CHAPTER IX
CONCLUSION: FINDINGS AND SUGGESTIONS

The present study deals with the legal control over conferment and exercise of discretion including the control over exercise of discretion during emergency and control in a particular area of preventive detention. This critical study of various cases decided by courts (the Supreme Court and the High Courts), since the commencement of the Constitution, reveals that in India the legal (Judicial) control has been playing a significant role in controlling administrative discretion which is one of the complex problems of modern democracies. It has been found that for controlling the administrative discretion the courts have been using two broad legal limits, namely, the constitutional limits of fundamental rights and the statutory limits arising out of the statute. In addition, the doctrine of promissory or equitable estoppel has also been used by the courts in some cases for ensuring justice to an individual against exercise of administrative discretion. The main findings and suggestions have been summarised below.

9.1 CONTROL OVER CONFERMENT OF DISCRETION:

A detailed study of the legal control over conferment of discretion has been presented in Chapters II, III & VII. Reference is being made to some important findings only.

Presently it is thought that in controlling the conferment of administrative discretion the courts have been dealing with the question of confining discretion through some guidelines and/or procedural safeguards only. However, the present study
has revealed an interesting feature that in addition to the above technique the Supreme Court has also used in some leading cases an important technique of cutting back the unnecessary discretion.

9.1.1. **The Technique of Cutting back of Unnecessary Discretion**:

Critical analysis of the leading cases (during last 35 years) indicates that while cutting back the unnecessary discretion under the doctrine of reasonableness or non-arbitrariness under Articles 14, 15(4) or under Article 21 (read with Articles 14 & 19), the Supreme Court has laid down some important governing rules with respect to certain crucial subject matters wherein the administration used to claim unlimited discretion (Chapters II & VII). For example, in the field of admission to medical and engineering colleges the Court has cut back the unlimited discretion of the Government to reserve the seats for Scheduled Castes, Scheduled Tribes and Backward Classes to the maximum of 50%. Similarly, the unlimited discretion of the State Government to reserve seats in M.B.B.S. or B.D.S. courses on the basis of domicile or residence in the State has been cut back to the maximum of 70% and the unlimited discretion to reserve seats in M.D. or M.S., on institutional basis has been cut to maximum of 50% and in the specialised courses of Neuro Surgery and Cardiology no discretion to reserve seats has been conceded and it has been held that admission to these subjects must be strictly according to merit. It seems that in this area even the Government has come to concede a leading role to the Supreme Court. The unlimited discretion of the Govern-
to medical or engineering college has also been cut to the maximum of 15%.

In the above cases the technique of cutting back the unnecessary discretion has been used to control the unlimited powers claimed by the Government while acting under the executive power of the State and under Articles 15(4) and 16(4). It is interesting to note that this technique has also been extended to the conferment or vesting of discretion under the statute. Recently the unlimited discretion conferred on the Government under S.5 of National Security Act, 1980, to detain a person under such condition and at such place as it pleased, has been cut down by the Supreme Court by laying down some governing rules. Under these rules Government is now bound to inform the near relatives of the determin about his detention, his place of detention and in case of his transfer, the place where he has been transferred, and to treat him with human dignity.

It is to be noted that the technique of cutting back the unnecessary discretion has been used by the Supreme Court and is limited to a few cases only. Although, the High Courts are bound by the governing rules, thus laid down by the Supreme Court, no decision has so far been noted wherein the High Courts may have used this technique. It is felt that the Supreme Court being the highest Court in the country, and having the power to declare the law binding on all the courts within the country, does not hesitate to lay down some general and governing rules in situations where the Court find them to be necessary in the larger interest of the society or the nation.

It is submitted that the technique of cutting back the unnecessary discretion by laying down the governing rules
is very useful, in the sense, that it enables the court to cut back the unnecessary discretion in such crucial areas where vesting of unlimited discretion may be detrimental to the society and the nation in the long run; and the legislature or the administration have not come out with any governing rules. But this technique should be resorted to in very exceptional cases and its use by the courts should not be a rule: Firstly because in cutting back the discretion and laying down the governing rules, the Supreme Court has been, in reality, performing the task of legislative and/or executive policy making. If such rules are made very often then the very legitimacy of this important technique may come to be questioned and its existence may come in jeopardy. Secondly, if the number of these governing rules goes on increasing, the task of administration may become difficult and as a result it may try to avoid these rules. Thirdly, since the governing rule cuts off the discretion and sometimes it may even cut into the needed individualisation, its general use has not been advised even by the experts in administrative law, instead, the use of guiding rules has been advocated. Probably, it is because of this reason, that the Supreme Court, thus far, has not so frequently leaned on cutting back the unnecessary discretion and has instead laid more emphasis on the requirement of confining and controlling the necessary discretion at the stage of conferment.

9.1.2. The Technique of Confining the Necessary Discretion:

The study of cases indicates that the main source for confining and controlling the administrative discretion at the
stage of conferment are the fundamental rights provided in Articles 14, 19 and 21 (Chapter III & VII). In a few cases the conferment of exceptionally drastic power to detain a person without the safeguard of Advisory Board has been controlled under Article 22(7)(a).

It is well known that the concept of equality under Article 14 prohibits conferment of unguided and uncontrolled discretion, because such a discretion results in discrimination. While studying the application of this principle a trend in the development of the approach of the court has been noticed. Although in the beginning some general or very broad guiding policy or object of the statute were held to be enough under Article 14, but after recognition of 'equality' as a dynamic concept the courts have started playing more active role under this article. While going into the question of constitutionality of a statute on the ground of unguided and uncontrolled discretion, the Supreme Court has started implying the important procedural safeguards of audi alteram partem and / or reasoned decision. Thus the trend signifying activist approach in controlling conferment of discretion under Art.14 which was started

\textit{Whish} by Bhagwati J. in \textit{Maneka Gandhi} (1978) has been generally followed by other Supreme Court judges also. This trend has also been followed by the High Courts. In some recent cases, the Supreme Court has even issued directions to administration to lay down clear substantive guidelines and provide for procedural safeguards.
It is seen that under Article 19, the courts have generally been insisting upon both the substantive as well as the procedural safeguards from the very beginning under the requirement of 'reasonable restriction'. However, the approach of the courts towards details of these requirements has varied in case of different freedoms. 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 guidelines which were provided in the impugned section. 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 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 bad elements for protecting property or persons. It is submitted that though it may be necessary to arm administration with a drastic power in this area, but even then, the right of movement needs a better protection and for this courts should insist upon the safeguard of recording of reasons for rejecting the representation of externee
and/or providing clear guidelines indicating the persons who may be subjected to this law.

It is noted that in cases relating to right to property the procedural safeguard of a review or appeal by court or other judicial authority has been generally insisted upon in cases where no social welfare legislation was involved, but where the legislation related to some social welfare objective, the safeguard of audi alteram partem has been regarded as sufficient.

In the matter relating to trade and commence generally two approaches have been visible from the leading cases decided by the Supreme Court, while clear guidelines and the procedural safeguard of an opportunity of being heard and/or a right to appeal to the higher authorities has been insisted upon in the cases where the very existence of business was threatened; however, no such safeguards have been insisted upon in the case where only an aspect of business was regulated. For example, in case of price fixation or wage fixation conferment of discretion was upheld by finding some guidelines or procedural safeguards in the statute and the above procedural safeguard of an opportunity of being heard and/or right to appeal to higher authorities were not insisted upon.

In recent years an interesting trend in the approach under Article 19 like Article 14 has been noticed. The courts have been implying procedural safeguards of an opportunity of being heard and/or recording of reasons at the stage of conferment; and instead of striking down a statute as unconstitutional under these Articles, uphold it.
The study indicates that in the beginning Art. 21 was not held to impose any restriction on the conferment of administrative discretion in the area of personal liberty, because in A.K. Gopalan (1950) it was held that the words 'procedure established by law' in Article 21 meant 'any procedure' provided by a statute, passed validly; and the requirement of reasonableness of Article 19 could not be applicable to statutes under Art. 21 because these articles operate in a water tight compartments. Subsequently as a result of overruling of premises of Gopalan, it has been held that in order to be a valid law under Article 21, a statute must satisfy the requirement of Article 19 and Article 14 and must be reasonable and fair, because these Articles do not operate in water tight compartments. As a result of this change, now Article 21 (read with Articles 14 and 19) constitutes an important check on the conferment of administrative discretion in the area of personal liberty. Thus, in the leading recent cases Maneka Gandhi (1978) and Sunil Batra (1978) the Supreme Court has implied the important procedural safeguards of audi alteram partem and reason decision.

It is heartening to note that in the drastic area of preventive detention, the Supreme Court has, in the recent case of A.K. Roy v. Union of India (1982), asked the Government to provide clear guidelines with respect to the criterion of 'maintenance of supplies and services essential to the community'. This, no doubt is an important step in the direction of channelising discretion in this drastic area, but it is not enough, since there are other vague criteria also for invoking the power of preventive detention which if used carelessly, arbitrarily or capriciously may affect an individual's personal liberty. The other broad
criteria for preventive detention are 'maintenance of public order', 'security of India', 'security of state', 'relations of India with foreign powers' and 'defence of India'. It is submitted that the administration should be required to lay down clear guidelines with respect to these other criteria also. Since the criterion of 'maintenance of public order' has been the most commonly invoked ground for preventive detention, the need to insist upon clear guidelines with respect to this criterion is imminent.

Besides the above improvement of requiring substantive guidelines, it is noted that in the case of *A.K. Roy* (1982), the procedural safeguards of representation by a friend (who is not a lawyer) before Advisory Board and a limited right to adduce evidence in rebuttal of allegations has also been implied by the Supreme Court in the National Security Act, 1980. This again is a step forward in the direction of controlling administrative discretion in the drastic area of preventive detention. However, this is not enough, and it is submitted that an important safeguard of recording of reasons by the Advisory Board and the Government for rejecting the representation of detenu should also be insisted upon in this area, because this requirement will ensure application of mind by the authority; if the detenu asks for disclosure of reasons, they should be disclosed to him, unless such disclosure is not possible in the interest of security of the nation.

It is noted that under Article 22(7) (a) the Parliament has power to confer by law the power of preventive detention of exceptionally drastic nature whereby, any person may be detained without the safeguard of Advisory Board. In
the beginning the Supreme Court did not insist for clear guidelines under this Article but subsequently overruling its previous stand the Court has clearly laid down that while conferring the exceptional power of preventive detention under Article 22(7)(a), the Parliament must clearly provide circumstances and the class or classes of cases with respect to which this power is intended to be exercised.

While dealing with the question of conferment of unguided and uncontrolled discretion and judging upon the constitutionality of a statutory provision, under Articles 14, 19 & 21 the courts generally have now the following three courses open to them:

1) While being satisfied with some general and broad standard or criteria by way of guidelines, 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 to be adopted where some immediate social interest may be involved.

2) Courts 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 adversely.

3) Courts may direct 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 his interest to get admission in such professional courses as medicine, engineering etc.
It is submitted that though all these alternative courses of action are important for controlling the conferment of discretion, the trend of requiring the administration to frame guiding rules is of a special significance, as by using this method the Supreme Court and the High 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 the 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 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 free to exercise discretion without laying down 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 alternative course of implying procedural safeguard should also be followed and the important procedural safeguard of notice and hearing and recording or reasons must be insisted upon in as many areas as possible. In addition, the safeguard of at least one appeal or review on merit should also be insisted upon.

The fundamental rights provided in Articles 14, 19 and 21 constitutes a very important source of control over conferment of administrative discretion as seen above. The development of Indian Administrative law, in this respect, 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 been used to control the conferment of any power by a statute, be it legislative or administrative. However, in India the use of doctrine of "excessive delegation" has been limited to control of conferment of legislative or rule making powers of the administration only; and the conferment of administrative powers has been controlled through fundamental rights. It may 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 power 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 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. This may be evident from the following factors: Firstly the fundamental rights can cover the conferment 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 exercise of discretion because of the concept of reasonableness and fairness imbeded in these rights. Thirdly, under fundamental rights the courts 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 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 during 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 refrained from using the term "excessive delegation" to denote control over conferment of administrative powers through fundamental rights. The same reason also seems to be responsible for the fact that generally the courts have refrained so far from using the above expression to denote the control over conferment through fundamental rights.

9.2 CONTROL OVER EXERCISE OF ADMINISTRATIVE DISCRETION:

The study relating to control over exercise of administrative discretion has been presented in Chapters V to VIII. The study reveals that besides, controlling conferment of discretion, the courts have also been controlling exercise of discretion. For this purpose the courts have been applying two legal limits namely, the constitutional limits of fundamental rights and the statutory limits through doctrine of ultra vires. Within these broad major legal limits, various legal principles of control have been applied. In addition, the equitable doctrine of promissory estoppel has also been used by the courts in order to protect an individual against whimsical or capricious action of the authorities, and to do justice to him.

9.2.1 Control over Exercise in the light of Constitutional Limits.

While, the major constitutional limits against the exercise of discretion have been provided by Articles 14 and 22(5), Articles 15(4), 16(4), 19 and 21 have also been used in some cases. (Chapter IV & VII).

The concept of equality underlying Article 14 has been the pivotal force through which the administrative arbitrariness, unreasonableness or capriciousness has been tried to be checked
by the courts. Although the 14th Amendment of the U.S.A.
Constitution also provides for right to equality, and the dis-
criminatory or arbitrary exercise of discretion has been chal-
enged under the provision before the U.S. Supreme Court, the
approach of U.S.A. Supreme Court and the Indian Supreme Court in
controlling the exercise of Administrative discretion differ.
While the U.S. Supreme Court has limited the scope of equality
clause only to the cases of intenCtional or purposeful discrimi-
mination to be proved or established by the individual, the
Indian Supreme Court has not invoked this restrictive phrase
while controlling the exercise of discretion in numerous cases
under Article 14. In fact the Indian Supreme Court has gone
ahead in controlling exercise of discretion under right to equal-
ity provided in Article 14.

A detailed study on the development of law in India
under Article 14 reveals two distinct stages. The Supreme Court
started with the traditional approach towards Article 14 under
which it applied the principle requiring the administration to
show that the exercise of discretion against a person was in
accordance with the guiding policy or object of the statute and
therefore not prima facie discriminatory. While applying the
above principle, in some leading cases, the Supreme Court spe-
cifically rejected the argument that it was for the party to
prove that the administration has discriminated by not following
guiding policy, object or standard.

The above traditional approach continued till about
1974. Under this approach (based on doctrine of classification)
Article 14 was applied in limited area, generally covering the
exercise of discretion under a statute or rules framed under it. During this period Article 14 generally did not cover the exercise of discretion under executive powers of the State. Subsequently, it came to be realised that the State has been performing equally important administrative activities under the executive powers of the State. Therefore, there was a need to control discretion in these areas also. Due to this probably the dynamic aspect of the concept of equality underlying Article 14 came to be revealed by Bhagwati J. in the Supreme Court decision in E.P. Royappa V. State of Tamil Nadu. He propounded rule against arbitrariness under the dynamic concept of Article 14. This rule tries to ensure that the administrative authorities do not discriminate and/or do not act arbitrarily or unreasonably. The above rule against arbitrariness requires that the State action (i) must be fair; (fairness here means procedural fairness requiring 'fair play in action' or natural justice; and the principle that reasons should be disclosed to courts), (ii) must be based on valid and relevant principles or standards applicable alike to all similarly situate, and (iii) must not be guided by any extraneous or irrelevant considerations.

It has been noted that the above rule against arbitrariness underlying the dynamic concept of Article 14 has been applied since 1974 in numerous cases decided by the Supreme Court and the High Courts. Applying the requirements of rule against arbitrariness the courts have required the administration, in some cases, to prove that it has acted in accordance with the requirement of "fair play in action" or natural justice.
and thus has not discriminated; while in some other cases they have required the administration to disclose reasons or materials for its decision for showing that it did not act arbitrarily or discriminatingly. Under this rule the courts have also insisted in various cases that the administration must prove that it acted in accordance with the guiding standard, norms, or policy; and any departure from the standard or norm in a particular case must be explained by the administration by disclosing relevant grounds, reasons or material to courts. Thus, the emergence of the dynamic concept introduced by Bhagwati, J. and subsequently followed by other judges of Supreme Court has enabled the courts to give relief under Article 14 in various cases of exercise of power covering new areas like the cases pertaining to grant of benefit in Government property, service matters in the autonomous institutes and educational institutions etc. The trend setting cases in this area have been E.E. and C. Ltd. v. State of West Bengal (1975) Manager, Government Branch Press v. Bellappa (1979) and R.D. Shetty v. International Airport Authority(1979).

In recent years, the courts are probing deeper into the exercise of discretion while trying to find out whether some relevant or rational reasons existed for a differential treatment. In some recent cases, the Supreme Court has not been carried away by the bald statements of the authorities in the affidavit, but has gone to the records to see whether the reasons given for differential treatment existed in fact or not. The highest watermark in this respect is the case of A.L. Kalra v. The Project and Equipment Corporation (1984). Thus the dynamic concept of Article 14 supplements and clarifies the traditional concept which also requires
that administration must classify or select persons while exercising discretionary powers in accordance with the guiding policy, with certain positive requirements of rule against arbitrariness mentioned above. After dynamic concept came into existence the rule that administration must prove non-arbitrary or non-discriminatory nature of its exercise of power gets strengthened. Although some of the jurists feel that while propounding the rule against arbitrariness under the dynamic concept, Bhagwati, J. has rejected the doctrine of classification, but it is submitted that this view does not seem to be correct and borne out by the various cases decided under Article 14. Also the view that Article 14 has not been able to serve as an important tool to control the exercise of administrative discretion is not corroborated by the various cases decided under this Article. On the other hand the view that the courts have been more forthcoming and willing to hold exercise of administrative discretion as discriminatory or arbitrary stands corroborated by various cases decided under Article 14.

Like Article 14, Article 22(5) has also been applied in a large number of cases of exercise of administrative discretion. However, application of this provision has been limited to only one specific area, namely the area of preventive detention. Since the power to detain a person on subjective satisfaction is a very drastic power, the Supreme Court evolved a number of guiding principles for exercise of discretion under this Article, and through these principle (Chapter VII) relief has been given to many detenus against illegal exercise of power of preventive
detention by the administrative authorities.

Besides Articles 14 and 22(5), the exercise of discretion has been controlled in some cases under Articles 19 & 21 also. Under these Article the courts have required that the authorities must act in accordance with the guiding policy, norm, standard or object provided in the statute and must follow the statutory procedure.

While controlling exercise of discretionary powers in the matter of making reservation under Articles 15(4) and 16(4), the Supreme Court has applied the principle that the criteria adopted for selection or classification of backward classes must be shown to be relevant to the purpose or object of these Articles namely to benefit "socially and educationally backward classes". The power exercised by the Government must benefit those for whose benefit it is really meant and in the garb of making reservations for backward classes the State Govt. should not benefit certain castes and communities only, favoured by it. In view of various Supreme Court decisions it can be said that a valid classification of backward classes can be achieved by applying such criteria, as low social status, low educational attainment, poverty, residence in adverse environment or geographical conditions and low level of occupation etc., and caste alone cannot furnish a valid criterion.

As ultimately it is the Supreme Court which has been deciding as to which criteria are valid or relevant for classification of backward classes, the following view of Professor Marc Galanter appears to be correct. He had pointed out that it has been the Supreme Court rather than the Central Government which has been the unifying and limiting influence and presumably any new
central policy will be shaped in the light of decades of judicial predominance in this area. The similar role of policy making is played by the Supreme Court when it has cut back the unlimited discretion of State Governments to certain specified percentage in the matter of making reservation for backward classes etc. The recent attitude of the Central Government and the State Governments towards this role of the Supreme Court shows that Marc Galenter made a correct prediction about the working of administration in this area.

9.2.2 Control over Exercise in the Light of Statutory Limits:

In addition to, and simultaneously with, the control through constitutional limits of fundamental rights, exercise of discretion has also been controlled in the light of statutory limits, express as well as implied, through the doctrine of ultra vires. These limits have been applied during the normal as well as emergency times (Chapter V, VI & VII).

9.2.2.1 Control during Normal Times: Inspite of the fact that the discretionary powers have been vested in very broad or general terms, various legal limits have been implied by the courts in the statute. The statutory limits thus implied are: (i) that the discretionary powers must be exercised reasonably, i.e. for proper purpose, object or policy; on the relevant considerations, by the person authorised; by considering the merit of each case or by proper application of mind, (ii) that the discretionary powers must be exercised in good faith and not mala-fide or in bad faith or with malicious intent. These limits constitute substantive limits; and any violation of these limits is called as substantive ultra vires.
In addition to above limits the courts also require that the discretion must be exercised in accordance with the procedural limits, expressly provided in the statute, and or in accordance with the fair procedure - which generally means "fair play in action" or concept of natural justice.

Since the above principles are well recognised principles of English Administrative law which have also been used by the Indian Supreme Court and the High Courts for controlling exercise of discretion, the development of law relating to control in the light of statutory limits has been similar to that of the United Kingdom (Chapter V).

Out of the various principles constituting substantive limit over exercise of discretion, the principle of acting on irrelevant considerations or leaving out relevant considerations has been invoked very often. Therefore, it constitutes an important limit in this area. The next important principle is the principle of acting for improper purpose. In fact both these principles are so much inter-related that in many cases they run into one another. Since control on these grounds depends very much upon the availability of the reasons or the material forming basis of an administrative decision, to the courts, the scope of legal control under these grounds was limited in the beginning to few areas only. However, subsequently, the scope of legal control through the above substantive limits came to be expanded due to the recognition of three inter related principles by the English and Indian Courts. These principles, which were recognised during late sixties are, (i) that there can be no absolute discretion in the administrative authorities,
(ii) every discretion is coupled with a duty to exercise it legally or within the legal limits, (iii) the administrative authorities must disclose reasons or the material forming basis of their decision to the courts, to show that they acted legally, in a case where their action has been challenged as being based on irrelevant considerations or for improper purpose. Disclosure of reasons to courts in this sense is more akin to substantive ultra vires and different from the procedural requirement to make speaking order.

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

As the concept of absolute discretion has been replaced by the duty to act within the legal limits, since the leading decision of the House of Lords in Padfield which has also been recognised and applied by the Indian Supreme Court, the courts in India have found no difficulty in going to the records and the principle that generally there are no unreviewable discretionary powers has come to be recognised in the field. This principle has also been strengthened by a liberal interpretation of locus-standi. As a result courts have been able to give relief against abuse or misuse of discretion in various areas of administrative power. The scope of judicial control over exercise of discretion may still be broadened by entertaining the challenge to legality of exercise of discretion through Public Interest Litigation (P.I.L). Although in a few recent cases a challenge to exercise of discretion has been allowed through P.I.L., but a clear trend on this point has not been
visible so far. In a comprehensive study on P.I.L., Dr. S.K. Agrawala has rightly pointed out that a consistent philosophy of the Supreme Court on P.I.L. has not yet emerged. It is, however, submitted that the court should not generally interfere in this area through P.I.L. but use the P.I.L. only in rare cases.

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

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

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

The present study also reveals that besides requiring compliance with the substantive limits, the courts have also accorded a general applicability to the important procedural safeguard of 'fair play in action' or the concept of Natural Justice. Any exercise of administrative discretion violative of the above procedural requirement has been held to be ultra vires. Generally, it is believed that a trend in this direction has started in the famous case of Kraipak (1970). However, the detailed study of cases has indicated that the trend had already started in the leading case of Binapani Dei (1967), and was in fact followed and reiterated in the cases of Kraipak (1970) and Maneka Gandhi (1978). In subsequent cases, this trend has been followed.

It has been found that the criteria for implying natural justice are right or interest, legitimate exception and civil consequences out of these, the criterion of civil consequences has been accorded a wider meaning which not only
covers the cases of right or interest and legitimate expectations but also covers other cases where no right or expectation may be involved, but still an individual could be adversely affected.

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

The study also indicates that in the leading case of Maneka Gandhi, Bhagwati, J. held the concept of natural justice applicable even to an emergent situation in the form of
a post-decisional hearing. While doing so he pointed out that there can be no general exclusionary principles to this concept. In subsequent cases the Supreme Court has generally been rejecting arguments based on the exclusionary principles which used to hold good previously. Thus there seem to be no general principles which *prima facie* exclude natural justice. It may, however, be noted that as a matter of judicial policy, so far the concept of natural justice has not been applied in few areas namely compulsory retirement, Article 311 (2)(a)(b) & (c), promotion, academic performance of a student and liquor licensing. It may be interesting to note that in most of these areas, the courts have conceded that though the procedural safeguard of concept of natural justice is not available, but the safeguard of substantive limit of requirement to act on relevant considerations or statutory purpose or policy is always available. For example, administrative orders of compulsory retirement has been struck down for not taking into account relevant considerations and acting on irrelevant considerations, or for being passed for ulterior purpose.

Unlike the area of quasi-judicial power, the procedural requirement of speaking order or reasoned decision has not been recognised as an established principle in the area of exercise of administrative powers. Neither it has been recognised as a part of concept of natural justice, nor as an independent principle of fair procedure. Further, a detailed study in this area indicates that the requirement of speaking order or reasoned
decision is different from the requirement of disclosure of reasons or material to the courts. In case of speaking order or reasoned decision, the decision or order of the authorities itself speaks about the reasons for decision and thus the requirement of making speaking order entitles and enables the individual to know the reasons for administrative action. Whereas the requirement of disclosure of reasons or material to Court is a lesser requirement in the sense that the reasons or material is liable to be disclosed to courts to enable them to judge upon illegality or legality of an administrative order. Thus unless an individual challenges an administrative order in a court, the reasons for administrative order may not be known to him. While controlling administrative discretion the lesser requirement of disclosure of reason to courts is invariably insisted upon and has been recognised as a general principle.

It has been noted above that the requirement of speaking order or reasoned decision is not generally recognised as an established principle in the area of administrative discretion. The pertinent reason for this seems to be the reluctance of the courts to introduce in this case a judicial type of formality. Although it is proper for the courts not to introduce too much formality in the area of exercise of discretionary powers, but it is submitted that as a rule of fair procedure they may insist that generally the reasons for every exercise of discretionary powers must be recorded in the file and if demanded by the person should be disclosed to him in the cases where some
important right of his is likely to be affected, recording
of reasons will ensure application of mind by administration
and disclosure of them to individual at least in some cases
crucial to him may ensure his confidence in the administrative
process. In the cases where he is satisfied with administrative
fairness it is quite likely that he may not prefer to go to
court to challenge administrative order. Thus unnecessary liti-
gation may be avoided in such cases.

9.2.2.2 Control During Emergency: The obligation to act
within the statutory limits arises from the statute itself and
any person affected by the exercise of discretion can enforce
this obligation of the authority through a writ petition under
Article 226, and if the case involves a fundamental right then
he can enforce this obligation under Article 32 also. It may
be noted, however that since various grounds of control under
the doctrine of ultra vires arise out of the statute, the person's
right to challenge the exercise of discretionary power on the
ground of statutory ultra vires is independent of any fundamental
right, and can be exercised even without involving a fundamental
right. Therefore, during the period of emergency, when some of
the important fundamental rights may be suspended, the control
in the light of statutory limits, based on the doctrine of ultra
vires acquires significance (Chapter VI). Thus it was rightly
held by the seven judges of the Supreme Court in Makhan Singh
and in subsequent leading cases, that what can be suspended
during emergency under Articles 359 and 358 are pleas based on
fundamental rights and not pleas based upon the statutes. Pre-
sent study reveals that the view has been generally applied while
controlling exercise of administrative discretion in various areas during emergency enabling an individual to challenge it on the ground of malafide, extraneous purpose, non-compliance with statutory provision or non-compliance with the concept of natural justice etc. It has been found that the above approach was followed in the drastic area of preventive detention also, till the majority decision of the Supreme Court in A.D.M. v. Shukla, wherein a confusion between the legal control in the light of statutory limits and control in the light of constitutional limits of fundamental rights resulted in giving an absolute power to administration in this drastic area. However, the majority decision in Shukla's case was distinguished on facts and not applied to other area of exercise of discretionary power. Thus although unlimited discretionary powers were conceded to the executive in the area of preventive detention during the emergency of 1975, this did not result in a general suspension of legal control in the light of statutory limits.

Nevertheless, the situation prevailing during emergency did enable the executive to lower the morale of the country to its lowest ebb by subjecting its people to fear psychosis, because it held the most drastic power to detain any person at its will. The majority decision in Shukla's case based on confusion about two major sources of legal control serves an important reminder that the legal control through constitutional limits of fundamental rights and the legal control through statutory limits operating through doctrine of
ultra vires should not be confused with one another. It must be well recognised that control in the light of statutory limits through the doctrine of ultra vires has its own existence which is based upon the concept of Rule of law and separation of powers recognised by the Indian Constitution which provides for a system of Parliamentary Democracy and responsible Government.

9.3 CONTROL IN THE AREA OF PREVENTIVE DETENTION:

Although a peculiar situation of lack of any legal control in the area of preventive detention was created during the period of internal emergency starting from June 25, 1975 to March 1977, during normal times the courts have been requiring a strict compliance with the constitutional requirement of Article 22 (5) and of the express and implied statutory limits while controlling exercise of power in this area (Chapter VII). As a result, in many cases the illegal exercise of power either due to violation of constitutional limits or statutory limits, or both, has been struck down. However, so much scrutinising approach has not been followed by the courts while controlling conferment of discretion in this area and a more scrutinising approach is needed in this direction. In this respect suggestions have already been given in Section(9.1.2) of this Chapter.

9.4 CONTROL OVER EXERCISE OF DISCRETION THROUGH DOCTRINE OF PROMISSORY ESTOPPEL:

The doctrine of promissory estoppel or equitable estoppel also constitutes an important source of control over
exercise of administrative discretion (Chapter VIII). It is a very important and valuable technique in the hands of courts to do justice to an individual while not unnecessarily hampering the exercise of discretion by administration. The principle evolved by the courts in this area is: that in the exercise of its discretion, the administration cannot go back from its representation made to a person, arbitrarily, unreasonably or whimsically, where the person to whom representation is made has acted on it and changed his position to his detriment.

It is a redeeming feature that the approach of the courts has not been peripheral. They try to go much deeper in the exercise of discretion, while asking the administration not to change its policy at its whim, where the courts have insisted on being satisfied about the existence of executive necessity, they tend to pronounce upon the merit of the decision of the administration as to whether executive necessity is such which required it to change its policy as against the person affected. Against an individual adversely affected they also sometimes ask the administration to act or not to act in a particular manner. This is evident from the fact that in most of the cases of application of the doctrine courts have been giving affirmative directions to the administration.

It is submitted that in view of the absence of an institution like that of Ombudsman in India which is normally supposed to probe into questions of justness and propriety of State action, the attitude of the courts generally and the role
played by them is commendable. The courts have rightly refused to give relief to an individual in case of executive necessity and in cases of raid the courts have refused to assist the party quality of raid. Relief against legislative power has been refused, it is submitted rightly, on the principle that courts cannot ask the legislature to enact or not to enact a particular enactment. However, the term "Duty under Law" has been widely interpreted by the courts and therefore the non-availability of the doctrine on this ground has not been proper in some cases. It is submitted that administration should be absolved from its obligation under promissory estoppel only where it is under some positive duty under law. It is also submitted that the scope of the doctrine of promissory estoppel should be extended to cases of representation by an officer who had ostensible authority, if justice towards individual so requires. As rightly pointed out by P.P. Craig compensation or the legislation cannot answer all such questions and finally it is the courts which can balance the interest of the administration with that of the individual. The verbiage that the doctrine of estoppel is excluded against the Government in the exercise of sovereign or executive functions should not be resorted to by the courts even in passing or as an obiter lest the law of promissory estoppel becomes confused (as has happened in the case of Government liability for torts in India).

9.5 GENERAL REMARKS:

In this investigation the development and recognition of various principles for legal control of administrative
discretion have been studied in detail. The impact of these principles on administrative machinery as a whole and/or on different components of the machinery, may form interesting topics for further research.

The general principles of legal control are applicable in several areas of administrative power. It may be interesting to study the operation of legal control through these principles in details. In addition, the study of finer development of legal control in each important area of administrative power may provide important results. As an illustration, the area of preventive detention has been studied in detail and some interesting results have been presented in the thesis. Similar studies in other areas, such as, Government contracts, Government and other public employments, licencing, slum clearance, town planning, education etc. may form interesting topics for further study.

In recent years the activities of mammoth administrative machinery have expanded tremendously and in future these activities are going to expand with still faster pace. In view of this the already over-burdened courts which have generally played and are playing commendable role, may not be able to cope up siggly with the task of controlling administration. Besides, the legal control has some inherent limitations like the courts do not go into the merits of exercise of discretion; the judicial control also depends upon chance of litigation, the process of control is much expensive and time consuming etc. In view of the above considerations, it is suggested that some additional institutions of administrative control, such as Ombudsman,
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Appellate Administrative Tribunals etc. similar to other common law democracies should be established in India also.