CHAPTER – 8
CONCLUSION AND SUGGESTIONS

Due to ever changing panorama of socio-economic conditions and apprehension of sudden emergence or extraordinary circumstances, the administration in India enjoys vast discretionary powers. Others factors which are responsible for conceding more and more discretionary powers to the administration are lack of time for Parliament, intricacies of modern administration, need to take quick and erective steps etc. The doctrine of liaissez faire has given way to the doctrine of Welfare State which has led to the proliferation of administrative power and functions. The change in the scope and character of Government from negative to positive has resulted in the concentration or considerable power in the hands of the executive. Generally discretion is given to the administration where no rules are possible to be framed in the advance the Governmental action involves the choice between many alternatives.

After independence the Government has assumed new responsibilities of varied sorts with a view to establish a Welfare State in which every individual may realise his legitimate dignity and aspirations. The implementations of a vast programme of economic and social reconstruction with a view to promote welfare the people, has resulted in a great proliferation of the administration and thus in a tremendous growth of administrative process. For the reasons stated above wide discretionary powers are conferred upon the administrative officers to control the various aspects of individual's life liberty and property. The word discretion in the context of Administrative Law cannot be easily defined in few words. Its nature and scope is to be determined from the language of the statute by which the power is conferred. The ambit of the power and its limit is to be determined by the Court by interpreting the statute as a whole and in this matter it is not possible for the courts to draw a hard and fast line. However, some amount of discretion in favors of the authority concerned is generally inferred from the use of the words-

expedient, satisfied, reasonable, beneficial etc. There are certain general principles evolved by the Court to explain the word discretion in the context of Administrative Law. Discretion is administration's own idea of expediency or satisfaction. Discretionary power is given to make a choice between various alternative course of actions and to adopt that particular way amongst the number of ways upon which the authority concerned to whom power is conferred, is to be satisfied. But it does not mean that the authority concerned to whom the discretion is conferred to make such a choice is to satisfy himself in an arbitrary manner. Its satisfaction must be guided law based on well known principles of justice and not by humor.

The need for administrative discretion arises to meet variability of situations in the interests of public. But an administration unrestrained in its power to pursue its socialistic objectives by any and all means considered expedient by the officials of government is anti-thesis of law and is nothing but administrative lawlessness. Administrators who do as they like and who are not bound by "considerations capable of rational formulation"[1] cannot be said to act within the framework of law.

Discretion is principal source of creativeness in government and in law: 'Wide discretion must be in all administrative activity'[2] but at the same time it is necessary to confine structure and check discretion to uphold the principle of rule of law in administration list cases of manifest injustice go unheeded and unpunished.

"It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them".

This rule has an independent existence apart from Article 14. "It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority". Under the impact of the philosophy of social Welfare State, the individual comes so much in "relationship of direct encounter with State power-holders", that it has become necessary" to

structure and restrict the power of executive government so as to prevent its arbitrary application or exercise".[3] The very essence of the rule of law is that every action of "the executive government must be informed with reason and should be free from arbitrariness" and it does not matter in applying this principle whether the "exercise of the power involves affectation of some right or denial of some privilege."[4]

Now-a-days most of the powers a conferred are exercisable at the discretion of the authority concerned. Legislations conferring powers on the executive in most of the cases are generally broadly worded and do not specify clearly and definitely the conditions and circumstances subject to which and the norms with reference to which the executive is to exercise the powers so conferred. For example in most of the orders issued under the Essential Commodities Act, 1956, neither adequate standards nor tests to control administrative powers or exercise of discretion by the executive were provided. There were also no provisions to protect and safeguard the interests of the producers, dealers, purchasers and sellers of controlled commodities against the misuse of power by the authority concerned. Infact no semblance or administrative procedure was laid down in a large number of orders and everything was left to the administrative officer concerned. Increase in governmental powers is not, however, an unmixed blessing, it poses the problems of disturbing some of the established and cherished notions of individual's liberty. It has come to be accepted as a necessary evil in all progressive democracies more so because of the concept of a Welfare State where great welfare schemes for the general body of people are planned, introduced and administered by governmental agencies. In executing such schemes individual's rights of property, enterprises and trade and personal liberties are inevitably affected. If complete freedom is left in exercise of discretionary power for implementing the welfare schemes it would lead to an arbitrariness and would frustrate the purpose for which it is conferred. The real problem therefore, is to reconcile freedom and justice for the individuals with the necessaties of a modern Government charged with promotion of far-reaching social and economic policies. In other words the problem is to raise

effective control over exercise of discretionary powers by the administrative authorities so that the abuse of power, if not completely eradicated, at least its chances are minimised because if complete freedom is left in the exercise of discretion it would give rise to administrative arbitrariness.

Judiciary, the well known historical institution of justice, plays an important role in keeping the administrative authorities within their bounds and to prevent them from abusing or misusing their powers. But there certain limitations on the power of judicial review which the courts enjoy in the field of administrative actions. The oft-repeated self imposed restriction by the judiciary is that the court is not an appellate forum where the correctness of an administrative action can be canvassed. The court is not concerned with the merit but it has to judge the legality of the decision, because the power is conferred on the authority concerned and not on the court and thus to go into the merits of the decision will amount to the substitution of the court's discretion for the discretion of the authority concerned. Another limitation is the finality clause added by the legislature or the conferment of discretion in very broad or wide terms, resulting in protection to the exercise of discretion good as well as bad.

The judiciary in the exercise of the power or judicial review is always conscious to protect the individual rights and were it feels that the power is not properly exercised or the authority concerned has failed to exercise the power, it will not leave the individual to suffer because of certain technical difficulties. It has in large number of cases insisted that the discretions is to be exercised within its limits, it has to conform to the well-known principles of justice and if the exercise of discretion does not conform to these well established judicial standards the power is liable to be declared as bad. Various judicial standards e.g. the exercise of power for improper purpose malafide exercise of power, exercise of power on irrelevant considerations, unreasonable exercise of power, acting under dictation, acting mechanically without due care, exercise of discretion on self created or imposed rules of policy etc. are applied to test the genuineness of the exercise of discretion. In India Article 14 of the Constitution provides an additional dimension of judicial review in the filed of administrative actions. An

administrative action may be challenged on the ground of un inequality under this article. In such cases though the law may not suffer from the defect of unreasonable discrimination, its application may be in a discriminatory manner. But in such cases also it is not easy to challenge the discriminatory administrative action and to get the relief unless discrimination is clear on the face and it is against more than one person. Nevertheless a discriminatory administrative action is open to challenge under Article 14 of the Constitution.

Because of certain inherent limitations on the power of Judicial review, the courts paly only a marginal role in preventing the abuse of discretionary power. A number of aspects of administrative functioning fall outside the purview of judicial review. The courts have confined themselves to the limited function or examining whether the administration functions according to law or not. But exercise of even this limited judicial review becomes difficult because one of the greatest hurdle in the exercise of the power of judicial review by the courts is the individual's helplessness in easy access to the official files. On one hand the administration enjoys privileges to with-hold the documents whereas on the other hand the burden of establishing the case lies wholly on the individual challenging the administrative act which is not any easy task for him as he has no access to the files and records. Further the judicial process is dilatory, formal and costly. It is professed that the courts are not concerned with the 'merit' but cases may arise where the abuse of power cannot be detected without looking into the merits of the decisions. These deficiencies have encouraged many lawyers and jurists in India to recommend the establishment of the institution of 'Ombudsman'. But no effort either judicial or through the institution of this proposed Ombodsman can prevent the abuse of discretion unless a self-restraint is imposed by the officers themselves coupled with a sinse of devotion towards the duty and welfare of the society. Discretion should not be treated a weapon to satisfy personal whims but rather means to achieve social ends of legislation. It is only a means to discharge certain duties imposed under the Law.

In England, where Parliament is supreme and can confer any amount of discretion on the administrative authority, the courts have always held that the

concept of "unfettered discretion" is a constitutional blasphemy. Besides requiring that the discretion must be exercised in conformity with the general policy of the Act and for a proper purpose, courts insist on its "reasonable" exercise. Thus the judicial control of administrative discretion in US, England, and India converges on the same pony despite divergent constitutional structurisations.

The European Union has to comply the principles of Rule of law respect for Fundamental rights. The European Union courts has power to examine its jurisdiction to protect the rights of European Union Community . After the Enforcement of Lisbon Treaty there principles have been expressly incorporated in Treaty and in the Charter of Fundamental Rights. Being part of the body of European union constitutional rules and principles ,the Charter is binding on European Union institution.

When adopting new measures as well as for member State during implementation.

In the US under "due process clause" judiciary has power to examine unfettered exercise of discretionary power. If Administrative agencies exercise their power arbitrarily which effects rights of citizen's court have always power to declare exercise of discretionary power agencies as unlawful.

This makes clear that if administrative discretion is exercised arbitrarily and capriciously the courts would intervene. Judicial activism in America has also entered in the area of Administrative discretion for the protection of citizens rights.

Part III of the Indian Constitution vouchsafing certain rights to the citizens and others, can also serve as basis for controlling administrative discretion. In addition to what the British Courts can do, the Indian Courts can also make use of certain fundamental rights to control the ambit of administration discretion. The general principle which the judiciary has evolved as regards the conferment of discretionary power to regulate the fundamental rights are that there should not be uncontrolled and unregulated arbitrary discretion to interfere with the fundamental rights and the judiciary has rejected the legislative attempts to confer unregulated and unguided discretion on the administrative authorities to regulate the

fundamental rights insisting that the legislature should set up a standard or lay down the policy or principles subject to which the discretionary power should be exercised. However, sometimes the efficacy of this approach is diluted by the judiciary itself where it accepts the policy and norms in general and vegue terms as adequate safeguards for holding the discretion as not unguided. Sometimes the standards or norms which the judiciary has accepted as sufficient safeguard to guide the exercise of a discretion is so general of vague that it hardly provides adequate safeguards against the arbitrary exercise of the power. Again, sometimes conferment of large discretionary power to interfere with fundamental rights by the administration dependent totally upon its subjective whims is justified and accepted by the judiciary where circumstances are extraordinary and amergent action was necessary in the interest of public order, peace or tranquility. But in absence of extra-ordinary circumstances if the enjoyment of fundamental rights is made dependent on subjective determination of the executive it is open to judicial scrutiny. In normal situations there must be some adequate safeguards so that the misuse of discretionary power may not occur. There is no uniformity in judicial decisions as regards the safeguards which are treated as sufficient for controlling the arbitrary exercise of power. An administrative discretion is treated as not unfettered or unguided where the legislature has provided standards, norms or conditions in conformity to which the discretion is to be exercised.

In some cases the judiciary has found the policy of the enactment as sufficient for guiding the exercise of administrative discretion but to this extent the observation of the judiciary does not appear to be sound because policy and preamble of an enactment may provide guide in promulgating the delegated legislation which has general applications but not in case as specifics situations where the exercise of administration discretion affects the enjoyment of Fundamental rights. Policy of enactment may control the exercise of discretion only when it is expressed in clear terms and the authority upon whom discretion is conferred limits his discretion to the extent of policy but it is hardly possible. Discretion is treated as not unfettered where the law lays down procedural safeguards such as the right of hearing or representation to the higher authority. In

some situations, conferment of large discretionary powers is justified when it is conferred on the administrative authorities of higher rank. In such cases Parliament believe in good sense and wisdom of the such higher authorities and expects that these authorities will act in a reasonable and responsible manner. But this is not totally correct because it is not easily assumed that a higher authority will always act in reasonable and responsible manner. Though it is an important consideration in determining the reasonableness of the restriction yet it has no general application. The conferment of large discretionary power on an officer of low rank is justified if there are sufficient norms or principle in conformity of which the discretion is to be exercised and the law provides some procedural safeguards against the arbitrary exercise of discretionary power. So the mere vesting of uncontrolled discretionary power in a superior authority cannot make the restriction reasonable unless such power is justified by emergent or other exceptional circumstances or the law lays down standards or other safeguards so that it may not constitute an arbitrary fetter upon the enjoyment of fundamental freedoms.

Thus, it may be said that in the modern Welfare State discretionary power will remain a necessary evil. It is not possible in a poor country like India for every one to move a court of law to get justice whenever power is misused by the administrative authorities. Even if it could be done, a merestriking down of an administrative action can give no solace to the individual because he may have suffered damage. Refusal of licence to conduct a business to a person who has invested huge amount of money is such an instance. It might be only after months or year that judiciary will reach him with justice striking down the administrative action. An order striking down the administrative action alone will be of no use to the aggrieved person at this stage. This is the most pathetic defect in the present administrative law system. The suggestion is that in India, the law relating to tortuous liability for such misuse of powers should be developed. Administrative authorities who misuse discretionary powers should be made liable to compensate the loss caused to the aggrieved. If the law in this respect is developed, as an English writer observed[5] it will serve as a potentially useful companion to the

other judicial remedies. An action done out of ill-will or where the authority exceeds power knowingly is more readly found and proved, and in such cases a right to be compensated would be welcomed by those who have suffered hardship as a consequence. Courts should also be ready to award damages as a remedy. Till the law relating to tortious liability is fully developed in India, such misuse of power should be included as a specific offence under the Penal Code or Prevention of Corruption Act.

Where vesting of discretionary power is justified the exercise of power should not be struck down merely on the suspicion that it can be exercised in a discriminatory manner or it may be abused. Thus the abuse of power should not be easily assumed. If the possibility of abuse of power is treated as an element to be taken into account in determining the reasonableness of the restriction, perhaps no statute by which discretionary power is conferred on the executive can be saved and thus all rounded development of the welfare State, is not possible. It is true that the abuse of power given by law sometimes occurs but the validity of the law itself cannot be questioned because of such an apprehension.

The requirement of procedural reasonableness is satisfied where the law lays down provisions for an appeal or revision. The provision for appeal may be judicial or administrative. The judiciary has satisfied even if there is a provision of administrative appeal instead of judicial one. With what the court is satisfied is that there must be possibility of getting relief from the superior authority whether by way of appeal or revision. But it does not mean that the absence of provision for appeal to a higher authority would in every case render a restrictive statute unreasonable. If the discretion vested in an administrative authority is not unfettered but guided by the statute itself by laying down policy or the principles in conformity to which the discretion is to be exercised, the restriction imposed is not unfeasible even though there is no such provision for appeal or revision.

The scheme of Article 19 enumerates different freedoms separately and also specifies the extent or restrictions to which they may be subjected. Restrictions on liberty should be judged not only subjectively as applied to few individuals who come within their operations but also objectively as securing the

liberty of far greater number individuals. If a Law ensures and protects the greater interests than such a law will be beneficent law because it protects the greater liberty of the rest of the member of the society but at the same time our liberty should also be guarded against the unrestrained arbitrary exercise of power by the executive. The concept of reasonableness is nothing but that of harmonising individual rights with collective interests. However, under the guise of protecting the public interest the legislature should not confer arbitrary and uncontrolled power to interfere with the fundamental freedoms under Article 19.

With respect to the freedom of speech and expression which is the backdone of the democracy, the judiciary has insisted that it is unreasonable to confer arbitrary and unlimited power on the executive to interfere with this freedom. So far as the seizure of an objectionable matter is concerned this action of the executive is justified only when it is subject to judicial review whether by way of appeal or revision or the executive section of seizure is certified by an independent officer, e.g. Law officer. In some cases where the administration interfere with the freedom of speech and expression the judiciary has not shown much satisfaction with the substantive safeguards but it has much insisted upon the procedural aspect also. Dramatic performance cases fall under this category of cases. Emphasising upon the procedural safeguards the judiciary has said that it is not sufficient that the provision of the statute conferring the power is substantively reasonable but it should be also procedurally reasonable i,e, aggrieved person should be given an opportunity to be heard in his defence with regard to the censorship of films the Supreme Court has insisted judicial appeal instead of administrative appeal against the order of the concerned authority which was also conceded by the Government and accordingly the Cinematograph Act, 1962 was amended. In normal situations the judiciary has conceded that a discretion is not unguided when it is to be exercised for the purpose the Act or in accordance with the legislative policy as prescribed in the statute concerned. As is apparent from the **Virendra's case**[6] in exceptional circumstances conferment of discretionary power is not unreasonable if there are sufficient safeguards against its arbitrary exercise provided that the restrictive order is to remain in force for a short period.

The attitude of the Indian judiciary in relation to the freedom of Assembly is not the same as is with respect to the freedom of speech and expression. The judiciary has conceded some sort of discretion on the administrative authorities and has not much insisted upon judicial review of the administrative orders because it is the executive which is the sole judge of the exigencies that may arise by breach of law and order and if the judicial review is insisted upon it may frustrate the very purpose of the enactment. However some of the High Courts have hinted that the authority upon whom the discretionary power is conferred may get guidance from the preamble affected to the enactment which so confer the discretion. But this view taken by the High Courts does not appear to be sound if examined in the context of the freedom of assembly because the policy as set out in the preamble may not provide adequate safeguarde in all cases as in number of statutes it is expressed in vague terms. The conferment of discretionary power upon the authority concerned to determine the time and place of holding meetings has not been held as improper by the Supreme Court[8]. The crux of discussion is that for an order of unadministrative authority prohibiting meetings, assemblies and processions to be valid it is necessary that it should be for a shorter period (which will vary from case to case). The discretion may be conferred upon the authorities concerned to regulate the time and place of the assembly. But this does not mean that it should be uncontrolled and unguided.

The judiciary has not shown its inclination towards the exercise of discretion based upon the subjective satisfaction of the authority concerned to regulate the freedom of association. Even the exercise of discretion to interfere with the freedom of association on subjective satisfaction of an independent body e.g. an advisory board not been treated as good in normal situations. The subjective satisfaction of the Government or its Officers with an advisory board to regulate this freedom may be justified only in exceptional circumstances i.e. when in the interest of public order and morality taking the emergent action is necessary. The right to form an association is the bedrock of the true democracy therefore, the Supreme Court has insisted upon the judicial review of the administrative action interfering with this freedom and has not relied much upon

the subjective determination of the authority concerned. However, some procedural safeguards such as right of hearing against the exercise of discretion has been insisted upon.

It is rather peculiar that where as in respect of freedom of association the Supreme Court rightly disapproved of an advisory board, it could not grant even the safety of an advisory board for whatever it is worth in the case of right of movement and residence. In relation to freedom of movement, the Courts have favoured the exercise of discretion on the subjective satisfaction of the authority concerned but only in exceptional circumstances i.e. when in the public interest emergent action is necessary or in the same interest externment order is necessary. Here the attitude of the judiciary differs from that which it took in relation to the freedom of association and movement. In case of freedom of association even in exceptional circumstances the presence of an advisory board was necessary. Whereas with regard to the freedom of movement only subjective satisfaction of the authority concerned is sufficient and there is no insistence upon other safeguards. In case of freedom of movement and residence in addition, to the subjective satisfaction, there should be other procedural safeguards also. In externment cases where the exterment order are for a limited period say for 3 months the courts have favoured subjective satisfaction of the authority concerned and have not insisted upon any procedural safeguard but if the externment or interment orders are not for limited period the have insisted on some procedural safeguards also e.g. right of hearing or having a right of representation to the higher authority. In connection with this freedom the judiciary has laid down much emphasis on the procedural rather than substantive safeguards. In its view it is the executive which can better judge and not the judiciary that how long the emergency will continue and what reasonable steps should be taken during the continuance of the same but at same time it would not be unreasonable to provide adequate procedural safeguards e.g. if in externment cases the externee is given an opportunity to be heard it would be more reasonable. However, the requirement of such procedural safeguards has been relaxed in cases where such safeguards would frustrate the very purpose of taking the action. With respect to the freedom

of residence the approach of our judiciary has not been uniform but has varied from case to case. This may be illustrated by taking two important cases. In **Re Shandti Bai Rani Banoor**[9] **and Bharat Singh** *Vs.* **State of M.P.**[10] In the former externee was ordered to live outside the radius of five miles from the Poon City Post office and she had a complete option to choose a place for her settlement but this was declared by the Court as invalid, whereas in the latter case the externee was directed to keep himself in a particular area but even this externment order was also held invalid. However, the judiciary in both the cases has emphasied on the procedural norms to be incorporated in the parent Act.

Large powers are conferred upon the administrative authorities through various orders issued under the Essential Commodities Act, 1956, to grant licences or permits to the producers dealers, purchasers and sellers. The purpose of licensing is to control the production, distribution, sale, purchase or storage of commodities. The judiciary has recognised some amount of discretion one the authority concerned in matters of granting or refusing the licences because it is not always possible for the legislature to formulate all the principles or the guide lines for the grant or refusal of such licences. In some cases powers are also conferred on administrative authorities to grant exemption for any person from licensing and thus the authority granting such an exemption has practically complete discretion in the matter. In none of the orders issued under the Essential Commodities Act 1955, there was any guide as to the grounds on which such exemptions could be granted. With regard to commodities control the Courts have found policy the parent Act i.e. the Essential Commodities Act, 1955 as a guidance for the exercise of the discretion. But policy of the parent Act would control the exercise of discretion in relation to all the essential commodities, is doubtful. For example if control orders are issued to regulate the trade and business of two essential commodities viz. Coal and silk then though their business may be regulated through licences yet in nature they are entirely different. Thus the observation of the judiciary to the extent it found policy of the Essential Commodities Act 1955 is a guide for regulating the business in relation to all the essential commodities is not sound. In fixing the prices of the essential

commodities the guidance is to be derived from the policy of the Essential Commodities Act, 1955, but again the policy of the said Act cannot the exercise of discretion of the authority concerned because it is not possible for the authority to look towards the policy of the Act at every stage in fixing the prices and to limit his discretion to that extent. In fixing the minimum wages there is adequate safeguard if the Government acts on the advice of a Committee consisting of equal numbers of representative from the employer and the employees. In granting or refusing to grant licences the courts have not laid down any uniform principle and have only said that there should not be absolute and unfettered discretion in granting the licences but courts have invariably insisted on procedural norms such as right of hearing before the cancellation of licences. Sometimes the recording of reasons for refusing or cancelling licences has been insisted upon as adequate safeguards against the arbitrary exercise of power such as emphasis enhances the scope of judicial review and gives a chance of getting relief from the judiciary. The attitude of the judiciary appears to be more convincing where it has recognised a large amount of discretionary power in favour of the authority concerned for regulating the licences a for dangerous things the legislature is not generally aware of the nature of such things, its use and suitability of the licence. Due to complexity in life and society and also due to human tendency to evade laws and regulations by concealing and manipulating important documents, it is necessary that the administration must be given sufficient powers to search and seize these documents. Such power or search and seizure has been attacked as violative or Article 19(1)(f) and (g) of the Constitution but such attacks have not been successful in cases where the power was vested in officers of higher rank and there were procedural safeguards available to aggrieved persons. However, where the power of search and seizure was vested in subordinate officers the courts have not shown much satisfaction.

Thus there is no uniformity in the judicial approach regarding substantive and procedural safeguards to be contained in the legislations conferring discretionary power to interfere with the fundamental freedoms under Article 19 or the Constitution. In case of certain freedom e.g. freedom to form associations,

and freedoms to carry on profession, trade and occupation the judiciary has insisted much upon the substantive safeguards than it has insisted for other fundamental freedoms viz. freedom to movement throughout the territory of India or reside and settle in any part of the Indian territory. So far as the procedural safeguard is concerned it is satisfied in cases of freedoms of association, speech or assembly, if there is a scope for judicial supervision whether by suit or by appeal or revision whereas in certain other cases e.g. the freedom to carry on trade or business it issatisfied when an appeal has been provided either to the higher administrative authority or to the Government.

It is the legislature which confers discretionary powers upon the administration, therefore it is the legislature which should primarily define the limits of discretion so conferred; but it is unable to perform this duty effectively for many reasons lack of time, lack of expert knowledge, unforeseability of circumstances being some or them. Moreover, in some cases legislature seems to be less willing to limit the discretion of administrative authorities and confers wide discretion on them. It tries to give shelter to their action by declaring the decision of the authority final or not questionable in any court of law. This practice to a great extent weakens the courts' power of judicial review. The legislature should, therefore, avoid this practice and except in cases of emergency or of national importance as far as possible, it should not confer power in too wide terms nor it should declare the administrative decision final. That is to say the power should be conferred within definable limits so as to conform to the known principles of justice. The legislature should prescribe the guide lines for the guidance of the authority and the principles and norms upon which the discretionary power is to be exercised and it should also prescribe the conditions or the circumstances only on the existence of which the power should be exercised. The legislature should prescribe the policy in clean words so that it may provide a sufficient safeguard for the exercise of the discretion. The policy should not be expressed in vague and indefinite terms. Again mere substantive safeguard is not sufficient to prevent the arbitrariness on the part of the administration but there should be a definite procedure to be followed by the authority while

exercising the power. The procedure should not be summary and if possible there should be elaborate provision to the party affected for making representation and there should be a provision for taking recourse of an independent tribunal whether by way of appeal or revision because it is well known principle that justice should not only be done but should also appear to have been done. Moreover the recording of reasons by the authorities concerned must be made a must if they by exercising their discretion intend to curb any of the fundamental freedoms. The recording of reasons is important for two reasons firstly because to make these fundamental freedoms totally dependent upon the subjective satisfaction of the authority concerned would mean to destroy their nature of being fundamental and secondly the recording of reasons is also necessary in view of Article 32 which is itself a fundamental right.

In the light of the discussion contained in this paper the following humble suggestions can be suggested:-

1- The enjoyment of the fundamental freedoms under democracy should not be left entirely on the subjective satisfaction of the authority concerned for an indefinite period.

2- If the administration is given a discretionary power to interfere with the freedom of Assembly then in such an event the parent Act must specifically and clearly indicate the circumstances in and conditions upon which the holding of public meetings should be allowed or restricted. Further it is also humbly suggested that if permission to hold public meeting is refused then the aggrieved party must have at least one opportunity to make representation against such refusal to another superior officer.

As in a democratic country public meetings are the best means to get the ideas propagated, power to interfere with this freedom should not be conferred upon the officers who are below the rank of the District Magistrate. In order to avoid the circumstances as arose in **Brahama nand Lal and others** *Vs* **The State**[11], it is humbly suggested that power to restrict any assembly

should not be conferred upon the administration, but at least religious or funeral processions should be left out of the purview of such regulatory measures.

3- Coming to another specific fundamental freedom i.e. freedom of movement and residence, it is submitted that though a sense of emergency impels an urgent order of externment or instrument, yet after the order is passed to the subjective satisfaction of a high placed officer, there appears to be a good case for an Advisory Board to review the case leisurely every three or six months when the externee can be given a hearing and all opportunity to show why the exterment order should not be allowed to stand.

4- In relation to the freedom of trade and business it is humbly suggested that the power to grant or refuse to grant a licence should not be conferred on the officers of Law rank. Again there should be definite criteria or standards upon which licensing power should be exercised and while refusing the licence the authority concerned should give reasons for his decision. In cases of cancellation of licence the person affected should be given an opportunity for making representation against such cancellation. In fixing prices of the essential commodities there should be a definite formula on the basis of which they can be fixed and this formula should be incorporated in the schedule of the Act conferring such power. The prices so fixed should not be less than the production cost of that commodity. Further the power of search and seizure should not be conferred on the officers of low rank and the affected person should be given some procedural safeguards. In fixing the wages there should be a provision to associate with the administrative officers concerned the representatives of the affected interest through an advisory committee, which can give advice to the officers concerned regarding exercise of their powers. Thus in relation to freedom of trade or business either the legislation or the rules made there under

should provide for procedural safeguards so that the discretionary powers by the administration are not abused. Such procedural safeguards as right of hearing, notice of proposed action, giving of reasons, and administrative appeals to superior authorities should be available to the persons affected for the protection of economic interest.

5- In the last it may again be said that while conferring discretionary powers the legislature should prescribe the norms, standards and policy on the basis of which they should be exercised specially when such discretionary powers are conferred to interfere with the fundamental freedoms guaranteed under Article 19(1) of the Constitution. Correctly speaking legislative drafting must not feel shy of stating clearly in the body of the statute policy and the conditions of exercise of discretionary power. In their absence the courts must not hesitate to strike down the provisions.

These above mentioned safeguards will result not only in preventing the abuse of power but will also help the judiciary to ascertain the limits of the exercise of power. These are the ways of ensuring that the cherished values of our democratic society such as the role of law and justice are not lost sight of in the present era of Welfare State with the inevitable, increase in discretionary power.

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