CHAPTER II

CONTROL OVER CONFERMENT THROUGH THE TECHNIQUE OF CUTTING BACK UNNECESSARY ADMINISTRATIVE DISCRETION

2.1 INTRODUCTION

Discretionary power enables a decision maker to choose between more than one possible alternative course of action in a given situation. This freedom of action provides to the administration an opportunity for the meaningful, sound and pragmatic use of the administrative power. In India, these powers are generally conferred by various statutes enacted by the Parliament, the State legislatures and the rules and regulations framed under the statutes. Sometimes, administrative discretion is also conferred on the authorities under the Executive powers of the State either by the administrative regulation, rules, directions or schemes. However, if the authorities are given absolute discretion, without any limits or control, it is very likely that the power may be misused or abused. Therefore, modern thinkers and jurists instead of questioning vesting of discretion are concerned with the more pragmatic problem of the controls over discretion. It has been rightly suggested that 'unnecessary discretionary power should be cut back and necessary discre-
tionary power should be properly confined, structured, and checked.

Challenge to the conferment of absolute or unconfined discretion is an issue to be decided by the courts as it involves the question of constitutionality of a statute or that of the rules framed under it or of an executive regulation, rule and scheme. The courts in India have used fundamental rights for the purpose of going into the question of conferment of discretion. On the other hand, the courts in America seem to have used the doctrine of 'non-delegation' and the 'due process' clause for the control of conferment of discretion. However, in England there exists no control at the stage of conferment of administrative discretion in view of the doctrine of Supremacy of the Parliament.

The control at the stage of conferment of discretion has been generally achieved by using the two techniques, namely cutting back the unnecessary discretion, and confining and controlling the necessary discretion. The former technique has been discussed in this chapter while the latter one has been dealt with in the subsequent chapter.

An attempt has been made here to study the development of the technique of cutting back unnecessary discretion since independence. Under this study, the foremost question in this
respect is; to what extent, the conferment of discretion is necessary to achieve a particular objective, or what is or what is not unnecessary discretion in a given situation? Though this question has been dealt with in very few cases, as compared to the question of confining the discretion, its consideration has not been altogether absent from the judicial mind, as is clear from the discussion presented below. The study is divided into two parts, in the first, the developmental aspect of the technique has been dealt with while in the second the achievements of the technique have been summarised.

2.2 DEVELOPMENT OF THE TECHNIQUE

The first case in which the Supreme Court addressed itself to examine the vesting of unnecessary discretion was Chintamanrao v. The State of Madhya Pradesh, wherein S. 4 of the C.P. and Berar Regulation of manufacture of Bidis (Agricultural Purposes) Act was questioned on the ground of being an unreasonable restriction on the fundamental right under Article 19(1)(g). The section conferred discretion on the Deputy Commissioner to prohibit the manufacture of bidis by an order during the agricultural season in such villages as he may specify and on such an order, being issued, no person
residing in the specified village could engage himself in
the manufacture of bidis and no manufacturer could employ any
person during the said season, for the manufacture of bidis.
The Supreme Court held this section as violative of Article
19(1)(g) as constituting an unreasonable restriction on the
fundamental right to carry out any trade or business, on the
ground that the discretion conferred under the section was
much in excess of what was required in the circumstances of
the case. The court pointed out that the object of the
statute was to provide measures for the supply of adequate
labour for agricultural purposes in bidi manufacturing areas
of the province and it could well be achieved by legislation
restraining the employment of agricultural labour in the
manufacture of bidis during the agricultural season. Even in
point of time, a restriction may well have been reasonable if
it amounted to a regulation of the hours of work in the busi-
ness. As the section vested sweeping power of prohibiting
the manufacture of bidis, the effect of the provisions of the
Act becomes so drastic in scope that it enabled the complete
suspension of bidi manufacturing Industry. Pointing out as
to what should have been the approach of the legislature in
conferring the powers, Mahajan, J. speaking for the Court
(consisting of himself, Kania, C.J., B.K. Mukherjea, S.R. Das
and Chandrasekhar Aiyer, JJ.) observed:
"the word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause(6) of Article 19, it must be held to be wanting in that quality".

It appears that in this case the Supreme Court has tried to go into the wisdom of legislature while judging whether a proper balance has been maintained between an individual, fundamental right and the need for social control, under the doctrine of reasonableness of restrictions, and if unnecessarily wide discretion has not been conferred on the authority! Thus, the court struck down the legislation because it conferred unnecessarily wide discretion on the authority.

After the above judgement, the Supreme Court refused to go into the legislative wisdom by judging the question whether unnecessary discretion has been conferred on the authorities, and did not strike down a law on this ground. For example in the case of Hari Khemu Gawali v. Deputy
Commissioner of Police\textsuperscript{10} (1956) where S. 57 of the Bombay Police Act, 1951 was challenged as constituting unreasonable restriction on the fundamental right under Article 19(1)(d) on the ground that S.57 clubbed minor and simple offences together with very serious offences, and the discretion had been conferred on the police officer to extern any person who had committed any of these offences on the subjective satisfaction that he is likely to commit such an offence again, it was argued that there was no rational basis for clubbing together these offences in view of the object of the Act, and by clubbing them together unnecessary wide discretion had been conferred on the police official. While agreeing with the point that the discretion was conferred with respect to the offences which are very diverse in nature, the majority of the Supreme Court (constituted by S.R. Das, S.J. Imam, C.J. Venkatarama Ayyar and Sinha, JJ.) expressed its inability to interfere on the ground that "the legislature in its wisdom has clubbed all those offences together and it is not for this Court to question that wisdom"\textsuperscript{11}. However, Jagannadha Das, J. in his dissenting judgement following the approach of Chintaman Rao observed:

"the proper balance between the fundamental rights and social control is not achieved"
by vesting the powers in executive officers in such wide terms as in S.57 of the Act. Such a provision would lead to serious encroachment on the personal liberty of a citizen.¹²

The majority approach in Hari Khemul Gawali was again followed in Jyoti Pershad v. The Administrator for the Union Territory of Delhi¹³ (1961), where S.19 of the Slum Areas Improvement and Clearance Act. 1956, conferred a discretion on the competent authority to grant or refuse to grant the permission for execution of decree of eviction against a tenant of building in slum area, it was argued that the restriction on the rights of the landlord was excessive in the sense that it invaded and trenched on their rights in a manner or to an extent not really strictly necessary to afford protection to the reasonable needs of the slum dwellers which it was the aim and object of the legislation to subserve. While rejecting this contention on the ground that courts generally do not go into the wisdom of the legislature, Rajagopala Ayyangar, J. speaking for the Supreme Court (consisting of himself, B.P. Sinha, C.J., S.K. Das, A.K. Sarkar and Mudholkar, J.J.) pointed out that where the legislature fulfils its purpose, enacts laws, which in its wisdom is considered necessary for the solution of what after all is
a very human problem the tests of 'reasonableness' have to be viewed in the context of the issues which faced the legislature. These cases, indicate that the Supreme Court has thus refused to strike down a statutory provisions conferring unnecessary discretion on the ground that they will not generally go into the legislative wisdom as to the question how much discretion is necessary to achieve a particular objective of the statute.

It may be worthwhile to note that the above trend of not going into the wisdom of legislation has been qualified subsequently by an interesting phenomenon witnessed in few leading cases. In these cases without apparently claiming to go into the legislative wisdom the courts have in effect done so by cutting back the unnecessary discretion, through the technique of reading down the section and laying down some governing rules for the exercise of discretion. M.R. Balaji v. State of Mysore (1963) appears to be the first leading case in this direction. In this case the State of Mysore claimed that Article 15(4) of the Constitution confers on it the discretion to reserve any number of seats in chooses for backward classes scheduled castes and scheduled tribes. It was argued on its behalf that it may even reserve 100% seats under Article 15(4) if the situation so demands. A five judge bench of
the Supreme Court (consisting of B.P. Sinha, C.J., P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta and J.C. Shah, JJ.) speaking through Gajendragadkar, J. (as he then was) not only rejected the argument but also laid down the governing rule cutting the unnecessary discretion that reservation under Article 15(4) should be less than 50% of total seats. Speaking on this point Gajendragadkar, J. pointed out that a special provision contemplated by Article 15(4) must be within reasonable limits. Undoubtedly, State has to take reasonable and even generous steps to help the advancement of weaker elements, but the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between several relevant considerations. In view of this the Court struck down 68% reservations made by the State Government under its discretionary power, as being unreasonable. Since 1963, this trend has been followed till 1984 as a result some governing rules have been laid down by the Court in a few areas.

2.3 GOVERNING RULES FRAMED UNDER THE TECHNIQUE:

Under this technique, the governing rules covering some important aspects have been framed in two areas namely, education and preventive detention. The details are given below:
2.3.1 Governing Rules in the Field of Education:

In this field the governing rules have been laid down concerning the admission in medicine and engineering courses.

The Constitution confers discretion on the Government under Article 15(4) to make reservation for the scheduled castes, scheduled tribes, and backward classes in very broad and general terms. This enabled various State Governments to reserve very high percentage of seats for them. As a result in M.R. Balaji v. State of Mysore\(^9\), this discretionary power was challenged and the Supreme Court not only struck down the 68% reservation by the Government but also laid down the governing rule that the discretion to reserve the seats under Article 15(4) cannot exceed 50% of the total seats. The Supreme Court has also applied the same principle in another interesting situation to decide that how much percentage of marks should be allotted for viva-voce examination in Ajay Hasia v. Khalid Mujib\(^{10}\). In this case an administrative rule relating to admission through competitive test to the Regional Engineering College, Srinagar, allotted (about 33%) marks for the oral interview out of the total 150 marks. It was contended that in allotting 50 marks for viva-voce out of 150 marks the authorities were vested with arbitrary discretionary powers since viva-voce examination does not afford a proper criterion for assessment of suitability of a candidate and
it is highly subjective and impressionistic test. While agree-
ing with the argument Bhagwati, J. speaking for the Supreme Court (consisting of himself, Chandrachud, Krishna Iyer, as S.M. Fazal Ali and A.D. Koshal, JJ.) laid down the governing rule 21 that 'allocation of more than 15% of total marks for oral interview would be arbitrary and unreasonable and would be struck down as constitutionally invalid, under Article 14. In view of this the rule allotting about 33% of marks was struck down as arbitrary and unreasonable. Thus the Court has cut down the discretion from 33% to 15%.

Recently the Supreme Court has laid down more detailed governing rules in Dr. Pradeep Jain v. Union of India 21 (1984). In this case the court has followed the above approach and rejected the claim by the State Governments and Union territories to make reservation to any extent on the basis of residence in the State or on the basis of institutional preference under their educational policies relating to admission to Graduate and Post Graduate courses in Medical Colleges. While cutting back the unnecessary discretion in this respect Bhagwati, J. speaking for the court (consisting of himself, Amerendra Nath Sen and Renganath Misra, JJ.) laid down the following governing rules.

1) In case of admission to MBBS or BDS, reservation
on the basis of residence or institutional preferences should not exceed outer limit of 70% of the total number of open seats after taking into account other kinds of reservations validly made. This outer limit of 70% seems to have appeared excessive to the court itself. However, it did not probably want to fix a lesser limit due to controversial nature of the issue involved and gave discretion to the Indian Medical Council to reduce it in future as is evident from rules 2 and 3 given below.

2) This outer limit will be subject to any reduction or attenuation which may be made by the Indian Medical Council within a period of nine months from the date of judgement. If Medical Council determines shorter outer limit it will be binding on the States and Union.

3) Indian Medical Council shall subject the outer limit to reconsideration at the end of every three years but in no event should the limit exceed 70%.

4) Residence requirement within the State shall not be a ground for reservation for admission to post graduate courses such as M.S., M.D., and M.D.S.

5) Certain percentage may in the present circumstances be reserved on the basis of institutional preferences in the
sense that a student who has passed MBBS course from a Medical College or University, may be given preference for admission to the post-graduate course in the same Medical College or University. But such reservation should not exceed 50% of the total number of open seats.

6) This outer limit shall be subject to revision to the lower side by Medical Council in the same way as the outer limit for admission to MBBS.

7) There must be no reservation in specialities, such as neuro-surgery and cardiology and admission to these subjects should be on all India basis strictly according to merit.

2.3.2 Governing Rules in the Area of Preventive Detention:

Under various preventive detention statutes the Government have generally claimed so far unlimited discretion in the matters of place, conditions and transfer of detenu. Recently in A.K. Roy v. Union of India the Supreme Court has however cut back the unnecessary discretion by reading down or restrictively interpreting S.5 of National Security Act, 1980 and laid down some important governing rules. This Section provided that every person in respect of whom a detention order was made was liable (a) to be detained in such place and under such conditions as the appropriate Government may by general or special order specify, and (b) to be
removed from one place to another place of detention whether in the same State, or in another State by order of the appropriate Government. It was argued on behalf of the petitioner that under the section the appropriate Government could introduce very stringent conditions of detention and order the person to be detained in a far away place from his home which may amount to punishment in addition to preventive detention. Cutting back the discretion of the Government to a large extent while interpreting the section, the Supreme Court held that

"Laws of preventive detention cannot by the backdoor introduce procedural measures of a punitive kind. Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and the community. It is neither fair nor just that a detenu should have to suffer detention in 'such place' as the Government may specify." 23

The decision on this point was given by Chandrachud, C.J. (speaking for himself, Bhagwati & Desai, JJ.) with whom A.C. Gupta and Tulzapurkar, JJ. also concurred. Speaking for the Court Chandrachud, C.J., thus laid down the following governing rules in order to ensure that the exercise of
discretion by the Government in the matters relating to the place and conditions of detention and transfer of the detenu should conform with the requirement of fairness, justness and reasonableness under Article 21 of the Constitution.

1) The normal rule has to be that the detenu be kept in detention in place which is within the environs of his or her ordinary place of residence. If a person ordinarily resides in Delhi, to keep him in detention in a far off place like Madras or Calcutta is a punitive measure by itself which, in matters of preventive detention at any rate, is not to be encouraged. Besides, keeping a person in detention in a place other than the one where he habitually resides makes it impossible for his friends and relatives to meet him or for the detenu to claim the advantage of facilities like having his own food.

2) Though the requirements of administrative convenience, safety and security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. Even when a detenu is required to be kept in or transferred to a place which is other than his usual place of residence he ought not to be sent to any far off place which by the very reasons of its
distance is likely to deprive him of the facilities to which he is entitled.

3) Whatever, smacks of punishment must be scrupulously avoided in the matter of preventive detention.

4) Immediately after a person is taken in custody in pursuance of an order of detention, the members of his household, preferably the parent, the child or the spouse, must be informed in writing of the passing of the order of detention and of fact that the detenu has been taken in custody.

5) Intimation must also be given as to the place of detention including the place where the detenu is transferred from time to time.

6) The person who is taken in custody does not forfeit, by reason or his arrest, all and everyone of his fundamental rights, it is, therefore, necessary to treat the detenu consistently with human dignity and civilized norms of behaviour.

2.4 CONCLUDING REMARKS:

The analysis of the above cases reveals that a trend in the development of the technique of cutting back unnecessary discretion by the Court has been evident. The application of this technique started in Chintamanrao v. The State of Madhya Pradesh\(^{24}\), in 1951. At this juncture the Court has gone into the question of vesting unnecessary discretion by going into
legislative wisdom and struck down the statute for conferring unnecessary discretion on the authority. Though the Court has refused to go into the wisdom of the legislature, for a short period, 1956 to 1963, it has applied this technique in subsequent years without directly going into the legislative wisdom through cutting back the unnecessary discretion by framing the governing rules under the doctrine of reasonableness recognised as the underlying requirement of Articles 14, 15(4), 19 and 21. After 1980, this technique is being used more often and the Court seem to be inclined to lay down relatively detailed governing rules. Recently this technique has been used even in the area of preventive detention where drastic power is vested on the administration.

Thus, the Court has, as mentioned above, framed the detailed governing rules in the matters of admission to medical and engineering courses; and the conditions of detention under preventive detention laws. As regards medical and engineering admissions it has limited the discretion of the Government to reserve the seats for Scheduled Castes, Scheduled Tribes and backward classes to the maximum of 50 percent. Similarly, reservation in M.B.B.S. & B.D.S. on the basis of domicile should not exceed maximum of 70 percent, and for M.D. no reservation can be made on the basis of residence, and reservation on the basis of institutional consideration which is permitted,
should not be more than 50%, also for neuro-surgery and cardiology there can be no reservation even on institutional basis. By making use of this technique the Court has even applied itself to the more specific questions as to what limit should be put to the marks allotted for viva-voce. As a result, it has fixed a maximum limit of 15 percent of the total marks for viva-voce in the field of education. Similarly in the matter of place and conditions of detention under a preventive detention statute, the discretion of the Government has been limited, and it can no longer detain a person at such place and under such conditions as it may please. Under the governing rules laid down by the Supreme Court a detenu has to be treated with human dignity; he cannot normally be transferred at the mere whim and away from his residence, immediately after his detention his whereabouts must be disclosed to his near relatives.

It may, however, be mentioned that the technique of cutting back the unnecessary discretion seems to be limited to the Supreme Court only, as no decision of the High Court has yet been noted. 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 the process of interpreting an enactment or a
constitutional provision conferring the discretionary powers on the administration, in the situations where it finds them to be necessary in the larger interest of the society and the nation.

It is submitted that the technique of cutting back the unnecessary discretion by laying down the governing rules, employing the principle of 'reasonableness' underlying Articles 14, 15(4), 19 & 21 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 court 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 new and important technique may come to be questioned and its existence may come in jeopardy. Secondly, if the number of these rules go on increasing the task of administration may become difficult and as a result it may try to avoid these
rules. Even otherwise there seems to be developing a tendency to avoid these rules on very minor technical grounds. The fact that the Bombay Municipal Corporation, which reserved all the seats for the post graduate courses in Civic Medical Colleges for their own students, interpreted the ruling of the Supreme Court in *Dr. Pradeep Jain* as not binding on it, on the ground that they were controlled by the local self governing body\(^{25}\) may be taken as an indication of the attitude of the administrative authorities to try to avoid these rules as far as possible on any technical ground. 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, using of guiding rules has been advocated\(^{26}\). 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 by requiring that some guiding standards, norms, principles or rules be provided in the legislative or the executive instruments, conferring the discretion.
FOOT NOT ES

1. An important point to note with respect to the functioning of the administrative organ in India is that it does not always need a statutory power to act and execute a policy. The Supreme Court case, Ram Jawaya v. State of Punjab, A.I.R. 1955 S.C. 549, explains this point.


3. 2 K.C. Davis, op.cit. p.167.


6. Jain & Jain, op.cit. p.310


8. Ibid at p.119

9. Dr. M.P. Jain points out that the consideration whether in a given situation the restriction imposed is in excess of needs of social control has been rather absent in judicial pronouncements, See M.P. Jain, Indian Constitutional Law, op.cit. p.484


11. Ibid at p. 565

12. Ibid at p.570


16. Ibid.

17. Ibid, p. 663


19. A.I.R. 1963 S.C. 649. Generally Government also has been following the limit of 50% in the matter of reservation for weaker section, on this practice, see Parmanand Singh, Some Reflections on Indian experience with policy of Reservation, 25 J.I.L.I. (1983) 46. The upper limit of 50% reservation had also been followed in the matter reservation in the area of Government service (see for example, Devadasan v. Union of India, A.I.R. 1964 S.C. 179). However, in the service area the efficacy of this upper limit has been much watered down in the subsequent case of State of Kerala v. N.M. Thomas (A.I.R. 1976 S.C. 490), wherein a type of carry forward facility for Scheduled Castes and Tribes was upheld even though it exceeded 50% on the ground that the total representation of the Scheduled Caste in the Government Service was much below 50%. In this case Krishna Iyer & Fazal Ali, J.J., also expressed their reservation, about the desirability of laying down upper limit of 50%. Thus, although apparently all the seven judges followed M.R. Balaji, in service matter, but they qualified it to a great extent.
22. A.I.R. 1982 S.C. 710
23. Ibid. p. 740
24. A.I.R. 1951 S.C. 118
25. See Indian Express, Bombay edition, Nov. 16, 1984 p. 1