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The Doctrine of Proportionality

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THE DOCTRINE OF PROPORTIONALITY

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List of Abbreviations

AIR All India Report
All ER All England Report
Cr. P. C. Criminal Procedure Code
Criminal
Cri Criminal
Cri LJ Criminal Law Journal
Co. Co.
EC European Commission
ed. Edition
KB King’s Bench
Queen’s Bench
QB
p. Page
pp. Pages
rev. Revised
SC Supreme Court
SCC Supreme Court Cases
v Versus
vol. Volume
CHAPTER – I

INTRODUCTION

Mubashshir Sarshar

Roll No. 41

Doctrine of proportionality signifies that administrative action should not be more drastic than it ought to be for obtaining desired result. The doctrine is of European origin and is very entrenched in the European Droit Administratif. The principle of proportionality has been characterized as the most important legal principle in the European Administrative Law.

The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve the public interest. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred.

The implication of the principle of proportionality is that the court will weigh for itself the advantages and disadvantages of an administrative action. Only if the balance is advantageous, will the court uphold the administrative action. The administration must draw a balance-sheet of the pros and cons involved in any decision of consequence to the public and to individuals. The principle of proportionality envisages that an administrative action could be quashed if it was disproportionate to the mischief at which it was aimed. The measures adopted by the administration must be proportionate to the pursued objective.

An administrative authority while exercising a discretionary power should maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purposes which it pursues. All in all, it means that the decision-maker must have a sense of proportion.

Thus the doctrine tries to balance means with ends. Proportionality shares space with ‘reasonableness’ and courts while exercising power of review sees ‘is it a course of action that could have been followed’.
With respect to India, administrative action affecting fundamental freedoms have always been tested on the anvil of proportionality. By ‘proportionality’ it is meant that the question whether, while regulating exercises of fundamental rights, the appropriate or least restrictive choice of measuring has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of administrative order, as the case may be. Under the principle court will see that the legislature and the administrative authority ‘maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purposes which they were intended to serve’. The legislature and the administrative authority are given an area of discretion or a range of choice but as to whether the choice made infringes the rights excessively or not is for the court to decide. This is the principle of proportionality.

While dealing with the validity of the legislation infringing fundamental freedoms enumerated in Art. 19(1) of the Constitution, the Supreme Court had occasion to consider whether the restriction imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. ‘Reasonable restrictions’ under Art 19(2) to (6) could be imposed on these freedoms only by legislation and courts had occasion to consider the proportionality of the restrictions. Legislation may be made and the restriction may be reasonable, but a balance has to be struck between fundamental right and need for restriction.  

In cases where such legislation is made and the restrictions are reasonable, yet if the statute concerned permitted administration authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administration for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restrictions or the reasonable quantum of restrictions, etc. In such cases, the administration action in our country has to be tested on the principle of proportionality, just as it is done in the case of main legislation.

**Research Proposal:**

The researchers propose in this research work to delve into the preceding principle of the Doctrine of Proportionality and the needs of the evolution of this Doctrine of Proportionality.

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2 Om Kumar v. Union of India, (2001) 2 SCC 386.
Effort will also be made to look into the contemporary position and applicability of the Doctrine in the English and Indian Legal System and its relationship with the Human Rights and Fundamental Rights. In between, various limitations and appreciations of the Doctrines shall also be looked into.

**Research Questions:**

1. Is the Doctrine of Proportionality a mere representation of the Wednesbury Principle?
2. What is the extent of applicability of the Doctrine of Proportionality in administrative decisions in the modern context?
3. Whether or not doctrine of proportionality is imbibed in any restriction imposed on the fundamental rights?
4. Whether with the enactment of Human Rights Legislation in England, the Doctrine of Proportionality has totally replaced the Wednesbury Principle of Reasonability in the English legal system?
5. Whether the Doctrine of Proportionality find its applicability in the Indian Legal System and if yes to what extent?

**Research Methodology:**

The research is doctrinal and Research Card Methodology has been followed in it. National Law University Library has been used for research purpose. Various books, articles and websites have been referred for the same.
CHAPTER – II

THE EVOLUTION OF THE DOCTRINE OF PROPORTIONALITY: WEDNESBURY PRINCIPLE OF UNREASONABLENESS

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Research Question – Whether the Doctrine of Proportionality is a direct implication of the Wednesbury Principle?

Hypothesis: Yes.

Associated Provincial Picture Houses v Wednesbury Corporation\(^4\) is the English law case which set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as Wednesbury reasonableness. The court stated three conditions on which it would intervene to correct a bad administrative decision, including on grounds of its unreasonableness in the special sense later articulated in Council of Civil Service Unions v Minister for the Civil Service.\(^5\)

The basic facts of the case were that ‘Associated Provincial Picture Houses’ were granted a license by the defendant local authority to operate a cinema on condition that no children under 15 were admitted to the cinema on Sundays. The claimants sought a declaration that such a condition was unacceptable, and outside the power of the Wednesbury Corporation to impose.

The court held that it could not intervene to overturn the decision of the defendant corporation simply because the court disagreed with it. To have the right to intervene, the court would have to form the conclusion, firstly that the corporation, in making that decision, taking into account factors that ought not to have been taken into account, or secondly that the corporation failed to take account factors that ought to have been taken into account, or lastly the decision was so unreasonable that no reasonable authority would ever consider imposing it.

\(^4\) [1948] 1 KB 223.
\(^5\) [1984] 3 All ER 935.
The court held that the condition did not fall into any of these categories. Therefore, the claim failed and the decision of the Wednesbury Corporation was upheld.

The test laid down in this case, in all three limbs, is known as "the Wednesbury test". The term "Wednesbury unreasonableness" is used to describe the third limb, of being so unreasonable that no reasonable authority could have decided that way. This case or the principle laid down is cited in common law courts as a reason for courts to be hesitant to interfere into the decisions of administrative law bodies.

However, in recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciaries have resiled from this strict abstention’s approach, recognising that in certain circumstances it is necessary for them to undertake a more searching review of administrative decisions. Indeed, the European Court of Human Rights now requires the reviewing court to subject the original decision to anxious scrutiny whether an administrative measure infringes a convention right. In order to justify such an intrusion, the respondents have to show that they pursued a pressing social need and that the means employed to achieve this were proportionate to the limitation of the right.

Thus, it can be concluded that Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to ‘assess the balance or equation’ struck by the decision maker. Proportionality test in some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and state burial, with full honours is surely not to happen in the near future.
CHAPTER – III

DEVELOPMENT OF THE DOCTRINE IN BRITAIN AND INDIA

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In many cases in Britain, proportionality has been treated merely as an aspect of the Wednesbury unreasonableness. The main reason for judicial reticence in Britain in adopting proportionality as a distinct head of judicial review is that it may involve the courts in assessing the merits of a discretionary decision taken by the administration, and for long, the court have been advocating the proposition that the courts do not probe into the merits of a discretionary decision but see if there is any flaw in the decision-making process and that this places the court in the role of second reviewer and not a primary reviewer.

There have however been a few cases where the court have applied proportionality expressly or impliedly in context of challenges to penalty imposed by the administrative authority. However after the enactment of the Human Rights Act, 1998, the House of Lords have adopted a position between proportionality and Wednesbury as regards judicial review under the HRA.6

In India though, the principle of proportionality in its broad European sense has not so far been accepted in India. Only a very restrictive version thereof has so far come into play. The reason in that the broad principle does not accord with the traditions of common-law judicial review. The European version of proportionality makes the court as the primary reviewer of administrative action is entrusted to administrative tribunals and not to ordinary courts, and therefore the broad concept of proportionality can be followed. In common law, the tradition so far has been that the court does not probe into the merits of an administrative action. This approach comes in the way of a full-fledged acceptance of the principle of proportionality, for, if accepted, it will turn the courts into primary reviewer of administrative action.

Accordingly in India, the courts apply the principle of proportionality in a very limited sense. The principle is applied not as an independent principle by itself as in European

Administrative law, but as an aspect of Article 14 of the Constitution, viz., an arbitrary administrative action is hit by Art. 14. Therefore, where administration action is challenged as ‘arbitrary under Art 14, the question will be whether administrative order is ‘rational’ or ‘reasonable’ as the test to apply is the Wednesbury test.\(^7\) As has been stated by the Supreme Court in Royappa\(^8\), if the administrative action is arbitrary, it could be struck down under Art. 14. Arbitrary action by an administrator is described as one that is irrational and unreasonable. Accordingly, a very restrictive version of proportionality is applied in the area of punishments imposed by administrative authorities.

The first proposition in this regard is that the quantum of punishment imposed by a disciplinary authority on a civil servant for his misconduct in service is a matter of discretion of the disciplinary authority. The second proposition is that the punishment has to be reasonable because of the constraints of Art. 14. This means that if the punishment imposed in unreasonable, Art 14 is infringed. The court can thus decide upon the proportionality of the punishment when it is strikingly disproportionate. The court would not interfere with the matter of punishment on compassionate ground or because it considers the punishment disproportionate. The court would not interfere only in such extreme cases which on their face show perversity or irrationality. The wednesbury test is to be applied in such cases.

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\(^7\) Associated Provincial Picture House v. Wednesbury Corporation, (1947) 2 All ER 680.
CHAPTER – IV

WEDNESBURY PRINCIPLE TO DOCTRINE OF PROPORTIONALITY
(AN ENGLISH PERSPECTIVE)

By: Mohit Shripat
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Research Question:
Whether with the enactment of Human Rights Legislation in England, the Doctrine of Proportionality has totally replaced the Wednesbury Principle of Reasonability in the English legal system?

Hypothesis: Yes, the Doctrine of Proportionality has totally replaced the Wednesbury Principle.

‘Rationality’ is probably the most ubiquitous concept used in studying how humans behave as individuals, members of groups, and in institutions. It plays a central role in disciplines as varied as economics, psychology, philosophy, the philosophy of science, public administration, organisational theory, sociology and business management — not to mention law. However, it is a ‘highly ambiguous expression’.9

By ‘irrationality’, I mean what can now be succinctly referred to as “Wednesbury’s unreasonableness”, … It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”10

With this landmark judgement of 1947, started in England, the one of the crucial tests of checking the validity of administrative decisions. It laid down a principle of unreasonability to determine whether the administrative action is validly taken or not.

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To test the existence of validity in the administrative actions, the Wednesbury principle provided the test of unreasonability in the administrative action. An action stands unreasonable in this test if it is such that no reasonable man would have taken such a decision or action. This principle provided the courts with an important basis for review of any administrative action.

The Wednesbury test, in the following years, started getting more and more importance in the English legal system. The courts were to judge the reasonability of the complained administrative action and decide the validity or invalidity of that administrative action.

But with the passage of time criticism of the Wednesbury test also started erupting. Its basic postulate of reasonability was brought into question for being insufficient\(^\text{11}\) and impractical\(^\text{12}\) test to judge validity of administrative actions. In recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciaries have resiled from this strict abstention’s approach, recognising that in certain circumstances it is necessary for them to undertake a more searching review of administrative decisions.

Thus, the courts started developing a new test for judicial review of administrative action, which came up for application although with lots of opposition, which was the Doctrine of Proportionality. This is a test for judicial review of administrative actions on a more comprehensive basis. The Doctrine of proportionality checks the important link between the administrative objective to be achieved and the means adopted by the administration to achieve it.

It was in \textit{R (Daly) v. Secretary of State for Home Department}\(^\text{13}\), in House of Lords that the court came up with a precise definition of the doctrine as:

“Whether: (i) the administrative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objectives are rationally connected to it; and (iii) the means used to impair the rights or freedom are no more than is necessary to accomplish the objective.”


\(^{12}\) \textit{R (Daly) v. Secretary of State for the Home Department}, (2001) 2 AC 532.

This lays down the three fundamentals of the test of proportionality which can also be briefly described as the three principles of (i) necessity, (ii) adequacy and (iii) strict sensu proportionality.\textsuperscript{14} Thus, now for administrative actions to be reviewed judicially, the administrative action has to pass through these three tests. And, if it fails at any of the three junctures, it would get invalidated.

But, now the question arose before the courts as to whether the new doctrine of proportionality was a replacement of Wednesbury principle or not. Initially, the courts remained hesitant to accept this doctrine, as was seen in the case \textbf{R v. Secretary of State for the Home Department ex. Parte Brind}\textsuperscript{15}, wherein the court held that the Wednesbury reasonableness and proportionality are different tests. The test of proportionality is not needed in the English legal system for the Wednesbury test provide a sufficient test. Lord Lowry lays two arguments for rejection of the new doctrine. First , the normative argument that the traditional Wednesbury approach represents the correct balance between judicial intervention and agency autonomy. Second, he concludes that the proportionality test strikes a different – and therefore incorrect – balance between those two factors, such that it would destroy the distinction between appeal and review.

This hesitation continued for few years, when in 1998 the Human Rights Act 1998 came into force, which emphasized on the requirement of a more in depth test for the review of administrative acts, followed by a series of cases adopting the new doctrine as a test for review. In \textbf{R (Alconbury Development Ltd. v. Secretary of State for the Environment, Transport and the Regions}\textsuperscript{16}, the Court accepted the new doctrine as an integral part of English legal system, irrespective of the provisions of the Human Rights Act, 1998. The court even went to place the Doctrine of Proportionality as a replacement of Wednesbury principle. In its words:

“\text{We have difficulty in seeing what justification there now is for retaining Wednesbury test ..... but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by House of Lords on more than one occasion. A survey of the}"

\textsuperscript{14} Juan Cianciardo, THE PRINCIPLE OF PROPORTIONALITY: ITS DIMENSIONS AND LIMITS, taken from: <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=juan_cianciardo>, as in 20.11.2010.
\textsuperscript{15} [1991] 1 AC 696.
\textsuperscript{16} (2001) 2 All ER 929.
various judgments of House of Lords, Court of Appeals, etc. would reveal for the
time being both the tests continued to co-exist.”

The House of Lords in R (Daly) v. Secretary of State for the Home Department¹⁷, demonstrated how the traditional test of Wednesbury unreasonableness has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:-

1. Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.
2. Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.
3. Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

Lord Steyn also felt most cases would be decided in the sameway whatever approach is adopted, though conceded for human right cases proportionality is the appropriate test.

The question arose as to whether doctrine of proportionality applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. Lord Steyn in R. (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions¹⁸ stated as follows:-

“"I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (proportionality) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing”.

¹⁷ (2001) 2 AC 532.
¹⁸ (2001) 2 All ER 929.
Lord Steyn was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same.

The Daly case also dealt with the question of whether the new doctrine of proportionality will ever replace the Wednesbury principle, in saying that:

"And I think that the day will come when it will be more widely recognised that [Wednesbury] was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation."

Whether the proportionality will ultimately supersede the concept of reasonableness or rationality was also considered by Dyson Lord Justice in R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence and stated as follows:-

“We have difficulty in seeing what justification there now is for retaining Wednesbury test ….. but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist.”

Position in English Administrative Law is that both the tests Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violations of citizens ordinary rights. Proportionality principle has not so far replaced the Wednesbury principle and the time has not reached to say good bye to Wednesbury much less its burial.

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19 [2003] QB 1397
Conclusion:

Thus, in the English legal System the Doctrine of Proportionality does not completely replace the old principles of Wednesbury. The Unreasonability test still continues to be more applicable in the domestic courts in England for the reasons of systemic separation of power as referred in the Brind case, whereas, the proportionality doctrine finds its application more in the cases affecting the Fundamental Human Rights in the European Courts of Justice. The Alconbury cases emphasizes on importance of proportionality test as a more in depth test to check the administrative actions affecting human rights. The two test still co-exist on their own platforms.

Hence, the Hypothesis is disproved.
A CONTEMPORARY VIEW TO THE DOCTRINE OF PROPORTIONALITY

Research Question – What is the contemporary position of the Doctrine of Proportionality. Whether it should be compulsorily followed in relation to Administrative functions?

It used to be thought in the classical constitutional doctrine that wide discretionary power was incompatible with the rule of law, but this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control its exercise. Modern government demands discretionary powers which are wide and numerous. Parliamentary draftsmen strive to find new forms of words which will make discretion even wider, and Parliament all too readily enacts them. It is also the attitude of the courts to such seemingly unbounded power which is perhaps the most revealing feature of a system of administrative law.

The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. The Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary but arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act. They have also imposed stringent procedural requirements. Here we are concerned with the substance of administrative discretion.

It has to be understood that the term ‘unreasonable’ means more than one thing. It may embody a host grounds mentioned already, as that the authority has acted on irrelevant or extraneous consideration or for an improper purpose, or mala fide, etc. Viewed thus, unreasonableness does not furnish an independent ground of judicial control of administrative
powers. ‘Unreasonableness’ may also mean that even though the authority has acted according to law in the sense that it has not acted on irrelevant grounds or exercised power for an improper purpose, yet it has given more weight to some factors than they deserved as compared with other factors. Interference on this ground requires going into the relative importance of different factors and their balancing which amounts to substituting the discretion of the judiciary for that of the executive. Courts do not normally exercise such wide power to interfere in the exercise of the administrative discretion.

‘Unreasonableness’ may furnish a ground for intervention by the courts when the Constitution of India or the statute so requires. Thus, article 14 of the Indian Constitution guarantees equality before the law but the courts have permitted reasonable classification to be made. Where the law is valid under the article, a discriminatory action would still be violative of the equality clause. Similarly, Article 19 requires only reasonable restrictions to be imposed on the rights specified therein. In Maneka Gandhi v. Union of India, it was held that an order made under section 10(3)(c) of the Passport Act, 1967 i.e. power of impounding a passport could be declared to be bad under clauses 1 (a) and (g) of the article if it was so drastic in nature, as to be imposing unreasonable restrictions on the individual’s freedom covered by the two clauses. Thus if the order of impounding is for an indefinite period it would not be valid under the article.

At times, the law may require reasonable administrative behaviour, e.g., reasonable ground to believe by an authority to take action. In several cases the courts have considered this statutory formula.

Firstly, ‘reasonable ground to believe’ is a condition precedent to taking the administrative action in question. In Sheo Nath v. Appellate Assistant Commissioner, the Supreme Court with reference to the phrase used in the Income Tax Act for initiating reassessment proceedings by the I.T.O. said that “The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the Section”. If such a condition precedent is not satisfied so as to make out a prima facie case the order will be quashed.

20 AIR1978 SC 597.
And secondly, there should be some basis on which reasonable belief is to be based. The Supreme Court has held with reference to s. 147 (a) of the Income Tax Act, 1961 that ‘reason to believe’ requires that the belief is to be reasonable or ‘based on reason which are relevant and material’. There should be rational and intelligible nexus between the reasons and the belief, though of course the court will not go into the adequacy or sufficiency of reasons. It will depend upon the facts of each case whether there was rational and intelligible nexus between reasons and belief. The reason to believe must be related to the time when the impugned action was taken; any subsequent acquisition of belief in this regard would not be of any avail. The I.T.O. may act on direct or circumstantial evidence but not on mere suspicion. If there is some relevant evidence to support the ‘reasonable belief’, then only should the courts would not go into its adequacy or the merits of the case.
CHAPTER - VI

INDIAN VIEW OF THE DOCTRINE OF PROPORTIONALITY

By: Mohit Sharma
Roll no.: 2008-39

Research question:

Whether the Doctrine of Proportionality find its applicability in the Indian Legal System and if yes to what extent?

Hypothesis: Yes.

The principle of proportionality in its broad European sense has not so far been accepted in India. Only a very restrictive version thereof has so far come into play. The reason is that the broad principle does not accord with the traditions of common-law judicial review. The European version of proportionality makes the courts as primary reviewer of administrative action, whereas in common-law, the courts have so far played the role of the secondary reviewer. In European Droit Administratif, the review of administrative action is entrusted to administrative tribunals and not to ordinary courts and, therefore, the broad concept of proportionality can be followed. In common-law, the tradition so far has been that the courts do not probe into the merits of an administrative action. This approach comes in the way of a full-fledged acceptance of the principle of proportionality, for, if accepted, it will turn the courts into primary reviewer of administrative action.

Accordingly, in India, the courts apply the principle of proportionality in a very limited sense. The principle is applied not as an independent principle by itself a in European Administrative Law, but as an aspect of Art. 14 of the constitution, viz., an arbitrary administrative action is hit by Articles 14. Therefore, where administrative action is challenged as ‘arbitrary’ under Article 14, the question will be whether administrative order is ‘rational’ or ‘reasonable’ as the test to apply is the Wednesbury test.22 As has been stated by the Supreme Court in Royappa23, if the administrative action is arbitrary, it could be struck down under

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Article 14. Arbitrary action by an administrator is described as one that is irrational and unreasonable. Accordingly, a very restrictive version of proportionality is applied in the area of punishments imposed by administrative authorities.

The first proposition in this regard is that the quantum of punishment imposed by a disciplinary authority on a civil servant for his misconduct in service is a matter of discretion of the disciplinary authority.

The second proposition is that the punishment has to be reasonable because of the constraints of Art. 14. This means that if the punishment imposed is unreasonable, Art. 14 is infringed. The court can thus decide upon the proportionality of the punishment when it is strikingly disproportionate. The court would not interfere with the matter of punishment on compassionate ground, or because it considers the punishment disproportionate. The court would interfere only in such extreme cases which on their face show perversity or irrationality. The Wednesbury test is to be applied in such a case.

The Supreme Court has laid down the principle in Om Kumar v. Union of India24 in these words:

“When an administrative decision relating to punishment in disciplinary cases is questioned as ‘arbitrary’ under Art. 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing authority. The court will not apply proportionality as a primary reviewing court.”

The court would thus intervene in the matter of punishment only when it is satisfied that Wednesbury principle has been violated.25 Below are given a few examples as to how this proposition is applied to specific factual situations.

In Union of India v. R.K. Sharma26, the Supreme Court has again laid down the principle as follows: The court cannot while exercising power under Art. 32/226 interfere with the punishment because the court considers it to be disproportionate. “It is only in extreme cases,

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26 AIR 2001 SC 3053.
which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a court should not interfere.” The court thus interferes only when the quantum of punishment is shockingly disproportionate, or it shocks the conscience of the court. The following cases illustrate this point:

a. In the case of A. L. Kalra v. P&E Corporation of India Ltd., the appellant was removed from government service on the ground of misconduct. Taking the kind of misconduct in view, the Supreme Court characterised the punishment of removal from service as arbitrary and quashed the order in question. 27

b. The Supreme Court has observed in Bhagat Ram v. State of Himachal Pradesh. 28

“It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Art. 14 of the Constitution.”

Prima facie, this was a broad statement which seemed to accept the principle of proportionality as such. But since then the Supreme court has qualified the statement. Instead of the ‘disproportionate’, the expression ‘shockingly disproportionate’ has come to be substituted.

c. In the context of “unfair labour practice” under Labour Law, the Supreme Court has observed in Hind Construction & Engineering Co. Ltd. V. Their Workmen. 29

“But, where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice”

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27 AIR 1984 SC 1361.
28 AIR 1983 SC 454 at 460.
29 AIR 1965 SC 917.
Accordingly, in several cases, the punishment of dismissal imposed on workmen by their employers have been quashed on the ground that the same is grossly disproportionate to the nature of the charges held proved against the workman concerned.\textsuperscript{30}

In a number of cases, the Supreme Court has refused to intervene with the punishment imposed by the disciplinary authority as it was not found to be shockingly disproportionate to the offence in question.\textsuperscript{31} For example, in \textbf{B.C. Chaturvedi v. Union of India},\textsuperscript{32} a government servant was dismissed form service because he was found to have assets disproportionate to his known sources of income. The Tribunal taking in view his brilliant academic record and 30 years of service, substituted the punishment of dismissal with compulsory retirement. The Supreme Court, on appeal, set aside the Tribunal order and restored the order of dismissal imposed on him by the disciplinary authority. The Court maintained that the disciplinary authority is invested with discretion to impose appropriate punishment keeping in view the magnitude or gravity of misconduct. The Court observed further in this connection:

“The High Court/Tribunal, while exercising power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.”

\textsuperscript{30} Ibid.
\textsuperscript{31} Union of India v. G. Gangayuthan, AIR 1997 SC 3387.
\textsuperscript{32} AIR 1996 SC 484.
CASE ANALYSIS

I. UNION OF INDIA AND ANOTHER V. G. GANAYUTHAM

A. Facts of the case:

1. This is an appeal by the Union of India and the Collector of Central Excise against the judgment of the Central Administrative Tribunal in Tr. A. No. 660 of 1986 dated 5-12-1986 allowing the petition filed by the respondent.

2. The respondent was working as Superintendent of Central Excise. While so, on 14-11-1977 was served with a memo of eight charges and an inquiry was conducted. The Inquiry Officer submitted a report dated 17-5-1978 stating that charge No. 4 was not proved. Charge No. 8 was partly proved and other charges were held proved. The respondent retired from service on 31-5-1978.

3. A show cause notice dated 18-3-1982 was issued under Rule 9 of the Central Civil Services (Pension) Rules, 1972 (hereinafter called the 'Rules') proposing withdrawal of full pension and gratuity admissible to the respondent on the ground that the Government suffered substantial loss of revenue due to the misconduct of the respondent. The respondent submitted an explanation. The Union Public Service Commission was consulted and the Commission felt that charges 4 and 6 were not proved but concurred with the findings of the Inquiry Officer on other charges. Based on the Commission's advice, a penalty of withholding 50% of the pension and 50% of gratuity was awarded to the respondent by orders dated 8-5-1984.

4. Questioning the same, a writ petition was filed by the respondent in the High Court of Madras which was later transferred to the Tribunal. Regarding the penalty of withholding 50% of the pension, it held that the punishment awarded was 'too severe', that the lapses were procedural, that the officer had otherwise done excellent work and, therefore, it was a fit case where the withholding of pension of 50% had to be restricted for a period of 10 years instead of on a permanent basis.

5. Aggrieved by the said decision of the Tribunal, the Union of India and the Collector, Central Excise have preferred this appeal.

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33 AIR 1997 SC 3387.
B. **Issue involved in the case:**

1. The issue involved in this case is whether it is permissible for Court or Tribunal to interfere with quantum of punishment imposed by competent authority on ground that it was too severe and hence disproportionate to gravity of charges proved.

C. **Contentions of the parties:**

1. It was contended by the appellants that the Tribunal ought not to have gone into the question as to whether the punishment of withholding 50% of the pension and gratuity was commensurate with the gravity of the misconduct proved and that this amounted to going into the 'proportionality' of the punishment which was not permissible in law. In any event, there was also no finding by the Tribunal that the punishment imposed was 'shockingly' disproportionate to the gravity of charges. In Ranjit Thakur v. Union of India, it was only after arriving at a finding that the punishment was 'shockingly' disproportionate that the Supreme Court interfered with the punishment.

2. It was contended by the respondents regarding the punishment that the Tribunal felt that the punishment was far severe having regard to the charges proved and it was, in those circumstances, permissible for the Tribunal to interfere with the quantum of punishment.

D. **Judgment and reasoning of the Supreme Court:**

1. The point to be determined by the Court was whether judicial review powers in administrative law permit the High Courts or the Administrative Tribunals to apply the principle of 'proportionality'?

2. To discern its opinion on the matter, the Supreme Court first discussed the requirements of judicial review of administrative action and found that an administrative decision is subject to judicial review if the same is unreasonable, illegal or irrational.

3. The Court concluded regarding the application of proportionality in India that in our country, in cases not involving fundamental freedoms, the role of our Courts/Tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU principles
to test the validity of executive action or of administrative, the Courts and Tribunals in our
country can only go into the matter, as a secondary reviewing Court to find out if the
executive or the administrator in their primary roles have arrived at a reasonable decision on
the material before them in the light of Wednesbury and CCSU tests. The choice of the
options available is for the authority the Court/Tribunal cannot substitute its view as to what
is reasonable.

4. The question arises whether our Courts while dealing with executive or administrative action
or discretion exercised under statutory powers where fundamental freedoms are involved
could apply ‘proportionality’ and take up a primary role. To that, the Court observed that the
position in our country, in administrative law, where no fundamental freedoms are involved,
is that the Courts/Tribunals will only play a secondary role while the primary judgment as to
reasonableness will remain with the executive or administrative authority. The secondary
judgment of the Court is to be based on Wednesbury and CCSU principles to find if the
executive or administrative authority has reasonably arrived at his decision as the primary
authority.

5. Further, whether in the case of administrative or executive action affecting fundamental
freedoms, the Courts in our country will apply the principle of ‘proportionality’ and assume a
primary role, is left open, to be decided in an appropriate case where such action is alleged to
offend fundamental freedoms. It will be then necessary to decide whether the Courts will
have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for
Article 14.

6. In the present case, it was not contended that any fundamental freedom is affected.
Therefore, there is no need to go into the question of ‘proportionality’. There is no contention
that the punishment imposed is illegal or vitiated by procedural impropriety. As to
‘irrationality’, there is no finding by the Tribunal that the decision is one which no sensible
person who weighed the pros and cons could have arrived at nor is there a finding, based on
material, that the punishment is in 'outrageous' defiance of logic. Neither Wednesbury nor
CCSU tests are satisfied.

7. Therefore, the order of the Tribunal which has interfered with the quantum of punishment
and which has also substituted its own view of the punishment was set aside by the Supreme
Court and the punishment awarded by the departmental authorities is restored.
E. Critical Analysis of the Case:

1. In the instant case, we can see the limited application of the doctrine of proportionality in India and that it comes into play only when the administrative actions affect the fundamental rights of a person and not otherwise. Moreover, regarding the quantum of punishment, the Court will only interfere when the same is ‘shockingly disproportionate’ to the gravity of the charges and not otherwise.

2. This shows the fine balance between the two organs, i.e., executive and judiciary. In order to maintain the separation of powers, the judiciary acts as a secondary reviewer of administrative action so as to not to creep into the latter’s domain and assumes primary role only in cases where fundamental rights of the citizens are being affected.

II. CHAIRMAN & MANAGING DIRECTOR, UNITED COMMERCIAL BANK AND ORS. V. P.C. KAKKAR

A. Facts of the case:

1. Disciplinary proceedings were initiated by the United Commercial Bank (the employer) against P.C. Kakkar (the employee). It was alleged that he had committed several acts of misconduct while functioning as Assistant Manager of Mirzapur Branch. He was placed under suspension w.e.f. 6.7.1983. The disciplinary proceedings were initiated against him and the charges were found established against him. On the basis of findings recorded by the Inquiry Officer and as endorsed by the Disciplinary Authority, order of dismissal was passed on 16.8.1988.

2. Appeal preferred by the employee before the prescribed appellate authority did not bring any relief. Similar was the fate of the review application. Matter was carried in writ petition

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34 AIR 2003 SC 1571.
before the Allahabad High Court. As noticed by the High Court, there was no challenge to the findings recorded, and what was urged related to the quantum of punishment.

3. One of the points highlighted to question the quantum of punishment was that in a similar situation, lesser punishment was imposed of one M.L. Keshwani though the allegations against him were of much serious nature. The High Court accepted the plea and, inter alia, directed as follows: “The Supreme Court has held in several cases, that there should be no discrimination in the matter of punishment vide Sangram Singh v. State of Punjab.35

4. The High Court concluded that the punishment given to the petitioner was misappropriate and excessive and quashed the orders directing that the petitioner shall be reinstated in service within six weeks but he will be given a lesser punishment. The High Court directed that the petitioner will be given the punishment of being deprived of 75% of salary for the period from the date of removal to the date of reinstatement and he will be given a severe warning not to make such mistakes in future but he will get seniority and continuity of service as if his service had not been terminated.

B. Issue involved in the case:

1. The primary question involved is the scope of interference in the matter of punishment by the High Court.

C. Contentions of the Parties:

1. The appellants (employer) are contending that the High Court committed an error in interfering with the quantum of punishment after having found that the charges were established. The scope of such interference is extremely limited. After having noted that there was no challenge to the findings, there was no scope for interfering with the quantum of punishment.

2. It is pointed out that even if a co-delinquent has been given lesser punishment, same cannot be a ground for interference. The employee was acting as Assistant Manager in the Bank and committed the acts of misconduct. Taking into account the higher standard of honesty and

35 (1984) ILLJ 161 SC.
integrity required by such employees any interference with the quantum of punishment would amount to misplaced sympathy.

3. The respondents (employee) are contending that there were several mitigating circumstances. It was categorically urged that there was no embezzlement or fraud and there was no loss caused to the Bank.

D. Judgement and reasoning of the Supreme Court:

1. Supreme Court discussed that the scope of interference with quantum of punishment has been the subject-matter of various decisions of this Court. Such interference cannot be a routine matter.

2. Where an administrative action is challenged as ‘arbitrary’ under Article 14 on the basis of Royappa\textsuperscript{36} (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is ‘rational’ or ‘reasonable’ and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegality or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.

3. Coming to the present case, it is not contended by the appellants that any fundamental freedom is affected. Therefore, there is no need to go into the question of ‘proportionality’. There is no contention that the punishment impugned is illegal or vitiated by procedural impropriety. As to ‘irrationality’, there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material that the punishment is in ‘outrageous’ defiance of logic. Neither Wednesbury nor CCSU tests are satisfied.

4. In the case at hand the High Court did not record any reasons as to how and why it found the punishment shockingly disproportionate. Even there is no discussion on this aspect. The only discernible reason was the punishment awarded in M.L. Keshwani’s case.

\textsuperscript{36} (1974) ILLJ 172 SC.
5. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik, it was observed that it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court.

6. It needs no emphasis that when a Court feels that the punishment is shockingly disproportionate, it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law.

7. In the peculiar circumstances of the case, it would be appropriate to send the matter back to the High Court for fresh consideration. The High Court shall only consider the punishment aspect, treating all other matters to be closed and to have become final. The appeal filed by the employer is accordingly disposed of while that filed by the employee is dismissed.

E. Critical analysis:

1. In the instant case, it has not been contended that no fundamental freedom has been affected. The Court should not interfere with the administrator’s decision imposing punishment unless “it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was defiance of logic or moral standards”. Unless the punishment imposed by the Disciplinary authority or the Appellate Authority shocks the conscience of the court/tribunal, there is no scope for interference. Also, if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed. This shows us that the Courts will not invoke the doctrine of proportionality to interfere with administrator’s decisions unless some fundamental right is being affected.

2. When the Court feels that the punishment is “shockingly disproportionate”, it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirements of law. Therefore, we can see that this case

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37 (1996) IILLJ 379 SC.
brings out the importance of the requirement of speaking order supported by reasoning whereby the affected party can know the reasons for decision and, also the superior appellate Court can understand the reason for the decision.
III. UNION OF INDIA (UOI) AND ORS. V. RAJESH P.U., PUTHUVALNIKATHU\textsuperscript{38}

A. Facts of the case:

1. The Central Bureau of Investigation (CBI) invited applications on 29.3.2000 for filling up 134 posts of Constables- in various branches of its office all over India, including the qualifications to be fulfilled by the incumbents for selection stipulating for the holding of a written examination and interview for the purpose at Hyderabad, fixing the date of recruitment as 24.4.2000.

2. Several persons including the private respondent applied and the candidates were called for undergoing written test on 24.4.2000 and interview on 30.4.2000 at Hyderabad. After passing the same, the contesting respondent was served with a Communication dated 25.5.2000 that he was selected for appointment to the post of Constable in the CBI. The Chief Medical Officer - Civil Hospital, Cherthala, was also subsequently asked to examine him to find out and certify the candidate's medical fitness and forward the same in the prescribed form by 7.6.2000. The said test regarding medical fitness also was undergone successfully and the respondent was found to satisfy all those requirements.

3. The respondent and other selected candidates were informed by a Communication dated 8.1.2001 that though they were selected for appointment and were asked to undergo medical test - the selection process for appointment already conducted and the list of selected candidates has been cancelled by the Competent Authority of CBI by reason of the fact that there were some allegations of favouritism and nepotism while conducting the physical efficiency test and some irregularities committed during the written examination.

4. Aggrieved by the order, the respondent moved before the CAT’s Bench at Ernakulam, Kerala, challenging the cancellation. The same got dismissed at the admission stage itself, observing that the action relating to cancellation having been taken bona fide and in public interest after due deliberation, does not call for interference and there was no legitimate cause of action. Aggrieved, the respondent moved the Kerala High Court where the Division Bench specifically noticed the nature of irregularities on the basis of which the selections came to be

\textsuperscript{38} AIR 2003 SC 4222.
cancelled. The stand on behalf of CBI before the High Court was that the Committee constituted for inspecting into the charges has identified all such cases individually and specifically found that 31 candidates, who were otherwise ineligible, got in the process included in the select list and an equal number of eligible candidates, thus, were considered to have been denied of their legitimate claims. It is for this reason, ultimately, the entire selection was found to have been cancelled and not otherwise.

5. The Division Bench came to the conclusion that there was no justification to cancel the entire selections and finding the cancellation of the entire selection to be arbitrary and unreasonable, the Kerala High Court allowed Writ Petition and directed the CBI to correct the mistakes in the selections by rearranging the select list. Not satisfied, the appellants have filed this appeal.

B. Contentions of the parties:
1. On behalf of the appellants, it was contended that the cancellation of the selection was justified on account of the discrepancies said to have been found out by the Committee in the matter of valuation of the answer papers and that, therefore, there was no justification for the High Court to interfere in the matter. It was also contended that there were certain lapses in the matter of dictating the questions in English and Hindi, resulting in some advantage being gained by some candidates and placing certain others in a disadvantageous position.

2. On behalf of the respondents, it was contended that there was no time gap in announcing questions in English and Hindi for discussion among candidates about possible answers; that as matter of fact, for every 10 candidates there was an invigilator to supervise the test and that such stand now taken was never taken in the previous suits, therefore, the well considered decision of the Division Bench of the High Court does not call for any interference.

C. Issue involved in the case:
1. The primary issue involved in this case is that whether the cancellation of the all the candidate because of irregularities in selection of 31 candidates is invalid and irrational under
the law. The second issue is that the order of the High Court requires interference by the Supreme Court or not.

D. Judgement and reasoning of the Supreme Court:
1. The Supreme Court held that there is no scope for any legitimate grievance against the decision rendered by the High Court. There seems to be no serious grievance of any malpractices as such in the process of written examination - either by the candidates or by those who actually conducted them.
2. In addition thereto, the Special Committee found that there was no infirmity in the selection of the other successful candidates than the 31 identified by the Special Committee. Therefore, applying an unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete miss to contextual considerations throwing to winds the principle of proportionality in going farther than what was strictly and reasonably required to meet the situation. In short, the Competent Authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational.
3. The judgment of the High Court adopted a practical, pragmatic, rational and realistic solution to the problem. The appeal, therefore, fails and shall stand dismissed.

E. Critical analysis of the case:

This case furnishes an example of application of the principle of proportionality to an area other than that of punishments. An aspect of the principle of proportionality is that the Administration ought not to make an order harsher than what the need of the situation demand. It is to be noted that the Court has not invoked the Wednesbury test in the instant case. The use of
the term ‘irrational’ seems to be in a sense wider than the Wednesbury test. In the instant case, the Supreme Court is nearly playing the role of a primary reviewer.

EXCEPTIONS TO THE SECONDARY REVIEW BY COURTS

A. Article 14: Discriminatory Action

If administrative action is challenged as discriminative under Article 14, proportionality applies and it is primary review. The Courts consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Hence, the Court deals with the merits of the balancing action of the administrator, and is, in essence, applying the principle of proportionality and is acting as a primary reviewing authority. Thus, the Supreme Court has stated in Om Kumar: “If, under Article 14 administrative action is to be struck done as discriminatory, proportionality applies and it is primary review”.

B. Fundamental Freedoms

Again, in an administrative action affecting fundamental freedom, proportionality has to be applied. In this area, proportionality of administrative action is to be treated by the Courts as a primary reviewing authority. On this point, the Supreme Court has stated in Om Kumar:

“Administrative action in India affecting fundamental freedoms has always been tested on the anvil of ‘proportionality’ in the last fifty years even though it has not yet been expressly stated that the principle that is applied is the proportionality principle.”

CONCLUSION:

In the light of the above cases, we can find a pattern in the judgments that the High Court almost always errs while interfering with the orders of the administrative bodies and the Supreme Court avoids interfering with the decisions of the administrative bodies until and unless they are shockingly disproportionate to the gravity of the offence which calls for invocation of the
‘proportionality doctrine’. Except for a few cases\textsuperscript{39}, the Supreme Court does not interfere with the quantum of punishment as it a discretionary matter for the administration or the executive. This shows the balancing of powers and functions between judiciary and the executive in a harmonious manner.

Moreover, doctrine of proportionality has not found completer application in India because in India, the courts do not act as primary reviewer of administrative action but only as secondary reviewer.

\footnotesize{\textsuperscript{39}} Dev Singh v. Punjab Tourism Development Corporation AIR 2003 SC 3712.
CHAPTER - VII

DOCTRINE OF PROPORTIONALITY AND FUNDAMENTAL RIGHTS

Monalisa
Roll No. 40.

Research question: Whether or not doctrine of proportionality is imbibed in any restriction imposed on the fundamental rights?

Hypothesis: Yes

1. Introduction:

Concerning the normative foundation of the principle, proportionality derives from the concept of the ‘Rule of Law’ (Rechtsstaat). The principle of Rechtsstaat consists of two sub-principles: the fact that the administrative power is liable to the legislative power (principle of legality) and, cumulatively, the fact that the legislative power is liable to Constitution, under the guarantee of the constitutional review conducted by judges.  

The principle of proportionality is especially intended to limit State’s action (both legislative and executive) against the citizens’ constitutional rights. The principle of proportionality provides the criterion, according to which judges decide whether a restrictive state action is proportional to the violated constitutional right: in cases where action originates from legislative power, it is an issue of constitutional review of legislation, whereas in cases where action originates from the executive power, it is an issue of review of the legality of the restrictive administrative act.

In India fundamental rights form a part of the Indian constitution, therefore, courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights. The Supreme Court in Laxmi Khandasari v State of U.P. has

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40 Sarantis Orfanoudakis And Vasiliki Kokota, “The Application of the Principle of Proportionality in the Case Law of Community and Greek Courts: Similarities and Differences”
41 Sarantis Orfanoudakis And Vasiliki Kokota, “The Application of the Principle of Proportionality in the Case Law of Community and Greek Courts: Similarities and Differences”.
42 IP Messey, Administrative Law, 7th Ed.
held that while deciding the reasonableness of the restriction on fundamental rights the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time should all enter into judicial verdict.

2. Basis of application of “Doctrine of Proportionality” by the judiciary:

Judges rely on the technique of balancing as a method of dispute resolution when dealing with competing interests. The technique of balancing is a method of solving real conflicts between equally protected but competing interests of the same legal status. The fact that the protected interests are of the same legal status shifts the conflict from the question of hierarchy, guiding the judge to the pursuit of different criteria, which could be used to solve the conflict. The principle of proportionality serves exactly as this criterion.

Balancing is a judicial technique which uses the principle of proportionality as a foundation/criterion. The principle of proportionality has a substantial content, which is the search for a reasonable relationship between the violated legal interest and the restrictive measure imposed.43

By proportionality, it is meant that the question whether while regulating the exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose for which they were intended to serve.

3. Application of Doctrine of Proportionality to Restrictions on Fundamental Rights:

“Doctrine of proportionality” is a theory, which has great practical and social significance in India. The said doctrine originated as far back as in the 19th century in Russia and was later

adopted by Germany, France and other European countries as has been noticed by this court in *Om Kumar v. Union of India*.\textsuperscript{44}

Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situation, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action in our country has to be tested on the principle of proportionality, just as it is done in the case of main legislation. This, in fact, is being done by the courts. Administrative action in India affecting the Fundamental Freedoms had always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the proportionality principle.

The court as far back as in 1952 in *State of Madras v V.G.Row*\textsuperscript{45} observed: “The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all the cases. The nature of right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at that time, should all enter the judicial verdict. In evaluating such elusive factors and forming their own conceptions of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judge participating in the decision would play an important part, and limit to their interference with legislative judgment in such cases can only be dictated by their

\textsuperscript{44} (2001) 2 SCC 386.
\textsuperscript{45} AIR 1952 SC 196.
sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable”.

In *Om Kumar v. Union of India*[^46^], the Supreme Court has said that administrative action in India affecting fundamental freedoms has always been tested on the anvil of proportionality in the last fifty years even though it has not been expressly stated that the principle that is applied is the proportionality principle. The Supreme Court further observed that there are hundreds of cases dealt with by our courts. In all matters the proportionality of administrative action affecting fundamental rights under Art. 19(1) or Art. 21 have been trusted by the courts as a primary reviewing authority and not on the basis of Wednesbury principle. It may be that the courts did not call it proportionality even though it really was.

In *Chintaman v. State of Madhya Pradesh*[^47^], the court has stated that while assessing the constitutional validity, of a statute or an administrative order, vis a vis, fundamental rights, the court always does the balancing act between a fundamental right and the restriction imposed thereon. A restriction which is disproportionate or excessive can always be struck down.

In *Bhagat Ram v. State of Himachal Pradesh*[^48^], the Supreme Court observed that the penalty imposed must be commensurate with the gravity of misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of A14 of the Constitution.

The Hon’ble Supreme Court in the case of *Teri Oat Estates (P) Ltd. v. U.T. Chandigarh*[^49^] discussed the doctrine of proportionality in its historical perspective. It has been held that the Court has to see that the legislature and the administrative authority maintain a proper balance between the adverse effects, which the legislation or the administrative order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve. It also been concluded that every case has to be examined on its own facts.

[^46^]: (2001) 2 SCC 386.
[^47^]: AIR 1951 SC 118.
[^48^]: AIR 1983 SC 454.
In the case of Chairman, All India Railway Rec. Board & Anr. v. K. Shyam Kumar & Ors., the Supreme Court has held Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to ‘assess the balance or equation’ struck by the decision maker. Proportionality test is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest.

Conclusion:

There has been an overlapping of reasonableness, proportionality and Wednesbury tests when reaching a decision on how far a restriction on the fundamental right is justified. It is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury test is applicable in set of circumstances while a set of situations permit the application of the proportionality test. However, the judicial interpretation has led to the following demarcation: Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to ‘assess the balance or equation’ struck by the decision maker. Proportionality requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium.

Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violation of citizens’ ordinary rights. Proportionality principle has not so far replaced the Wednesbury principle.

Hence, the Hypothesis is proved.
Thus the doctrine of proportionality requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision.

Courts have to develop an indefeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables or comparison; it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker.
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