CHAPTER III
CONTROL OVER CONFERMENT THROUGH THE TECHNIQUE OF CONFIRMING AND CONTROLLING THE NECESSARY ADMINISTRATION DISCRETION

3.1 INTRODUCTION:

In the previous chapter, it has been noted that the courts rarely go into the question of cutting back unnecessary discretion. On the contrary, they have been going into the question of confining and controlling the discretionary powers very often, presuming generally that whatever discretion is conferred is necessary. Discretion can be confined and controlled by insisting that some guidance must be provided for the exercise of discretion, at the stage of conferment. Guidance can be provided for controlling the substantive as well as the procedural aspects of the exercise of discretion. In substantive aspect, which generally relates to the question when and against whom the discretionary power should be exercised, the guidance can be provided by some guidelines in the form of standard policy, principle, or rule. While in the procedural aspect which relates the question regarding the manner of exercise of discretion the guidance can be provided by some minimum procedural safeguards.

It may be interesting to study how the Indian courts, since Independence, have developed the law to achieve the
the objective of requiring the guidance, covering both
the substantive and the procedural aspects of the exercise
of discretion at the stage of conferment. It may be menti-
oned that conferment of the administrative discretion is
confined and controlled through the fundamental rights

Although the main source of control has been gene-

erally provide by Articles 14 and 19, sometimes Article 21

along with Articles 14 and 19 and Article 22 have also been

resorted to. In view of this an attempt has been made

here to analyse and critically evaluate the approach of the

courts under these Articles.

3.2 CONTROL UNDER ARTICLE 14:

Article 14 constitutes a very potential source of
judicial power to regulate administrative discretion.

This Article strikes at arbitrariness and discrimination
and ensures to an individual equality before the law and
equal protection of the laws. The general principle namely
the conferment of unguided and uncontrolled discretionary
powers is violative of Article 14 as it enables the adminis-
trative authorities to discriminate between the persons
situated similarly and gives room for the play of adminis-
trative whim or caprice, has been constantly applied by the
Supreme Court and the High Courts. However, the approach
towards this principles has evolved from the lone requirement
of substantive safeguards to the combination of procedural
and substantive safeguards as is evident from the analyses of various cases, presented below.

3.2.1 **Traditional Approach in the Interpretation of Article 14** :-

While applying the above principle, the court had started requiring the guidelines in the form of some criteria or standard somewhere in the statute covering the substantive aspect of the exercise of discretion.

This approach was started in 1952 in *State of W.B. v. Anwar Ali Sarkar*[^1], wherein the Supreme Court laid down the basic principle regarding control over conferment of administrative discretion under Article 14. In this case the statute involved was West Bengal Special Courts Act, 1950. This act provided for setting up of special court for trial of certain offences. The preamble of this Act provided that it is expedient to provide for the speedier trial of certain offences, & S. 5(1) provided that 'A Special Court shall try such offences or classes of offences or cases or classes of cases, as the State Government may.....direct'. S.6 to 15 of the Act prescribed special procedure for the trial of offences. S. 5(1) of the Act was challenged as being violative of Article 14 on the ground that it conferred unlimited discretionary power on the State Government, enabling it to pick and choose between the persons placed similarly.
This contention was upheld by the Supreme Court by a majority of 6 to 1. The majority consisting of Fazal Ali, Mahajan, B.K. Mukherjea, S.R. Das, Chandrasekhara Aiyar, and Bose, JJ, laid down the principle that an Act which vests in the executive Government unregulated or uncontrolled discretion or gives unfettered discretion to the executive without laying down any standards, principles or rules of guidance, infringes Article 14, as it enables it to pick and choose or discriminate between the persons situated similarly. As the Court did not find any guidelines it thus struck down the statute. However, Patanjali Sastri, C.J. who gave a dissenting judgement was of the view that a liberal approach should be adopted and the statute should not be struck down as unconstitutional merely on the assumption that the administrative authority will act in an arbitrary manner in exercising discretion committed to it. The statute should generally be upheld even if some very broad or general criteria can be round. According to him "speedier trial" was not a too vague and indefinite criterion for guidance for classifying or selecting the persons. Liberalisation of approach in subsequent cases seems to be similar to this dissenting opinion of Patanjali Sastri, C.J.

In the above case, the Supreme Court appears to have followed a strict approach as it refused to search out the guidelines simply for upholding the statute. However, in the subsequent cases, the Court has followed a liberal
approach as it tried to uphold the statute by finding out some guidelines anywhere in the statute or even implying them from the statute or from other similar statutes. For example in *Kathi Raning Rawat v. State of Saurashtra* (1952) the case decided in the same year by the same judges as *Anwar Ali*, the Supreme Court by a majority of 4 to 3 upheld a provision similar to S. 5(1) of the W.B. Special Court Act by finding the guidelines in preamble of the concerned provision. In this case Saurashtra State Public Safety Measure (Third Amendment) Ordinance, 1949 provided for trial of certain offences by Special Courts. S. 11 of the Ordinance which conferred discretion on the State Government in the similar language was challenged by the petitioner as being violative of Article 14. Relying on *Anwar Ali* it was argued that an unguided discretion has been conferred on the Government to pick and choose any case. Reiterating the principle laid down in *Anwar Ali* the majority (consisting of Patanjali Sastri, C.J., Fazal Ali, B.K. Mukherjea & Das, JJ) held that though conferment of unguided discretion is violative of Article 14 but in this case since preamble of the previous Ordinance of which the present Ordinance was an amending Ordinance mentioned that the object was to provide for public safety, maintenance of public order and preservation of peace and tranquility in the State, the State Government is expected to select only such offences or class of offences or class of
cases for being tried by special procedure as are calculated to affect public safety, maintenance of public order, etc. One of the majority judges even went to the extent of finding the guidance in the surrounding circumstances mentioned in the affidavit filed on behalf of the State. The only difference in this case and Anwar Ali Sarkar's case was that here preamble was more elaborately worded than in that case. Thus in this case the Court found the guidelines in the preamble of the statute. However, the dissenting judgements of Banajin, Chandrashekhara Aiyar and Bose, JJ. insisted upon more clear guidelines and thus struck down the concerned provision.

In 1957, the above liberal approach was also applied in the leading case of K/s. Pannalal Binjraj v. Union of India (1957). In this case S. 5 (7-A) of Income Tax Act, 1922, which conferred discretion on the Commissioner of Income Tax and Board of Revenue to transfer the case of any assessee at any stage of the proceeding was challenged. It was argued on behalf of the petitioners that the power vested in the Commissioner of Income Tax and the Central Board of Revenue is naked and arbitrary power, unguided by any rules as no rules have been framed or no directions have been given and the whole matter is left to the un-restrained will of the Commissioner of the Central Board of Revenue. Rejecting this argument the Supreme Court upheld the conferment of power under S.5(7-A)
of the Income-Tax Act by finding guidelines for the exercise of power in the purpose of the Act which has been stated in the first Indian - Income Tax Act of 1886. N.H. Bhagwati, J. speaking for the Court (consisting of himself, Jagannadhadas, Venkatarama Ayyar, Sinha & S.K. Das, JJ.) pointed out that since the purpose of the Act is to levy income tax, assess and collect the same, the power of transfer 'is to be exercised for more convenient and efficient collection of tax' and with this object in view the provision for transfer has been made for administrative convenience. Thus the court upheld practically unlimited discretion to transfer the case of an assessee vested in the authorities by finding the guidelines in the objective of the statute.

In 1961 the same liberal approach was applied by the Supreme Court in a leading case of Jyoti Pershad v. Administrator for the Union Territory of Delhi. In this case Section 19(3) of the slum areas (Improvement and clearance) Act, which conferred discretion on the competent authority to grant or refuse to grant the permission to the landlord to execute an eviction decree against a tenant residing in slum area was upheld by the Supreme Court by finding out the guidelines from the preamble and the policy of the enactment. Rajagopala Ayyanger, J. speaking for the Court pointed out that the preamble describes the Act as one enacted for two purposes: (1) the improvement and clearance
of slum areas in certain Union Territories, and (ii) for
the protection of tenants in such areas from eviction.
So long, therefore as a building can, without great detri-
ment to health or safety, permit accommodation, the policy
of the enactment would seem to suggest that the slum dweller
should not be evicted unless alternative accommodation could
be obtained for him.

In Prithivichand v. Lieutenant Governor\textsuperscript{9} the Himacnal
Prades\textsuperscript{9} High Court in 1962 had gone ahead of the above
approach in finding guidelines from the other similar statute
even though no guidelines were provided in the impugned
statute. In this case S.7 of Punjab Small Towns Act con-
ferred the power on the State Government to remove any
member of municipal committee. The Act did not mention the
grounds on which a member could be removed. The Court
upheld the conferment of power on the ground that the other
cognate Acts, such as the Punjab Municipalities Act (1911),
provided that the order of removal could be passed only if
the Government was of the opinion that a member is unfit
to discharge his duties or is persistently remiss in dis-
charge of his duties.

Similarly, in 1974 in Naraindas Indurkhya v. State
of M.P.\textsuperscript{10} the Supreme Court has applied the above liberal
approach by finding guidelines in the objective of the
statutes. In this case Section 4(1) of M.P. Prathamik,
Middle School Tatha Madhyamik Shiksha (Patnya Pustakon
Sambandhi) Vyavostha Adhiniyam, 1973 which conferred dis-
cretion on the State Government to prescribe the text books according to syllabi was upheld. This provision was challenged as conferring unguided and uncontrolled discretion enabling the Government to discriminate between one person and another by prescribing books published by one publisher and not prescribing books of another publisher. P.N. Bhagwati, J, speaking for the Court (consisting of himself, A.N. Ray, C.J., H.R. Khanna, K.K. Mathew & A. Alagiri, J.J.) rejected this contention. He held that S. 4(1) does not vest an arbitrary or uncontrolled discretion in the State Government to select and prescribe such text books as it likes irrespective of their merit and quality. The object or purpose for which the power to select and prescribe text books is conferred on the State Government is to ensure uniformity of standard and excellence in instruction which can be achieved only if standardised text books of high quality and merit are used in the schools. This object or purpose furnishes guidance to the State Government in exercising its power of selecting and prescribing text books.

In the same year in Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay, the Supreme Court implied the guidelines from the purpose behind the statute. In this case Ch. V-A of the Bombay Municipal Corporation Act, 1888 and S. 105 B of Bombay Government Premises (Eviction) Act, 1955, which conferred discretion
on the Commissioner to evict unauthorised occupiers from the lands belonging to the Municipality or the Government were challenged as conferring unguided discretion. The above provisions was upheld by the Court (consisting of A.N. Ray, C.J., Palekar, Khanna, Mathew, Alagirswami, Bhagwati and Krishna Iyer, JJ.) on the ground that the statute itself in the two classes of cases lays down the purpose behind them, that is that premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorised persons occupying them and this is sufficient guidance for the authorities.

The study of the cases reveals that the above liberal approach solely requiring some broad guidelines as substantive safeguards was improved upon in 1978 in the leading case of Maneka Gandhi v. Union of India. The details of the subsequent developments are discussed below:

3.2.2 Activist Approach in the Interpretation of Article 14:

As mentioned above, the first leading case where this improved approach was applied was Maneka Gandhi v. Union of India. This case which clarified and laid down many important constitutional law and administrative law principles, is equally important in the context of control over conferment under Article 21, however this aspect of the case has been discussed later in this chapter. For the present purpose discussion is limited only to Article 14.
In this case S. 10(3)(c) of the Passport Act, 1967 was challenged. The section, which confers discretion on the State Government and the Central Government to revoke or impound the passport of any person, provides four grounds on which a passport may be revoked. One of the grounds mentions that passport may be revoked "in the interest of public". The section also requires that the authority revoking passport should record in writing a brief statement of reasons for impounding the passport and save in certain exceptional circumstances, to supply a copy of such statement to the person affected. When the power of revocation is exercised by State Government an appeal is to lie to the Central Government, however if power is to be exercised by the Central Government no appeal lies. The challenge was mainly directed against the power of Central Government to revoke the passport. It was contended that unguided and arbitrary discretion has been conferred on the Central Government as it can revoke passport on the vague ground of "public interest" and also refuse to disclose reasons in "public interest" and in addition there was no safeguard of appeal against the exercise of discretion by the Central Government.

Bhagwati, J. (speaking for himself, Untwalia, Murtaza Fazal Ali, JJ,) with whom Beg, C.J. Krishna Iyer & Chandrachud, JJ. also concurred, rejected the above contention and held that "enough guidance" was provided in
the word 'public interest'. In addition he pointed out that it is true that when the order impounding a passport is made by the Central Government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. It may be noted that so far as the substantive guidelines were concerned, the approach of the Court under Article 14 was same in this case also as it was in the previous cases. However, an important and distinctive improvement in the Court's approach arose in interpreting as to what reasonableness under Article 14 will require. In this respect, while reiterating his faith in the activist magnitude of Article 14, Bhagwati, J. observed:

"equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits....Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence" (emphasis supplied.)

As a requirement of reasonableness or non-arbitrariness Bhagwati, J. required that the procedure of impounding
passport must be just, fair, and reasonable and in order to bring the section in conformity with this requirement he implied the procedural safeguard of "audi alteram partem" i.e. hearing the party, in the impugned section. However, in view of the urgency which may b. required in passport revocation cases, a post-decisional hearing was held to satisfy this requirement.

It is submitted that the contribution which the case of Maneka Gandhi has made in the area of control of conferment of discretion is that it introduced the rule against unreasonableness in Article 14 which was not an essential requirement of traditional theory of classification. As a result of this the court started paying more attention towards procedural requirement at the stage of conferment of discretion.

Following the approach similar to that of Maneka Gandhi, the courts, in subsequent cases, have upheld the conferment of discretion by implying procedural safeguards in the section. Thus in M/s. Sukhwinder Pal Bipan Kumar v. State of Punjab (1982), the Supreme Court upheld second proviso to Cl. 11(1) of Punjab Foodgrains Dealers Licencing and Price Control Order, 1978 which empowered the District Food and Supplies Controller to suspend the licence of a food grain dealer without giving an opportunity to the licensee for stating his case, for a period not exceeding ninety days, during the pendency or in contempla-
tion of the proceedings for cancellation of his licence, by finding guidelines in the section itself and by implying procedural safeguards. Thus, speaking for the Court (consisting of himself, A.D. Koshal and Balkrishna Eradi, JJ.), A.P. Sen, J. pointed out that the power cannot be exercised unless there is contravention of any terms or conditions of licence or any provisions of the order and the breach is of such a nature that it must entail cancellation of the licence. In addition to this the safeguard of according reasons was implied in the section. This safeguard was implied in addition to the safeguard of appeal found by the Court under Cl. 13 of the Order.

Subsequently, in Manickchand v. Union of India\textsuperscript{18} (1984), proviso under S.79 of the Gold (Control) Act, 1968 was challenged. This proviso conferred the discretion on the Collector of Central Excise to extend the time for investigation. It was argued in this case that as the gold is to be returned to the owner after the initial period of six months, for the investigation, was over and no notice was received by him during this period, the power of extension affects the right of the owner to have the seized gold returned to him; and since this power is conferred without any guidance the power is violative of Article 14.

Tulzapurkar, J. speaking for the Supreme Court (consisting of himself, Balkrishna Eradi and Madon, JJ.) rejected this contention and held that the power under the impugned provision is to be exercised only in extra-
ordinary situations where investigation could not be completed within the normal period of six months. He also rejected the contention that there was no maximum limit fixed up to which the period may be extended. He pointed out that presumably, the ramifications of any gold smuggling activity which are usually extensive and complicated must have led the legislature not to impose a limit or ceiling on power to grant extension. However, keeping with the trend in Maneka Gandhi, he implied two in-built procedural safeguards for the exercise of discretion in the impugned section and upheld it. He observed that:

(1) "since every extension involves civil consequences in that the owner's or the concerned persons' right to have the seized gold returned to him is adversely affected by being postponed, before granting any extension he must be given a notice and an opportunity to make representation against the proposed extension".

(2) "since the collector's decision or order granting extension of time is appellable..... every order granting extension must record reasons for it as otherwise the appeal will be ineffective."

In Harishchandra Singh v. State of Bihar (1984) S. 45-B of Bihar Land Reforms (Fixation of Ceiling Areas and Acquisition of Surplus land) Act, 1962 which authorised State Government to reopen a case disposed off by a Collector under the Act, was upheld by the Patna High Court on the ground that guidelines were provided in the section,
as a case could be reopened only if the previous order was not in accordance with the provisions of the Act. In addition the court implied the safeguard of recording of adequate reasons, on the ground that since a case is to be reopened only if the authority "thinks fit on examination or records" it indicates that a case may be opened only for adequate reasons.

The cases discussed above indicate a definite change since 1978 in the approach of the courts under Article 14, where the courts have been increasingly attaching more importance to the procedural safeguards at the stage of conferment of discretion and have been upholding the statute by implying the important procedural safeguards of giving fair hearing to the party and/or recording of reasons.

These cases generally related to conferment of regulatory powers under social welfare legislation. However, it seems that the Supreme Court while insisting upon the significance of substantive and procedural aspects, may not imply the procedural safeguards to uphold discretion where probably the exercise of discretion may affect some crucial interest of a person, but may direct the administration to frame the rules covering these aspects. Thus in Air India v. Naryesh Meerza^{22} (1981) the discretionary power conferred to decide 'matters of moment' affecting an individual's life and involving no social
welfare legislation has been struck down by the Supreme Court in the absence of substantive and procedural safeguards. In this case Regulation 47 of Air India Employees' service Regulations has been held violative of Article 14 on the ground of conferring unguided and uncontrolled discretion. Reg. 47 fixed the retirement age for air hostesses to be 35 years, but gave option to the Managing Director to extend the services of an air hostess every year upto 45 years of age. S.M. Fazal Ali, J. speaking for the Court (consisting of himself, Varadarajan and A.N. Sen, JJ.) struck down the provision and held that managing director has been given an uncontrolled, unguided and absolute discretion to extend or not to extend the period of retirement in case of an air hostess after 35 years. He pointed out that the words 'at the option' are very broad and general in nature which allow the managing director to exercise his discretion in favour of one air hostess and not in favour of the other, which may result in discrimination. Thus there are no guidelines, rules or principles which may govern the exercise of discretion of the managing director. About the absence of procedural safeguards, he observed that there is no provision in the regulation requiring the authorities to give reasons for refusing to extend the period of retirement; also the provisions do not give any right of appeal to higher authorities against the order passed by the managing director. In addition to this, and probably as a result of impact of activist
magnitude of Article 14, the Court directed that a rule providing clear guidelines for the exercise of discretion in the matter of yearly extension of retirement age of air hostesses be framed and till such rules are framed, all air hostesses shall be entitled to such extension till the age of 45 years.

It is submitted that this decision of the Supreme Court is very significant in view of the present attitude of the legislature or the administration (while making rules, regulations or bye laws etc. under a statute, or in the executive capacity) towards conferment of discretion, which shows their unwillingness to provide guidelines and procedural safeguards simply because of the lack of the will to apply their mind to the problem of control over discretion. By the above direction the Court virtually granted extension to air hostesses till the age of 45 years of age till the authorities were quick enough to provide rules to guide discretion to extend or not to extend their age of retirement. It is significant to note that the similar approach of directing the administrative authorities to frame guiding principles or rules has been repeated by the Supreme Court in the recent case of Suman Gupta and others v. State of Jammu and Kashmir. In this case, the discretionary power of the State Governments conferred in absolute terms by a reciprocal administrative agreement amongst them to nominate the students to the 5 percent seats
reserved in their Medical Colleges, for the candidates from other states, was challenged as being violative of Article 14. While upholding this contention R.S. Pathak, J. speaking for the Court (consisting of himself, Y.V. Chandrachud, C.J. and Sabyasachi Mukherji, J.) directed the Medical Council of India, an expert and independent body, to formulate proper guiding criteria or rules for selection of candidates for nomination. He further directed that till such criteria are framed the nomination shall be governed strictly according to merit.

The study presented above has revealed that the principle prohibiting conferment of unguided and uncontrolled administrative discretion under Article 14 has been constantly applied by the courts since independence. It may, however, be mentioned that while the principle remained the same, the approach of the courts has evolved with the progress of time. The application of this principle started in 1952 in Anwar Ali Sarkar requiring clear cut substantive guidelines in the section for upholding the statute. Although starting with this strict approach, the Court liberalized it in subsequent cases by trying to uphold the conferment of discretion by reading the substantive guidelines somewhere in the concerned statute or sometimes in the previous or parallel statute also. While following this liberal approach the courts have been satisfied with a very broad and general criteria or standards, such as
'public interest', 'public order', 'reason to believe', urgency etc. It is interesting to note that the above liberal approach under which the statutes were generally upheld even though only very broad and general substantive guidelines were provided, continued till the leading case of *Maneka Gandhi* combined the requirement of substantive safeguard with the requirement of procedural safeguards in 1978. After this case the courts have been generally insisting upon both, the substantive guidelines as well as the procedural safeguards. It may, however, be noted that the liberal approach towards substantive safeguards continued even after 1978 with the difference that the Supreme Court and the High Courts have in addition been implying the procedural safeguard of an opportunity of being heard and or recording of reasons. While following this approach recently the Supreme Court has started playing a more positive role by giving direction, in a few cases, to the administration to frame guiding rules or criteria.

The above change in the approach of the Supreme Court in applying the principle under Article 14 may naturally prompt one to ask the question as to what could be the basis of this change. By way of answer to this question, it could be said that probably the old approach of the Court, followed before *Maneka Gandhi*, was influenced by the old or the traditional doctrine of classification under Article 14, and it was followed by the courts for a long time in the expectation that in due course a just administrative
process would be provided by the Government either through legislation or through administrative rules. However, in view of the absence of any development in this direction, the Supreme Court judges now seem to be inclined to play more active role in the area of control over administration. For this purpose they have started giving activist magnitude to Article 14 which covers the vast area of administrative powers.

The application of the activist or dynamic concept of Article 14 for the purpose of controlling vesting of, or conferment of power since Mahatma Gandhi, may, probably also be attributed to the changing role of the Supreme Court, particularly after internal emergency. It seems that the Court is trying to find legitimacy through an activist approach after its controversial retreat in the vital area of personal liberty during emergency.

It is submitted that the approach under recent dynamic concept of Article 14 seems to be of more practical value. The laws governing the changing and the dynamic society cannot remain static. This does not suggest that the basic principle of the law should also change, but it only means that the approach under it should change depending upon the changing needs of the society.

3.3 CONTROL UNDER ARTICLE 19

Recognition and application of the principle of reasonableness or rule against arbitrariness under the
activist magnitude of the Article 14 since Maneka Gandhi
has resulted in the courts insisting upon the procedural
and the substantive safeguards under that Article. How-
ever, under Article 19, the principle of reasonableness
has been recognised expressly in the Constitution itself.
Sub. Cl. (a) to (g) of Article 19(1) of the Constitution
guarantee certain freedoms to the citizen of India.
However sub. cl. (2) to (g) of that Article permit the
imposition of reasonable restrictions on these freedoms.
Whether a restriction imposed by a statute is reasonable
or not is to be decided by the courts. A statutory provi-
sion may be declared to be unreasonable restriction of Arti-
cle 19 by applying various principles. One of those prin-
ciple, which relates to conferment or discretion is that
if a statute confers unguided or uncanalised or uncontrolled
discretionary power over the administrative authorities
with respect to any of the freedoms mentioned in Article 19,
it constitutes an "unreasonable restriction". Thus under
Article 19, unlike Article 14, the courts have been insis-
ting upon the substantive and procedural safeguards from
the very beginning. An attempt has, therefore, been made
here to study the approach during the last 3 decades towards
these requirement under different freedoms guaranteed
under Article 19.

3.3.1 Requirements under Article 19(1)(a):

Sub. Cl. (a) to cl. (l) of Article 19 confers right
to freedom of speech and expression. However, this freedom is not absolute and the State can curtail this freedom by imposing reasonable restriction over it, by making a law in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, under Cl. (2) of Article 19. If a law, conferring discretion is challenged as constituting an unreasonable restriction on the right of freedom of speech and expression, the minimum safeguard of an opportunity to make a representation to the concerned authority has been insisted upon even in case of a statute which deals with the extraordinary situation of communal riots. Thus, in Virendra v. The State of Punjab (1957) S. 2(1) of the Punjab Special Powers (Press) Act, 1956 which vested the State Government with the power to prohibit the printing or publication of any matter in any newspaper or document on its satisfaction, that such matter may affect or is likely to affect public order, or that it is necessary to prohibit its publication for maintaining communal harmony, was upheld by the Supreme Court, because the Court speaking through S.R. Das, C.J., found that the procedural safeguard enabling the person affected to make a representation to the authorities within ten days of the order was provided in the Section 2. On the other hand S. 3(1) of the same
Act which conferred discretion on the State Government to prohibit the entry into the State of any newspaper, periodicals etc. for the purpose of maintaining public order and communal harmony, was struck down by the Court as this section did not provide for the procedural safeguard of "making a representation". Virendra's case related to extraordinary situation of communal riot, even in this situation the Court insisted upon the minimum procedural safeguard of making representation. In the normal situation naturally the courts were inclined to insist upon more detailed procedural safeguards, in cases of conferment of discretion affecting freedom of speech and expression. For example in State v. Baboolal 30 (1956) Dramatic Performances Act, 1876, which provided that the provincial Government or the magistrate who has been empowered by it in this behalf may by order prohibit the performance of any play, drama or pantomime, if it is of opinion that its performance, is of a scandalous or defamatory nature, or is likely to deprive and corrupt persons present at the performance, and that a dramatic performance could only take place under a licence granted by the Provincial Government or the officer specified by it, was held to be violative of Article 19(1)(a) by the Allahabad High Court on the ground that the discretionary power was conferred on the authorities without any procedural safeguards. Allahabad High Court pointed out that since (i) the authority is not required to afford an opportunity of being heard; (ii) there is no requirement
to give any reasons for his order; and (iii) there is no provision for review or appeal to a higher authority, the Act falls foul of Article 19(1)(a). In K.A. Abbas v. Union of India \(^3\), (1971) the Cinematograph Act provided for an opportunity to be given to a party before the Film Censor Board and also before the Central Government in appeal, yet, the Act was challenged as violative of Article 19(1)(a) on the ground that instead of an appeal to the Central Government, the appeal should lie to court or to an independent Tribunal. This argument found favour with the five judge bench of the Supreme Court (consisting of Hidayatullah, C.J., Shelat, Mitter, Vaidialingam and A.N. Ray, JJ.). However, as the Government agreed to remedy these defects Hidayatullah, C.J. who gave the judgement for the Court did not go into the above arguments. According to the Government’s assurance an amendment was passed in 1974, providing for an Appellate Tribunal.

There have been a very few cases under Article 19(1)(a) where the conferment of discretion has been challenged. In fact, subsequent to K.A. Abbas no important decision on this point has been noted so far. In these cases discussed above, since the substantive safeguards were already provided in impugned provision, the minimum procedural safeguards for exceptional and normal circumstances were required by the courts. In the exceptional circumstances the opportunity to make representation was
considered enough while in the normal circumstances the safeguards of an opportunity of being heard, recording of reasons and the review or an appeal preferably to an independent higher authority were considered essential. It seems that the courts insist on the above safeguards as they probably consider the fundamental right to freedom of speech and expression to be "the very soul of democracy."

3.3.2 Requirements under Article 19(1)(b):

Article 19(1)(b) guarantees fundamental right to assemble peaceably and without arms. Cl. (3) permits reasonable restrictions to be placed on this right by a statute, in the interest of sovereignty and integrity of India or public order. In order to comply with the requirement of reasonable restriction under this Article the courts have insisted upon the clear guidelines and procedural safeguards. The Supreme Court specifically pointed out the need of recording of reasons under this requirement in *Himmatlal K. Shah v. Commissioner of Police* \(^{33}\) (1973). In this case Rule 7 made under Section 33(l) of the Bombay Police Act, 1951, provided that no public meeting without without loudspeaker, shall be held on the public street within the jurisdiction of the Commissionerate of the Police, unless the necessary permission in writing has been obtained from the officer authorised by the Commissioner. This section was challenged as conferring very wide and uncontrolled power. Upholding this contention S.M. Sikri, C.J. (speaking for himself, Jaganmohan Reddy and
and A.N. Ray, JJ.) observed that Rule 7 does not give any
guidance to the officer authorised as to the circumstances
in which he can refuse the permission to hold public meeting,
also, the rule enables the Commissioner to give or refuse
permission to hold a public meeting without the necessity
of giving reasons, and there is no other procedural safeguard
against misuse of power, thus the rule prima facie, confers
arbitrary discretion; and to vest an arbitrary discretion
is an unreasonable restriction. Machew and Beg, JJ., the
other two judges of the bench also agreed with the above
holding, although they differed on other points of the case,
not relevant for the present purpose.

Unlike its approach towards the requirement of subs-
tantive safeguard in the form of guidelines in many cases
under Articles 14 and 19 the Court, while adopting the
restrictive approach in this case, rejected the argument on
behalf of the Administration that the marginal note to
Section 33, which read 'power to make rules for regulation
of traffic and for preservation of order in public place
etc.' provided the necessary guidance for the exercise of
power under the rule and the officer could exercise this
power for regulation of traffic and for preservation of
order in public place. On point Sikri, C.J. observed:

"It is doubtful whether a marginal note can be
used for this purpose, for we cannot imagine
the officer referring to marginal note of the
section and then deciding that his discretion
is limited, specially as the marginal note ends with 'et al'ra'. It is also too much to expect him to look at the scheme of the Act and decide that his discretion is limited'°.

It is submitted that the above approach of the Supreme Court is more appropriate and the Court should generally insist on clear guidelines instead of finding them somewhere in the Act for the purpose of upholding an enactment. The Court also insisted upon the necessity to give reasons for the order though it did not insist on the safeguard of hearing perhaps in view of the urgency that may be involved in preventing an assembly of people. Probably in the cases where urgency may not be involved the court may insist on the safeguard of "an opportunity of being heard and an appeal or review. Thus in State of Bihar v. K.K. Misra°, (1971) latter part of Section 144 (6) of Cr. P.C. (Old) was struck down by the Supreme Court as imposing unreasonable restriction on the right of a citizen under Article 19(1) (b), (c) and (d) in the absence of any procedural safeguards. This part of the section vested discretionary power in the State Government to extend the operation of the order made under Section 144 (l), beyond two months in cases of danger to human life, health or safety, or likelihood of a riot or an affray. Holding that the power conferred is violative of Article 19, Shah, J., speaking for the Court observed:
"Although the object of a restriction may be beyond reproach and may very well attract the protection of sub-articles, (1) to (o) of Article 19, if the statute fails to provide sufficient safeguards against its misuse the operative section will be held invalid. .....on the ground that the Act did not provide for..... a representation by an aggrieved party."³⁶

As in the impugned statute there was no provision for making representation by the aggrieved party against the direction given by the Government; no appeal or revision was provided against that direction; and the order made was not to be of a temporary nature, the impugned provision was held invalid.

Like Article 19(1)(a) under this sub-clause also very few cases seems to have been decided so far. However, from these cases it seems that in this area the courts insist on both the clear guidelines and the procedural safeguards of giving of reasons and/or right to make representation, because, probably they consider the freedom of assembly under this sub-clause as essential for the existence of democracy.

3.3.3 Requirements under Article 19(1)(c) : The freedom to form association is ensured by Article 19(1)(c), and Cl. (4) authorises reasonable restriction being imposed in the interest of public order or morality. The right to form association is the life blood of
democracy, without such a right it may become impossible to form political parties in the country. Therefore, the Supreme Court has been more strict and watchful as regards legislation conferring power on the executive to restrict this right and has required the safeguard of the judicial supervision over the exercise of discretion in addition to other safeguards. The leading case in this area is the **State of Madras v. V.G. Row**. In this case section 15(2)(b) of Criminal law amendment (Madras) Act, 1950 was involved. This section conferred discretion on the Provincial Government to declare an association as unlawful on the ground that such association (i) constitutes a danger to the public peace etc., (ii) has interfered or interferes with the maintenance of public order or has such interference for its object, or (iii) has interfered or interferes with the administration of law, or has such interference for its object. The State Government was to specify in the notification declaring such association unlawful, the grounds on which it is issued, the reasons for issue and such other particulars, if any, as may have bearing on the matter. It was also required to fix a reasonable period for any office bearer or member of the association or any other persons interested to make a representation to the State Government. In addition to this an Advisory Board was to be constituted and the Government was required to place before it a copy of notification and of representation and if Board found no sufficient cause for notification then the Government was required to cancel it. Inspite of these safeguards
Patanjali Sastri, C.J., speaking for the Supreme Court (consisting of himself, Mahajan, B.K. Mukherjea, S.R. Das and Chandrasehara Aiyar, JJ.) held Section 15(2)(b) as being violative of Article 19(1)(c) on the ground that the section did not allow the judicial inquiry in the factual and legal aspects of the exercise of discretion by the Government, and because there was no provision in the Act for adequate communication of the Government's notifications under Section 15(2)(b) to the association and its members or the office-bearers. The Government has to fix a reasonable period in notification for aggrieved person to make a representation but no provision for personal service on any office bearer or member of association concerned, or service by affixture at the office, of any of such association was prescribed. Nor was any other mode or proclamation of the notification at the place where such association carries on its activities provided for.

Patanjali Sastri, C.J. further pointed out that publication in the official gazette whose publicity value is by no means great, may not reach the members of the association declared unlawful, and if the time fixed expires before they know of such declaration their right of making a representation would be lost. About the safeguard of judicial inquiry into factual and legal aspects of the order the observed:

"The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught
with such potential reactions in the religious, political and economic fields that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which... must be taken into account in judging the reasonableness of restrictions imposed by Section 15(2)(b) on the exercise of the fundamental right under Article 19(1)(c); for no summary and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government, can be a substitute for a judicial inquiry.38

The Court distinguished Dr. N.B. Khare's case, which dealt with the restriction on the fundamental right under Article 19(1)(d) and upheld the conferment of discretion in very wide terms because the safeguard of Advisory Board was provided even though its opinion was not binding on the authority, on the ground that matter of externment involves an element of emergency. The approach in V.C. Row has been generally followed in subsequent cases dealing with conferment of discretion affecting the fundamental right to form association under Article 19(1)(c).

3.3.4 Requirements under Article 19(1)(d):

Article 19(1)(d) confers the fundamental right on the citizen of India to move freely throughout the territory of
India. Clause (c) of Article 19 empowers the State to impose reasonable restrictions on the exercise of this right in the interest of general public or for the protection of the interest of scheduled tribe. A restriction which though apparently connected with the above object may not be a reasonable restriction if it confers unguided or uncontrolled discretion on the administrative authorities. The courts have generally upheld the conferment of discretion in this area provided the minimum procedural safeguard or right to make representation is available to the person affected. Thus in *Dr. M.B. Khare v. The State of Delhi* discretion conferred on an executive officer under Section 4 of the East Punjab Public Safety Act, 1949, to order extermination of a person on his subjective satisfaction was upheld by the Supreme Court because the safeguard of receiving the grounds of his extermination and making a representation was provided if the extermination was to be for more than three months, provision for an Advisory Tribunal was also made, however, its advice was not binding on the authority. It was argued in this case that no safeguard was provided for extermination up to three months and no time limit was provided up to which the provincial Government could extend such order of extermination. Rejecting these contentions Kania, C.J. held for the Court (consisting of himself, Fazl Ali, Patanjali Sastri, Mahajan and B.K. Mukherjea, JJ.) that extermination for three months without any safeguards is not unreasonable. He observed that the Constitution itself provides for minimum
period of three months detention in respect of preventive
detention which is a more severe restriction. Further under this
section the District Magistrate is not permitted to order the
exclusion or removal of a person ordinarily in his district
from that district similarly the provincial Govt. is not
permitted to direct the exclusion or removal from the province
of a person ordinarily residing in the province, this itself
is a great safeguard. About the absence of any time limit for
the extension of the period of externment the Court held that
since the Act itself was to last for two years there was no
necessity of fixing maximum time limit. In Hari Khenu Gawali
v. Deputy Commissioner of Police\(^ {41} \), Section 57 of Bombay Police
Act, which conferred power on the Deputy Commissioner to extern
any person who had been convicted of the specified offences
and he has reason to believe that such person is likely to
engage again in the commission of an offence similar to that
of which he was convicted, was upheld by the Supreme Court on
the ground that the person concerned was given an opportunity
to represent his case before an order of externment was passed.
He was to be informed of the general nature of the material
allegations against him and given a reasonable opportunity of
explaining these allegations. It was argued here that there
was no advisory board to scrutinize the material on which the
authority had taken action against a person and because of this
the provision in question was violative of Article 19(1)(d).
Rejecting this contention, Sinha, J. speaking for the majority
of the Court (consisting of himself, S.R. Das, C.J., Venkatarama
Ayyar & S.J. Imam, JJ.) observed that there was no universal rule that the absence of advisory board would necessarily make such legislation void. He also rejected the argument that case was initiated by the police and it was the police who was to judge the case, on the ground that whereas the case could be initiated by an inspector of police, the order of externment could be made only by Commissioner of Police. Jagannadhasa, J. who gave a dissenting judgement, however, held the conferment of discretion as unreasonable in view of any clear substantive guidelines.

However, conferment of discretion without any safeguard has been held violative of Article 19(1)(c). In State of Madhya Pradesh v. Thakur Bharat Singh Clause (b) of Section 3(1) of Madhya Pradesh Public Security Act, 1959, was struck down by the Supreme Court in the absence of any safeguards. Section 3(1)(a) empowered the State Government or the District Magistrate to extern a person on being satisfied that he is likely to act in a manner prejudicial to security of the State or the maintenance of public order. Section 3(1)(b) empowered the District Magistrate to require him to reside or remain in such place or within such area as may be specified. Detailed procedural safeguards were provided against the order of externment under Cl. (a) but no such safeguards were provided under Clause (b) requiring him to stay at such place as may be specified. Shah, J., speaking for the Court (consisting of himself, Subba Rao, C.J., Shelat, Bhargava and Mitter, JJ.) struck down clause (b) of Section 3(1) of the Act on the ground that under
this clause the State Government is given power to direct a person to stay at any place within the State which may, or may not be place where he ordinarily resides. The Act does not give any opportunity to the person concerned of being heard before the place where he is to reside or remain is selected. The place so selected may be one in which the person concerned may have no residential accommodation, and no means of subsistence. It may not be possible for the person concerned to honestly secure the means of subsistence in the place selected. Also, the Act does not indicate the extent of the place or the area, its distance from residence of the person externed and whether it may be habitated or uninhabited, the clause also nowhere provides that the person directed to be removed shall be provided with residence, maintenance or means of livelihood in the place selected.

In the *State of M.P. v. Baldeo Prasad*\(^43\) (1961) where the Act in question provided for externment of a goonda by District Magistrate on being satisfied that he is committing or is likely to commit acts calculated to disturb public peace or tranquility, Gajendragadkar, J. speaking for the Supreme Court (consisting of himself, B.P. Sinha, C.J., Kapur, Subba Rao and Wanchoo, J.J.) held that the word 'goonda' which was defined in the Act as meaning "a hooligan, rough or vagabond including a person who was dangerous to public peace or tranquility", did not provide any guidance for the exercise of discretion and was a vague criteria. And no opportunity was
provided to a person proceeded against to show that he was not a goonda.

Under this sub clause generally while being satisfied with the guidelines provided in the Act the Supreme Court has insisted mainly upon the one procedural safeguard namely the right to make representation. It seems that the courts do not consider the right under this sub-clause as important as the rights under sub-clauses (a), (b) and (c), under which they have insisted upon other safeguards also.

3.3.5 Requirements under Article 19(1)(e):

This sub-clause confers the right to reside and settle in any part of the territory of India. Sub-clause(5) of the Article empowers the State to impose reasonable restrictions on the exercise of this right in the interest of general public. Section 7 of Influx from Pakistan (Control) Act, 1949, conferred discretion on the Central Government to direct the removal from India of any person against whom a reasonable suspicion exists that he has committed, an offence under the Act. In Ebrahim Vazir Mavat v. The State of Bombay⁴⁴ (1954) the Supreme Court struck down this section as being violative of Article 19(1)(e). S.R. Das, J., speaking for the Court, (consisting of himself, Mahajan, C.J., Mukherjea, Vivian Bose and Ghulam Hasan, JJ.) held that the section has left the matter of removal of a citizen of India from his own country to the arbitrary and unrestrained discretion of the Government. The question whether an offence has been committed is left
entirely to the subjective determination. The inference of a reasonable suspicion rests upon the arbitrary and unrestrained discretion of the Government, and before a citizen is condemned all that the Government has to do is to issue an order that a reasonable suspicion exists in their mind that an offence under the Act has been committed. The section does not provide for the issue of a notice to the person concerned to show cause against the order nor is he afforded any opportunity to clear his conduct, of the suspicion entertained against him. This is nothing short of a travesty of the right of the citizenship. The Court pointed out that neither the Act nor the rules framed thereunder indicate what procedure is to be followed by the Government in arriving at the conclusion that a breach of the provision has taken place. This case seems to be the lone one which has been decided under this sub-clause.

The above case indicates that an enactment conferring discretion in this area must provide for substantive guidelines and the procedural safeguard of notice and opportunity of being heard.

3.3.6 Requirement under Article 19(1)(f):

Article 19(1)(f) guarantees the right to acquire, hold and dispose of the property. A reasonable restriction on this right could be imposed in public interest. However, the Constitution 44th Amendment Act, 1978 deleted Article 19(1)(f) but as the repeal is not retrospective but comes into effect from June 20, 1979, discussion on this Article is retained
because it will apply to all laws enacted before that date. Under this Article the courts generally did not approve the conferment of very wide discretion on administrative authorities, and they insisted upon judicial supervision over the exercise of discretion in the matters interfering with the right to property. However in cases where the discretion was conferred in relation with some social welfare objectives the Supreme Court did not insist upon judicial supervision and they tried to uphold the conferment of discretion if it found some procedural safeguards, such as "an opportunity of being heard and/or a right to appeal". In *Government of Mysore v. J.V. Bhatt*, (1975) the Supreme Court has even gone to the extent of upholding the conferment of discretion to requisition and acquire the properties under the Mysore Slum Area Improvement Act by implying the procedural safeguard of "*audi alteram partem*". In this case Section 3 and 9 of the Mysore Slum Area (Improvement) Act, 1958, were challenged as violative of Article 19(1)(f). Section 3 of this Act authorised the competent authority to declare any area as slum area where it is satisfied about the existence of certain specified circumstances from the report of any of its officers or on other information in its possession. Section 9 gave power to declare any slum area to be a clearance area if it is satisfied that the most satisfactory method of dealing with the conditions in the area is the demolition of all buildings. Once the property was declared as clearance area it could be acquired for clearance.
It was contended that though the circumstances were specified in Section 3 about whose existence the competent authority was to be satisfied, no procedure was provided for the inquiry into these circumstances and there was no provision for giving an opportunity to the owner to show cause against the exercise of discretion in the matter of declaring any area as slum area or clearance area, thus uncontrolled and arbitrary discretion had been conferred on the authorities affecting the right to property of the persons affected. While accepting this contention and holding that the declarations under Section 3 and 9 have far reaching consequences and that the possibility of arbitrary action cannot be ruled out, Alagiriswamy, J. speaking for the Court (consisting of himself, P. Jaganmohan Reddy, and M.H. Beg, JJ.) observed that there can be two possible approach when the constitutionality of a provision of statute is questioned in the absence of procedural safeguards, (i) either to strike it down in the absence of such safeguards or (ii) to hold that these procedural safeguards are to be followed while exercising power under the impugned provision. The rule is that as far as possible a statute should not be struck down as being unconstitutional. Therefore, unless it is expressly excluded the procedural safeguard of 'audi alteram partem' can be implied in the impugned provision. Following the second alternative the Court implied the safeguard of 'notice and opportunity of being heard', to be observed by the competent authority before exercising the discretion under
Section 3 and 9 of the Act and upheld the same as not conferring an arbitrary power on the authorities.48 

The right to property has been deleted from the chapter on fundamental rights and hence no statute coming into being after the 44th Amendment may be questioned for conferring unguided and uncontrolled discretion under Article 19(1)(f). It is, however, submitted that the conferment of discretion relating to property matters can be challenged under Article 14 and also under Article 21. There seems to be some indication of this trend, as recently, speaking in the context of control at the stage of exercise of discretion, the Andhra Pradesh High Court has interpreted Article 21 as including right to property.49 The High Court observed:

"All rights are essentially personal rights only. Property rights are no more than personal rights in property. In the ultimate analysis these rights in property delimit the powers a man might enjoy or duties he may be obliged to discharge to a civilized society. Personal liberty guaranteed in Article 21 of the Constitution cannot be enjoyed without minimal right to property."49a

3.3.7 Requirement under Article 19(1)(g):

Article 19(1)(g) of the Constitution guarantees to the citizen of India the fundamental right to practice any profession, or to carry on any occupation, trade or business. Clause (e) of the same Article authorises the State to impose
reasonable restrictions on the exercise of this right in the interest of general public. Various regulatory powers have been conferred under different statutes in the area of trade and commerce, for example power of licencing, power of price fixation, power to grant permit etc. To control the conferment of unguided and arbitrary power in these areas, Article 19(1)(g) has been used by the courts. The approach of the Supreme Court under this Article has varied; in some cases it has been satisfied with some general and broad policy in the form of guidelines, while in other cases it has insisted upon clear guidelines with procedural safeguards. This variation in the approach seems to be influenced by the extent of the infringement on the right to do business. In the cases where very existence of the business was to be affected by the exercise of discretion the Court has generally required the clear guidelines as well as the procedural safeguards. For example in *Messrs Dwarka Prasad Laxmi Narain v. The State of U.P.* 50 (1954), conferment of discretion to grant or refuse to grant, renew or refuse to renew, suspend, cancel, revoke or modify any licence under clause 4(3) of the U.P. Coal Control Order 1953 was struck down by Mukherjea, J. speaking for the Supreme Court (consisting of himself, Mahajan, C.J., Vivian Bose, Ghulam Hasan and Jagannadhadas, JJ.) on the ground that no rules have been framed and direction given to regulate or guide the discretion of the licensing officer. Practically the order committed to the unrestrained will of a single indi-
individual the power to grant, withhold or cancel licence in any way he chose and there was nothing in the order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same.

In addition to the above substantive safeguards, the Court have also insisted upon the procedural requirements. Though the impugned clause provided that the power in the above matters was to be exercised for the reasons to be recorded, this was not considered to be enough procedural safeguards. Besides this procedural safeguard, Court insisted, that a safeguard of an appeal to the higher authority must be provided in such cases. While requiring the above procedural safeguards and clear guidelines the Court seems to have proceeded on the basis that as the exercise of discretion conferred under the impugned provision could threaten the very existence of the business, the power was of drastic nature and it should be subjected to stricter control. Striking down the above provisions, the Court also observed that as the power of licensing could be exercised by any person to whom the State Coal Controller may choose to delegate the same, and as the choice could be made in favour of any one there was no safeguard even of the power being exercised by some responsible person. In Harichand Sarda v. Mizo District Council\textsuperscript{51} (1957) Section 3 of the Lushai Hills District (Trading by non-Tribals) Regulation 1953, was struck down by the Supreme Court under Article
19(1)(g). This section conferred the power, on the District Council to issue or refuse to issue licence to do business in any commodity, to a non-tribal. This power was to be exercised by the executive committee of the Council. Considering the reasonableness of the law Shelat, J., speaking for the majority (constituted by himself and Subba Rao, C.J.) held that the regulation nowhere provided any principle or standards on which the executive committee has to act granting or refusing to grant licence. The non-tribal trader either wishing to start a trade or to continue his trade started on a grant of licence is entirely at the mercy of the executive committee. Even the rules made under Section 3 of the regulation do not lay down any principles or standards. Rule 4 which empowers the committee to make such enquiry as it deems proper into the antecedents and character of any new applicant and then reject or accept his application, also does not lay down any standard on the basis of which the committee has to decide whether the antecedents or character are such that application should be rejected. The committee, therefore, can in any given case reject an application merely stating that antecedent of an applicant are not good or proper without the applicant knowing what standards or character or antecedents he has to conform. The majority, insisting upon clear guidelines also rejected the contention that para ten of the sixth schedule of the Constitution, under which the impugned regulation was framed provided guideline which laid down the policy to safeguard the tribals from being exploited, on the ground, that this is not
enough guidance to save the restriction from the vice of being unreasonable, as the regulation provides no principles on which such a policy is to be implemented. The impugned provision was also held violative of Article 19(1)(g) as it did not provide any machinery under which an applicant can show cause why his application for a licence or its renewal should not be rejected.

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In the cases where the discretion conferred was merely regulatory, and did not threaten the very existence of the business the courts have not been so strict in requiring clear guidelines or procedural safeguards. For example in Hari Shankar Bagla v. The State of M.P. 52 (1954) Section 3 of Cotton Textiles (Control of Movement) Order, 1948, was upheld even in the absence of any safeguards by the Supreme Court in the judgement delivered just after Dwarka Prasad although the majority of the judges in both the cases were same. Like the Coal Control Order in Dwarka Prasad this order has also been passed under the same Act, namely, the Essential Supplies Act, 1946. Under Section 3 of this order no person could transport by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under a general or special permit issued by the Textile Commissioner. The conferment of power to grant or refuse permit under this section was challenged on the ground that the textile commissioner had been given unregulated and arbitrary discretion to refuse or grant a permit. Unlike its approach in Dwarka Prasad the Court rejected this
contention by finding the policy underlying the order in the parent Act, namely "to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all". The Court pointed out that grant or refusal of a permit is thus to be governed by this policy and the discretion given is to be exercised in such a way as to effectuate this policy. It may be noted that in this case there was no safeguard of recording of reasons, or any other procedural safeguard against the exercise of power, in spite of this the Court rejected the argument about the likelihood of abuse of discretion on the ground that in case of an abuse of power court can undo the mischief under its power of judicial review under Article 226. The facts of Dworka Prasad were distinguished on the substantial ground that there was nothing which could ensure proper execution of power and also power there could be conferred on any person.

In Chinta Lingam v. Government of India53a(1971), the Supreme Court even went ahead of the above case in upholding the Rice Control Orders, without even emphasising the need for guidelines by trying to find them out somewhere in the statute. In this case the three Control Orders, issued under the Essential Commodities Act, 1955, which restricted the intra and inter-state movement of Rice and Paddy from the State of Andhra Pradesh, by providing that a permit issued by the State Government or an Officer authorised by it must be
issued for such movement. The conferment of the power to grant and refuse permit was challenged as being unguided and arbitrary as no guidelines were provided and there were no provisions for appeal or revision against refusal to grant permit. Rejecting this contention Grover, J. speaking for the Court (consisting of himself, Shah, Mitter, Hegde and A.N. Ray, JJ.) held that when the power had to be exercised by one of the highest authority, the fact that no appeal has been provided for is a matter of no moment. Dwarkan Prasad was again distinguished on the flimsy ground that there the powers could be vested in any person.

The study of the leading cases mentioned above reveals that the courts generally follow two distinct approaches under Article 19(1)(g) towards the requirement of substantive safeguard (guidelines) and procedural safeguards. They insist upon clear guidelines and the procedural safeguards of 'audi alteram partem' and/or right to appeal in the cases where the very existence of the business may be threatened. On the other hand where discretion relates to exercise of regulatory powers on the business for example grant of permit for movement of goods, wage fixation etc., they neither insist upon clear guidelines nor upon the procedural safeguards, and try to uphold the conferment of discretion by finding the guidelines or some procedural safeguard somewhere in the statute. In few cases they may uphold the statute even in the absence of these safeguards on the ground that power is vested in high authority therefore it is not likely to be abused.
3.4 CONTROL UNDER ARTICLE 21

Recently, particularly after the case of the Supreme Court in Maneka Gandhi, Article 21 has been increasingly invoked in the area of personal liberty. With the concept of public interest litigation it has given relief to many persons who were suffering due to maladministration in the area of criminal law\(^ {57}\), rehabilitation of bonded labour\(^ {58}\) etc. However, many of these cases do not strictly relate to the area of discretionary power as in these cases the administrative authorities did not possess any discretion, but had to implement certain provision of law but they failed to do so due to their sheer negligence and indifference and perhaps due to certain other reasons. The Ombudsman's role played recently by the Supreme Court under this Article can be a very interesting subject of a separate investigation, but for the present purpose it is sufficient to note that the scope of Article 21 has been very much widened in recent years. The effect of this recent development in the area of 'control over conferment of administrative discretion' is the subject of following discussion.

Article 21 provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. To put it positively a person can be deprived of his life or personal liberty only according to the 'procedure established by law'. The key words in the above
provisions are 'procedure established by law', the question arises as to what is meant by this term? Whether any statutory procedure howsoever arbitrary, discriminatory or unreasonable, will satisfy the requirement of Article 21? What are the minimum procedural safeguards which a law conferring discretion in the area of personal liberty must provide? Whether the law conferring discretion in this area should contain some clear guidelines or principles for the exercise of power? An attempt has been made here to find out an answer to these questions by tracing the development of the law under Article 21 and its application to different areas of personal liberty.

3.4.1 Development of the Law Requiring Procedural Safeguards under Article 21:

It was in the famous case of A.K. Gopal v. State of Madras where the importance of certain procedural safeguards was sought to be emphasised for the first time, at the stage of conferment of discretion. Two arguments were advanced in this respect. Firstly, it was argued that the word 'procedure' in the phrase 'procedure established by law', did not mean 'any procedure' but it meant a 'fair procedure', the word law did not mean 'lex' but it meant 'jus' which included the four principles (1) notice, (2) opportunity of being heard, (3) an impartial tribunal, (4) an orderly course of procedure. Therefore a law which confers discretion without these procedural safeguards must be violative of Article 21. Secondly, it was argued that as a law affecting personal liberty also affects the freedoms of a person under Article 19, it must also satisfy
the procedural requirements under Article 19 also. The majority\textsuperscript{60} of the Supreme Court (consisting of Kania, C.J., Patanjali Sastri, Mahajan, B.K. Mukherjea and S.R. Das, JJ.) rejected both the above arguments. First argument was rejected on the premise that the word 'procedure' in Article 21 meant 'any procedure and the word 'law' meant the 'enacted law' which means that any procedure, howsoever drastic it may be provided in a validly enacted law could satisfy the requirement of Article 21. The principle of natural justice could not be implied under Article 21. The second argument was rejected by the majority on the premise that certain Articles in Part III of the Constitution exclusively dealt with specific matters and there could be no overlapping between these Articles regarding their scope\textsuperscript{61}. Therefore, a law depriving personal liberty should satisfy the requirement of Article 21 only and not of Article 19 and hence the requirement of reasonable and fair procedure under Article 19 could not be implied under Article 21 and under this Article 'any procedure' provided in a law enacted by a competent legislature was regarded as valid.

The \textit{Copolan} view held the field, for a long time in the area of personal liberty and the court virtually refused to go into the fairness of procedure provided by law\textsuperscript{62}. However, subsequently in \textit{R.C. Cooper v. Union of India}\textsuperscript{63}, Shah, J. speaking for the Supreme Court in the context of property right, over-ruled the second premise of \textit{Copolan}'s case that certain Articles in Part III of the Constitution
exclusively deal with specific matters, and there can be no overlapping between these Articles regarding their scope. He pointed out that the Articles under Part III of the Constitution are not exclusive of each other. Since in A.K. Gopalan, the argument that the law under Article 21 has also to satisfy the requirement of 'reasonable restriction' under Article 19 was rejected on the above premise, and the above premise was overruled in R.C. Cooper. The law thus laid down in R.C. Cooper came to be accepted in the subsequent cases in the area of personal liberty, particularly in matters dealing with the preventive detention laws; it was held that the law under Article 21 has also to satisfy requirement of Article 19. However, it was not till the leading case of Maneka Gandhi v. Union of India, that the requirements of Article 21 were clearly expounded and applied to other areas of personal liberty too. This case related to revocation of passport of the petitioner, where going abroad was held to be an aspect of personal liberty under Article 21. The question was as to what are the procedural requirements for the exercise of the power of impounding the passport. While summarizing the development of procedural requirement of a law under Article 21, P.N. Bhagwati, J. (as he then was) reiterated that since R.C. Cooper, a law depriving an individual of his personal liberty must satisfy the requirement of 'reasonableness' under Article 19 and then only it will be a valid law under Article 21. However, realising that the right to go abroad is not a right covered under Article 19,
the learned judge invoked the activist magnitude of Article 14 in the area of personal liberty. He pointed out that as a law affecting personal liberty has to satisfy the test of 'reasonableness' under Article 19, if it also affects a right under this Article, on the premise that the Articles in the Part III of the Constitution, are not mutually exclusive, it must also satisfy the requirement of Article 14 on the same premise. And since the rule against arbitrariness and unreasonableness under this Article require that the law must be fair, just and reasonable, the law affecting personal liberty, in order to be valid under Article 21, must provide a fair, just and reasonable procedure.

As a result of the above interpretation of requirement of the law under Article 21, following principle, emerges:-

In order to be a valid law under Article 21, a law depriving an individual of his personal liberty, must provide a fair, just and reasonable procedure, in other words the procedure contemplated under Article 21 is not any procedure but a fair procedure.

This principle clearly accepts the argument which was rejected by the majority in A.K. Gopalan that the 'procedure' contemplated under Article 21 is not 'any procedure' but a 'fair procedure'.

3.4.2 Application of the Principle Requiring Procedural Safeguards under Article 21:

The application of the above principle can be studied
under two headings (i) application in other areas and (ii) application in the area of preventive detention.

3.4.2.1 Application of the Principle in other Areas: Applying this principle the Supreme Court in Maneka Gandhi v. Union of India, held that the law conferring discretion in the matter of impounding of passport must contain the procedural safeguard of 'audi alteram partem' and held that a 'post-decisional hearing' in these cases would satisfy this requirement. The Court upheld the Passport Act by implying the above procedural safeguard at the stage of conferment.

The principle laid down in Maneka Gandhi has been followed in Sanil Batra v. Delhi Administration. In this case it was contended that S. 56 of Prisons Act confers unguided, unchannelled and arbitrary powers on the Superintendent to confine a prisoner in iron fetters. The section provided that "whenever the Superintendent considers it necessary (with reference either to the State of Prison or character of the prisoners) for the safe custody of any prisoners that they should be confined in irons, he may, subject to such rules and instructions as may be laid down by the Inspector General with the sanction of the State Government, so confine him". Applying the law laid down in Maneka Gandhi that the law under Article 21 must be just, fair and reasonable and for that purpose it must satisfy the requirement of Articles 14 and 19, the Supreme Court upheld the above provision of the Prisons Act since it found enough substantive guidelines and by implying the procedural
safeguards in the impugned provision. In this case an elaborate judgement was given by Krishna Iyer, J., with whom D.A. Desai speaking for himself, Chandrachud, C.J., S.M. Fazal Ali, and P.N. Sinha, J.J., also concurred. The Court observed that a bare perusal of S. 56 would show that the Superintendent may put a prisoner in a bar fetters (i) when he considers it necessary with reference either to the state of the prison or character of the prisoner and (ii) for the safe custody of the prisoner. The Court also implied the following procedural safeguards in the impugned section from provisions of Punjab Jail Manual which had no statutory force, these are: (i) The reasons have to be fully recorded in the Superintendent's Journal and the Prisoner's history ticket. The Court held that for the purpose of this requirement no ordinary or routine reasons can be sufficient. They must be such so as to make the next safeguard of revision effective, and they must be recorded in history ticket in the language intelligible and understandable by the prisoner. (2) There is a provision for a revision petition to the Inspector General of Prisons. (3) The Superintendent will have himself to review the case of the prisoner at regular and frequent intervals for ascertaining whether fetters can be removed, consistently with the requirement of safety.

Applying this principle the Court also upheld S. 30 of the same Act which empowered a murder convict to be put in solitary confinement. The Court implied in the section that this provision only could be applied in exceptional circumsta-
tances and reasons for this must be recorded and the person concerned must be given an opportunity.

The decisions of the Supreme Court in Maneka Gandhi and Sunil Batra indicate that the Court may emphasise the need of providing the important procedural safeguards of an opportunity of being heard, and/or giving of reasons and/or an appeal to higher authorities, under Article 21. However, it seems that in the matters dealing with the exceptional situation of serious disturbances in a State the above procedural safeguard may not be insisted upon; and the statute may be upheld under Article 21 by finding some safeguards in it. Thus the Delhi High Court upheld the discretion conferred on the armed forces under S. 4 of Assam Disturbed Areas Act 1955 and of Armed Forces (Assam and Manipur) special power Act, 1958, to use force even to the extent of causing of death, on the ground that the power is to be exercised in public interest and before the exercise of this power a warning is to be given by the officer to the person concerned.

3.4.2.2 Application of the Principle Requiring Procedural Safeguards in the Area of Preventive Detention: Existence of drastic Preventive Detention laws in India has been decried by the eminent jurists of this country. Inspite of this the fact remains that this law has existed all along since independence, even during normal times, therefore the question of control of the discretion in this area acquires much significance in this country. By exercising the discretion in this area
administration can take away the personal liberty of an individual by detaining him not as a result of an established guilt in a crime, but only on its subjective satisfaction regarding certain matters. The question is how to control the power of preventive detention? As already noted that for the purpose of controlling discretion some important procedural safeguards can be insisted upon by the Court when the discretion is being conferred.

The Constitution of India itself provides the minimum safeguards of a right to representation70 to the Government in all cases and a review of the order by the Advisory Board71 in the cases where the detention may be for more than three months, it also requires the administration to furnish grounds of detention as soon as possible72, and to afford to the detenu the earliest opportunity of making representation. However it says nothing about the details of the procedure regarding consideration of representation either by the Government or by the Advisory Board. It also does not confer on the detenu a right to be represented by a legal practitioner of his choice73. Generally the preventive detention laws also provided for these minimum safeguard only and have not tried to provide any additional safeguards. Therefore, these laws have been challenged as conferring unguided and uncontrolled discretion on the administration on the ground that they do not provide for an oral opportunity of being heard or recording of reasons, for a representation through a legal practitioner
before the Advisory Board. The leading case where the objection to the conferment of discretion, in the absence of any procedural safeguards, was considered by the Supreme Court is \textit{Hardhan Saha v. State of W.B.} \textsuperscript{74}. This case related to challenge to \textit{M.I.S.A.}, 1971. It was argued here that in order to satisfy the requirement of Articles 19 and 21 the detenu must be given an opportunity of being heard on all facts and circumstances, and that there should be a requirement to disclose reasons to the detenu on which his representation is rejected by the Advisory Board; as the Act did not provide for these safeguards it is violative of Article 19 hence it is not a valid procedure under Article 21.

Ray, C.J., speaking for the Court (consisting of himself, Jaganmohan Reddy, Mathew, Beg and Alagiriswami, J.J.) rejected the above contentions, and upheld the \textit{MISA}, on the ground that the requirement of Article 19 are satisfied as soon as the Act in question complies with the procedural requirements of Article 22. Article 19 does not add anything in the matter of preventive detention. Even otherwise the law in question constituted a reasonable restriction as there was a right to make representation, representation was to be considered by the Advisory Board, which had power to examine the entire material. The detenu could be examined orally before the board on his request. The Court also held that it is not necessary that reasons should be given for rejecting representation and right to oral hearing also does not
constitute a necessary requirement of natural justice under Article 19. Thus the Supreme Court refused to invoke any other additional procedural safeguards in the area of preventive detention at the stage of conferment in Hardhan Saha, this case has been followed in other subsequent cases.\textsuperscript{75}

The challenge against conferment of preventive detention powers has been repeated in the recent case of A.K. Roy v. Union of India\textsuperscript{76} where the question of procedural safeguards has been again raised with respect to the National Security Act, 1980. It was argued in this case that since the consideration by the Advisory Board of matter and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case, the Advisory Board must therefore adopt a procedure which is akin to the procedure generally adopted by judicial and quasi-judicial tribunal.

The procedure provided in S. 10 and 11 of the Act is not in consonance with the principles of natural justice and it militates against the requirement of Article 21. It was contended that the Act must provide following safeguards: (i) detenu must have the right to be represented by a lawyer of his choice, (ii) he must also have the right to cross-examine the persons on whose statements the order of detention is founded, (iii) he must have right to present evidence in rebuttal of the allegation made against him, (iv) Advisory Board must give reasons in support of its opinion which must be furnished to the detenu, (v) entire material which is available to
Advisory Board must be disclosed to the detenue, (vi) proceeding of the Advisory Board must be open to public. In addition to this an appellate function was sought to be implied on the Advisory Board by arguing that Advisory Board must not only consider whether the order of detention was justified but it must also consider whether it would have itself passed that order on the basis of the material placed before it. It must see that whether all procedural steps which are obligatory under the Constitution were taken until the time of the report. It must also see the impact of loss of time and altered circumstances on the necessity to continue the detention and whether there is factual justification for continuing the order of detention beyond period of three months.

Judgement on this point was given by Chandrachud, C.J. (speaking for himself, Bhagwati and D.A. Desai, JJ.) with whom Gupta and Tulsiapurkar, JJ. also concurred, although on other points (not relevant for the present purpose) they gave dissenting opinions. Chandrachud, C.J. upheld S. 10 and 11 of the Act by rejecting the above contentions generally. About the contention that the Advisory Board must act as appellate body, he held that Article 22 contemplates it to be only an advisory body and it is not a quasi-judicial or judicial tribunal. It is to go into the question whether there was sufficient justification for detention, at the time of making the report. It cannot go into the question whether a detenue is to be detained or not beyond three months, that is for the executive to decide.
Inspite of his being convinced on the necessity of the right to legal representation he rejected the contention that the detenu must have a right to legal representation on the ground that the Constitution specifically excluded the cases of preventive detention from this right while conferring it on other arrested persons under Article 22(1). Contention regarding right to cross examination was also rejected on the ground that the principle that witnesses must be confronted and offered for cross-examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. In proceedings before the Advisory Board, the question for consideration is not whether the detenu is guilty of any charge but whether there is any sufficient cause for the detention of the person concerned. The detention is based on the subjective satisfaction. Therefore the proceeding of Advisory Board has to be structured differently from the proceedings of judicial or quasi-judicial tribunals. Probably it may be due to this, that he did not go into the question of giving of reasons by the Advisory Board to the detenu for rejecting his representation.

However, following the recent trend set up in Kaneka Gandhi, Chandrachud, C.J. while rejecting the above contentions implied the following safeguards in the area of preventive detention:

1. If Government is allowed to appear with the aid of legal practitioner the detenu should not be denied this facility
otherwise the proceeding before Advisory Board would be violative of Article 14.

2. The detenue can be aided and advised by a friend who, in truth an substance, is not a legal practitioner if he asks for such facility. Regarding this he observed:

"Every person whose interests are adversely affected as a result of the proceedings which have a serious import is entitled to be heard in those proceedings and be assisted by a friend. A detenue, taken straight from his cell to the Board's room may lack the ease and composure to present his point of view. He may be 'tongue tied, nervous, confused or wanting in intelligence' and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas.....it is not fair,....., that the detenu should not even be allowed to take the aid of a friend."??

3. Though the detenue does not have right to cross-examine witness he can present evidence in rebuttal of allegation made against him and may offer oral and documentary evidence for this purpose before the Advisory Board. But that will have to be done within the time fixed by Advisory Board and there will be no obligation on the Advisory Board to summon the witnesses if the detenue desires to examine any witnesses he will have to keep them present.

It is submitted that by implying the above procedural
safeguards in the proceedings before the Advisory Board the Supreme Court has gone ahead of its approach depicted in previous cases in this area. Here the Court tried to infuse the procedure before the Advisory Board with some fairness by laying down the above guiding rules. This is a welcome step in the direction of control over the conferment of administrative discretion in this area. May be that in future, by following the above approach the courts also imply the duty to record reasons for rejecting a representation. Although in the beginning they may not insist upon their disclosure to the detenu, but they may insist that the reasons should be on record in order to show that the authority applied its mind to representation.

Compliance with the procedural safeguards implied by the Supreme Court in A.K. Roy, has been insisted upon by the courts in subsequent cases while controlling the exercise of discretion in this area. 

3.4.3 Development & Application of the Law Requiring Substantive Safeguards under Article 21 in the Area of Preventive Detention: Conferment of discretion in very broad and general terms has been the constant feature of all the legislations in this area. The authorities are empowered to detain a person preventively on any ground coming within the ambit of very broad criteria, such as, security of India, security of the State, the relations of India with foreign States, maintenance of Public Order or
maintenance of supplies and services essential to the community. These criteria are virtually lifted from the legislative entries in the Seventh Schedule of the Constitution and have been planted in the legislation relating to preventive detention, without any effort on the part of the legislature to specify and explain the purport of these general notions in the context of preventive detention. This was done in 1950 and this is being done to-day even after the experience of 34 years since Independence. The question in this area has not been that the power is conferred without any guidelines, but it has been that the power is conferred with vague and general criteria. It has been repeatedly argued in the cases challenging conferment of discretion in this area that while conferring the discretion in such general terms as "maintenance of public order", "security of the State" etc., the legislature vests the administration with very wide and drastic powers, and in view of these vague or general criteria this power can be used to detain any person, even with some ulterior purpose, therefore, a statute conferring discretion with such vague and general criteria is void for vagueness and is unconstitutional under Article 21.

In A.K. Gopalan v. State of Madras with respect to Preventive Detention Act, 1950, it was argued that the word 'law' in Article 21 meant 'Jus' and one of the requirement of 'Jus' is to provide an objective test, i.e., a certain definite and ascertainable rule of human conduct for violation of which
one can be detained. Since the Act in question did not provide any objective criteria but conferred discretion in vague terms it was violative of Article 21. Although this interpretation of Article 21 was not accepted by the majority judges, all of them except Patanjali Shastri, J. discussed the question of need of providing some objective criteria in the law of preventive detention and came to the conclusion that no objective standard can be prescribed in this area, as action under this law is taken on suspicion. For following this contradictory approach on the point, no reason seems to have been mentioned in the case. Patanjali Shastri, J. refused to go into this question on the ground that this question involved a concept similar to that of the American Clause of "due process of law" which was excluded by the words used in Article 21.

Subsequently, as the requirements of Articles 19 and 14 also formed part of requirement of Article 21 after the decision of the Supreme Court in R.C. Cooper the question of providing substantive safeguards was gone into by the Supreme Court under these Articles. Thus in Harishan Saha v. State of West Bengal, the conferment of discretion in the area of preventive detention was considered in the light of requirement of Articles 19 and 14. In this case S. 3 of the Maintenance of Internal Security Act, 1971, which conferred the discretion on the Government or the other authority to detain a person preventively in the interest of defence of India, Security of India, foreign relation of India, Security of the
State, for maintenance of public order or for the maintenance of supplies and services essential to the community, was challenged as conferring unguided and uncontrolled discretion. It was argued that S. 3 of the Act does not define or lay down the standards for objective assessment of the grounds of detention and therefore it constitutes an unreasonable restriction under Article 19. The power is unguided as the order can be passed on the acts sought to be prevented which are not defined. Power is so unguided that acts forbidden and acts not forbidden by law may be treated alike to be the foundation for detention hence it is also violative of Article 14. Rejecting these contentions Ray, C.J. held that "S.3 is to be interpreted in the light of various statutes which deal with various acts mentioned. Acts sought to be prevented are found in various legislations like the Essential Commodities Act, the Essential Services Act etc. Sometimes it may be possible that an act which is not forbidden by law may fall within the ambit of S.3, such cases may be dealing with relations of India with foreign power or maintenance of public order, but then exercise of such power is based on subjective satisfaction it is not possible to provide objective criteria for the exercise of such power".

The case of Hardhan Saha shows that even after compliance with the requirement of 'reasonable restriction' under Article 19 has become necessary for a law affecting personal liberty, the Supreme Court did not insist upon the legislature to provide
clear guidelines. The reason for this approach seems to be that the court does not think it to be possible for the legislature to provide clear guidelines in form of some guiding principle or rule.

However, it appears that in view of the criticism against vesting of wide discretionary powers in this area with some vague or general criteria, the attitude of the Supreme Court seems to be changing recently and it has directed the administration to frame clear guiding rules in the area of preventive detention with respect to one of the above criteria namely, "maintenance of services and supplies essential to community" under Article 21 read with Articles 14 and 19 in A.K. Roy v. Union of India. In this case S. 3 of the National Security Act, 1980, which conferred the power of preventive detention in the same terms as S. 3 of M.I.S.A. was challenged on the ground that criteria such as 'defence of India', Security of India, Security of the State, the Relation of India with foreign powers, and maintenance of services and supplies essential to the community are so vague in their content and wide in their extent that by their application, it is easy for the Central Government or the State Government to deprive a person of his liberty for any fanciful reasons which may commend itself to them.

While agreeing with the above argument, the Court has gone into the question whether any clear guidelines could be provided with respect to the above criteria and it concluded
that though no clear guidelines could be provided with respect to the matters relating to defence of India, security of India, security of the State and relations of India with foreign powers because these concepts by their very nature are not capable of being defined clearly; but clear guidelines can be provided with respect to the criterion of "maintenance of supplies and services essential to community". It pointed out that in the absence of a clear definition as to which commodity is essential and which is not, the detaining authority will be free to extend the application of this clause to any commodities which, according to him is essential. However, the Court did not strike down the provision but it prevented the Government from exercising its discretionary power unless it laid down clear guidelines under it. For this purpose the Court held that no person can be detained on the ground of "maintenance of supplies and services essential to the community", unless it is made clear as to what are essential services and supplies under the Act either by a law, or by an order or notification; and such law, or notification or order must be made and published fairly in advance before the Government is to act on it.

It is submitted that though in A.K. Roy the Supreme Court required the administration to lay down clear rules only with respect to the matters relating to preventive detention on the ground of "maintenance of services and supplies essential to the community", still this indicates a significant change in
the approach of the Court. It seems that in the beginning the Court is treading on this path very cautiously therefore it has limited the demand of clear guidelines to the above matter only, but in the near future it may also require the administration to frame some clear guiding rules or principles with respect to preventive detention on the criterion of "maintenance of public order", which has been most widely used covering various instances. Even with respect to other criteria, such as defence of India, security of state, security of India or foreign relations, the administration could be asked to frame some guiding rules as it already has experience of about 34 years in dealing with such matters. It seems that the underlying reason for the Court's approach in not requiring clear guidelines with respect to the other criteria mentioned in the impugned Act, was, that it can control the exercise of discretion when exercised widely covering even minor infractions or violation by interpreting these concepts restrictively. Thus while upholding the Act, Chandrachud, C.J. speaking for the Court, observed:

".....since the concepts are not defined, undoubtedly because they are not capable of a precise definition, Courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed,
that can well be the unstated premise for upholding the constitutionality of clauses like those in S. 3 which are fraught with grave consequences to personal liberty, if construed liberally.\(^8\)

How far the courts will abide by this caution in interpreting these provisions is to be seen in future.

Vesting of discretion in the District Magistrate to detain a person on his satisfaction that he is acting or likely to act in a manner prejudicial to the security of the state, or maintenance of public order, or maintenance of supplies and services essential to the community under sub. clause (ii) and (iii) of MISA, was challenged in John Martin v. State of W. B. (1975) on the ground that since drastic discretionary power of preventive detention, which infringed personal liberty of an individual has been conferred on a person who is not very high official, Article 19 has been violated. Rejecting this contention Bhagwati, J. speaking for the Supreme Court, held that the District Magistrate was the head of the district administration, and was in charge of maintaining law and order and essential supplies and services within the district, also the exercise of power by him was subject to the Government's approval and hence the conferment of discretion on the District Magistrate does not constitute an unreasonable restriction.

The above study reveals that in the beginning the Supreme Court did not require any safeguards in the cases where the conferment of discretion related to personal liberty
under Article 21. It was thought that the words "procedure established by law" meant "any procedure established by a validly enacted law". Once this requirement was satisfied the Court did not go into the question of fairness of procedure and reasonableness of the law. This attitude was based on the premise that the Fundamental rights in Part III of the Constitution are not inter-related but they operate in a watertight compartment. However, subsequently the premise gave way to the new premise that the fundamental rights particularly in Articles 14, 19, 21 & 22 are not exclusive of each other but they are inter-related or they do not operate in watertight compartment but are complementary to each other; a result of this change in the basic premise is that currently a law affecting personal liberty has to satisfy the requirement of reasonableness and fairness under Articles 19 & 14 in order to be a valid law under Article 21. Therefore, the Court now insists that a law affecting personal liberty must provide fair procedure and the substantive guidelines for the exercise of discretion.

While insisting upon the above safeguards in matters relating to impounding of passport and confining and fettering the prisoners the Supreme Court has insisted upon the procedural safeguard of "audi alteram partem" and giving of reasons. Even in the area of preventive detention the Supreme Court is now trying to infuse the procedure before the advisory board with some fairness by allowing the detenu to be represented by a
friend and to adduce the evidence in rebuttal of charges against him. The Court has even asked the administration to provide clear guidelines for the exercise of discretion to detain a person on the criterion of "maintenance of supplies and services essential to the community". These significant developments in the law controlling the conferment of discretion in the area of personal liberty indicate that the courts are no longer ready to allow the administration to have unconfined and uncontrolled discretion in this area.

In spite of the broadened horizons of Article 21, the Court has not yet started to insist upon the requirement of giving the reasons to the detenu for rejecting his representation either by Government or by the Advisory Board. It is thus submitted that the Court should at least insist upon this important procedural safeguard in the area of drastic power of preventive detention in the absence of which the right of the detenu to make representation gets very much diluted and he can never be sure that the concerned authority had ever applied its mind to the case put forward by him.

3.5 CONTROL UNDER ARTICLE 22:

Article 22(4) to (7) provide the minimum procedural safeguards for the preventive detention laws. Therefore it has generally been invoked to uphold the preventive detention laws, once these safeguards have been found by the courts. However, Article 22(7)(a), which requires the Parliament to lay down clear substantive safeguards for the exercise of power
of preventive detention in very exceptional circumstances, came up for interpretation in two leading cases decided by the Supreme Court. This Article provides that Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without the opinion of an Advisory Board\(^8\). 

In *A.K. Gopalan v. State of Madras*\(^8\) S. 12 of the preventive detention Act, 1950, conferred discretion on the Government to detain a person for more than three months without the safeguard of Advisory Board on its satisfaction that he is acting, or likely to act prejudicially to the security of India, foreign relations, security of the State and maintenance of Public order. This section was challenged on the ground that it did not comply with the requirement of Article 22(7)(a) as it only planted the terms from the legislative entries and did not specify the circumstances and the class or classes of cases for the exercise of this power. It was contended that both of them must be specified clearly. The majority consisting of Kania, C.J., Patanjali Shastri, Mukherjea and Das, JJ, rejected this contention by holding that word 'and' in the Article meant in the context 'or' which meant that it was enough if Parliament under Article 22(7)(a) prescribed either the circumstances or the classes of cases in which a person might be detained for a period longer than three months without reference to an Advisory Board and the matters
referred to in S.12 constituted sufficient description of the circumstances or classes of cases so as to comply with the requirement of Article 22(7)(a). Mukherjea and Das, JJ. observed that though it would have been more proper if specific circumstances or classes of cases were provided but as Parliament has chosen not to provide them it cannot be compelled to do so.

However, Fazl Ali and Mahajan, JJ. constituting the minority on the point accepted the contention on behalf of the petitioner that the Parliament while conferring such a drastic power must clearly specify both, the circumstances under which, and the class or classes of cases in which, a person may be detained for a longer period without the intervention of the Advisory Board.

The majority view in A.K. Gopalan adopted a positivistic approach in upholding whatever the Parliament laid down even in face of a clear requirement of the Constitution. However, this view has rightly been overruled in a subsequent case given below.

The interpretation of Article 22(7)(a) again came up for interpretation in Sambhu Nath Sarkar v. State of W.B. In this case S.17 A of the MISA which was in identical terms was challenged on the same grounds, that since S. 17A did not provide circumstances and class or classes of cases it was violative of Article 22(7)(a). Accepting this contention the Supreme Court held that requirement of Advisory Board can be dispensed with, only in very exceptional circumstances. The
word 'and' in Article 22(7)(a) did not mean 'or' but it meant 'and' only. Therefore if Parliament dispensed with the Advisory Board it must provide circumstances and class or classes of cases both. A seven judge bench of Supreme Court rejected the contention, that words such as 'security of India', 'relation of India with foreign power', 'security of the State' and 'maintenance of public order', provided both the circumstances and the class of cases and hence Article 22(7)(a) has been sufficiently complied with. The Court specifically overruled A.K. Gopal on this point. Speaking for the Court, (consisting of himself, K.S. Hegde, A.N. Ray, P. Jaganmohan Reddy, H.R. Khanna, A.K. Mukherjea and Y.V. Chandrachud, JJ.) J.M. Shelat, Acting C.J. (as he then was) observed:

"The purposes of these entries and of Cl. (7)(a) are distinct; that of the entries to lay down the topics in respect of which legislation can be made and that of Cl. 7(a) to distinguish the ordinary from the exceptional to which only the salutary safeguard provided by Cl. 4(a) would not apply. Mere repetition of the subject or topics of legislation from the entries would not mean prescribing either the circumstances or the classes of cases to which only, as against the rest of individuals.....the safeguard of intercession of an independent body would not apply. The law under Cl. 7(a) would, as compared to the one to which Cl. 4(a) would apply, be a drastic law and the presumption would be that such a drastic law would apply to exceptional circumstances and exceptional activities expressly and in precise terms prescribed." 89.
Pointing out that the purport of the words 'circumstances and class or classes of cases', he observed, that circumstances would ordinarily mean situations or events extraneous to the activities of a concerned person or a group of persons, such as riots, disorders, tensions, religious, racial, regional or linguistic or other such commotions, which might by their pre-existence accentuate the impact of such activities affecting the security of the country or a part of it or the public order. Class or classes of cases on the other hand relate to group or groups of individuals, who by the nature of their activities fall under one group or groups by their common or similar objective or objectives. Hence after Sambhu Nath Sarkar's case, the Parliament cannot confer the discretion to detain a person preventively without the safeguard of his case being considered by the Advisory Board under a law passed under Cl. 7(a) of Article 22, without clearly laying down the (i) circumstances, (ii) and the class or classes of cases, in which such a drastic power can be used. Thus in this respect the court has required the Parliament to lay down clear guidelines for the exercise of discretion in view of the specific constitutional mandate in this matter.

3.6 CONCLUDING REMARKS:

The study of the cases in this Chapter has revealed that the fundamental rights provided in Articles 14, 19 & 21 constitute a very important source of control over conferment of administrative discretion. Under these Articles the courts are generally requiring that the substantive safeguard of guidelines for the exercise of discretion, and the proce-
dural safeguards of *audi alteram partem* and/or recording of reasons and/or an appeal or review by a higher authority should be provided at the stage of conferment of discretionary powers on the administrative authorities.

Approach of the courts under Article 14 has evolved with the progress of time. The application of this principle started in 1952 in *Anwar Ali Sarkar* requiring clear cut substantive guidelines in the section for upholding the statute. Although starting with this strict approach, the Supreme Court liberalized it in subsequent cases by trying to uphold the conferment of discretion by reading the substantive guidelines somewhere in the concerned statute or sometimes in the previous or parallel statute also. While following this liberal approach the courts have been satisfied with a very broad and general criteria or standards, such as 'public interest', 'public order', 'reason to believe', urgency etc. It is interesting to note that the above liberal approach under which the statutes were generally upheld even though only very broad and general substantive guidelines were provided, continued till the leading case of *Maneka Gandhi* combined the requirement of substantive safeguard with the requirement of procedural safeguards in 1978. After Bhagwati, J's leading pronouncement in *Maneka Gandhi* the other judges of the Supreme Court, and various High Courts have generally been insisting upon both, the substantive guidelines as well as the procedural safeguards. It may, however, be noted that the liberal approach towards substantive safeguards
continued even after 1978 with the difference that the Supreme Court & the High Courts have in addition been implying the procedural safeguard of an opportunity of being heard and or recording of reasons. While following this approach recently the Supreme Court has started playing a more positive role by giving direction, in a few cases, to the administration to frame guiding rules or criteria.  

The above change in the approach of the Supreme Court in applying the principle under Article 14 may naturally prompt one to ask the question as to what could be the basis of this change. By way of an answer to this question, it could be said that probably the old approach of the Court, followed before Maneka Gandhi, was influenced by the old or the traditional doctrine of classification under Article 14, and it was followed by the courts for a long time in the expectation that in due course a just administrative process would be provided by the Government either through legislation or through administrative rules. However, in view of the absence of any development in this direction, the Supreme Court judges now seem to be inclined to play more active role in the area of control over administrative discretion. For this purpose they have started giving activist magnitude to Article 14 which covers the vast area of administrative powers.

The application of the activist or dynamic concept of Article 14 for the purpose of controlling vesting of, or conferment of power since Maneka Gandhi may, probably also be
attributed to the changing role of the Supreme Court, particularly after internal emergency. It seems that the Court is trying to find legitimacy through an activist approach, after its controversial retreat in the vital area of personal liberty during emergency.

It is submitted that the approach under recent dynamic concept of Article 14 seems to be of more practical value. The laws governing the changing and the dynamic society can not remain static. This does not suggest that the basic principle of the law should also change, but it only means that the approach under it should change depending upon the changing needs of the society.

Recognition and application of the principle of reasonableness or rule against arbitrariness under the activist magnitude of the Article 14 since Maneka Gandhi has resulted in the courts insisting upon the procedural and the substantive safeguards under that Article. However, under Article 19, the principle of reasonableness has been recognised expressly in the Constitution itself. Therefore, under Article 19 the Supreme Court & consequently the High Courts have been generally insisting upon the procedural safeguards, in addition to the substantive safeguards, from the very beginning since independence.

While controlling the conferment of discretion under Article 19 the courts have adopted a somewhat varied approach towards the requirement of substantive and procedural safeguards.
In the cases where the discretion conferred related to freedom of speech and expression, freedom of assembly and freedom of association the procedural safeguard of an opportunity of being heard, recording of reasons and a right of an appeal to higher authority has generally been insisted upon, in addition to the substantive safeguard of guidelines which were provided in the impugned section, in most of the cases. In case of freedom of association the procedural safeguard of a review or appeal by the court or a judicial authority has also been required. It seems that the courts have been more strict in their approach in the cases affecting these freedoms because they regard them as very important for the existence of democracy. On the other hand freedom to move throughout the territory of India and to settle anywhere has not been given so much importance and in the cases affecting this freedom the only safeguard of making a representation to the authorities has been held to be sufficient. Probably in these cases the Supreme Court has been generally influenced by the fact that the discretion was conferred for exterminating the bad elements for protecting property and persons of the society. Though it may be necessary to arm the administration with a drastic power in this area, but even then, the right of movement needs a better protection and for this the Court should insist upon the safeguard of recording of reasons for rejecting the representation of the externee and on providing of very clear guidelines indicating clearly the persons who may be subjected to this law.

In the cases relating to right to property the procedu-
eral safeguard of a review or appeal by court or other judicial authority has been generally insisted upon in the cases where no social welfare legislation was involved, but where the legislation related to some social welfare objective, the safeguard of an opportunity of being heard has been regarded as sufficient.

Where the discretion conferred related to matters of trade and commerce the Supreme Court has generally adopted two distinct approaches; while in the cases where the very existence of business was threatened it required clear guidelines and the procedural safeguard of an opportunity of being heard and/or a right to appeal to the higher authorities, but in the cases where only an aspect of business was regulated for example price fixation, wage fixation, the Court did not insist upon the above safeguards and tried to uphold the conferment of discretion by finding some guidelines or procedural safeguard in the statute. It is submitted that though it may be proper for the courts not to insist that legislature should provide clear guidelines for these regulatory matters, they may nevertheless insist upon the administrative authorities to provide some guiding rules for the exercise of discretion in these matters. In addition to this the procedural safeguard of an opportunity of being heard and/or recording of reasons should be insisted upon.

In the beginning the Supreme Court did not require any safeguards in the cases where the conferment of discretion related to personal liberty under Article 21. It was thought that the words "procedure established by law" meant "any procedure
established by a validly enacted law". Once this requirement was satisfied the Court did not go into the question of fairness of procedure and reasonableness of the law. This attitude was based on the premise that the fundamental rights in Part III of the Constitution are not inter-related but they operate in a watertight compartment. However, subsequently this premise gave way to the new premise that the fundamental rights particularly in Articles 14, 19, 21 & 22 are not exclusive of each other but they are inter-related or they do not operate in water tight compartment but are complementary to each other; a result of this change in the basic premise is that currently a law affecting personal liberty has to satisfy the requirement of reasonableness and fairness under Articles 19 and 14 in order to be a valid law under Article 21. Therefore, the courts now insist that a law affecting personal liberty must provide fair procedure and the substantive guidelines for the exercise of discretion.

While insisting upon the above safeguards in matters relating to impounding of passport and confining and fettering the prisoners the Supreme Court has insisted upon the procedural safeguard of "audi alteram partem" and giving of reasons. Even in the area of preventive detention the Supreme Court is now trying to infuse the procedure before the advisory board with some fairness by allowing the detenu to be represented by a friend, and to adduce the evidence in rebuttal of charges against him. The Court has even asked the administration to provide clear guidelines for the exercise of discretion to detain
a person on the criterion of "maintenance of supplies and services essential to the community". These significant developments in the law controlling the conferment of discretion in the area of personal liberty indicate that the courts are no longer ready to allow the administration to have unconfined and uncontrolled discretion in this area.

In spite of the broadened horizons of Article 21, the Supreme Court has not yet started to insist upon the requirement of giving reasons to the detenu for rejecting his representation either by Government or by the Advisory Board. It is thus submitted that the Court should at least insist upon this important procedural safeguard in the area of drastic power of preventive detention in the absence of which the right of the detenu to make representation gets very much diluted and he can never be sure that the concerned authority had ever applied its mind to the case put forward by him.

In view of the above development the courts have now the following three courses open to them:

1. While being satisfied with some general and broad standard or criteria the courts may uphold the conferment of discretion by implying the important procedural safeguard of notice and fair hearing, and/or recording of reasons. This approach seems to be more likely where some immediate social interest may be involved.

2. Court may strike down a legislation by insisting upon some clear guidelines as well as procedural safeguards to control
the discretion. This approach seems to be more likely where some crucial interest of an individual may be involved and probably the courts see no immediate social interest which may be affected.

3. The court may require the administration to frame guiding rules for exercise of discretion where the discretion affects "matters of moment" or important aspects of an individual's life, for example a person's interest in continuation of his service or an interest to get admission in such professional courses such as medicine or engineering.

It is submitted that though all these alternative courses of action developed by the Supreme Court, while controlling the conferment of discretion, are important as the Court may use any one of them depending upon the situation in hand, the trend of requiring the administration to frame guiding rules is of a special significance, as by using this method courts can require the administration to frame the clear guiding rules covering substantive as well as procedural aspects of the exercise of discretion, particularly in areas where it has many years of experience such as education, preventive detention, government service, government contracts etc. Although it is proper for the courts not to expect legislature to lay down detailed guidelines and safeguards and refuse to strike down a statute if some general standard, policy or criteria can be found in it, but it does not seem to be proper to leave administrative authorities to exercise discretion without some clear guidelines and safeguards. Therefore while a statute
may be upheld by the court as a general policy, it can still require administration to frame the guiding rules under its recent approach.

It is also submitted that the procedural safeguard of notice and hearing or recording of reasons, implied by the Supreme Court in some cases should be insisted upon in as many cases of conferment of power as possible. In addition the safeguard of at least one appeal or review on merit must be insisted upon.

It is significant to note in this respect that while emphasising the need of procedural safeguards and substantive guidelines in a recent case (decided on 28th November, 1984), the Supreme Court observed that the experience has shown that the discretionary powers are not always exercised fairly and objectively. This observation probably suggests that being disillusioned by the performance of the administrative machinery so far, in future the Court is not likely to stick to its old approach under Articles 14 and 21 of trying to uphold a statute even in face of conferment of discretion practically without any guidelines and procedural safeguards. It may be interesting to note that the above development of the Indian Administrative law differs from that of the U.S.A. In U.S.A., the doctrine of "non delegation" which is similar to the doctrine of "excessive delegation" has generally been used to control the conferment of any power by a statute be it legislative or administrative. In India while the use of doctrine of "excessive delegation" has been limited to the control of
conferment of legislative or rule making powers of the administration only, the conferment of administrative powers has been controlled through fundamental rights. It may, however, be worthwhile to point out that as the doctrine of "non delegation" or "excessive delegation" insists upon the legislature to provide the guiding policy in the statute, there should be nothing to stop the Indian courts from invoking this doctrine to control the conferment of administrative powers also. Then why have the courts preferred fundamental rights for this purpose? The reason seems to be that the fundamental rights provided in Articles 14, 19 & 21, through the rule against discrimination, arbitrariness or unreasonableness, underlying them, not only cover what is covered by the doctrine of "excessive delegation" but also enable the courts to control the conferment of administrative discretion more comprehensively. Firstly, the fundamental rights can cover the delegation of administrative discretion not only by a statute but also by a rule made under a statute. In addition, the conferment of discretion on the administrative authorities by executive rules, regulations or resolutions can also be controlled under these rights. Secondly, under fundamental rights it is possible for the courts to insist upon more clear guidelines to guide the exercise of discretion. Thirdly, under fundamental rights the court can also insist upon the procedural safeguards to be provided at the stage of conferment. Fourthly, for the purpose of complying with the requirement of
fairness and reasonableness under these rights the courts can themselves imply certain procedural safeguards at the stage of conferment. Fifthly, under fundamental rights the courts may sometimes go to the extent of directing the administration to frame the rules to guide the exercise of discretion.

It may, however, be suggested that non-use of doctrine of "excessive delegation" in normal times does not prevent the courts from using this doctrine in the period of emergency when the fundamental rights provided in Articles 14 and 19 are generally suspended.

In a recent writing, Dr. M.P. Jain has observed that "Just as there is the doctrine of excessive delegation of legislative power in India, so there operates the parallel doctrine of excessive delegation of administrative powers". But in the immediately following discussion he made it amply clear that he used the term, "doctrine of excessive delegation of administrative power" for denoting the control of the conferment of administrative powers through fundamental rights and not for denoting the control through the traditional constitutional doctrine of "excessive delegation", based on the constitutional theory that the "essential legislative functions must be performed by the legislature itself". It is submitted that the use of the term "excessive delegation" for denoting the control over conferment of administrative powers through fundamental rights may result in confusing the
two different sources of control over conferment of discretion. Perhaps due to this reason the other writings on Indian Administrative Law have not used the term "excessive delegation" to denote the control over conferment of administrative powers through fundamental rights. Besides, the courts have also generally refrained so far from using the above expression to denote the control over conferment through fundamental rights.

FOOT NOTES


2. Ibid at p. 244.

3. A.I.R. 1952 S.C. 75


5. A.I.R. 1952 S.C. 123

6. A.I.R. 1957 S.C. 397

7. Ibid, p. 410. The case of Pannalal Binjraj has been severely criticised by the eminent jurists as being a conspicuous example of judicial deference to administrative convenience, under which the principle against conferment of unguided discretion under Article 14 had come under a cloud, See supra n.1

11. A.I.R. 1974 S.C. 2009. This case also has set at rest the controversy on the question: whether clear guidelines should be provided or not in the cases where the discretion has been conferred on the administration to choose between two or more alternative procedures. While applying the liberal & permissive approach towards the conferment of discretion to choose between two alternative procedures, one ordinary and another drastic the Court held that though the special procedure may not be as elaborate as ordinary one, yet if it is fair enough, the then even very broad and general guidelines for the exercise of discretion under the special procedure, are enough for upholding the conferment of discretion under a statute. The Court specifically overruled the case of N.I. Caterers Ltd. v. State of Punjab, A.I.R. 1967 S.C. 1581 which required clear guidelines in this area. The subsequent cases in this area have been following the approach in Maganlal Chhaganlal, see for example, S.T. Commissioner, K.P. v. Radhakrishan A.I.R. 1979 S.C. 1588; Director of Industries, U.P. v. Deep Chand, A.I.R. 1980 S.C. 801; Shreenshyla Crowns and Screws Pvt. Ltd. v. Union of India, A.I.R. 1983 Kant. 130.
13. Ibid
14. It is submitted that the approach of the court in upholding the conferment of wide discretionary powers with vague or very broad criteria on the ground that the power vested in high officials is not likely to be abused is not justified. This presumption negatives the very concept
of fundamental rights for the simple reason that the fundamental rights are guaranteed against State action and if it is generally presumed that the power vested in high officials will not be abused then control over conferment of discretion through these rights loose much of its force.

17. A.I.R. 1982 S.C. 65
19. Ibid, p. 1256
20. Ibid
21. A.I.R. 1984 Pat. 337
29. A.I.R. 1957 S.C. 896
31. A.I.R. 1971 S.C. 481
32. Speaking in the context of Control of exercise of discretion, E.S. Venkataramiah, J. reaffirmed the sanctity of freedom of press and called it "the very soul of democracy" see Indian Express, dated 7th Dec. 1984 p.1
33. A.I.R. 1973 S.C. 87
34. Ibid, at p. 96
35. A.I.R. 1971 S.C. 1667
36. Ibid, at p. 1675
37. A.I.R. 1952 S.C. 196
38. Ibid, at p. 200
40. A.I.R. 1950 S.C. 211
42. A.I.R. 1967 S.C. 1170
43. A.I.R. 1961 S.C. 293
44. (1954) S.C.R. 933
48. Actually the trend of implying the procedural safeguards, while upholding the statutory provision started from this case which has been applied & followed under Article 14 also, since Maneka Gandhi.
49a. Ibid
50. (1954) S.C.R. 803
51. A.I.R. 1967 S.C. 829
52. (1955) 1 S.C.R. 380
53. Mahajan, C.J., Mikherjea & Vivian Bose, JJ. of the five judge bench in this case had also participated in the decision of Dwarka Prasad. The other two judges of the bench were
53a. A.I.R. 1971 S.C. 474


57. Husainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360; Recently in Kudul Shah v. State of Bihar, A.I.R. 1983 S.C. 1086, the Supreme Court awarded Rs. 35,000 as ad interim compensation to the petitioner till he claimed compensation in a regular suit. In this case the petitioner was detained for 16 years even after acquittal.


59. A.I.R. 1950 S.C. 27

60. Fazluli, J. in his dissenting judgement, however accepted the above argument regarding procedural safeguards.

61. Mahajan, J. one of the majority judges, even went to the extent of saying that Article 22 constituted a self contained code for preventive detention and therefore other Articles do not come into picture. However, the other majority judges did not agree with such a statement. While Kania, C.J. Patanjali Sastri and Das, JJ. specifically held that Article 22 was not a complete code, Khursheda, J. held that it was unnecessary to decide that question. On this point, see 1 H.M. Seervai, Constitutional Law of India 697 (N.M. Tripathi, Pvt. Ltd. Bombay 3rd ed. 1983).
63. A.I.R. 1970 S.C. 564
65. A.I.R. 1978 S.C. 597
66. Ibid
C.M. Jariwala 'Preventive Detention in India: Experience and some suggested Reforms, in, Indian Constitution Trends and Issues, p. 203 (Ed) by Rajeev Dhavan & Alice Jacob
(N.M. Tripathi Pvt. Ltd. Bombay, 1978); V.S. Rakhri,
'Preventive Detention: Need for Substantive Restraints' in Indian Constitution Trends and Issues, p. 216 (Ed.) by Rajeev Dhavan & Alice Jacob, (N.M. Tripathi, Pvt. Ltd.
70. See Article 22(5) of the Constitution of India.
71. See Article 22(4) of the Constitution of India.
72. See Article 22(5) of the Constitution of India.
73. See Article 22(3) of the Constitution of India.
74. A.I.R. 1974 S.C. 2154
76. A.I.R. 1982 S.C. 710
77. Ibid, at pp. 747-748
80. Ibid, at pp. 2158
81. See Supra n. 69
82. A.I.R. 1982 S.C. 710
83. Ibid, at p. 737
84. A.I.R. 1975 S.C. 775, also see A.K. Roy v. Union of India
85. **Art. 22(7)** a provides that Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without obtaining the opinion of an Advisory Board.

86. **A.I.R. 1950 S.C. 27(a)**

87. **For a critical commentary on Article 22(7)(a)** See *1 H.M. Seervai, op.cit.,* pp. 798; 813-814.

88. **A.I.R. 1973 S.C. 1425**

89. **Ibid.,** at p. 1439

90. **Ibid.**


of the Act. The enactment was also held invalid because it did not provide for procedural safeguard, notice and opportunity. In this case Chandraanud, C.J. also made an important observation that "the fact that the power.....is vested in officers of higher echelons makes no difference to this position and is not a palliative to the prejudice which is inherent in the situation". Thus it is an important shift, expressly made by the Supreme Court from its previous stand in some cases, wherein it used to hold that if power is vested in higher officials, it is unlikely that it will be abused.


94. Ibid