(2) Second Proviso Clauses (a), (b) and (c) must be limited to really exceptional cases. To ensure this the court should probe into the reasons for dispensation of natural justice in such cases.

In another recent case decided on 12th September 1985 the Supreme Court has again dismissed the appeals by the certain employees of Research and Analysis Wing (R.A.W.), who were dismissed from service for their involvement in aggressive gherao of their superior officers. 388

(3) Promotion: In the matter of promotion of a government servant the protection of an opportunity of being heard has not been available because in these cases it has been held that a mere expectation of the Government
servant is involved\textsuperscript{389}. It seems that since he did not acquire any right or interest in the post his expectation does not amount to a 'legitimate expectation'.

It may be noted, however, that in the above cases the government servant is not without any remedy, he can challenge the exercise of discretion as being based on irrelevant considerations or being for improper purpose or malafide. Also, in the cases of removal of his name from the select list prepared for promotion the authorities are bound to give reasons under the statutory requirement which is mandatory. Disclosure of reasons may enable him to show that the authority acted on irrelevant reasons or for improper purpose.

In addition to above legal remedy he may also be entitled to departmental appeal or review to higher authority under his service rules.

(4) **Cases involving assessment of Academic Performance of Students**: There have been various cases in which the concept of natural justice has been applied in the area of education, for example generally in the matter of disciplinary action (by classifying these matters as quasi-judicial)\textsuperscript{390} cancellation of admission of a student\textsuperscript{391} or with-holding of result of a student\textsuperscript{392} etc. However, there is one area, namely, the area of assessment of academic performance of a student where the application of natural
justice has been refused so far, and it seems unlikely that it may be extended to this area in the near future because probably the judges do not consider the application of natural justice in this area to be in public interest. Thus in Jawaharlal Nehru University v. B.S. Narwal, a bench of the Supreme Court consisting of V.R. Krishna Iyer and O. Chinnappa Reddy, JJ. who have extended the scope of application of concept of natural justice even to the cases requiring prompt action, refused to apply the rule of *audi alteram partem* on the ground that the exercise of discretion mainly involved the assessment of academic performance of a student. Similarly in the recent case of Maharashtra S.B.O.S. and H.S. Education v. Paritosh (1984) a bench consisting of D.A. Desai and V. Balkrishna Eradi, JJ., held that the process of evaluation of answer papers or of subsequent verification of marks does not attract the principles of natural justice. Speaking for the Court Balkrishna Eradi, J. observed:

"The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the
answer books and determining whether there has been a proper and fair valuation of the answer books by the examiners. ⁴⁹⁵

The above observation shows that the courts are not inclined to stretch the scope of natural justice to a breaking point or to absurd lengths.

(5) **Liquor Licencing**: The area of liquor licencing is another area where the courts generally do not want to interfere because in this area consideration of public interest over-rides the interest of a person. For example in *P.E. Corporation v. Excise Commissioner, Assam* ⁴⁹⁶ (1972) Heyde J., speaking for the Supreme Court, (consisting of himself, Grover & Mitter, JJ.) held that in the matter of grant of exclusive privilege to supply liquor, fairness did not require the observance of principles of natural justice, therefore the petitioner was not entitled to an opportunity of being heard. Similarly in the recent case of *M/s. Chingleput Bottles v. M/s. Nagestic Bottles* ⁴⁹⁷ (1984) the A.P. Sen, J. of the Supreme Court refused to apply natural justice in the matter of grant of exclusive privilege in matter of supply of liquor.

(6) **Concept of Natural Justice has not been extended in few other cases, by the various High Courts**: In *P.L. Lakhanpal v. Union of India* ⁴⁹⁸ (1981) Delhi High Court held that no hearing was required in a case where a licence was refused to a person for establishing a broadcasting station,
because the question involved a policy of national importance. It may also be possible to say that probably the court did not interfere in this case because a political question of issuing a licence to a person of opposition party was involved. Similarly in a case involving the exercise of discretionary power in the matter of land grab movement, the Andhra Pradesh High Court refused to apply natural justice. In the matter of revocation of fire arm licence under Section 17(3), Calcutta High Court refused to imply natural justice on the ground that nature of power is such that it must be exercised quickly in public interest.

In cases of price fixation and rate fixation also the application of natural justice has been refused on the ground that these functions are more akin to legislative functions. Similarly in the matter of merger of Municipality and Gram Panchayat in a Municipal Corporation, natural justice has been refused.

The above cases indicate that although the concept of natural justice or 'fair play in action' has found a general application in the area of administrative discretion, there are few areas or situations where the courts do not want to extend it. The courts are not inclined to stretch the concept of natural justice to absurd lengths. The approach of the courts is proper because in these few situations the public interest involved did not warrant for
an introduction of even minimal procedural safeguard of 'fair play in action'. It may be noted, however, that while refusing to extend the scope of natural justice, the old distinction between administrative and quasi-judicial or right and privilege has still been used in few cases by the courts.

An interesting instance of use of old distinction between administrative and quasi-judicial for refusing the application of concept of natural justice is provided in the recent case of *S.P. Gupta v. the President of India* (1982). Despite being a leading authority on various points, namely, the disclosure of materials to the court, Governmental privilege, and the public interest litigation, this case constitutes a weak authority on the point of applicability of natural justice because of the self-contradictory approach adopted by four out of the seven judges towards this question. In the instant case the exercise of executive discretion in the matter of transfer of High Court judges and in the matter of appointment of additional judges to the High Court was questioned inter alia, on the ground that the concerned judges were not given a fair chance to explain their case during the consultation process, therefore, their transfer and or their non-appointment was void or invalid. Main questions relating to applicability of fair play were :- (i) what is the nature of consultation process under Articles 222, 217 and 224 of the Constitution;
(ii) What is the position of the additional judges;
(iii) Whether the consultation process under these Articles includes the requirement to give fair hearing to the affected judges; (iv) Whether the additional judge, who was dropped was entitled to a fair opportunity to explain his position to the Chief Justice of the High Court and the Chief Justice of the Supreme Court;
(v) Whether the High Court judge who was transferred, is entitled to a fair opportunity to explain his case to the Chief Justice of India. About question No. (i), namely the consultation process all the seven judges (Bhagwati, D.A. Desai, Fazal Ali, Venkataramaiah, Tulzapurkar, Gupta and Pathak, JJ.) held that the nature of consultation under Articles 222, 217, and 224 was the same; about question No. (ii), namely the position of the additional judges, also all the seven judges agreed that his position was different from that of a fresh person since an additional judge had some interest in view of the fact that he held the post of the additional judge and also in view of the general practice followed under which an additional judge was generally appointed a High Court judge; About the question No. (iii), namely the requirement of fairplay in consultation process, while Tulzapurkar, Gupta and Pathak, JJ. held that the concerned judges were entitled to a fair opportunity to explain their case to the Chief Justice of the concerned High Court and/or the Chief Justice of India during the consultation process, Bhagwati, Fazal Ali,
Desai and Venkataramaiah, JJ. omitted to mention anything about the fairplay involved in consultation process under Articles 222 and 217; on question No. (iv), namely the right of the additional judge to have a fair opportunity, while Tulzapurkar, Gupta and Pathak, JJ. held that he was entitled to a fair hearing during consultation process, Bhagwati, J., (as he then was) with whom Fazal Ali and Desai, JJ. agreed held that the additional judge was not entitled to fair play because the action involved was administrative or was to be exercised on subjective satisfaction and not quasi-judicial. Similarly Venkataramaiah, J. in his concurring opinion on this point held that the President has wide discretionary power under Article 217, & this is indicative of the absence of an obligation to act judicially. Therefore, the additional judge was not entitled to fair play.

In view of their approach on the question No.(i), (iii) and (iv), relating to general nature of consultation process and fair play involved in it and its application to the case of additional judges, Bhagwati, Desai, Fazal Ali and Venkataramaiah, JJ. should have answered the (Vth) question also in negative since this was a logical conclusion to the above approach, however, while answering question No. (v) they turned round and contradicting themselves, held that the transferred judge (K.B.N. Singh) was
entitled to a 'fair play' in the consultation process and the Chief Justice of India should have consulted him before giving his advise to President under Article 222.

One fails to understand that when it was held by all the judges that 'consultation process' under Articles 222 and 217 is the same, how in one case it could include 'fair play' and in another case it could be excluded on the ground that function involved was administrative and not quasi-judicial. No theoretical basis has been laid down by any of the four judges for this distinction. Further, while rejecting natural justice or fair play in the case of additional judge on the long discarded distinction between quasi-judicial and administrative, Bhagwati, J. who himself was one of the architects of the concept of universalisation of natural justice, or fair play in action by doing away with the quasi-judicial/administrative dichotomy and by holding it applicable to administrative function, in Maneka Gandhi, did not refer to any of the previous cases on this point, (including Maneka Gandhi). Similarly Venkataramaiah, J. while resorting to long discarded label of 'duty to act judicially' on the question of applicability of fair play did not mention any of the leading cases since Kraipak. This was probably due to the fact that the leading cases on this point were not mentioned in the arguments.

In view of this self contradiction in the approach
of Bhagwati, Fazal Ali, Desai & Venkataramaiah, JJ. it is difficult to state the law clearly on the point of availability of 'fair play' to the concerned judge during the consultation process involved under Articles 222 and 217. Further, since the judgements of Bhagwati and Venkattaramaiah, JJ. appear to be per-incurim, the law in the previous decision of Sankalchand Seth's 407 case could still be taken to be good law.

5.3.1.6 Effect of Failure to Observe Natural Justice: Void or Voidable: According to majority of English cases breach of natural justice resulted in a null or void administrative order in the same way as any other act which was ultra vires. For the duty to act fairly, just like the duty to act reasonably was enforced as an implied statutory requirement, so that failure to observe it meant that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void. This assumption was so well understood that it was rarely spelled out in judgements. The majority of the House of Lords in Ridge v. Baldwin 409 (1963) (consisting of Lord Reid, Lord Morris & Lord Hodson) decided consistently with this hypothesis and held the dismissal of the chief constable void. However, Lord Evershed, who was the dissenting judge introduced the confusion of void or voidable. He held that although natural justice should have been observed, but since the
decision in violation of natural justice was voidable the
court need quash it only in case of 'a real substantial
miscarriage of justice'. Motive of this dissenting judg-
ment was to enlarge judicial discretion in the cases
involving procedural ultra vires. The confusion, started
by the dissenting opinion of Lord Evershed, was carried
forward in the Privy Council decision in Durayappah v. Fernando (1967). In this case mistaking the minority opinion of Lord
Evershed as the majority opinion of Ridge v. Baldwin in favour
of voidable, the Privy Council held that although the municipal
council of Jaffna should have been given a hearing before superses-
sion, but the order was voidable only at the instance of the
municipal council and not at the instance of the mayor who
brought the action and therefore the order was not liable to
be quashed at this instance.

The void or voidable controversy thus created by
few English judges has been the subject of severe criticism
by administrative law experts. Also, except for a very
few cases the decision in violation of natural justice has
generally been held to be void by English Courts.

In India also violation of natural justice has
been held as void in various leading cases and in view
of the vast freedom enjoyed by the courts under Articles 32
and 226 in the matter of framing the ultimate relief in
the case, the courts have not found themselves under compul-
sion to quash the administrative order irrespective of the
situation involved. Therefore the void and voidable controversy has not generally arisen particularly with respect to the question of ultimate relief. The various cases decided in this area indicate that the courts have not applied the term void or nullity mechanically; and have given relief generally keeping in view the difficulties of administration, as well as the interest of the individual. On one hand there have been some cases where while holding a decision in violation of natural justice as void, the courts did not quash the order, but directed the administration to give a hearing to the person concerned and then reconsider its decision; on the other hand there have been some cases where action of administration has been quashed. It appears that in cases where the exercise of discretion involved a decision which might have resulted in paralysing the administration or might have affected the public interest, the courts have been reluctant to quash the administrative order. For example, in Maneka Gandhi v. Union of India, the Supreme Court refused to quash the order of revocation of passport of the petitioner because if the order would have been quashed and the petitioner would have been given back the passport, she could very well have thwarted the course of justice by going abroad and thus avoiding her appearance before the Commission of Inquiry appointed by the Government. As it would have affected the public interest the Court agreed
with the request of Attorney General and allowed the order of the Government to stand, at the same time it directed the Government to give the petitioner a hearing and reconsider its decision. Similarly, in the case of *S. L. Kapoor v. Jagmohan*[^415^], the Supreme Court did not quash the order of supersession of municipality because the normal term of the committee was due to expire within next few days and the reinstatement of the committee at this stage would have led to confusion and chaos in the affairs of the municipality. Also in *Swadesni Cotton Mills v. Union of India*[^416^], the Supreme Court refused to quash the order of the Government taking over the management of the company under S. 18AA(a) of the Industries (Regulation and Control) Act, but directed the Government to give a hearing within a certain fixed period and reconsider its decision. The unstated consideration of the ultimate relief in this case also appears to be that it would create confusion and chaos if the undertaking is handed over to the owner after quashing the order and if after hearing the Government again passes an order of taking over. However, in cases involving decisions mainly affecting an individual interest and not immediately affecting public interest the courts may generally quash the order. For example in *Kraipak*, *Binapani Dei*[^418^] the administrative order was quashed.

[^417^]: *D. Subba Rao v. State of Andhra Pradesh*[^419^], however is a questionable authority in this respect. In this case
the State Government removed the president of Panchayat Samiti without giving him a hearing. It was held by the Supreme Court that the order was in violation of natural justice, but the order was not set aside and the Government was directed to give him an opportunity to make representation, and reconsider its order in the light of representation. It is submitted that as the order affected mainly an individual it should have been quashed and the Government could have again started the proceeding against him if they wished. This course is always open in cases of exercise of administrative powers, which can be reviewed by the authorities any time.

Thus the above cases reveal that in India the controversy between void & voidable has not been raised with respect to the ultimate relief in a case. The term void or nullity is not an absolute term, but a relative term, and its interpretation would depend upon the situation in which it is used.

However, with respect to the more complex question whether a person was bound to obey a void or illegal order, and whether he could be prosecuted or convicted for the same, the controversy of void and voidable was raised in the case of Nawab Khan v. State of Gujarat. In this case the petitioner was externed from a district as an undesirable person. He disobeyed the order and was consequently prosecuted for this disobedience. While the
prosecution was pending, the order of externment was quashed by the High Court under Article 226, in a petition, on the ground that the order was violative of natural justice because he was not given an opportunity of being heard. Consequently the petitioner was acquitted by the trial court in the criminal prosecution. However, on an appeal from this acquittal the High Court convicted him on the ground that when he violated the order at that time the administrative order in question was operative and he could not disobey the order by himself deciding on its illegality. This view of the High Court was challenged in the Supreme Court on the ground that since the order was void ab initio or non est, there could be no violation of such an order and the petitioner could not be convicted for any offence which he did not commit. Krishna Iyer, J. while delivering the judgement for the Court, (consisting of himself and R.S. Sarkaria, J.) pointed out the difficulties involved in such a situation and observed that if the illegal acts of the authorities were defied on self-determined voidness, law and order chaos and anarchy might result; on the other hand it is also true that a person does not commit any wrong by disobeying an illegal order. In view of this dilemma or confusing situation he gave no general answer to this question and left it open. He also noted that legal chaos in this branch of jurisprudence should be avoided by evolving concepts which might work in practice in Indian situation and for this legislation rather than judicial
law making will meet the needs more adequately.

However, so far as the fact situation in the instant case was concerned he gave a definite ruling that in case of a restrictive order affecting fundamental right, breach of natural justice rendered the order void ab initio and the person could not be prosecuted or convicted for such offence.\(^4\)\(^2\)\(^1\).

About the cases not involving fundamental rights also Krishna Iyer, J. opined that an order in violation of natural justice was void, but it was void in a limited sense of being liable to be avoided by the court with retroactive force.\(^4\)\(^2\)\(^2\).

It may be noted, however, that void and voidable controversy in Nawab Khan has not affected the general development and application of concept of natural justice in the area of administrative discretion. The main purpose of the courts has been to imbue or imbibe the administrative process with fairness. Therefore, the consequence of a violation of natural justice, though void, has not always resulted in the quashing of an administrative order. While giving a final relief in such cases generally the courts have been keeping in mind the exigencies of the administration as well as the interest of the individual affected. This is a proper approach and should be continued. Thus it may be said that the natural justice has become a generally accepted norm for exercise of discretionary powers.
Generally the requirements of natural justice in the area are that the administrative authority exercising discretion must not have any personal interest involved in the matter, and notice and fair hearing must be accorded to the person affected. For implying the natural justice it is enough if any right of interest of the person or his legitimate expectation is affected or the exercise results into civil consequences to him.

Although speaking order does not form the part of concept natural justice nor has it established itself as a necessary requirement of fair procedure in the area of exercise of administrative discretion, but, there have been a few decisions of the High Courts and the few observations of the Supreme Court which indicate that it could be implied as a requirement of fair procedure. In view of this, the approach of the courts towards this principle is discussed below.

5.3.2 Speaking Order or Reasoned Decision:

An order may be called a speaking order or a reasoned decision when the reasons for the decision are given to the person affected along with the order. It has been already noted that the requirement has been considered to be a mandatory requirement in cases where the statute provided for recording of reasons. However, unlike the development in the area of quasi-judicial powers it has not become an established principle in the absence of a statutory
requirement. This is evident from the leading case of Mahabir Jute Mills v. Shibbanlal Saxena, the Supreme Court refused to lay down a general rule that an administrative order must be a speaking order. In the instant case the exercise of discretion by the appropriate Government under Section 10(1) of the Industrial Disputes Act, was challenged on the ground that no speaking order was passed while refusing to refer an industrial dispute. Dealing with this question S.M. Fazal Ali, J. speaking for the Court (consisting of himself, A.N. Ray, C.J., K.K. Mathew & V.R. Krishna Iyer JJ.) held that since the function of the Government is administrative no speaking order is required. However, while refusing to lay down a general rule in this respect he made the following observation, by way of an obiter

“But we think it desirable that such orders should contain reasons when they decide matters affecting rights of parties.”

(emphasis supplied)

This observation indicates that the court may require speaking order if some right of the person affected may be involved. This observation of the Supreme Court has been followed by the Calcutta High Court in H.S. Kohli v. Union of India. In this case the court held that since the order blacklisting affected the petitioner's right to carry on business under Article 19(1)(g) it must be speaking order. In addition to this case there has been some more
cases where other High Courts have also required making of speaking order on the ground that the order affected rights of the person.\textsuperscript{428}

In some cases where the name of a person was superseded or dropped from a select list, prepared for the departmental promotion, the High Courts insisted upon making of speaking order even though there was no statutory requirement to this effect:\textsuperscript{429}

The requirement to give reasoned decision has been implied in the statute at the stage of conferment of discretion in few recent cases by the Supreme Court, while pronouncing upon its constitutionality under Articles 21 and 14. Thus in \textit{Sunil Batra v. Delhi Administration}\textsuperscript{430} (1978), it was held by Krishna Iyer, J. that the Section 56 of of the Prison Act of 1894 required that the bar fetters cannot be put on a prisoner unless the reasons for it are recorded on the prisoner's history ticket in the language intelligible to him so as to make the next safeguard effective, namely, the revision petition to the Inspector General of Prison, and therefore the Section was not violative of Article 21 read with Article 14. Similarly in \textit{Manick Chand v. Union of India}\textsuperscript{431} (1984), Tulzapurkar J. held on behalf of the Supreme Court (consisting of himself and Balkrishna Eradi and D.P. Madon, J.J.) that Section 79 of the Gold Control Act, 1968 requires that the authority must make a speaking order before extending the initial statutory
period of investigation because without it another statutory provision in the Act which gave a right to appeal would become ineffective. In view of this implied safeguard it was held that the section is not violative of Articles 14 and 19(1)(g), as conferring arbitrary discretionary power. These cases of the Supreme Court indicate that the Supreme Court may insist upon the making of speaking order in cases involving fundamental rights, particularly where an administrative appeal or revision has been provided in the statute against the initial administrative order.

The above cases indicate a growing trend in favour of speaking order. Although it has not become an established principle in the area of exercise of discretion, so far, it is quite possible that in future the court may insist on giving reasons to an individual or making a speaking order.

It is submitted that making of speaking order is the minimum and elementary requirement for ensuring just, fair and open administrative process, and for safeguarding the rights of the individual against arbitrariness or abuse of power. The administration, intending to proceed arbitrarily has to sit back, hold its hand and think twice, if it has to state reasons for its action. In addition to this the making of speaking order or disclosure of reasons to the persons affected also generates confidence in the minds of people towards the administrative process. The
The Court should, therefore, insist upon the passing of speaking order in cases where some right of a person is being affected and no adverse effect on public interest may result from such disclosure.

The argument against making of speaking order in the exercise of administrative power generally has been that giving of reason may cause delay and thus hamper the working of administration. The answer to this argument has been provided in some important cases\textsuperscript{432}; and in academic writings\textsuperscript{433} which rightly point out that requirement of making speaking order does not mean that the administration must write a judgement. The reasons which give an indication as to why and under what circumstances a particular decision has been taken may be enough. Therefore, it is suggested that, in the area of exercise of discretionary powers a general rule, requiring speaking order, in the cases affecting the rights of an individual, must be evolved. It may be hoped that the courts, treading on this path cautiously and steadily, will be able to evolve such a general rule.

Above discussion reveals that the courts have been controlling the exercise of administrative discretion under the doctrine of substantive \textit{ultra vires} and the doctrine of procedural \textit{ultra vires}. The various areas of exercise of power has now come under judicial review by means of these two doctrines. The question, now, is whether the
courts are inclined to increase the scope of legal control still further by recognising the principle of public interest litigation in this area or not? This question has been dealt with in the following discussion.

5.4 CONTROL OVER EXERCISE OF ADMINISTRATIVE DISCRETION AND PUBLIC INTEREST LITIGATION:

There have been various recent cases since the famous case of Hussainara Khatoon v. State of Bihar\(^{434}\) (1979) in which the Supreme Court allowed a member of public to raise some important issues before it. Generally these cases related to maladministration of the criminal law with respect to prisoners, or maladministration of mental asylum or maladministration of labour laws\(^{434a}\). In these cases the provisions of the law did not confer a discretion, but a duty on the authorities, therefore the question of public interest litigation vis-à-vis discretionary powers was not raised. However, in the recent case of S.P. Gupta v. The President of India\(^{435}\) (1982) which related to exercise of executive discretion a question of Public Interest Litigation (PIL) was raised although it was not necessary to answer this question in view of the fact that the judges affected by the executive order themselves challenged it, Bhagwati, J. (as he then was), dealt with this question in detail and made the following observations which indicated that the Supreme Court was inclined to decide upon the legality of exercise of administrative discretion through the PIL.
also. Thus while speaking on the question whether the lawyers associations could challenge the decision of the President of India in transferring some High Court judges or in dropping some of the additional judges of the High Courts, he observed:

"If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State of public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it. The Court cannot countenance such a situation where the observance of law is left to sweet will of the authority bound by it, without any redress if the law is contravened".436 (emphasis supplied).

Applying the above broad principle, in few public interest litigations, the exercise of discretion has been struck down by some of the High Courts437 and in addition some positive directions were given to administration to exercise its discretion in a particular manner.

Regarding the present approach of the Supreme Court on PIL, since S.P. Gupta v. the President of India, Dr. S.K.Agarawal rightly points out in a lucid study that the present Supreme Court is divided on the question of PIL and a consistent philosophy on this point is yet to emerge438. At present it is therefore difficult to say whether the court would, as a general rule entertain a PIL questioning exercise of discretion. However, it may be noted that in the matter of administrative discretion
the court has declined to give directions so far. An illustrative case on this point is Dr. P.N. Thampy Thera v. Union of India (1983). In this case while refusing to give directions to Government regarding implementation of certain committee reports relating to Railways, Ranganath Misra, J. speaking for the Supreme Court, (consisting of himself, Bhagwati & A.N. Sen, JJ.) held that giving directions in a matter where availability of resources, policy regarding priorities, expertise is involved is not prudent.

In the recent case of State of H.P. v. Parent of a student (1985) the Supreme Court set aside the decision of Himachal Pradesh High Court which gave directions to the State Government to take steps against ragging.

5.5 ULTRA VIRES EXERCISE OF ADMINISTRATIVE POWER & LIABILITY IN DAMAGES:

Some times the exercise of discretion which has been held ultra vires or illegal may also result in loss to the person concerned. For example pulling down of house of a person without hearing him may result in loss to him; similarly the refusal of the authority to admit a student on irrelevant grounds may result in losing of his valuable year; also non consideration of an application for passport may cause a person some irreparable loss, etc. The question is: whether the administration can be liable for damages for such loss? The subject of Govern-
mental liability for damages is a new or developing area in the Government 'torts', and it constitutes a very important topic in that area, but as the present study is limited to the various modes and principles of control of discretionary power, this topic has not been dealt with in detail here. However, for the present purpose it may be noted that simply because the exercise of discretion has been held as ultra vires, it does not mean that the individual automatically becomes entitled to damages in tort. For claiming damages he has to file a civil suit against the Government. The present position seems to be that the administrative action which is ultra vires will found an action for damages in any of the following situations:

(i) if it involves the commission of a recognised tort such as trespass, false imprisonment or negligence;

(ii) if it is actuated by malice, e.g. personal spite or a desire to injure;

(iii) if the authority knows that it does not possess the power which it purports to exercise.

In all these cases, in fact, it may be nearly impossible to get a relief since the burden is heavy on the plaintiff to prove his case. Also, there seems to be one
more impediment which naturally arises in the area of administrative discretion, and that is: even if an action is held ultra vires, say, for taking into account irrelevant consideration or for not observing natural justice, it does not stop the authority to come to the same decision by removing the legal defect, and thus change the nature of decision from ultra vires to intra-vires. In such a case the very base of an individual action in tort may go away.

In India recently there have been a few cases in which the Supreme Court awarded some compensation to petitioner under Article 32 by way of an interim relief, however in these cases carrying out of a constitutional and a statutory obligation by the authority was involved and there was no discretion in the authority to not to carry out their obligation. For example in Radul Shah v. State of Bihar 443 (1983) the person concerned was kept in prison for about 16 years, even after his acquittal. No provision of law vests a power in the administrative authorities to keep a person in prison after his acquittal, on the contrary there is a duty to release him under the criminal law and Article21. In view of this flagrant violation of the law Chandrachud C.J. held that in this case that the petitioner was entitled to get damages, in a proper civil proceedings. However, he pointed out that till the exact amount of damages is arrived at by the civil court the petitioner cannot be left without anything to sustain or
support him; and as in view of the facts he was certainly entitled to get damages the court could give him an interim amount, in the writ petition under Article 32, till the exact amount of damages could be calculated in a civil suit. In view of this the Court granted the petitioner Rs.35,000/- as interim amount under its power under Article 32.444.

However, the recent practice of the Supreme Court to award compensation has become a controversial topic currently. It is submitted that Dr. S.K. Agrawala has rightly suggested that the practice of giving compensation should be limited to such extreme cases as custodial violence445 etc.

5.6 CONCLUDING REMARKS:

Above discussion reveals that besides constitutional limits provided in fundamental rights, the exercise of administrative discretion has also been controlled by the courts in the light of statutory limits. Inspite of the fact that the discretionary powers have been vested in very broad terms various legal limits have been implied by the courts in the statute. The justification for implying these limits has been the doctrine of ultra vires446.

The statutory limits thus implied are: (i) that the discretionary powers must be exercised reasonably, i.e. for proper purpose, object or policy; on the relevant considerations; by the person authorised; by considering the merit of each case or by proper application of mind, (ii) that
the discretionary powers must be exercised in good faith and not malafide or in bad faith or with malicious intent. These limits constitute substantive limits.

In addition to above limits the courts also require that the discretion must be exercised in accordance with the procedural limits, expressly provided in the statute, or in accordance with the 'fair procedure', which is generally implied in all the statutory powers.

The above principles are well recognised principles of English administrative law which have also been used by the Indian Supreme Court and the High Courts for controlling exercise of discretion in the light of statutory limits.

Out of all the above principles constituting the substantive limit over the exercise of discretion, the principle of acting on irrelevant considerations or leaving out relevant considerations has been invoked very often. Therefore it constitutes an important limit in this area. The next important principle is the principle of acting for improper purpose. In fact both these principles are so much inter related that in many cases they run into one another. Since the control on these grounds very much depends upon the availability of the reasons or the material forming basis of an administrative decision to the courts, the scope of the legal control under these grounds was limited in the beginning to few areas only, where the reasons for the administrative decision were available to the courts
under the statutory requirements. However, subsequently the scope of legal control through the above principle came to be expanded due to the recognition of three interrelated principles by the English and Indian Courts. These principles, recognised during late sixties, are as follows:

(i) there can be no absolute discretion in the administrative authorities;

(ii) every discretion is coupled with a duty to exercise it legally or within the legal limits;

(iii) the administrative authorities must disclose reasons or the material forming basis of their decision to the courts to show that they acted legally, in case where their action is challenged as being based on irrelevant considerations or for improper purpose.

The development of the principle of disclosure of reasons to courts has not been hampered, either by the question of burden of proof or by the question of Governmental privilege under the Evidence Act.

As the concept of absolute discretion has been replaced by the duty to act within the legal limits; since the leading decision of the House of Lords in Padfield which has also been recognised by the Indian Supreme Court, the courts have found no difficulty in going through the records or material on which the administrative decision was based, even in the areas which were previously considered to be impregnable. Thus the exercise of administrative power,
if found to be based on irrelevant considerations or for improper purpose, has been struck down in numerous cases. In view of this development, H.W.R. Wade has rightly pointed out that '. . . . it makes no sense to ask whether there may be unreviewable administrative action. Unreviewable administrative action is just as much a contradiction in terms as is unfettered discretion. The scope of legal control on the above grounds has expanded so much that recently the Supreme Court has shown its readiness to review in appropriate cases, the President's discretion in the matter of grant of pardon under Article 72 and in the matter of dissolution of the State Legislative Assemblies under Article 356. Similarly the exercise of discretionary power in the matter of transfer or appointment of judges have not been held to be beyond judicial review. The scope of judicial control over exercise of discretion may still be broadened by entertaining the challenge to legality of exercise of discretion through Public Interest Litigation (PIL). Although in a few recent decisions of the High Courts a challenge to exercise of discretion has been allowed through PIL, but a clear trend on this point has not been visible so far. In a comprehensive study on PIL, Dr. S.K. Agrawala has rightly pointed out that a consistent philosophy of the Supreme Court on PIL has not yet emerged. It is, however, submitted that the court should not generally interfere in the area of administrative discretion through PIL, but use PIL only
in rare cases and thus avoid unnecessary interference.

The present study also reveals that not only the scope of judicial review has been expanded but also the court's capacity to probe deeper into exercise of discretion has increased. The requirement to act on relevant considerations and not on irrelevant considerations, coupled with principle of disclosure of reasons or material to courts also enables the court to reach very near to the merit of exercise of discretion. Due to this sometimes the thin dividing line between sufficiency and relevancy of grounds gets blurred and thus the court's decision in such cases may amount to an interference with the merit of discretion.

In view of the expanding scope of legal control and the increased probing capacity of courts through the principle of disclosure of reasons or material, the question has now been raised by eminent jurists about the judicial policy towards administrative discretion. The question is whether as a matter of policy the courts should or should not leave a few matters of administrative discretion out of their purview? On this question mainly two views have been expressed. One view which generally welcomes the recent trend of extinction of absolute discretion and its subjection to the judicial review as a healthy development for an open Government in a democratic country like India, warns/cautions against too much intervention
by the courts. According to this view courts should
normally not interfere with the political decisions
of the executive. The recent decision of the Supreme
Court wherein it refused to go into the subjective satis-
faction of the President in passing Ordinance under
Article 123 and the refusal by a High Court to go into
exercise of discretion by the Governor in appointing a
ministry have been appreciated as the decisions in the
right direction by supporters of this view. However, the
other view which suggests more restrictive approach
recommends that the judicial intervention should generally
be limited to such matters as preventive detention and
the reference of industrial disputes i.e. the areas where
a right of an individual may be involved. This view also
recommends that the exercise of discretionary powers which
are only regulatory in nature should not generally be
interfered.

It is submitted that the first view which although
welcomes the general development of principle of control,
but cautions the courts against unnecessary involvement
in the politically charged issues, is more appropriate and
suitable to the Indian situation where by and large no
other control mechanism exists on the exercise of discre-
tionary powers. If the courts revert back to the old policy
of general non-interference, there may be no place for an
individual to complain against administrative arbitrariness,
unreasonableness and unfairness. It may be interesting to
note that even in the other common law democracies, such
as Australia and England where the enlightened Government have provided for other institutional controls, the legal control through courts has not only been accorded a central place but has also been strengthened. It is, thus, submitted that the Indian courts, while generally adhering to the law so remarkably developed through various decisions, should take care of avoiding the unnecessary judicial interference. For example the courts should not generally interfere with the political decisions of executive as mentioned above. In addition the courts should also try to avoid giving of directions in the matters which involves matters like availability of resources having material bearings, policies regarding priorities, expertise etc.

While emphasising upon the procedural fairness in the exercise of discretion the courts in India have generally held that the statutory procedure expressly provided in the statute is mandatory and must be strictly followed.

However, as the statutes providing for such safeguards are very few, an implied procedural requirement of 'fair procedure' has been insisted upon by the court. This trend was visible since the decision of the Supreme Court in Binapani Dei (1967). Generally the concept of natural justice has been held to be the requirement of fair procedure.
The criteria for implying natural justice are right or interest, legitimate expectation and civil consequences. Out of these, the criterion of civil consequences has been accorded a wider meaning which not only covers the cases of right or interest or legitimate expectation but also other cases where the individual had no right involved, but still he could be adversely affected.

Generally the content of the concept of natural justice are: that the authority must not be personally biased; and that the person affected should be given notice and a fair hearing. While giving notice the authority must inform him of the reasons for the proposed action and the nature of the action proposed to be taken against him. Fair hearing does not mean an oral hearing or a representation through a lawyer or an opportunity to cross examine, it simply means that the person should get some chance to represent his case to the authority. Similarly the requirement of notice does not require that the report of inquiry officer, (if one preceded the administrative action) should be disclosed to the person. It is submitted that although the courts are right in not introducing the formality of representation through lawyer or of cross examination, but in case of inquiry report, if the report of inquiry contains all the allegations against the person then it should be shown to him or at least he should be informed of all the charges in the inquiry report against him.
Generally hearing must be provided before taking the decision, but in the cases involving some emergent or prompt action, it may be a post-decisional hearing.

The concept of Natural Justice or fair play in action has been accorded a general applicability in the area of administrative discretion since Maneka Gandhi v. Union of India, therefore the principles which were regarded as prima facie excluding natural justice no longer hold the field and now even in case of emergent situation a minimum safeguard of post-decisional hearing has been recognised.

Although there seem to be no general principles which prima facie exclude natural justice, there are few areas where the courts have refused to extend the concept of natural justice. These are: compulsory retirement; Article 311(2) Second Proviso, Clauses (a), (b) & (c); promotion; academic performance of a student; liquor licensing etc. In most of these areas it has been conceded by the courts that though the procedural safeguard of concept of natural justice is not available, but the safeguard of substantive limit of requirement to act on relevant consideration is always available. For example an order of compulsory retirement has been struck down for not taking into account relevant considerations and acting on irrelevant considerations.

Unlike the area of quasi-judicial power, the require-
ment of speaking order or reasoned decision has not been recognised as an established principle in the area of exercise of administrative powers. Neither it has been recognised as a part of concept of natural justice, nor as an independent principle of fair procedure. However there have been few High Court decisions and observations of the Supreme Court which indicate that in future it may be recognised as a principle of 'fair procedure' in the area of administrative discretion. It is submitted that the principle of speaking order should be insisted upon in the cases where some right of an individual has been affected, and no immediate public interest is involved. Reasons in such cases may be disclosed informally and not in the form of judgement. This may strengthen confidence of the governed in the administrative process, also it may ensure that administrative authority will not act arbitrarily or capriciously. As the speaking order discloses reasons to the person concerned, if he is convinced about the genuineness of administrative action, he may not go to court to challenge it and thus unnecessary litigation may be avoided.
FOOT NOTES

1. See Articles 358 & 359 of the Constitution of India.

2. In the U.S.A. § 10(e) of Administrative Procedure Act provides that the reviewing court shall 'hold unlawful and set aside any action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law'. The development of law relating to control of discretionary power has taken place under this section which is almost similar to that of England, see Wade & Schwartz, Legal Control of Government, pp. 252-270 (Clarendon Press, Oxford, 1972).


4. Ibid at p. 38


9. Ibid. at pp. 682-683


12. A.I.R. 1964 S.C. 72
13. Ibid at p. 83
16. Roberts v. Hopwood (1925) A.C. 573 Padfield v. Minister of Agriculture, Fisheries & Food, (1968) A.C. 997; Congreve v. Home Office (1976) Q.B. 628; Laker Airways Ltd. v. Department of Trade, (1977) Q.B. 643; Teh Cheng Poh v. Public Prosecutor, Malaysia, (1980) A.C. 458. In this case privy Council has held that the discretion of the Malaysian head of State to revoke a proclamation of emergency is not entirely unfettered; and that failure to revoke it after he no longer considers it to be necessary would be an abuse of his discretion.


18. \[
\text{\textcopyright \, 1886-90 \, All E.R. Rep. P. 651.}
\]
19. Ibid at p.653.
20. (1968) A.C. 997
21. Ibid at p.1060
22. Ibid. at pp.1029-1030, 1045-1046, 1054
23. A.I.R. 1981 S.C. 70
24. Ibid. at p.72
25. (1968) A.C. 997
27. A.I.R. 1960 S.C. 1223
28. A.I.R. 1983 H.P. 75
29. H.W.R. Wade, op.cit. p.359
31. Ibid at pp. 1032-1033, 1049, 1053
32. Jain & Jain, Principles of Administrative Law
   1979). For the cases of voluntary disclosure of rea-
   sons to court see Ahmed Hossain v. The State,
   Ranisahib A.I.R. 1957 All 359.
33. See for example, Sodhi Samsher Singh v. State of
   Punjab, A.I.R.1954 SC 302; Shibbanlal Saksena v. State
   State, A.I.R. 1957 Raj 5; Ravinder Kumar Sardarilal
   Guj 126; Sushanta Goswami v. State of W.B., A.I.R.
   1969 S.C.1004 etc.
34. The statutes passed on the subject has to provide
   for disclosure of ground under Article 22(5) of
   the Constitution.
   S.C.1223.
37. Ibid at p. 692.
38. Sheo Nath v. Appellate Assistant Commissioner,
   A.I.R. 1971 S.C. 2451; S. Narayanappa v. Commissioner
   of Income Tax, A.I.R. 1967 S.C. 523, Collector of
   Central Excise v. L.K.N. Jewellers, A.I.R. 1972
   All 231; Sales-tax Commissioner U.P. v. Bhagwan
   Industries A.I.R. 1973 S.C.370, Assistant Con-
   troller of Customs v. the New Central Jute Mills
   Co. Ltd., A.I.R. 1973 Cal 91; Hindustan Aluminium
   v. Controller, A.I.R. 1976 Del.225; P. Ramachandra
40. A.I.R. 1973 Cal. 91
41. A.I.R. 1981 S.C. 1363
44. A.I.R. 1961 S.C. 705
45. The minority judgement given by Subba Rao, J. (for himself & B.P. Sinha C.J.), however insisted upon the requirement of speaking order and stuck down the section in absence of it.
47. A.I.R. 1977 Cal. 382
49. Ibid. at p. 1739


53. See S. 237(b) Sub Cl. (i), (ii) & (iii) of the Companies Act, 1956.


55. A.I.R. 1977 S.C. 183

56. Ibid. at p. 194

57. Ibid at p. 94


59. A.I.R. 1981 S.C. 818; Also see Chandreshwari Prasad v. State of Bihar, A.I.R. 1956 Pat. 104, wherein it was held that the words 'is satisfied' means satisfaction must be arrived reasonably.

60. Ibid at p. 836

61. Ibid.


63. A.I.R. 1978 S.C. 597

64. See for example, old approach A.K. Gopalan v. Govt. of India, A.I.R. 1966 S.C. 816.

65. A.I.R. 1981 S.C. 70

66. A.I.R. 1982 S.C. 149

67. For a discussion of disclosure of reasons under fundamental rights see Ch.IV(4.2.2.1)

68. See discussion on Article 22(5) under Ch.IV(4.6.1)
69. Ibid.
71. A.I.R. 1975 S.C. 919
72. A.I.R. 1976 S.C. 1207
73. See supra, notes 32-33 & 35.
74. A.I.R. 1977 S.C. 183
75. In 1977 this case was termed as the first comprehensive pronouncement by Dr. M.P. Jain in his comments on the Administrative Law in XIII A.S.I.L. (1977) p.475, since then no case has been noted so far which has dealt with the question of burden of proof in a comprehensive manner.
76. A.I.R. 1977 S.C. 183, at p.192
77. Ibid, at p. 191
78. Ibid
79. Ibid, at p.195
81. A.I.R. 1979 S.C. 429
82. A.I.R. 1981 S.C. 818
85. (1968) A.C. 910
86. The similar view was expressed by Subba Rao, J. in his dissenting judgement in Sodhi Sukhdev Singh’s case, see A.I.R. 1961 S.C. pp. 527-531.
87. (1968) A.C. 910 pp. 953, 979, 981, 993.
88. H.W.R. Wade has given few examples showing how the doctrine was overworked by making excessive claims, see H.W.R. Wade, op.cit. p.723.
91. A.I.R. 1975 S.C. 865
92. A.I.R. 1982 S.C. 149
93. Ibid, at pp. 247-248
94. Ibid, at pp. 247 & 364
95. Ibid, at p. 249
96. Ibid, at p. 248
97. Ibid at pp. 347-364
99. Kuljeet Singh Ranga v. Lt. Governor, Delhi, (1982) 1 S.C.C. p11 & 417. In this case President's power to grant pardon under Article 72 of the Constitution was challenged. On behalf of Ranga, a murder convict, it was contended that the mercy petition made on his behalf was rejected arbitrarily without following any guidelines and without any reasons. While rejecting his petition in view of the peculiar facts of the case, Chandrachud, C.J. pointed out that the power of granting pardon could be exercised only in accordance with some guidelines and according to the purpose of Article 72. He further pointed out that the Court can go into this question when a proper occasion arises.
100. State of Rajasthan v. Union of India, A.I.R. 1977 S.C. 1361. In this case while giving its opinion
about the exercise of power under Article 356, it
was pointed out by the Supreme Court that the
exercise of power, if malafide may be challenged
before the Court, & the Court may go into this
question.

101. H.W.R. Wade, _op.cit._ at p. 357
102. A.I.R. 1966 S.C. 740
103. For the distinction between 'Law & Order' & 'Public
Order', Ram Manohar Lohia's case has been a leading
pronouncement. In this case Hidayatullah, J.
(as he then was) dealt with the meaning of Law & Order
& public order in detail in his judgement.

104. A.I.R. 1983 N.O.C. 56 (KANT)
105. A.I.R. 1979 S.C. 49; also see Swnami Saran v. State
106. A.I.R. 1980 Pat. 49
109. A.I.R. 1983 Cal. 61
110. _Ibid._ pp. 74 & 76
111. _Ibid._ p. 66
113. _Ibid._
114. A.I.R. 1984 S.C. 1334
115. _Ibid_, at p. 1345
117. _Ibid_, at p. 2146; Recently the appointment of a
reader in French in the Department of Foreign lan-
guages of Bombay University was held invalid by
Bombay High Court because the person appointed had
no requisite qualifications, provided in the rele-
vant rules, See Indian Express, Bombay Edition,
Sept. 13, 1985 p.4
118. A.I.R. 1984 H.P. 4

119. Bhopal Sugar Industries v. Union of India, A.I.R. 1979 M.P. 163; Shervani Sugar Syndicate v. Union of India, A.I.R. 1979 All. 394. See the contrary opinion of the Punjab High Court in Jai Bharat Cold Storage v. State of Haryana A.I.R. 1980 P & H 52, wherein it was held that formation of opinion in fixing charges for cold storage was based on subjective satisfaction and the court will not interfere in it. However, in this case no clear guidelines were provided in the statute.


122. A.I.R. 1962 S.C. 764

123. A.I.R. 1960 S.C. 1223


125. Ibid.


127. A.I.R. 1981 S.C. 70


140. Rameshwar Prasad v. District Magistrate, A.I.R. 1954 All. 144

158. A.I.R. 1984 S.C. 1334
159. A.I.R. 1984 S.C. 211
160. A.I.R. 1984 S.C. 1334
166. A.I.R. 1985 All 166
168. A.I.R. 1966 S.C. 1140
171. A.I.R. 1975 S.C. 1265
176. Sansher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192. It may be noted that this case overruled Sardarilal v. Union of India, A.I.R. 1971 S.C. 1547, which had held that the President must be personally satisfied about dispensation of inquiry in the "interest of State" under Article 311(2)(c) of the Constitution.


179. A.I.R. 1952 S.C. 16
180. (1969) 1 S.C.C. 308


183. A.I.R. 1978 Del 17
184. A.I.R. 1965 Mys. 143

185. (1981) 1 W.L.R. 854
186. (1982) 2 W.L.R. 62
187. (1971) A.C. 610
188. A.I.R. 1976 Del. 35


191. See, Infra, Ch. VIII

192. See for example, Avinash Glass Work v. Director Railway Board, A.I.R. 1980 All. 412; Acchelal Singh v. State, A.I.R. 1980 Pat. 49; Amitananda v. State of W.B., A.I.R. 1976 Cal. 408. Also see the definition of malafide given in State of Punjab v. Gurdial Singh, where Krishna Iyer, J., defined this term very broadly including the ground of Improper purpose or irrelevant considerations, although the ultimate decision in this case was based on dishonest intention or factual malafide.
195. Jain & Jain, op.cit. at p.487
196. A.I.R. 1964 S.C. 72
197. Rameshwar Prasad v. Suptd. of Police, A.I.R. 1963 All. 408; Rowjee v. Andhra Pradesh, A.I.R. 1964 S.C.962; G. Sadanandan v. State of Kerala, A.I.R. 1966 S.C.1925, State of Punjab v. Gurdial Singh A.I.R. 1980 S.C. 319; B. Krishna Bhat v. Suptd. of Police, A.I.R. 1980 Kant 81; Also see the recent case of the Supreme Court wherein the Supreme Court has struck down the demolition order against the Express Newspapers Ltd. on the ground that it was politically motivated; and it was not issued in the ordinary course of official business and thus was malafide and ultra vires. The Court, in this case ordered the Union Govt. & Mr. Jagmohan, the then Lt. Governor, to pay the cost of litigation to the petitioner. While A.P. Sen, J., also mentioned about the violation of fundamental rights under Article 19(1)(a); Venkataramaiah, J., who concurred with him on the point of malafide did not think it necessary to express any opinion on freedom of press, because the order was illegal on the ground of malafide. Justice K.B. Misra, who also wrote a concurring judgement, opined that the right to land and to construct buildings thereon for running business was not derived from the right to freedom under Constitution but sprang from the terms of the contract between the parties regulated by other laws governing the subject. Thus it may be said that the decision was based, mainly on the statutory prohibition against 'mala fide', action, See Indian express, Oct. 7, 1985, pp. 1 & 9. Recently reported as Express News Papers Pvt. Ltd. v. Union of India, (1986) 1 S.C.C. 133.


199. Ibid, at p. 323.

200. A.I.R. 1980 Kant. 81


203. Thakur Prasad Bania v. State of Bihar, A.I.R. 1955 S.C. 63; However, the facts about the criminal prosecution constitute the important relevant considerations, see Sadhu Roy v. State of W.B., A.I.R. 1975 S.C. 919


208. Dalchand Chittaranjan v. Commr., Food & Civil Supplies
A.I.R. 1952 All 61; Bhagwan Singh v. State of Bihar,
A.I.R. 1977 Pat. 39; Dr. Srikrishna Rajoria v. State
State, A.I.R. 1979, Gau 59; Rajamalliah v. Anil

A.P. 420; Bishamber Nath v. D.L. Authority, A.I.R.
1973 Del. 294; Ajantha Industries v. Central Board
of Direct taxes, A.I.R. 1976 S.C. 437; Union of
India v. M.L. Capoor, A.I.R. 1974 S.C. 87; P. Hemalatha
v. Govt. of A.P., A.I.R. 1976 A.P. 375; State of U.P.
v. H.P. Chothia A.I.R. 1978 S.C. 1214; Virendra Bandhu

305; Some other cases holding the statutory require-
ments as mandatory in the matter relating to Govt.
property are: Manoranjan Paul v. State of Assam,
A.I.R. 1970 Assam 142; Bipinchandra v. State of Assam,
A.I.R. 1973 Gau. 19; Ramchandra Singh v. State of Bihar,
A.I.R. 1984 Pat. 18.


213a. See infra, Ch. IV (4.6)


215. Ibid, at p. 204

216. Ibid, at p. 204-205

217. A.I.R. 1980 S.C. 1502; also see Parashram Thakur v.

218. Ibid, at p. 1509
221. Ibid
222. A.I.R. 1984 N.O.C. 5 (ANDHRA)
223. A.I.R. 1975 S.C. 536
228. The idea of natural justice being a 'majestic concept' capable of being restricted or expanded according to the situation in hand was given by Lord Morris of Borth-y-Gest, in his speech on Natural Justice before Bentham Club, for this see 26 Current Legal Problems (1973) p. 16.
231. A circuitous reasoning seems to have prevailed during this period, it was said that an authority is required to give hearing if the function is quasi-judicial; and a function is quasi-judicial, if it involves giving of a hearing. See S.P. Sathe, Administrative Law p.35 (3rd ed. 1979)
233. (1963) 2 All. E.R. 66
234. Ibid at p. 77-80.
235. Ibid, at p.107
236. Ibid, at p.113
238. (1967) 2 Q.B. 617
239. Ibid at p. 630
243. Ibid at p. 1272
244. A.I.R. 1970 S.C. 150
245. Ibid at p. 156
247. A.I.R. 1978 S.C. 597
248. Ibid, at p. 628
249 A.I.R. 1978 S.C. 851
250. Ibid, at p. 870
251. Ibid, at p. 881
253. A.I.R. 1984 S.C. 1271
264. Messrs Kashiram Dalmia v. State, A.I.R. 1978 Pat. 264. In some cases cancellation of licence is termed as quasi-judicial function, and therefore natural justice has been held to be necessary, on this point see Board of Mining Examination v. Ramjee, A.I.R. 1977 S.C. 965; State of Punjab v. Agudhia Nath, A.I.R. 1981 S.C. 1374. However, whether cancellation of all types of licence is a quasi-judicial function is not clear.


274. Homesh Kumar v. V.C. Aligarh Muslim University, A.I.R. 1985 All 166.


278. State of Gujarat v. Ambalal, A.I.R. 1976 S.C. 2 002; State of Gujarat v. Patel Chaturbhuj, A.I.R. 1975 S.C. 629. It may be noted that in India there is no general legislation like Tribunal and Inquiries Act, 1971, of England; and therefore the procedure of an inquiry is governed by the concerned statute. While some of the statutes may provide expressly for the procedure, the others may not. However, the minimum requirement to act in accordance with the concept of natural justice should be implied in most of these statutes.


282. Ibid

283. Ibid, at p.40


286. A.I.R. 1975 S.C. 266

287. A.I.R. 1978 S.C. 930

288. See supra, notes, 261-265

289. A.I.R. 1982 S.C. 1550

290. Ibid, at p. 1552

291. A.I.R. 1984 S.C. 1030

292. Ibid at p. 1042


293. (1969) 2 ch. 149
293a. **Ibid**, at p. 170
295. **Ibid**, at p. 232
296. *A.I.R. 1979 Bom.* 250
299. *A.I.R. 1983 Bom* 369
300. **Ibid**, at p. 375
301. *A.I.R. 1967 S.C.* 1269
301a. **Ibid**, at p. 1272
304. **Ibid**, at p. 628
316. See for example, the case of Binapani Dei, where civil consequences ensued because the right vested in Government servant to remain in service was affected.
316a. See for example, E.E. & Co. Ltd. v. State of W.B., A.I.R. 1975 S.C. 266, wherein legitimate expectation were affected and civil consequences ensued.
317. See for example, Kraipak v. Union of India, wherein the person concerned had no right to get a promotion, yet natural justice was applied because violation of it might have resulted in civil consequences to him. For other similar cases, see, Balu Ram v. Union of India, A.I.R. 1972 Del. 5; Haridayal v. State of J & K., A.I.R. 1977 J & K 1; Durga Oil Mills v. State, A.I.R. 1977 Pat. 134; Apeejay (P) Ltd. v. Union of India, A.I.R. 1978 Cal. 577.
318. A.I.R. 1978 S.C. 851
319. Ibid, at p. 876
320. A.I.R. 1977 Del. 156
321. Ibid, at p. 158
326. S.P. Sathe, op.cit., p. 179 (4th ed.)
331. A.I.R. 1982 Ker. 12
333. A.I.R. 1981 Sikkim 9
335. A.I.R. 1973 H.P. 30
336. A.I.R. 1976 P & H 238
337. For a general discussion on official bias see S.P. Sathe, op.cit., pp. 186-193 (4th ed.)
339a. Ibid at p. 873
343. A.I.R. 1985 All. 166
344. A.I.R. 1984 S.C. 1271
A.I.R. 1973 S.C. 389

Ibid at p. 399

A.I.R. 1984 S.C. 1030; However, see A.L. Kalra v. The Project Equipment Corporation of India, A.I.R. 1984 S.C. 1361, wherein the Supreme Court has gone into details of an enquiry report while going into the question of arbitrariness of administration under Article 14. This case has already been discussed under Ch. IV which deals with control under Constitutional limits.

Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 at p. 630; Mohinder Singh Gill v. Chief Election Commissioner, A.I.R. 1978 S.C. 851. Also in the area of preventive detention it has been held that the oral hearing is not a necessary part of natural justice, for example see Devji Vallabhbhai Tandel v. Administrator, A.I.R. 1982 S.C. 1029.

For a general discussion on requirement of natural justice, covering the cases of quasi-judicial and administrative discretion, see Jain & Jain, op. cit. pp. 204-262.


(1971) Ch. 388

A.I.R. 1982 S.C. 710

Supra, n. 350

A.I.R. 1982 S.C. 710

A.I.R. 1978 S.C. 597

Ibid, at p. 629

de Smith, op. cit at p. 193


A.I.R. 1978 S.C. 851

Ibid, at p. 876

A.I.R. 1981 S.C. 818


A.I.R. 1984 S.C. 1271
369. Ibid, at p. 142
370. A.I.R. 1984 S.C. 1271
371. Ibid, at p. 1284
372. Recent leading case on this point is Liberty Oil Mills v. Union of India, A.I.R. 1984 S.C. 1271.
373. Ibid
374. Ibid, at p. 1286
375. A.I.R. 1978 S.C. 851
376. A.I.R. 1981 A.P. 373
379. A.I.R. 1975 S.C. 596
382. A.I.R. 1982 Pat 1
383. A.I.R. 1971 S.C. 40
385. Ibid.
393. A.I.R. 1980 S.C. 1666
394. A.I.R. 1984 S.C. 1543
395. Ibid, at p. 1549
396. A.I.R. 1972 S.C. 2281
397. A.I.R. 1984 S.C. 1030
398. A.I.R. 1982 Del. 167
403. A.I.R. 1982 S.C. 149
404. Ibid, at pp. 258-259
405. Ibid, p. 602
406. It may be noted that in this case the final relief rested on the question of natural justice; and the judgement of Venkataramaiah, J. tilted the balance against the judges who were affected by the Presidents order. In this case of additional judges, since he agreed with Bhagwati, Fazal Ali & Desai, JJ. that natural justice is not applicable because the action was administrative, the impugned order was not struck down and concerned judge did not get relief. In the case of transferred judges, although he held that 'fair play' was required to be observed in such cases, he agreed with Tulzapurkar, Pathak & Gupta, JJ., in holding that fair play was observed in fact. Thus, the order of transfer was, also not struck down and the transferred judges did not get any relief.
407. Union of India v. Sankalchand Seth, A.I.R. 1977 S.C. 2328. In this case the decision was given by the five judge bench of the Supreme Court, consisting of Chandrachud, Krishna Iyer, Bhagwati, Untwalia & Fazal Ali, JJ. & it was held that the consultation process included fair play towards the affected judge & should be given an opportunity to explain his case to Chief Justice of India, before he gave his opinion to the President. For clarification it may be noted here that 'fair play' in the consultation process only means that the concerned judge should be given an opportunity by the concerned Chief Justice before giving their opinion to the President and not that they should be given an opportunity to explain their cases to the executive directly. This was made clear by Chandrachud, J., when he observed that fair play does not mean that there should be a direct rapport with the executive, enabling it to interfere in the independence of judiciary.

408. H.W.R. Wade, op.cit., pp. 468-469

409. (1953) 2 All. E.R. 66

410. (1957) 2 All E.R. 152; This case was decided on wrong footing because in this case the dissent of Lord Evershed in Ridge v. Baldwin was treated as the decision of the court; and inspite of the clear majority holding that violation of natural justice renders an action void, it was interpreted as holding it voidable.


414. A.I.R. 1978 S.C. 597
420. A.I.R. 1974 S.C. 1471
421. Ibid p. 1479

423. See *supra*, n.324
424. *Supra*, n.324
426. Ibid, at p. 2060
427. A.I.R. 1978 Cal. 513

430. A.I.R. 1978 S.C. 1675
431. A.I.R. 1984 S.C. 1249
434. A.I.R. 1979 S.C. 1360
436. Ibid, at p. 190
438. S.K. Agrawala, Public Interest Litigation in India, pp. 10-13 (N.M. Tripathi Pvt. Ltd. 1985)
439. (1983) 4 S.C.C. 598
440. A.I.R. 1985 S.C. 910
442. H.W.R. Wade, op.cit. p.673
443. A.I.R. 1983 S.C. 1086
444. Ibid, at p.1089
445. See S.K. Agrawala, op.cit. p.42
446. For a recent case which witnessed a confused approach on this point see Bromley L.B.C. v. Greater London Council, (1982) 1 W.L.R. 52. In this case majority of the judges in the House of Lords and also of the lower courts treated principles of control over exercise of discretion as independent of the doctrine of ultra vires. Only Lord Diplock of the House of Lords was clear in mind that the question of control of discretionary powers under a statute and the doctrine of ultra vires are one and the same thing and thus, they cannot be separated. Such a confusion
should not arise because it may be fatal to the very justification of the court's interference with administrative discretion.

447. See S.P. Sathe, *op.cit.* p. 303 (4th ed.); also see S.K. Agrawala, *op.cit.*, pp. 43 & 45, here speaking in the context of public Interest Litigation in India, Dr. Agrawala, though welcomes a general negation of absolute power, but expresses his reservation about too much judicial interference.