

THE INDIAN LAW INSTITUTE, NEW DELHI

Seminar

on

Government Regulation of Private Enterprise

March 1969

Some thoughts on Government Regulation
of Private Industry in India

by

H.G. Paranjpe

Government regulation of private industry in India has in recent years* been subjected to extensive examination. More important among such studies are the following:-

- (a) Industrial Licencing - (i) Swaminathan Committee
(two reports)
- (ii) Prof. R.K. Hazari
(vide his interim and
final reports)
- (iii) Estimates Committee of
Lok Sabha.
- (b) Commodity controls - (i) Iron & Steel by Raj
Committee and Khadilkar's
study team.
- (ii) Textiles by Study Team
appointed by Administrative
Reforms Department.
- (c) Economic controls in - Study Team of ARC on
general Economic Administration.

The main trend of opinion in most of the above studies is that controls have failed to fulfill the purpose for which they were intended; nay they have become a hinderance

* Until 1962 when I published my article on the subject (containing a general survey of the regulations' in the Indian Journal of Public Administration no regulatory power had been examined in its operation by any official or non-official agency.

and therefore need to be minimised. These studies have observed that other instruments of Government policy can achieve the objectives better. The ARC Study Team epitomizes this trend of **thinking** towards relaxation of controls in the following words:

"Within the frame work of broad aggregate laid down by the Plan we feel there is a considerable scope for the market mechanism to operate. Instead of seeking to achieve detailed targets through the control mechanism the Government should bring about a desired result by controlling the flow of inputs in the shape of finance, foreign exchange, credits etc. and by channelizing them to the desired field".

1

More or less similar views have been expressed by Prof. Hazari in his final report. In respect of industrial Licencing Prof. Hazari goes further to point out that the area of significance which industrial licencing occupied in the past is progressively shrinking. I am in agreement with the above views. I am also at one with the views expressed by the various Study Teams of Administrative Reforms Department that procedures of Commodity Controls as at present are too clumsy and deserve to be simplified.

3. There are however a few aspects of industrial regulation which in my opinion have not received full attention an account of the pre-occupation of the above critics with the economic or procedural aspects of the regulations and it is these which I would like to stress² in the seminar like the present one organised by the Indian Law Institute.

A - CONSTITUTIONAL FRAME WORK - DEMARCATION OF CENTRE AND STATE AREAS

4. Like all other State activities the regulation and control of industries including mines and minerals and trade and commerce have also been demarcated between **the Centre and State**. Generally speaking where a foreign country is involved or inter State relations are involved, the subject is left entirely to the Central Government.

1. para 17.2

2. I should like to add that the dimensions on which I have focussed attention are academic in nature and they do not present a serious problem to the industry as the questions of foreign exchange of industrial licencing do.

Further the industries, the control of which by Union is declared by Parliament to be expedient in the public interest are also reserved for the Central Government. As a corollary of the above provision trade and commerce within the State of all the products of such industry are also subject to Central intervention (entry 33 of List III). Basu has pointed¹ out a lacuna in the above arrangement in that while entry 33 of List III gives power for Central intervention with regard to the trade and commerce, in and production, supply and distribution of the products of Industries controlled by Central Government, the raw products used in industrial products can be treated as exclusively within the jurisdiction of the State Government (vide entry 27 of List II). But what are these raw products? Is it contemplated that there can be State Acts similar to the Essential Commodities Act of the Centre.

5. Another lacuna pointed out is the inclusion of gas and gas work (entry 25 of List II) exclusively in the State List. Under the Industries Development and Regulations Act, fuel gas (coal gas, natural gas and the like) are controlled Industries. If powers for such control can be derived from entry 52 of list I, why has entry 25 of List II been not made subject to 52 of List I, as has been the case with regard to entry 24 of List II?

6. Apart from these two specific cases of incongruities of Central State functions, there seems to be some unreality about the functions assigned to the State Governments. For instance, entry 26 relate to trade and commerce within the State subject to provision of entry 33 of List III and entry 27 relates to production, supply and distribution of goods subject to provision of 33 of list III. The trade and commerce in and production control and distribution of practically of all commodities (may be within a particular State) is done through the Essential Commodities Act which is a Central Legislation though administered through the State Government agencies. What are these State List entries therefor? Entries 23 and 24 of State list relate to regulation of Mines and Mineral Development and Industries which are again subject to entry 54 and 52 respectively of the Union List. With such sweeping legislations as Mines and Minerals Regulations and Development Act, 1948 and Industries Development and Regulation Act, 1951 framed by the Central Government, is there any function in these fields left for the State Government?

-
1. Page 401 Basu's commentary on the Constitution of India Volume 5 1964 and page 455 *ibid*.
 2. See footnote on p. 5.

7. It is also somewhat strange to me why there is no entry corresponding to entries 26 and 27 of List II in List I. Trade and Commerce in and production - supply and distribution of the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in public interest under Entry 33 of List III provides the sanction for activities such as those contemplated in section 18 G of Industries Development and Regulation Act. What is the sanction for production, control and distribution of commodities under E.C. Act? Only in the case of manufacture supply and distribution of salt under E.C. Act can be related to a separate entry. (viz entry 58 of List I).

8. I cannot believe that our Constitution framers did any absurd distribution of powers between Centre and States. But what could not perhaps be foreseen at that time was the extensive functions required to be undertaken by Central Government under a centralised planning. In the light however of legislations such as the Industries/Central Govt Development and Regulation Act and the Acts relating to Mines and Essential Commodities, a second look is necessary.

B - CONTROL OVER PRODUCTION, DISTRIBUTION AND PRICES ETC.

9. A comparison of section 2 and 3 of Essential Commodities Act and section 18 G of the Industries Development Act, 1951 shows that there is some duplication and overlapping of powers in so far as control over supply, distribution and price of certain articles relating to scheduled industry is concerned. It may be argued that whereas the control contemplated under the Industries Development and Regulation Act deals with articles or class of articles relating to scheduled industries (and that schedule is changed from time to time), for certain other industrial articles the Essential Commodities Act is necessary. But what prevents these non-scheduled industrial commodities (or products) being included in the list of Essential Commodities for purposes of control over supply, distribution and prices. Does section 2 (a) clause (xi) of the E.C. Act not empower Centre Government to declare by a notified order any other class of commodities in respect of which Parliament has power to make laws by virtue of entry 33 of List III to be an Essential Commodity?

For instance the Nagaland Govt. Order No. SPLY/28/64 dt. 25th October 1965 although relating entirely trading in noniodised salt in Nagaland was issued under section 5 of the E.C. Act.

10. The Estimates Committee of Lok Sabha has drawn attention to the anomaly resulting from the Cement Control Order 1961 issued under the Industries Development and Regulations Act, the cement quality order 1962 issued under the Essential Commodities Act. In regard to the cotton Textiles, I may quote the study group on cotton textile organisation 1966 which has observed as follows:

"The Cotton Textile Order was so long before the Industries Development and Regulations Act was enacted and its provisions remained applicable even though in some respects the later enactment made this control out of date. The result is that today the licencers have to comply the requirement of both statutory provisions."

Ambiguity also exists in the case of Iron and Steel (Control) Order 1956 issued under the Essential Commodities Act 1956. The Public Accounts Committee of Lok Sabha have pointed out an instance where a party was given Industrial licences for setting up 2 Tin Plate Plants under the orders, which actually should have been regulated under the Industries Development Regulations Act. Similarly, the instance of alcohol and molasses can be quoted. These articles are controlled both under the Industries Development Regulations Act and the E.C. Act. Prof. Hanson has drawn attention to such 'excess of statutory authority' and has observed that while this duplication may perhaps be convenient for the controllers, it must be a little confusing for the controlled. The Estimates Committee of Lok Sabha have in their 9th Report recommended that since such duplication is likely to cause avoidable inconvenience and harrasement and is likely to stand in the way of effective implementation of the relevant provisions of the Act, Government should examine these aspects urgently.

* An eminent industrialist in a Memorandum furnished to the Estimates Committee had stated "At present prices of Commodities like alcohol and molasses are controlled under the I D & R) Act. There are many other legislative measures including E.C. Act which empower the Government to control prices distribution in and similar provisions under the Industries D & R) Act appear to be redundant (Page 24 - 9th Report of E.C. Fourth Lok Sabha)

+ Process of Planning by A.G. Hanson p. 494.

C - INVESTIGATIONS INTO THE AFFAIRS AND CONTROL OVER
MANAGEMENT OF INDUSTRIES

11. There seems to be considerable overlapping between the powers exercised under section 15 of the Industries Development and Regulations Act and powers exercised under Section 235 and 237 of the Companies Act. In this connection the following observation in the Second Annual Report of the working of Administration of the Companies Act 1956 are significant.

"Enquiries into complaints and investigations in several cases disclosed that in respect of many of them preliminary enquiries had been already made under the provisions of the Industries (Development and Regulation) Act, 1951, although these enquiries were generally inconclusive. On the other hand in some cases, formal investigations were needlessly delayed by duplicated preliminary enquiries both under the provisions of the Companies Act and those of the Industries (Development and Regulation) Act, 1951. The primary object of an investigation under the Industries (Development and Regulation) Act is to assess the causes of any fall in production or employment, but in practice as production and employment are, in the case of all established companies essentially functions of the basic independent variable, viz. Management, investigations under the provisions of the Industries (Development and Regulation) Act to be meaningful and suggestive of effective remedies must, in most cases be accompanied by investigations into the management of companies including their financial management and require a careful enquiry into company practices, board decisions and the accounts of companies such as can be undertaken only in terms of the provisions of the Companies Act. The area of overlapping between the administration of the Industries (Development and Regulation) Act and that of the Companies Act must, therefore, in many cases be necessarily considerable".

1

12. Under Section 3(4) of the E.C. Act, the Centre Government can by an order appoint an authorise Controller

1. It is not known in how many cases under section 3 of E.C. Act controllers were appointed. But so far as 18 A of I D & R Act is concerned, it is understood that during the period 1961-66 the Central Government had taken over the management of 10 textile units, 1 Jute Mill, 1 Bicycle factory and 3 Sugar Mills.

for an undertaking engaged in the production and supply of an essential commodity in order to maintain or increase its production or supply. The controller is to exercise such functions of control as may be specified in the order and in accordance with Government instructions. Under Section 18 A of the I.D.&R. Act 1951 also, Government can issue directions to an industry. In case the directions are not complied with or if the undertaking is being managed in a manner detrimental to the industry or public interest, its management can be taken over by Government.

13. It is understood that of late co-ordination is attempted between the two Departments and it is also known that most of the investigations have been undertaken only under the Industries Development Regulations Act. It is also true that in practice not several complaints have been received from Trade and Industry. But the question arises why keep two duplicate sets of provision for the same purpose. Are not all organised industries run as Companies? If the Industries Regulation Act contemplates of co-operative form for schedule Industries, can the Co-operative Law not take care of the situation contemplated in Section 15 of the I.D.R. Act?

D - PREREQUISITES OF EFFECTIVE FORMAL CONTROLS

14. Despite the strong views expressed by the Administrative Reforms Commission and economists like Professor Hazari against controls and the gradual lifting of controls by Government, it is not likely that either the Essential Commodities Act or the Industries Development Regulation Act will be completely put into the shelve. That means that formal controls on industries in whatever limited form they exist must function effectively and efficiently.¹ There are two pre-requisite for effective and efficient controls:

- (i) Simple procedures and
- (ii) Efficient organisation.

1. The A.R.C. Study Team on Economic administration has prescribed the following desiderata for controls:
(i) the general policy of the procedural instructions should be published for the information of all those who are affected (ii) the public directly concerned with the particular control should be closely associated (iii) There should be greatest possibility in Govt. regulation and minimum on ad hoc consideration (iv) the names of beneficiaries whenever practicable should be published. There should be forum for appeals and representations (v) time schedules should be prescribed for various stages.

The Study Team referred to by me earlier, have already suggested simplifications and changes in procedures. But constant watch will have to be kept and periodical studies will have to be conducted so that the procedures do not become a hurdle.

15. The more important prerequisite is, however, the organisation. Whereas in respect of some of the Industries and Commodities the regulatory agencies are under the Central Government eg. the Textile Commissioners Organisation, the Iron and Steel Controller's office, - in some other areas the function entrusted to Central agency is only to lay down the policy and effect co-ordination - actual implementation of the control or regulation is left to the State agencies, as for example in the case of sugar and vanaspati. It is a common knowledge that there is no uniform pattern of administration for these matters at the State level and efficiency differs from State to State. It is difficult for the Central Government to direct the pattern of organisation to the State Government or even to lay down the Rules of Procedure, but from the point of view of entrepreneur or the consumers it is of utmost concern that he should get his permit, certificates, quotas as smoothly and quickly as possible. It has been the experience of trade and industry that in addition to the delays at the CCI or DGTD levels several months have to be spent¹ in dealing with State Department in the matter of Import Control Act and the Industries Development and Regulation Act. Without impinging on the State's prerogatives to organise their own affairs is it not possible to review the actual mechanism and organisation² of work at the State

-
1. References to such complaints have been made in the Lok Sabha E.C. Report on Industrial Licencing pp 25-26.
 2. 9th Report of the Estimates Committee of Gujarat Legislative Assembly provides some instances of State Industries Department has to play in the various Central controls, (1) Viewing with concern, large no. of rejections of applications for industrial licences, the Committee has suggested that applications for industrial licences when received in the office of the Director of Industries should be very carefully scrutinized. (2) The Committee found that the system of distribution of coal and coal through the Director of Industries who was appointed as controller of coal and coal was not satisfactory. The system of permits had led to the establishment of syndicates. (3) Director of Industries in each State is empowered to issue Essentially certificate for import of all raw materials including all metals and procedures followed in issuing them certificates was not satisfactory.

level atleast so far as these Central Acts are concerned? While Central mechanism of Control has been subjected to detailed studies by various agencies no such study seems to have been conducted in respect of State Department to my knowledge.

E - CHECK OVER ADMINISTRATIVE DISCRETION

16. The problem of execution of Central Controls through the State Governments leads to the problem of check on administrative discretion. Let one not be alarmed by the statement that this problem is created because of the administration of Central Controls through the State Governments. Whereas in respect of the powers exercised by the Central authorities there is the mechanism of the Orders being laid on the table of Parliament and being subjected¹ to scrutiny by the Lok Sabha Subordinate Legislation Committee in the case of powers delegated to State Governments there is no such check.² But it is

1. The Lok Sabha Subordinate Legislation Committee has examined the orders issued under section 18(g) of the Industries Development and Regulation Act which deals with controls over production distribution and sales price etc. The report, however, show that only in the case of motor cars distribution and sales control order 1959 and the imported tourist car control 1961, they had something to comment. In the case of Essential Commodities Act, the Lok Sabha Subordinate Legislation Committee has examined the orders issued under section 3 of the Essential Commodities Act. However, they had occasion to comment only in respect of SROs, the chief ones being the cotton textile (production by handling) control order 1956, the SRO 1415 of 1957 commend cotton control order 1955 and the Punjab Sugar Cane (Prohibition of use for manufacture of goods), 1959. Out of these 4 again only 2 contained some observations about administrative discretion used by State Departments.

2.... While examining SRO 1415 of 1957 made under the Cotton Control Order 1955, the Committee on Subordinate Legislation of Lok Sabha had expressed the view that subsidiary orders made subsequently under the SROs should also be deemed to have been made directly under the provisions of the E.C. Act and that such orders should be laid before Parliament. Government however, pleaded that it would involve considerable political and administrative difficulties as the orders ran into thousands. The Committee therefore accepted the Government point of view and did not pursue the matter. It may also be mentioned in this connection that while under E.C. Act all orders 1955 by Centre Govt. including those delegating powers to State Govts. are atleast required to be placed before Lok Sabha in the case of I.D.&R. Act, orders delegating powers to State Govt. issued under provisions of section 25 are not specifically required to be placed before Parliament.

common knowledge that large number of orders have been issued by the State Governments in respect of the powers delegated to them placing extensive powers in the hands of the State Administrative agencies. Let alone a check by any State Assembly on these powers, one wonders whether there is any uniformity observed between the various States. I examined atleast 15 Reports of the Committee on Subordinate Legislation of various State Assemblies selected at random basis but in none of them could I find a reference to the statutory orders, rules issued by the State Government under powers delegated to them. This is a problem which needs to be carefully enquired. Is it not possible to provide that all statutory orders issued by the State Governments in pursuance of delegated authority under the Industries Development and Regulation Act and the Essential Commodities Act may be required to be laid on the table of each State Assembly? By doing so it will be possible for State Subordinate Legislation Committees to check the Exercise of Administrative discretion by State Government.

-0-0-0-0-0-

-
1. There was one lone exception and that was the third Report of the Committee on Subordinate Legislation of Gujarat Legislative Assembly. The nearest scrutiny over Delegated Powers to State to which the Committee has gone is to recommend in this Report that "Govt. should take steps to reprint all Central Acts with respect to matters enumerated in List III in force in the State and the rules made by State Govt. thereunder" (p. 12 of the Report).