DOCTRINE OF PROPORTIONALITY

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AIM OF THE STUDY

The scope of judicial review of administrative action has been the central theme of discussion in administrative law; which the author tries to critically examine and drive the conclusion with decided cases.

ORIGIN OF THE DOCTRINE

The ordinary meaning of proportionality is that the administrative action should not be more drastic than it ought to be for obtaining desired result. It implies that canon should not be used to shoot a sparrow. In other words, this doctrine tries to balance means with ends. Proportionality shares platform with 'reasonableness' and courts while exercising power of review take into consideration the course of action that could have been reasonably followed'. Indian courts have been following this doctrine for a long time but English Courts have started using this doctrine in administrative law after the passing of the Human Rights Act, 1998. The doctrine of proportionality is being applied in the situations where administrative action invades fundamental rights. In such a case, courts make strict scrutiny of administrative action and go into the question of correctness of the choices made by the authority. The Courts would also balance adverse effects on the right and the object sought to be achieved, where question of quantum of punishment imposed by the administrative authority is involved, courts would not make strict scrutiny. Courts follow the principle that though quantum of punishment is within the jurisdiction of the administrative authority but arbitrariness must be avoided. This principle may be titled as 'deference principle' where court show respect to the choice made by the administrative authority except when choice is manifestly disproportionate.

While reviewing an administrative action on the ground of proportionality Courts generally examine two aspects namely:

(i) Whether the relative merits of different objectives or interests have been appropriately weighed and fairly balanced?

(ii) Whether the action under review was, in the circumstances, excessively restrictive or inflicted an unnecessary burden?

In *Association Of Registration, Plates v. Union of India*[1], the Court observed that judicial review of administrative action is limited to consideration of legality of decision making

[1] (2004) 5 SCC. 364

process and not legality of the decision per se. Mere possibility of another view cannot be a ground for interference. Therefore, courts will not interfere unless the decision suffers from illegality, irrationality, procedural impropriety and proportionality deficiency. Mere assertion of these grounds is not sufficient, each ground must be proved by evidence on record. The court also emphasised that the doctrine of immunity from judicial review is restricted to cases or class of cases which relate to deployment of troops and entering into international treaties etc. In policy matters and where subjective satisfaction of the authority is involved, courts will not interfere unless the decision is totally perverse and violates any provisions of the Constitution.

Courts in India, by creatively exercising the power of judicial review of administrative action, have progressively eliminated all 'no-go' areas of the administration. At present, there exists no limitation on the power of judicial review of the Courts except self-restraint. This has put new challenges and opportunities before the court, as it can now do justice in any manner of case to any manner of people. With the growth of administrative law, a need was felt to control the possible abuse of discretionary powers by the administration. For this purpose, courts have evolved various principles like illegality, irrationality, procedural impropriety, proportionality and legitimate expectation. Proportionality is the latest entrant in administrative law.

In *Coimbtore District Central Coop Bank v. Employees Association*[2], the Supreme Court held that through the use of the doctrine of proportionality court would not allow administration to use a sledgehammer to crack a nut where a paring knife would suffice. Thus it is a principle where courts would examine priorities and processes of the administration for reaching a decision or recalling a decision. However, courts have always tried to temper this doctrine with the doctrine of 'flexibility'. Doctrine of proportionality was developed in 19th century in Europe originated in Prussia. In EU jurisdictions courts evaluate the necessity, suitability, utility and desirability of administrative action. However, the courts do not sit as an appellate authority or super legislature and show deference to administrative and legislative authorities. Nevertheless while applying proportionality test court apply more exacting and intrusive parameters than Wednesbury test of unreasonableness.

Originally the doctrine of proportionality was developed to control the police power of the state but it applies to: (i) Administrative discretionary action; (ii) constitutionality of law where fundamental rights are involved; and (iii) quantum of punishment.

While applying the doctrine court examines: (i) Did the action pursue a legitimate aim; (ii) were the measures employed to achieve the aim were suitable; (iii) could the aim would have been achieved by less restrictive/onerous alternatives; (iv) is the restriction/derogation justified in the overall interest of a democratic society and human dignity.

[2] (2007) 4 SCC 669

However, the application of the doctrine of proportionality in administrative law is a debatable issue and has not been fully and finally settled. Proportionality is a course of action which could have been reasonably followed and should not be excessive or severe, etc. Proportionality can be described as a principle where the court is concerned with the way in which the administrator has ordered his priorities the very essence of decision-making consists, surely, in the attribution of relative importance to the factors in the case. This is precisely what proportionality is about[3].

If elaborated further, it is the preparedness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims in view. Deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities. The doctrine of proportionality used in fundamental rights' context involves a balancing test and the necessity test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interests and a manifest imbalance of relevant considerations. The "necessity test" means that the infringement of fundamental rights in question must be by the least restrictive alternative[4] .

In *Associated Provincial Picture Houses v. Wednesbury Corpn*[5] , the court held that While judging the validity of an administrative action or statutory discretion, normally the Wednesbury test is applied. According to this test, the court would consider whether irrelevant matters had been taken into consideration or whether relevant matters had not been taken into consideration or whether the action is bona fide. The court would also consider whether the decision was absurd or perverse. Neither the court would go into the correctness of choice made by the administrator amongst the various alternatives open to him nor the court would substitute its decision to that of the administrator. The decision of the administrator must be within the four corners of law and not one which no sensible person could have reasonably arrived at. Besides these, the decision should be bona fide. The decision could be one of many choices open to the authority but it is for that authority to decide upon the choice and the court does not substitute its own view.

In *Council of Civil Services Union v. Minister of Civil Services*[6] Lord Diplock summarised the principles of judicial review of administrative action as illegality, procedural impropriety and irrationality. He further said that the doctrine of proportionality as a principle of judicial review may become later available in the same manner as is available in several member States of European Economic Community. Illegality means that no authority should act beyond its powers. Therefore, excess of jurisdiction is the basis of judicial review on ground of illegality. Irrationality is Wednesbury test of unreasonableness. It applies to actions which are so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived

[3] Laws, J., Is the High Court the Guardian of Fundamental Constitutional Rights? (1993 PL 59)
[4] De Smith, Woolf and Jowel: Judicial Review of Administrative Action, (1995) 601-605.
[5] (1948) 1 KB 223
[6] (1984) 3 All ER 935 (HL)

at. Procedural impropriety refers to what may be called procedural ultra vires. Adoption of 'proportionality' as a ground of judicial review was left for the future. However, Wednesbury test of reasonableness is not the standard of "the man on the Clapham Omnibus". It is the standard indicated by a true construction of the act which distinguishes between what is authorised and what is not.

The House of Lords in *R. v. Secy, for Home Affairs Brind, ex. p.* [7] , again reiterated that doctrine of proportionality cannot become a part of administrative law in England unless European Convention of Human Rights and Fundamental Freedoms are incorporated by the Parliament into domestic law. In this case Lord Bridge explained the two judgments which the court can make while exercising power of judicial review of administrative action, primary judgment as to whether the particular competing public interest justifies the particular restriction and secondary judgment as to whether a reasonable administrative officer, on material before him, could reasonably make the primary judgment. It was also held that the Court would make only the secondary judgment and the primary judgment would be made by the administrative officer whom Parliament has entrusted the discretion. It follows that if the European Human Rights Convention is incorporated into the domestic law of England, Court will be obliged to make the primary judgment also and apply the principle of proportionality in situations involving human rights. Until it is done, the Court would confine itself to making a secondary judgment only.

The same principle was reiterated by Lord Bingham in *R. v. Ministry of Defence*[8], ex parte Smith and said that in the case appellants' rights as human beings are in issue which are justiciable, the Court can thrust itself into the position of the primary decision maker. With the incorporation of European Human Rights Convention into domestic law of England in 1998 when Parliament passed the Human Rights Act, 1998, reluctance on the part of the English courts in applying the doctrine for determining the validity of an administrative action has now changed and the courts are making use of the doctrine in administrative law. where human rights of the people are violated. However, due to the concept of Parliamentary sovereignty in force, Court merely issue a 'declaration of incompatibility' while reviewing a law, if an interpretation compatible to the Law of Parliament is not possible. This gives an opportunity to the Parliament to rethink the whole issue afresh.

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. In *Laxmi Khandsari v. State of U.P.*[9], the Supreme Court held that the law is clear on the point 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. Thus while exercising

[7] (1991) 1 All ER 720
[8] (1996) 1 All ER 257
[9] (1981) 2 SCC 600

the power of judicial review court performs the primary role in Brind's sense of evaluating if a particular competing public interest justifies the particular restriction under the law. This situation arises when the court is deciding on the constitutionality of a law imposing unreasonable restriction on the exercise of fundamental rights. The same view was reiterated in the case of *State of A.P. v. MC Dowell & Co.*[10]

However, it is still not certain whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are not involved could apply principle of 'proportionality' and take up primary role in *Union of India v. G. Ganayutham*[11], the Court left this question open because it was not necessary for the decision in the case as the party had not pleaded the violation of fundamental rights. In this case 50% of respondent's pension and 50% of gratuity had been withheld on proof of his misconduct. One of the grounds taken by respondent was that the penalty was excessive. The Central Administrative Tribunal came to the conclusion that the punishment awarded was "too severe", that the lapse was procedural, there was no collusion between the respondent and any party, 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. The Supreme Court allowed the appeal and held that in such cases the judicial review is restricted to secondary judgment[12] and thus the review court cannot substitute its own views of the punishment. Power of judicial review is limited to illegality, procedural impropriety and irrationality meaning thereby that no sensible person who weighed the pros and cons could have arrived at or that the punishment is outrageous in defiance of any logic or standard of morality. Therefore, as neither the Wednesbury nor proportionality tests had been satisfied, the order of the Tribunal was set aside. It was also emphasised by the Court that unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to the Wednesbury or based on principle proportionality, the punishment cannot be quashed. Even then, the matter was remitted back to the appropriate authority for reconsideration.

In *B.C. Chaturvedi v. Union of India*[13], the court held that it is only in a very rare situation in order to shorten litigation that the Court may substitute its own view on punishment. Such a rare situation may include a case where punishment awarded is such which shocks the conscience of the Court/Tribunal. A similar view as taken in Indian Oil Corpn. v. Ashok Kumar Arora[14] when the Court held that in matters of punishment, the Court will not intervene unless the punishment is wholly disproportionate.

The Supreme Court in *Ranjit Thakur v. Union of India*[15], had applied the doctrine of proportionality while quashing the punishment of dismissal from service and sentence of

[10] (1996) 3 SCC 709
[11] (1997) 7 SCC 463
[12] (1991) 1 AC 696
[13] (1995) 6 SCC 749
[14] (1997) 3 SCC 72
[15] (1987) 4 SCC 611

imprisonment awarded by the court-martial under the Army Act, 1950. However, while quashing the punishment on the ground of its being "'strikingly disproportionate" the Court observed that the question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amounts in itself to conclusive evidence of bias. The doctrine of proportionality, and as a legitimate basis of the judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.

Though in this case the court applied the doctrine of proportionality but in fact the court confined itself to the description of irrationality as laid down in *CCSU v. Ministry of Civil Services*[16], namely, that it should be in outrageous defiance of logic.

It is a fundamental principle of criminal jurisprudence that the punishment imposed should not be disproportionate to the gravity of offence proved. However, while dealing with a disciplinary matter of a government servant, the Supreme Court[17] held that if the High Court is satisfied that some but not all the findings of the tribunal were unassailable, then it had no jurisdiction to direct the disciplinary authority to review the penalty. If the order may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing a public servant.

In *Dwarkadas Marfatia v. Board of Trustees of Port of Bombay*[18] , the Supreme Court said that the jurisdiction of the High Court under Article 226 of the Constitution, is highly limited. It can only go into the questions of illegality, irrationality and procedural impropriety, therefore, it is not within the power of the court to substitute a decision taken by a competent authority simply because the decision sought to be substituted is a better one. Thus it is clear that while deciding the proportionality of a punishment/penalty the court keep in mind that unless the punishment is so outrageous and in defiance of logic that no sensible person could have arrived at it, the court would not interfere.

In *Director NRSA v. G. Radeppa*[19], the Supreme Court said that in cases of adjudication under the Industrial Disputes Act, 1947 the principle of proportionality fully applies by virtue of Section 11-A of the Act. The Industrial Court as well as the High Court, on a perusal of the charges and the punishment imposed, can always reduce the punishment if it is disproportionate to the gravity of the charge held proved. Rule of proportionality shares ground with the rule against arbitrariness. Therefore, in the absence of any statutory provision if a major penalty has been imposed for a minor lapse it would be clearly arbitrary

[16] (1984) 3 All ER 935
[17] State of Orissa v. Vidya Bhushan Mahapatro (1963) Supp (1) SCR 648
[18] (1989) 3 SCC 293
[19] (1991) 1 APLJ 243

falling within the inhibition of Article 14 of Indian Constitution and the same is in violation of legitimate expectation.

In *Union of India v. G. Ganayutham*[20], the Supreme Court held that rule of proportionality is fully applicable in constitutional adjudication where the court has to decide on the reasonableness of a restriction on the exercise of fundamental rights. However, its application in the field of administrative law is still in an evolving stage. At the present, the doctrine is not available in administrative law in the sense that the court cannot go into the question of choice made and priority fixed by the administrator. The court can only see if upon given material before the administrative officer he has acted as a reasonable man. In an action for review of an administrative action, the court cannot act as a court of appeal. Even in cases where the validity of a restriction imposed on the fundamental right is involved, the court must exercise self-restraint and allow greater margin of appreciation to the administrator and the legislature in such cases.

In order to maintain the balance between individual rights and societal needs courts have always used the doctrine of proportionality and legitimate expectation with a judicious mix of principle of 'flexibility'. Courts take into consideration factual matrix of the case while applying this doctrine. In Allahabad *Jal Sansthan v. Daya Shanker Rai*[21], the Supreme Court opined that while protecting interest of the workman interest of the employer and the societal needs must be taken into consideration because complete detriment of the employer would only lead towards skewing investment away from labour intensive market, thus strangling economic development. In the same manner in *Hombe Gowda Educational Trust v. State of Karnataka*[22] , the Supreme Court observed that though dismissal causes grave hardship but grave misconduct should not go unpunished. Thus Courts are now more willing to provide more space to employers in labour relations in the interest of societal concerns.

In *Canara Bank v. V.K. Awasthy*[23], while explaining the applicability of the doctrine of proportionality, the Court observed that in situations where no fundamental freedoms are involved Court will only play a secondary role while primary judgment will remain with the administrative authorities, but in situations where fundamental freedoms are directly and substantially involved, the Court will exercise primary judgment. Regarding application of the doctrine of proportionality to determine quantum of punishment, Supreme Court was of the view that it cannot be a routine matter. If departmental proceedings establish charges of failure to discharge duties with honesty, integrity and diligence scope of judicial review is highly limited to situation of illegality and irrationality only.

While describing the current position about the application of the doctrine of proportionality in administrative law in England and India the Supreme Court in

[20] *Supra Note 11*
[21] (2005) 5 SCC 124
[22] (2006) 6 SCC 430
[23] (2005) 6 SCC 321

Coimbatore District Central Coop Bank v. Employees Association[24], was of the view that with the growth of administrative law, there is a need to control the possible abuse of discretionary powers exercised by the administration. For this purpose, courts have developed various principles. Proportionality principle legitimate expectation are the latest induction. These are the principles where court review the process, method or manner in which authorities have ordered their priorities or recalled a decision. Doctrine of proportionality includes 'balancing' and necessity' tests. 'Balancing test' permits scrutiny of punishments on infringement of rights, interests and a manifest imbalance of relevant considerations. 'Necessity test' requires infringement of fundamental rights to least restrictive alternative.

The Supreme Court referred that judgment passed in *Associated Provincial Picture Houses v. Corpn. of Wednesbury*[25] and said that to judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker, could, on material before him and within the framework of the law have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not be however go into the correctness of the choices made by the administrator amongst the various alternatives open to him. The court would substitute its decision to that of the administrator.

The court also affirmed the views expressed in *Council of Civil Services Union v. Ministry of Civil Services*[26] and said that the court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are called the Council of Civil Services Unions principles.

The Supreme Court also referred contents of the judgments passed by it in the case of *P.D. Aggarwal v. State Bank of India*[27], where it was said that jurisdiction of the Court to interfere with the quantum of punishment is limited to very exceptional circumstance. In the opinion of the Court 'verbal abuse may entail punishment of dismissal from service. The Court applies doctrine of proportionality in a limited manner. In *State of U.P. v. Sheo Shanker Lal Srivastava*[28], the court held that in the present context, doctrine of proportionality is gaining ground at the cost of Wednesbury unreasonableness to make scrutiny of administrative action more exacting and intrusive.

[24] *Supra Note 2*
[25] *Supra Note 5*
[26] *Supra Note 16*
[27] (2006) 8 SCC 776
[28] (2006) 3 SCC 276

The jurisprudence considered so far has applied proportionality, or legitimate, in specific types of case. More recently, The courts have expressed the view that proportionality should be recognised as a general head of review within domestic law and even without reference to the Human Rights Act, 1998 the time has come to recognise that this principle of 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 be unnecessary and confusing. Reference to the Human Rights Act, 1998 however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.

In *Suresh Madan v. General Medical Council*[29] the court held that there was a material difference between a rationality test cast in terms of heightened scrutiny and a proportionality test. The Court accepted that many cases would be decided in the same way under either test, but acknowledged that the intensity of review would be greater under proportionality. Proportionality could require the reviewing court to assess the balance struck by the decision maker, not merely that it was within the range of reasonable decisions. A proportionality test could also oblige the court to pay attention to the relative weight accorded to relevant interests in a manner not generally done under the traditional approach to review. It had to be shown that the limitation of the right was necessary in a democratic society, to meet a pressing social need, and was proportionate to the legitimate aim being pursued.

In *R. v. Secretary of State for the Home Department Ex. P. Adams*[30], the Court has applied proportionality in cases which have a Community law element.

It is important at the outset to ascertain the place of proportionality within the general scheme of review and its relationship with other existing methods of control. It is clear, as a matter of principle, that to talk of proportionality assumes that the public body was entitled to pursue its desired objective. The presumption is, therefore, that the general objective was a legitimate one and that the public body was not seeking to achieve an improper purpose. If the purpose was improper then the exercise of discretion should be struck down upon this ground without any investigation as to whether it was disproportionate. Proportionality should then only be considered once the controls have been satisfied. If we bypass this level of control then the danger is that the courts will assume that the public body was able to use its discretion for the purpose in question, the only main issue being whether it did so proportionately. It is obvious that at a general level proportionality involves some idea of balance between interests or objectives, and that it embodies some sense of an appropriate relationship between means and ends. There is a need to identify the relevant interests and ascribe some weight to them. A decision must

[29] (2001) A.C.D. 3
[30] Ibid.

then be made as to whether the public body's decision was indeed proportionate or not. The most common formulation is for a three type analysis. The court considers:

(1) Whether the measure was necessary to achieve the desired objective.

(2) Whether the measure was suitable for achieving the desired objective.

(3) Whether it nonetheless imposed excessive burdens on the individual. The last part of this inquiry is often termed proportionality stricto sensu.

It will be apparent from the analysis that the court will decide how intensively to apply these criteria. It should also be recognised that the criteria may require the court to consider alternative strategies for attaining the desired end. This follows from the fact that the court will, in fundamental rights' cases, consider whether there was a less restrictive method for attaining the desired objective. The need to consider alternative strategies may well also arise in other cases. Where the decision is of a technical or professional nature it may require specialist evidence as to the practicability of alternative strategies. It is readily apparent that the application of the test might well produce differing results depending upon the circumstances of the case.

APPLICATION OF PROPORTIONALITY FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

The first type of situation is one in which the exercise of discretion and power impinges upon, or clashes with, a recognised fundamental right. Proportionality is part of the test for review under the Human Rights Act, 1998 in England. The courts must take the jurisprudence of the European Court of Human Rights on proportionality into account, even though it is not binding on them. It is, however, clear as a matter of principle that some such test should apply in this area, quite apart from the persuasive force. If we recognise certain interests as being of particular importance, and categorise them as fundamental rights, then this renders the application of proportionality necessary or natural, and easier. Proportionality is necessary or natural because the very denomination of an interest as a fundamental right means that any invasion of it should be kept to a minimum. Society may well accept that rights cannot be regarded as absolute and that some limitations may be warranted in certain circumstances. Nonetheless there is a presumption that any inroad should interfere with the right as little as possible and nothing more than is merited by the occasion. It is natural therefore to ask whether the interference with the fundamental right was the least restrictive possible in the circumstances. In this sense, the recognition of proportionality is a natural and necessary adjunct to the recognition of fundamental rights. Proportionality is also easier to apply in such cases. The reason why this is so, is that one of the interests, such as freedom of speech, has been identified and it has been weighted or valued.

(A) Proportionality against Imposition of Penalty

The second type of case is that in which it is the penalty which is deemed to be disproportionate to the offence committed. People may disagree as to the precise penalty which is appropriate for a particular offence. It is a recognised principle of justice that penalties should not be excessive, as acknowledged in the Bill of Rights, 1689. In *Commissioners of Customs and Excise v. P&O Steam Navigation Co.*[31] it was said that a court is unlikely to intervene unless the disproportionality is reasonably evident, and judicial review of this kind is to be welcomed. The application of proportionality in this type of case is also made easier because the applicant will not normally be challenging the administrative rule itself but simply the penalty imposed for the breach.

(B) Doctrine against Unbalancing

The third type of case is harder. This category includes those situations not dealt with by the previous two. There are no fundamental rights at stake and no excessive penalties. The paradigm of this third category is the case where the public body decides to exercise its discretion in a particular manner, this necessitates the balancing of various interests, and a person affected argues that the balancing was disproportionate. The application of a proportionality test may be more difficult in this type of case. This is difficult because it requires weighting, many factors. It important part because many administrative decisions involve balancing, which is the essence of political determinations and many administrative choices. It cannot therefore be correct for the judiciary to overturn a decision merely because the court would have balanced the conflicting interests differently. This would amount to substitution of judgment by any other name. This does not mean that proportionality has no role to play in this type of case. This is especially so given that administrative policy choices should be susceptible to judicial scrutiny. What it does mean is that we must decide on whether the proportionality inquiry is confined to the particular administrative decision under attack, or whether the court is also to consider alternative policy strategies.

Consideration of the former will often push the analysis in the direction of the wider ranging inquiry. What it also means is that we must decide on the intensity with which proportionality will be applied. A less intensive form of review can be utilised for some cases in this area[32].

INDIAN APPROACH TO THE DOCRINE OF PROPORTIONALITY

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 the primary reviewer of administrative action, whereas in common-law, the courts have so far played the role of the

[31] (1993) C.O.D. 164.
[32] Harden and N. Lewis, The Noble Lie, The British Constitution and the Rule of law (Hutchinson, 1986)

secondary reviewer. In European Droit Administratif 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 as in European Administrative Law, but as an aspect of Article 14 of the Constitution, viz., an arbitrary administrative action is hit by Article 14. Therefore, where administrative action is challenged as 'arbitrary' under Art. 14, the question will be whether the administrative order is 'rational' or 'reasonable' as the test to apply is the Wednesbury test. As has been stated by the Supreme Court in E. Royappa v. State of Tamil Nadu[33], 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 Supreme Court has observed in *Bhagat Ram V. State of Himachal Pradesh*[34]

> *"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.

In the context of "unfair labour practice" under Labour Law, the Supreme Court has observed[35]

> *"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*

[33]AIR 1974 SC 555: (1974) 4 SCC 3 : 1974 (1) LLJ 172.

[34] AIR 1983 SC 454 at 460 (1983) 2 SCC 442 : 1983 (2) LLJ 186.

[35] Hind Construction & Engineering Co. Ltd v. Their Workmen, AIR 1965 SC 917 : 1965 (2) SCR 85 : 1965 (1) LLJ 462.

may treat the imposition of such punishment as itself showing victimization or unfair labour practice".

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.

(a) Art 14. Discriminatory Action

However, if administrative action is challenged as discriminative under Art. 14, Proportionality applies and it is primary review. Where administrative action is challenged as being discriminatory under Art. 14, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts to consider as primary reviewing courts. 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 Art. 14 administrative action is to be struck down as discriminatory, proportionality applies and it is primary review". At another place, in the instant case, the Court has stated: "Thus, when administrative action is attacked as discriminatory under Art. I4, the principle of primary review is for the courts by applying proportionality."

(b) Fundamental Freedoms

Again, in an administrative action affecting fundamental freedom, proportionality has to be applied. ln 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 been expressly stated that the principle that is applied is the 'proportionality' principle."

In this connection, the Supreme Court has observed further:[36]

"There are hundreds of cases dealt with by our courts. In all these matters, the proportionality of administrative action affecting the freedoms under Art. 19(1) or Art.21 has been trusted by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was."

Also, 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

[36] AIR 2000 SC 3689; 2000 (7) Scale 524.

right and the restriction imposed thereon. A restriction which is disproportionate or excessive can always be struck down.[37]

WESTERN APPROACH

(A) Traditional Wednesbury Principle and Proportionality

The courts could persist with Wednesbury principle as basis for review outside those areas where they have to apply proportionality. Different grounds of challenge would be dealt with under different heads of review, and Wednesbury principle would be interpreted in the traditional sense that the applicant would have to show that the public body's action really was so unreasonable that no reasonable body would have made it. It would, however, be accepted that this standard of review could vary in intensity, as exemplified by the application of the test in cases concerned with human rights.

Those who favour this approach would argue that it prevents the courts from intruding too far into the merits and obviates the need for any complex balancing, both of which are said to be undesirable features of proportionality. It is argued that the traditional approach will preserve the proper boundaries of judicial intervention. This claim is, however, undermined, in two ways.

First, it is true that if we take the language literally the need for any meaningful balancing is obviated by the extreme nature of the test, it simply does not use the colour of a person's hair as the criterion for dismissal. The reality is, as if has been seen, that the courts, while preserving the formal veneer of the Wednesbury test, have on occasion applied it to decisions which could not be regarded as having being made in defiance of logic or of accepted moral standards. The realisation that the courts have been applying the test to catch less egregious administrative action casts doubt on the claim that Wednesbury review can be conducted without engaging in some balancing. It raises the question as to the difference between this and the balancing that occurs within proportionality.

Secondly, the juridical device of varying the intensity with which the test is applied functions as a mechanism whereby the courts can exercise the degree of control which they believe to be desirable in a particular area, without thereby being accused of improper intrusion into the merits or inappropriate balancing. The very malleability in the standard of review means, however, that it is within the courts' power to shift the line as to what is regarded as a proper or improper intrusion into the merits.

(B) Modified Wednesbury Principle & Proportionality

The courts could, alternatively, retain the Wednesbury test for those areas not covered by the European Conventions or the Human Rights Act, 1998, but give it the tougher meaning ascribed by Lord Cooke. In other words, a decision would be overturned if it was one which a reasonable authority could not have made. This standard of review could also

[37] Chintaman v. State of M.P., AIR 1951 SC 118.

vary in intensity depending upon the subject-matter. This option is, somewhat paradoxically, more unstable than that just considered, and the reasons why this is so are revealing.

The essential premise of Lord Cooke's thesis is undoubtedly correct. His Lordship argued that the proper boundaries between courts and administration could be secured by a test which was less exaggerated than the traditional Wednesbury formulation. To be sure, the courts should not substitute their judgment on the merits for that of the administration, but this could be avoided even where the reasonableness test was formulated in the manner articulated by Lord Cooke.

The instability of this option becomes apparent once it is probe a little further. It should be recalled that the "virtue" of the traditional Lord Greene reading of the test was that there was no need to press further. The really outrageous decision would be all too evident and indefensible. If it is shifted to Lord Cooke's reading of the test this no longer holds true. It would be incumbent on the judiciary to articulate in some ordered manner the rationale for finding that an administrative choice was one which could not reasonably have been made, where that choice fell short of manifest absurdity. If the courts are not obliged to explain their own findings in this manner, the new test will create unwarranted judicial discretion. It is, however, difficult to see that the factors which would be taken into account in this regard would be very different from those used in the proportionality calculus. The courts would in some manner, shape or form want to know how necessary the measure was, and how suitable it was, for attaining the desired end. These are the first two parts of the proportionality calculus. It is also possible that under Lord Cooke's formulation a court might well, expressly or impliedly, look to see whether the challenged measure imposed excessive burdens on the applicant, the third part of the proportionality formula. If these kinds of factors are taken into account, and some such factors will have to be, then it will be difficult to persist with the idea that this is really separate from a proportionality test. There will then be an impetus to extend proportionality from the areas where it currently already applies, the European Conventions and the Human Rights Act, 1998, to general domestic law challenges.

Proportionality should neither be regarded as a panacea that will cure all ills i.e. real and imaginary, within our existing regime of review, nor should it be perceived as something dangerous or alien. It seems likely that it will be recognised as an independent ground of review within domestic law. This is because the courts are already applying the test directly or indirectly in some areas. The Wednesbury test itself is moving closer to proportionality; the European Conventions and the Human Rights Act, 1998 will acclimatise our judiciary to the concept; and the concept is accepted in a number of civil law-countries. It might therefore be of help to pull together some of the advantages and alleged disadvantages of this criterion.

A corollary is that proportionality facilitates a reasoned inquiry of a kind that is often lacking under the traditional Wednesbury approach. This is brought out forcefully by Laws J. who stated that under proportionality "it is not enough merely to set out the problem,

and assert that within his jurisdiction i.e. the Minister chose this or that solution, constrained only by the requirement that his decision must have been one which a reasonable Minister might make". It was rather for the court to "test the solution arrived at and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable and proportionate to the aim in view". It will often only be possible to test the soundness of an argument by requiring reasoned justification of this kind.

The experience with proportionality in European Conventions law shows full well that the concept can be applied with varying degrees of intensity so as to accommodate the different types of decision subject to judicial review. On the other hand, it is argued, that proportionality allows too great an intrusion into the merits and demands that the court undertakes a balancing exercise for which it is ill-suited. It is important to address the matter directly since fears in this regard have been so prominent in the debate about proportionality. It should be made absolutely clear at the outset that advocates of proportionality do not favour substitution of judgment on the merits by the courts for that of the agency. It is not the task of the court to decide what it would have done if it had been the primary decision maker, and, as it has recognised, there is nothing in the concept of proportionality which entails this. It is true that proportionality does entail some view about the merits, since otherwise the three-part inquiry could not be undertaken. There are said to be difficulties if we apply proportionality, particularly in those cases which have nothing to do with fundamental rights or penalties. It is' right to acknowledge such difficulties, but they should be kept within perspective.

CONCLUSION

"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.

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.

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.