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DOCTRINE OF PROPORTIONALITY IN INDIAN ADMINISTRATIVE LAW: AN ANALYSIS

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ABSTRACT

Development of the welfare state and few other reasons such as advancement in technology, etc. have caused the Legislature to confer huge amount of discretion on the Executive as well as delegate many of its functions to bureaucrats which has in turn caused the administrative authority to become exceedingly powerful. It is in this background that the principle of Webnesbury unreasonableness and later on, the doctrine of proportionality emerged. The proportionality doctrine ascertains whether legal standards are complied with by ensuring that administrative decisions are least intrusive of the rights of citizens and that there is a balance between the two. Though the Webnesbury unreasonableness principle can be said to have been more popular earlier on, it is nowadays commonly being substituted by the proportionality doctrine which ensures a proper balance between factors that influence administrative decisions. However, it is disheartening to note that even though the doctrine became part of Indian law nearly twenty years ago, in the case of Omkumar v. Union of India, there have not been any significant developments in it, in the Indian context, till date. The doctrine has been allowed only limited application in India though the Judiciary has been given considerable power in this respect under Articles 13, 32 and 226 of the Constitution. Applying the doctrine to review administrative actions so as to safeguard human rights to the maximum possible extent is hence the need of hour. With all these aspects in the backdrop, this paper aims at understanding the meaning and concept of the doctrine of proportionality, the principle of Webnesbury unreasonableness and the doctrine of margin of appreciation. The paper also aims at chalking out the different models of the doctrine, i.e., the British model of proportionality and the European model of proportionality. Additionally, the paper aims at analysing and interpreting the judicial interpretation of the doctrine in the Indian context, through cases such as Union of India v. G. Ganayutham and Sandeep Subhash Parate v. State of Maharashtra, and also the application of the doctrine in the country.

ISSN: 2582-7677

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INTRODUCTION

Though the principle of judicial review was brought into existence in the early part of the nineteenth century in the case of *William Marbury v. James Madison, Secretary of State of the United States*[1], it was only after World War II more than a century later that the concept gained popularity in the rest of the world. The extent of judicial review has since then been widely discussed and debated in administrative law. The evolution, growth and development of the welfare state and few other reasons such as technological advancement, etc. have caused the Legislature to confer huge amount of discretion on the Executive as well as delegate many of its functions to bureaucrats which has in turn caused the administrative authority to become exceedingly powerful.[2]

In such a scenario, there is high chance of abuse of discretion and power related thereto by the administrative authority which gives rise to the need for judicial review.[3] However, such intervention must not cause the Judiciary to encroach into areas that have specifically been reserved for the Executive.[4] Due to this reason, judicial review should always be restricted in such a manner that only as much intervention takes place as is required to control and regulate misuse of discretionary power by the administrative authority.[5]

Common law legal systems and civil law legal systems tackled the problem of ensuring limited judicial intervention in administrative orders, differently. In common law countries, a concept known as secondary review in which Wednesbury unreasonableness was the criteria for judicial intervention was introduced. In such jurisdictions, an administrative order would be struck down by the Judiciary if such order appeared to be *"so absurd that no sensible person could ever dream that it lay within the powers of the authority"*.[6]

In civil law countries, however, a concept known as primary review in which proportionality was the criteria for judicial intervention was introduced. In such jurisdictions, an administrative order would be struck down by the Judiciary if such order appeared to be *"more drastic than was necessary for attaining the desired*

[1]William Marbury v. James Madison, Secretary of State of the United States, 5 US 137 (1803).
[2]Normawati Binti Hashim, *Constitutional Review of Administrative Actions: Development in United Kingdom, India, Malaysia, South Africa and Hong Kong*, 2 International Journal of Sosiological Jurisprudence 134, 134-140 (2019).
[3]*Id.*
[4]Aditi Mallavarapu, *Judicial Review of Administrative Discretion in Awarding Government Contracts: The Indian Perspective*, 5 Journal of Global Research & Analysis 48, 48-54 (2016).
[5]*Id.*
[6]G. L. Peiris, *Wednesbury Unreasonableness: The Expanding Canvas*, 46 The Cambridge Law Journal 53, 53-82 (1987).

ISSN: 2582-7677

result".[7] Primary review or proportionality-based review thereafter slowly but steadily made its way into common law systems due to its inherent benefits as well as the establishment of the European Court and growth of European jurisprudence which led to the spread of civil law doctrines and principles across the globe.[8]

India, being a former British colony, follows the common law legal system that had been established in the country by the British government. English precedents are also often referred to by the Judiciary while giving judgements. [9] The case of administrative law in India is also somewhat similar. Though Articles 226, 32 and 13 of the Indian Constitution confer a considerable amount of power on the Judiciary to intervene in administrative decisions, Indian courts over of the years have adhered to the principle of Wednesbury reasonableness as is followed in Britain.[10] Despite this, due to widespread popularity of the doctrine and other such reasons, Indian courts were finally forced to accept the proportionality doctrine to be a part of Indian law in the case of *Omkumar v. Union of India*[11] two decades ago. This paper will hence analyse and interpret the proportionality doctrine in the Indian context.

PRINCIPLE OF WEDNESBURY UNREASONABLENESS AND DOCTRINE OF PROPORTIONALITY: MEANING AND CONCEPT

Lord Diplock, in the case of *Council of Civil Service Unions v. Minister for the Civil Services*[12], devised a tripartite classification for external structure of judicial review in terms of illegality, irrationality and procedural impropriety. This classification remains important even today despite development of the doctrine of legitimate expectation, changes in the concept of jurisdiction, decline in prerogative powers and other such changes and developments in judicial review.[13] It can, however, be said that irrationality has much more relevance in the present day than illegality and procedural impropriety.

[7] *Id.*
[8] *Supra* note 4.
[9] Ashwita Ambast, *Where's Waldo: Looking for the Doctrine of Proportionality in Indian Free Speech Jurisprudence*, 9 Vienna Journal on International Constitutional Law 344, 344-370 (2015).
[10] *Id.*
[11] Omkumar v. Union of India, AIR 2000 SC 3689.
[12] Council of Civil Service Unions. v. Minister for the Civil Services, (1984) 3 All ER 935.
[13] Ajoy P.B., *Administrative Action and the Doctrine of Proportionality in India*, 1 IOSR Journal of Humanities and Social Science 16, 16-23 (2012).

ISSN: 2582-7677

Principle of Wednesbury Unreasonableness

Primarily, the concept of irrationality was associated with Webnesbury unreasonableness, a principle that originated in the case of *Associated Picture House v. Wednesbury Corporation*[14]. The principle basically connotes that the discretion that has been conferred on the administration should be exercised properly and reasonably in accordance to the law.[15] Pursuant to this, matters relevant to the subject at hand should be included and matters irrelevant to the subject at hand should be excluded from consideration while taking administrative decisions.[16] Any action in contravention to this will be considered to be unreasonable and will attract the Wednesbury unreasonableness principle. Though no standard test for universal application can be made applicable in case of Wednesbury unreasonableness and though the principle is somewhat vague and not capable of objective evaluation, according to Lord Diplock:

"Wednesbury unreasonableness is a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it".[17]

Doctrine of Proportionality

The proportionality doctrine basically prescribes that decisions and orders of the administration should only be as restrictive as absolutely necessary for public purpose.[18] As opposed to the Webnesbury unreasonableness principle, the proportionality doctrine has objective criteria for analysis and review which can be applied on case-to-case basis through pre-determined tests. Furthermore, Lord Diplock, while classifying the external structure of judicial review, had also opined that the concept of proportionality would become one of the grounds for judicial review in the future in addition to illegality, irrationality and procedural impropriety.[19] Proportionality and Wednesbury unreasonableness are widely considered to be sub-divisions of the concept of irrationality. Though initially, there was a slight conflict between these two concepts, due to changes and developments that have occurred in the doctrine in recent years, proportionality

[14]Associated Picture House v. Wednesbury Corporation, (1947) 2 All ER 680 (CA).
[15]Shivaji Felix, *Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka: Comparative Studies*, 2006 Acta Juridica 95, 95-116 (2006).
[16]*Id.*
[17]*Id.*
[18]Vikram Aditya Narayan and Jahnavi Sindhu, *A Historical Argument for Proportionality under the Indian Constitution*, 2 Indian Law Review 51, 51-88 (2018).
[19]*Supra* note 13.

ISSN: 2582-7677

has now become synonymous with irrationality and it is now the only aspect of the concept of irrationality that is taken into consideration.[20] In this context Lord Diplock has said that:

"The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employees to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve public interest".[21]

MARGIN OF APPRECIATION DOCTRINE AND PROPORTIONALITY DOCTRINE

The proportionality doctrine ascertains whether legal standards are complied with by ensuring that administrative decisions are least intrusive of the rights of the citizens and that there is a balance between such intrusion and the exercise of rights.[22] The administration has been conferred adequate discretion, depending upon the subject matter and nature of rights involved, to select the best possible option from the various alternatives available. As long as their choice is within the permissible limit of discretion, their decision will not be questioned by the Judiciary.[23] However, even in this scenario, the Judiciary will retain the right to examine whether excessive or unnecessary violation of rights had taken place or not.

The European Court of Human Rights developed a doctrine known as margin of appreciation or margin of state direction so as to maintain a balance between individual rights and national interests and also resolve the conflicts that may arise in this regard.[24] The doctrine is mainly applied in international human rights law and helps the court in judging whether or not contracting parties should be allowed to impose restrictions on enjoyment of rights. Practical differences in implementing the articles of the European Convention on Human Rights are hence reconciled in this manner.[25]

After the enactment of the Human Rights Act, 1998 in the United Kingdom, there arose the need for a domestic equivalent to this doctrine which took into consideration the relationship of the Judiciary with other government organs such as the Legislature and proportionality thereof.[26] The proportionality doctrine can be said to be this domestic equivalent. However, as the European Court of Human Rights is an international tribunal that has to take into consideration cultural diversity of human right conceptions, substantial

[20]Ram Pandit, *Doctrine of Proportionality*, 1 Law Audience Journal 1, 1-6 (2018).
[21]*Supra* note 13.
[22]Namita Vashishtha, *Principle of Proportionality: Extent and Application in Industrial Disputes*, 1 Shimla Law Review 158, 158-169 (2018).
[23]*Id.*
[24]Prashant Gupta, *Doctrine of Judicial Review: A Comparative Analysis Between India, U.K. and U.S.A*, 1 International Journal of Legal Developments and Allied Issues 49, 49-73 (2019).
[25]*Id.*
[26]*Id.*

ISSN: 2582-7677

differences are there between the doctrines.[27] The doctrine is hence also referred to "margin of discretion" or "discretionary area of judgment".

The margin of appreciation comprises of two parts: judicial deference and judicial restraint. Judicial deference places reliance on the fact that the Judiciary may not always have the requisite skills or expertise determine the proportionality of an administrative action. In such cases, they will accept the discretion that has been exercised.[28] Judicial restraint, on the other hand, takes into consideration the legality or legal aspect of the decision. This connotes that if the decision that has been taken by the administration is proportionate, the Judiciary will not interfere even though other proportionate decisions are also available.[29]

MODELS OF PROPORTIONALITY DOCTRINE

British Model of Proportionality

The British model of proportionality was propounded by Lord Stynn in the case of *Regina v. Secretary of State for the Home Department, Ex Parte Daly*[30]. The concept, however, first originated in the case of *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing and Ors.*[31] wherein Lord Clyde devised a three-stage test for the application of the doctrine as follows:

- The administrative intent behind enacting the legislation is sufficient to justify the infringement of the fundamental rights of the citizens.
- There is a reasonable nexus between the administrative intent and the measures that have been adopted so as to fulfil the same.
- The means that have been utilised so as to limit enjoyment of rights do not amount to more than what is required to fulfil the administrative intent.[32]

The model places more emphasis on the attainment of the objective of the legislation using the most effective and efficient, or alternatively, least intrusive means. The model thus provides for assessment of the correctness of administrative orders and decisions on the basis of the factor of necessity. The model stems from the belief that the primary function of the Judiciary is to protect citizens from the Legislature and its

[27] *Id.*
[28] Swatantra Singh Rawat, Proportionality and Judicial Review of Administrative Discretion in India, THE EVOLVING CONCEPT OF THE DOCTRINE OF PROPORTIONALITY IN ADMINISTRATIVE PROCESS (Oct. 19, 2020, 6:45 PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/49259/1/swatantra%20thesis%20%20%20may%202015.pdf.
[29] *Id.*
[30] Regina v. Secretary of State for the Home Department, Ex Parte Daly, (2001) 3 All ER 433 (HL).
[31] De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing and Ors., (1999) 1 A.C. 69.
[32] *Supra* note 13.

ISSN: 2582-7677

actions. The model hence only permits those legislations with crucial or vital public objectives to restrict the fundamental rights of the citizens. At the same time, the court also has to give due regard to administrative discretion and not intrude or interfere into the same unnecessarily. This is mostly achieved through judicial deference and judicial restraint.[33]

European Model of Proportionality

The proportionality doctrine emerged in Prussia in the nineteenth century. The four-stage test prescribed for the application of the doctrine was thereafter adopted by the European Court of Justice in the case of *R v. Minister of Agriculture, Fisheries and Food, Ex Parte Federation Europeenne de la Sante Animale*[34]. The stages of the test are as follows:

- Legitimacy - The first and foremost stage focuses on whether the objective or aim of the legislation in question is legitimate.
- Suitability - The second stage focuses on whether the legislation has the competence or ability to attain this objective or aim.
- Necessity - The third stage focuses on whether the legislation is the least intrusive means to attain the requite objective or aim.
- Fair balance or proportionality - The fourth and final stage focuses on whether the legislation ultimately confers some sort of benefit, taking into consideration factors such as restriction of fundamental rights of citizens, attainment of objective or aim of the legislation, etc.[35]

The model tries to bring about a balance between the limitation that has been imposed on the enjoyment of rights and the objective or aim that is sought to be achieved through the imposition of such restrictions. The model hence maintains a neutral ground and merely concentrates on optimising the scenario. The model also confers due importance on the discretionary power of the Legislature through application of concepts such as judicial deference and judicial restraint.[36] Judicial deference may be applied in any of the four stages of the model depending on the subject matter, nature of rights, etc. The concept is based on the belief that the decision of the Judiciary will have a higher probability of being correct when it is referred to some other competent authority such as the Executive. In such a scenario, the court could either agree with the decision of

[33]Lee Marsons, *Bifurcation, Unification, and Calibration: A Comparison of Indian and English Approaches to Proportionality*, 1 Indian Law Review 26, 26-50 (2018).
[34]R. v. Minister of Agriculture, Fisheries and Food, Ex Parte Federation Europeenne de la Sante Animale, 6 (1991) 1 C.M.L.R. 507.
[35]*Supra* note 13.
[36]*Supra* note 34.

ISSN: 2582-7677

the authority or ask the authority to offer proof in this respect. Deference can hence be said to be the degree to which the Judiciary asks the authority to offer proof in support of their decision.[37]

The degree of judicial restraint exercised by the court may be large, moderate or small, depending on the subject matter and nature of rights. Judicial restraint primarily becomes applicable in the fourth and final stage of the model. If the degree of restraint is large, the Judiciary will scarcely ever question the action of the administration; if the degree of restraint is moderate, the Judiciary will verify whether the benefit conferred by the legislation does in fact overweigh the violation of fundamental rights of the citizens and if the degree of restraint is small, the Judiciary will try to create a balance between restriction on the enjoyment of rights and attainment of the objective of the legislation and ensure that the decision of the administration is in fact the least intrusive means for the same.[38]

JUDICIAL INTERPRETATION OF DOCTRINE OF PROPOTTIONALITY IN INDIA

In the case of *Chintaman v. State of Madhya Pradesh*[39], the court stated that it always attempts to balance the fundamental rights of the citizens and the restriction that have been imposed while checking the constitutional validity of a legislation or an administrative decision.

The proportionality doctrine has been applied by the Supreme Court in various other cases as well:

In the case of *Hind Construction and Engineering Company Limited. v. Workmen*[40], few workmen were dismissed from service on the ground that they had not turned up for duty on a particular day. The court, in this case, opined that no reasonable employer would have imposed such an extreme punishment in this manner.

In the case of *Bhagat Ram v. State of Himachal Pradesh*[41], the court opined that if the punishment imposed is not proportionate to the gravity of the offence committed, then Article 14 of the Constitution of India would be infringed.

In the case of *Ranjit Thakur v. Union of India and Ors.*[42], the petitioner was sentenced to one-year rigorous imprisonment for an offence and later on dismissed from service when he declined to eat food while serving

[37] *Supra* note 28.
[38] *Id.*
[39] Chintaman v. State of Madhya Pradesh, AIR 1951 SC 118.
[40] Hind Construction and Engineering Company Limited v. Workmen, AIR 1965 SC 917.
[41] Bhagat Ram v. State of Himachal Pradesh, (1983) 2 SCC 422.
[42] Ranjit Thakur v. Union of India and Ors., (1987) 4 SCC 611.

ISSN: 2582-7677

the sentence. The court, in this case, opined that the penalty imposed had been disproportionate to the gravity of the misconduct.

The same opinion was thereafter reiterated by the court in various other cases as well such as *Ex-Naik Sardar Singh v. Union of India and Ors.*[43] and *Federation of Indian Chambers of Commerce and Industry v. Workman, Shri R. K. Mittal*[44].

Though the court does not usually interfere or intervene in administrative decisions pertaining to quantum of punishment, it has done so in few cases such as *Dev Singh v. Punjab Tourism Development Corporation*[45].

In the cases of *Mani Shankar v. Union of India*[46] and *Coal India Limited v. Mukul Kumar Choudhari*[47], the court opined that administrative action must not be excessive.

In the case of *Union of India v. G. Ganayutham*[48], the court opined that as long as the fundamental rights of the citizens are not involved, the principle of Wednesbury unreasonableness would be applied.

In the case of *Omkumar v. Union of India*[49], the court observed that the proportionality doctrine would be applied to while judicially reviewing administrative actions that infringed Article 19 and Article 21 of the Constitution of India. It further opined that when an administrative decision was challenged as being arbitrary under Article 14, a primary review would be carried out using the proportionality doctrine.

The proportionality doctrine has also been recognised in various other cases such as *State of Uttar Pradesh v. Sheo Shankar Lal Shrivastava*[50] and *Indian Airlines Limited v. Praba D. Kanan*[51].

Thereafter, in the case of *Sadhuram v. Pulin Behari Sarkar*[52], the court opined that social justice must prevail over the technical rules in certain situations.

In the case of *Union of India v. S. B. Vohra*[53], the court opined that it would zealously guard human rights, fundamental rights and citizens' right of life and liberty in exercise of its power of judicial review.

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[43]Ex-Naik Sardar Singh v. Union of India and Ors., (1991) 3 SCC 213.
[44]Federation of Indian Chambers of Commerce and Industry v. Workman, Shri R. K. Mittal, (1972) 1 SC 40.
[45]Dev Singh v. Punjab Tourism Development Corporation, AIR 2003 SC 3712.
[46]Mani Shankar v. Union of India, (2008) 3 SCC 484.
[47]Coal India Limited v. Mukul Kumar Choudhari, (2009) 15 SCC 620.
[48]Union of India v. G. Ganayutham, (1997) 7 SCC 463.
[49]*Supra* note 11.
[50]State of Uttar Pradesh v. Sheo Shankar Lal Shrivastava, (2006) 3 SCC 276.
[51]Indian Airlines Limited v. Praba D. Kanan, AIR 2007 SC 548.
[52]Sadhuram v. Pulin Behari Sarkar, AIR 1984 SC 1471.
[53]Union of India v. S. B. Vohra, 2004 (2) SCC 150.

ISSN: 2582-7677

DOCTRINE OF PROPORTIONALITY IN THE INDIAN CONTEXT

The applicability of the proportionality doctrine in India was first discussed in the case of *Union of India v. G. Ganayutham*[54]. In this case, the Apex Court opined that the principle of Wednesbury unreasonableness would be followed in the country provided that the fundamental rights of the citizens had not been infringed. The court, however, did not make any comment with regard to the use of the proportionality doctrine in cases where the fundamental right of a citizen had been violated.

Thereafter, in the case of *Omkumar v. Union of India*[55], the Supreme Court recognised the proportionality doctrine in the Indian context and also realised that the doctrine had been applied in deciding the legitimacy of legislations, that infringed the fundamental rights guaranteed under Articles 14, 19 and 21 of the Indian Constitution, since the 1950s onwards though the doctrine had never been explicitly referred to by the court. The Supreme Court further held that in case of discriminatory or arbitrary administrative decisions violative of Article 14, primary review would be carried out on the basis of the proportionality doctrine whereas secondary review would be carried out on the basis of the Wednesbury unreasonableness principle. Additionally, the court opined that challenges that arose pertaining to service law would be subjected to secondary review and principle of Wednesbury unreasonableness as a result thereof because arbitrariness or discrimination under Article 14 would not be applicable in such a scenario.

Though the Apex Court in *Indian Airlines Limited. v. Praba D. Kanan*[56], *State of Uttar Pradesh v. Sheo Shankar Lal Srivastava*[57] and other subsequent cases opined that the ground for judicial review in India had moved from Wednesbury unreasonableness to proportionality, there has not been much improvement in the scope of review in the country because administrative orders sought to be reviewed predominantly pertain to arbitrariness or discrimination which does not come under the purview of the proportionality doctrine.

Though the Indian Judiciary did not provide any justification in the *Omkumar case*[58] for the principle of Wednesbury unreasonableness being associated with claims under arbitrariness or discrimination, there are two possible reasons for the same. The first being that Indian courts merely followed the example set by English courts, where proportionality and Wednesbury unreasonableness were made applicable in cases of

[54] *Supra* note 48.
[55] *Supra* note 11.
[56] Indian Airlines Limited. v. Praba D. Kanan AIR 2007 SC 548.
[57] State of Uttar Pradesh v. Sheo Shankar Lal Srivastava (2006) 3 SCC 276.
[58] *Supra* note 11.

ISSN: 2582-7677

infringement of convention rights and non-convention rights respectively.[59] Alternatively, the Indian Judiciary may have been apprehensive of the likely docket explosion that would be the consequence of enhancing the scope of judicial review in the country.[60]

However, multiple arguments may be raised in response to these justifications. Though there is a probability of an upward trend in the number of judicial review cases that would have to dealt with by the court if such a change is made, there is also a chance that the Legislature would become more responsible for their actions due to the possibility of them being held accountable having increased.[61] Furthermore, there is not much of a distinction nowadays in England between convention and non-convention rights where the proportionality doctrine is concerned.

Also, the Judiciary's supposition that administrative decisions which are discriminatory and arbitrary in nature will not infringe the fundamental rights of the citizens is not factually correct.[62] For example, if a public servant is given two weeks suspension for taking part in a religious gathering, then such suspension would be an infringement of his or her right to religion as well as right to assemble, both of which are fundamental rights. On the same lines, an administrative decision wherein a senior employee who possesses the requisite experience and qualification for a promotion is passed over in favour of a junior employee with similar experience and qualifications will be arbitrary or discriminatory in nature.

Furthermore, administrative orders would be sought to be reviewed in the court of law only if rights of citizens have been infringed and reaching a conclusion as to whether such right is fundamental or not is a time-consuming and tedious task on part of the Judiciary especially because of the wide ambit of Article 21 and other such fundamental rights.[63] The fact that there is a high probability that more than one right of the citizens have been violated further adds to the problem. The valuable time of the court could otherwise have been utilised in passing a balanced and well-thought judgment taking into consideration concepts such as judicial deference and judicial restraint.

The next dilemma faced by the Indian Judiciary is whether or not administrative decisions should continue to be reviewed on the basis of Wednesbury unreasonableness. The Legislature would not be subjected to the

[59]Abhishek Mour and Adarsh Tripathi, *English Concept of Judicial Review and Its Application to India: An Analysis in Light of Current Trends*, 2 National Law University Delhi Student Law Journal 1, 1-11 (2013).
[60]*Id.*
[61]Abhinav Chandrachud, *Wednesbury Reformulated: Proportionality and the Supreme Court of India*, 13 Oxford University Commonwealth Law Journal 191, 191-208 (2013).
[62]Alka G. Chavan, *Doctrine of Proportionality and Administrative Action with Reference to Human Rights in India*, 4 VSRD International Journal of Justice and Legal Studies 9, 9-12 (2018).
[63]*Id.*

ISSN: 2582-7677

strict judicial review process necessary if the term arbitrariness is understood to connote unreasonableness as opined by the Supreme Court in the case of *Shrillekha Vidyarthi v. State of Uttar Pradesh*[64]. Substituting the proportionality doctrine for the principle of Wednesbury unreasonableness in such cases is hence the need of the hour.

Another question that needs to be answered in this respect is with regard to the model of proportionality to followed in the country. Though the Apex Court in various judgments has leaned towards the European model as opposed to the British model, no concrete decision has been made till date. The court, however, did opine that though the administrative authority had been conferred considerable amount of discretion, the Judiciary had also been given the power to decide whether or not such discretion was excessive or unnecessary.[65] Indian courts also have the power to pass judgement on whether the rights of the citizens had been violated or not, thereby placing reliance on the fair balance stage of the European model.[66] A possible reason for the same is that though the status of the proportionality doctrine in the Indian context has been hinted at in various cases, the doctrine in itself has hardly ever been applied.

Apart from the *Omkumar case*[67], the proportionality doctrine has been utilised in the true sense only in the case of *Sandeep Subhash Parate v. State of Maharashtra*[68]. In this case, a student was granted admission for Bachelor of Engineering in Government Engineering College, Pune on the basis of his representation, by means of a caste certificate, that he belonged to a Scheduled Tribe. This certificate was, however, subsequently invalidated by the Caste Scrutiny Committee on the ground that the Halba Community, of which he was a member, did not comprise a Scheduled Tribe. Though he completed his studies and also appeared for the necessary examination on the basis of the interim order that had been passed in his favour by the High Court, the Pune University refused to acknowledge his degree.

The High Court thereinafter held the university to be in the right. The Supreme Court, however, on the basis of the proportionality doctrine, instructed the university to grant the student an engineering degree on payment of one lakh rupees compensation in lieu of the education that had been conferred on him by them. Despite this, the decision of the Apex Court had been made in accordance to Article 142 of the Indian Constitution and it hence remains unclear even today how exactly the proportionality doctrine had been applied in the case.

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[64]Shrillekha Vidyarthi v. State of Uttar Pradesh, AIR 1991 SC 537.
[65]Usha Antharvedi, Doctrine of Proportionality, JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS AND PRINCIPLES (Oct. 19, 2020, 5:30 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104955.
[66]*Id.*
[67]*Supra* note 11.
[68]Sandeep Subhash Parate v. State of Maharashtra, (2006) 1 SCC 501.

ISSN: 2582-7677

CONCLUSION AND SUGGESTIONS

The Judiciary has the duty to respect the decisions of the Legislature. In this respect, it can be said that the proportionality doctrine does not seek to undermine the authority of the administration but rather to ensure that administrative actions are in consonance with the law so as to protect the rights of the citizens of the country. From the above analysis, it can be observed that usage of the Webnesbury unreasonableness principle is on a decline, in the present day, in the international context especially in countries such as the United Kingdom. The principle is now being substituted by the proportionality doctrine which ensures a proper balance between the factors that influence administrative decisions. The doctrine is also considered to be a more intense form of judicial review.

The proportionality doctrine has two models: the European model and the British model, out of which the European model can be said to be more effective and efficient. Though it has not yet been made clear which model India follows, Indian's preference for the European model has become apparent through the analysis of relevant cases laws. However, it is disheartening to note that even though the proportionality doctrine become part of Indian law nearly 20 years ago, there have not been any substantial or significant developments or changes in the doctrine in the Indian context till date. There are hardly any cases in India wherein the doctrine has been directly applied. In addition to this, the doctrine has been allowed only limited application in India though the Judiciary has been given considerable power in this respect. Due to the narrow approach followed, the doctrine has not been able to reach its full potential in the country.

Applying the proportionality doctrine to review administrative actions so as to safeguard human rights to the maximum level is hence the need of the hour. This is also a necessity for a better and brighter future in India. Additionally, as human rights and associated jurisprudence is fast gaining importance, the necessity of adopting the doctrine cannot be ignored. The following are some points that may be taken into consideration in this regard:

- The proportionality doctrine should be established in a proper manner and be applied by the Judiciary, as and when required, to curb administrative actions in cases wherein they outreach reasonability and instead become arbitrary or unreasonable.
- Proportionality-based review incorporating concepts such as judicial deference and judicial restraint must be adopted in India taking into consideration factors such as subject matter and nature of rights.

ISSN: 2582-7677

- Supportive legal and political culture and generous approach towards interpretation of rights is required for the effective and efficient application of the proportionality doctrine in India. In addition to this, broader conception of law and democracy and shift in judicial attitude in this respect is also necessary.
- Progressive change in administrative culture is also suggested. This implies that the administrative authority must keep an open mind and also be prepared to consider if exceptions to general policy should be allowed in certain circumstances.
- It is also recommended that the Judiciary start invoking the proportionality doctrine in all cases involving rights of citizens irrespective of whether these rights are fundamental or ordinary in nature. Parameters may also be developed in this respect so as to cover every possible infringement of public and private right that is a result of administrative actions.

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Administrative Action and the Doctrine of Proportionality in India

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Abstract: *The scope of judicial review of administrative action has been the central theme of discussion in administrative law. Initially common law countries including India adopted the doctrine of wednesbury reasonableness to review administrative action. But subsequently under influence of civil law systems and Strasburg jurisprudence the doctrine of proportionality is being gradually accepted as the standard of judicial review by the common law countries. There are two models of proportionality namely the British Model or the state limiting conception of proportionality and the European model or the optimizing concept of proportionality. Of the two the European model is more objective and hence preferred. The Indian Supreme Court accepted the doctrine of proportionality in the year 2000. Yet even today the Indian legal system has not come to terms with the doctrine. There is hardly any case where the doctrine has been practically applied. The need of the hour is to increasingly apply the doctrine of proportionality to review administrative action in India.*
Key words*: Discretionary area of judgment, Doctrine of proportionality, Judicial deference, Judicial restraint. Margin of appreciation, Margin of discretion, Wednesbury reasonableness,*

I. Introduction

Judicial review of legislative and executive action has been one of the most important developments in the field of public law in the last century. Though the concept of judicial review was developed way back in 1803 in the famous case of *Marbury v. Madison*[1], it found wide application only in the later periods of the 20th Century, when in the aftermath of the World War II, democracy came to be the governing political principle in most parts of the world. Since then the scope and ambit of judicial review has been one of the central themes of discussion in the branch of administrative law.

Among the two - executive and legislative actions - it is the judicial review of executive action (administrative action) that has assimilated much content enrichment, particularly in the last two decades. The growth of modern welfare state coupled with the technological advances has resulted in the legislature not only leaving wide areas of discretion to the administrative authority but also even delegating many of its powers and functions. This has resulted in the modern day bureaucrat becoming extremely powerful. This often leads to misuse of discretion vested in him there by requiring frequent judicial intervention. However this intervention should not result in the judiciary encroaching into areas reserved for the executive. Consequently, the scope and ambit of judicial review must be limited to the extent just necessary to prevent the abuse of the discretion conferred on the executive.

To achieve this limiting function of judicial review, common law systems and civil law systems reacted differently and developed different processes. In common law jurisdictions the concept of secondary review was developed to achieve this limiting function of judicial review. Under the concept of secondary review the courts would strike down administrative orders only if it suffers the vice of wednesbury unreasonableness[2] which means that the order must be so absurd that no sensible person could ever dream that it lay within the powers of the administrative authority. The civil law jurisdictions on the other hand developed the concept of proportionality based review (primary review) which is a much more intensive form of judicial review. The principle of proportionality ordains that the administrative measure must not be more drastic than is necessary for attaining the desired result[3]. Though the common law countries prefer secondary review, it could not ignore proportionality based review for long. This was not only because of the advantages associated with proportionality based review but also because of the establishment of an European court and the consequential growth of a separate pan European jurisprudence primarily based on civil law concepts.

India, a former colonial state of British Empire, inherited from British India, the common law system. After Independence, India chose to retain the common law system without much change. Indian courts have

[1] 5 US 137 (1803)
[2] See *Associated Picture House* v. *Wednesbury Corporation* (1947) 2 All ER 74 (CA).
[3] Justice Anand Byrareddy, *Proportionality vis-à-vis irrationality in administrative law* (2008) 7 SCC J-29, p.32

always found it desirable to follow English precedents while deciding domestic cases. This has virtually been the case in the development of administrative law in India. Inspite of Article 226/Article 32 read with Article 13 of the Constitution of India giving the constitutional courts much wider scope to interfere with executive orders, the Indian courts have chosen to follow the English concept of wednesbury reasonableness. However, with the doctrine of proportionality fast gaining currency across the world including common law countries, the Indian legal system could not remain closed for long and in the case of *Omkumar* v *Union of India*[4] the Indian Supreme Court accepted the doctrine of proportionality as a part of Indian law.

This article seeks to analyze the theoretical aspects of the doctrine of proportionality and the scope of its applicability to the Indian legal system.

II. Judicial Review: Wednesbury Unreasonableness Versus Proportionality.

The broad contours of the external structure of judicial review have been laid down by Lord Diplock in the case of *Council of Civil Service Unions.* v. *Minister for the Civil Services*[5] as: 'illegality', 'irrationality' and 'procedural impropriety'[6]. This tripartite classification demarcates judicial review's external structure. However it is not exhaustive, nor is the grounds it classifies mutually exclusive.[7] Nevertheless all major authors of books on judicial review use this classification method[8]. Many developments have occurred within the concept of judicial review including the decline of prerogative powers and immunity, rise and fall of the concept of jurisdiction, and the formalization and expansion of legitimate expectation. However all these changes can be accommodated and neatly housed within Lord Diplock's tripartite classification.

Lord Diplock has himself very neatly defined all the three structures within his classification – namely illegality, irrationality and procedural impropriety[9] but it is the concept of irrationality that is of importance in this work.

Irrationality and Wednesbury Unreasonableness

While defining irrationality Lord Diplock equated it with 'wednesbury unreasonableness'[10]. The concept of' 'wednesbury unreasonableness' was developed in the case of *Associated Picture House* v. *Wednesbury Corporation*[11] and hence the name 'wednesbury unreasonableness'. It simply means that administrative discretion should be exercised reasonably. Accordingly, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the subject he has to consider. If he does not obey those rules he can be said to be acting unreasonably[12]. Lord Diplock beautifully sums up 'wednesbury unreasonableness' as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it[13]. Quite obviously the concept of wednesbury unreasonableness is extremely vague and is not capable of objective evaluation. Hence wednesbury unreasonableness cannot be defined in the form of standard tests for universal application.

Proportionality

The classical definition of proportionality has been given by none other than Lord Diplock when his Lordship rather ponderously stated "you must not use a steam hammer to crack a nut if a nut cracker would do"[14] Thus proportionality broadly requires that government action must be no more intrusive than is necessary to meet an important public purpose[15]. However the greatest advantage of proportionality as a tool of judicial review is its ability to provide objective criteria for analysis. It is possible to apply this doctrine to the facts of a case through the use of various tests.

Lord Diplock even while giving the tripartite classification admits that proportionality in the future would be an additional ground of review[16]. However, today most authors accept proportionality as an additional

[4] *Infra* n. 22
[5] *Infra* n. 9
[6] *Id*., p. 950
[7] *Wheeler* v. *Leiscester City Council* (1985) A.C. 1054, per Lord Roskill, p. 1078
[8] For e.g., See John Adler, *General Principles of Constitutional and Administrative law,* (4th ed., 2002) p. 368
[9] *Council of Civil Service Unions*. v. *Minister for the Civil Services* (1984) 3 All ER 935, pp. 950, 951
[10] *Ibid.*, p. 951
[11] (1947) 2 All ER 680 (CA)
[12] *Ibid.*, pp.682, 683
[13] See *Supra* n. 9 at p. 951
[14] *R* v. *Goldsmith* (1983) 1 WLR 151, p. 155
[15] See *Supra* n. 8 at p. 385
[16] See *Supra* n. 9 at p 950

head of judicial review within the concept of irrationality[17]. Thus proportionality and wednesbury unreasonableness is seen as the two aspects of irrationality. Initially proportionality was only a competitor with wednesbury unreasonableness but because of the high degree of objectivity associated with proportionality and the vast improvements that the concept has undergone in the last decade and a half, it is seeking to totally replace Wednesbury unreasonableness as the only sub-head of review under the concept of irrationality.

Margin of Appreciation

The proponents of the doctrine of proportionality always maintained the view that judicial review using proportionality is different from an appeal. An appeal allows the appellate body to decide the whole matter again[18]. Hence it involves a thorough reconsideration of the whole decision[19] whereas judicial review is concerned only with ensuring that legal standards are complied with[20]. Proportionality form of judicial review achieves this by ascertaining whether the decision maker has adopted the least restrictive choice of measures and has maintained a proper balance between the possible adverse effects of the decision on the rights, liberties and interests of the persons affected by the decision. This does not involve a full blown merits review. Further the decision maker is given an area of discretion or range of choices. The width of the area of discretion depends upon the subject matter[21] and type/nature of rights involved. If the decision maker functions within the area of discretion and makes a choice among the various alternatives available, the courts would not normally question the wisdom of the decision maker. However as M. Jaganatha Rao J. rightly points out, the court may still look into whether the choice made, infringes the rights excessively or not[22].

In the language of Strasburg jurisprudence (European Court) this range of choice allotted to the decision maker is called the Margin of Appreciation. It refers to the power of the contracting states[23] to enjoy a certain degree of latitude in balancing individual rights and national interests as well as resolving the conflict that emerge as a result of diverse moral convictions.

When the Human Rights Act, 1998 came to be effective in United Kingdom there emerged a consensus that there must be a domestic equivalent of the margin of appreciation. However the domestic 'margin of appreciation' cannot be identical to the European one, primarily because European court is an international tribunal supervising independent legal systems with legislative, executive and judicial branches. By contrast, the domestic equivalent addresses the relationship of the judiciary to other branches of government, requiring regard to be had at some point, to their assessment of proportionality. An International Court on the other hand has to take into account the cultural diversity of human right conceptions among nations in a way inappropriate for the courts of a single political community[24]. Hence the English Judges and academic writers avoid using the term margin of appreciation and instead prefer terms like "margin of discretion' or "discretionary area of judgment".

According to Julian Rivers, this margin of discretion has two aspects[25] namely 'Judicial Deference' and 'Judicial Restraint' both of which together determine the width of the margin of discretion. The concept of judicial deference is grounded on concept of institutional competence of non judicial bodies to determine the proportionality of the limitation imposed on rights of the citizens. Quite often the courts would not have the expertise to determine whether an act is proportional or not and in such situations the court will accept the discretion of the decision maker. On the other hand judicial restraint relates to the legality aspect of judicial review. Suppose that in a particular case there are two or more proportionate decisions available and the decision maker bona fide make one choice, then in such situation the court will not interfere with the decision not because of deterrence, but because the court exercises restraint. There is no intrinsic reason why a judge could not make a choice as well but such a choice would be illegitimate. Their role is to secure legality not correctness[26].

III. TWO MODELS OF PROPORTIONALITY

Over the last few decades, two prominent conceptions or models of proportionality has emerged. The two models can be tentatively named as

[17] *Id.,* p.368
[18] *Id.,* p. 366
[19] *Id*., p. 367
[20] *Ibid*
[21] *R(Mahmood)* v. *Secretary of State for Home Department* (2001) 1 WLR 840, per Laws L.J., p. 847
[22] See *Omkumar* v. *Union of India* AIR 2000 SC 3689, p. 3689
[23] Signatories of the European Convention on Human Rights, 1950 (i.e., Members of Council of Europe who signed the Convention)
[24] Julian Rivers, *Proportionality and Variable Intensity of Review*, (2006) 65 (1) C.L.J.174, p. 175
[25] *Id.,* pp. 191-194
[26] *Id.*, p. 193

1) The British model or the state-limiting conception of proportionality[27] and
2) The European model or the optimising conception of proportionality[28].

Both models suggest different test that the court must undertake to determine whether a decision set is proportionate or not.

British Model

The British model as expounded by Lord Stynn in *R* v. *Secretary of State for the Home Department exparte Daly*[29] finds its origin in the judgment of the Privy Council in *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing*[30]. In that case, Lord Clyde while deciding an appeal from Antigua and Barbuda, used South African and Canadian jurisprudence to formulate a three stage test for proportionality review.

A decision is proportionate if :

I. The legislative (or executive) objective is sufficiently important to justify limiting a fundamental right.
II. The measures designed to meet the legislative (or executive) objective are rationally connected to it.
III. The means used to impair the right or freedoms are no more than necessary to accomplish the objective[31].

An analysis of the above three stage test would show that the main focus of the court would be to ensure that the decision making body takes the correct decision as regarding the least intrusive means. Hence in this model, proportionality is not about optimising costs and benefits, but about the pursuit of pre determined goals by the most efficient (or least intrusive) means. It does not raise question about the intensity of review, but only imposes a judicially generated criticism of the correctness in respect of necessity or efficiency. Thus this test treats necessity as the final stage of proportionality review and suppresses the balancing element[32].

Such a conception of proportionality, called the state limiting conception of proportionality[33], arises from the common law belief that courts exists to protect individuals and groups from other branches of the government namely legislature and executive. Courts therefore maintain a framework of legal rights which sets limits to the freedom of action of legislative and executive bodies. Within such a framework, only sufficiently important public objectives are permitted to limit the enjoyment of rights (i.e., first of the tests described above). This implies that there are legitimate public objectives that are not important enough to warrant limiting the enjoyment of rights. It is the responsibility of the court to act as a gate keeper here. However if a public objective is sufficiently important, any state action rationally connected to the objective and necessary to fulfill it is justified (i.e., second and third test described above). Thus carrying out important public objectives is the duty of the legislature and executive. All that the court does is to maintain an efficiency based oversight to ensure that there are no unnecessary costs to rights, that sledge hammers are not used to crack nuts or rather that sledge hammers are only used when nut crackers prove impotent[34]. Further at the necessary test stage the court will have to provide latitude to accommodate the margin of discretion of the decision maker. Thus judicial deference and judicial restraint are accommodated at the necessary stage.

European Model

The very concept of proportionality originated in nineteenth century Prussia[35]. This nineteenth century Prussian concept prescribed various tests. Those were accepted by the European Court of Justice in *R* v. *Minister of Agriculture, Fisheries and Food, ex parte Federation Europeenne de la Sante Animale (FEDESA)*[36]. Based on this case Julian Rivers outlines a four stage test as:

1. Legitimacy: Does the act (decision, rule policy etc) under review pursue a legitimate general aim in the context of the right in question?
2. Suitability: Is the act capable of achieving that aim?
3. Necessity: Is the act the least intrusive means of achieving the desired level of realisation of the aim?
4. Fair balance or proportionality in narrow sense: Does that act represent a net gain, when the reduction in enjoyment of rights is weighted against the level of realisation of the aim?[37]

[27] *Id.,* p 176
[28] *Ibid*
[29] (2001) 3 All ER 433 (HL)
[30] (1999) 1 A.C. 69
[31] See *Id.,* p 80
[32] See *Supra* n. 24 at p. 179
[33] *Id*., p. 176
[34] *Id*., p. 180
[35] See *Supra* n. 24 at p. 3696
[36] (1991) 1 C.M.L.R. 507
[37] *Supra* n. 24 at p.181

From the analysis of the above formulation it is apparently clear that the said formulation is institutionally neutral. It is not defined to help courts determine its relationship with other organs of the government. It more importantly focuses on optimising or balancing the rights (which is seen as protected interest and which is being limited by the proposed action) with the public interest or aim (which the proposed measure seeks to achieve). Hence it is called as the optimisation conception of proportionality[38].Even under this model the court has to allow latitude to accommodate the margin of discretion of the decision maker.

i) Judicial restraint: This latitude is taken into consideration only at the final stage of proportionality review namely the fair balance stage. This range of discretion is variable depending upon the subject matter and the nature of the affected rights. A large degree of restraint means that the court will be very unwilling to question the view of the decision maker that what is necessary to achieve a certain level of public interest is also balanced. A moderate degree of restraint means that the court will want to check that the costs and gains are indeed roughly commensurable. A small degree of restraint will reduce the set of necessary decisions to a minimum; the court will need to be convinced itself that the decision, rule or policy in question, even though necessary, really is the best way of optimising the relevant rights and interests[39].

ii) Judicial deference: This aspect of the margin of discretion is much more complex because it is a question of relative institutional competence and the court's acceptance that its judgement is more likely to be correct if it relies on some other authority's assessment of some relevant matter. Hence this latitude can be accommodated at any or all of the stages of proportionality review depending upon the subject matter, nature of the affected right and the confidence that the court reprises on the competence of the decision making body involved. The court could simply accept the assertion of the public authority; or it could demand such assertions under oath or it could require the authority to reveal the factual basis for its judgments and so on. In short, the degree of deference means the extent to which the court will demand that the authority put procedural resources into answering the relevant questions reliably and expose that process to judicial scrutiny[40].

Julian Rivers after carrying out an extensive analysis of the two models came to the conclusion that it is the European model that must be given preference over the British model due to fact that the European model has a higher degree of objectivity[41].

IV. Indian Approach To The Doctrine Of Proportionality

The Indian Supreme Court consciously considered the application of the concept of proportionality for the first time in the case of *Union of India* v. *G. Ganayutham*[42]. In that case the Supreme Court after extensively reviewing the law relating to wednesbury unreasonableness and proportionality prevailing in England held that the 'wednesbury' unreasonableness will be the guiding principle in India, so long as fundamental rights are not involved. However the court refrained from deciding whether the doctrine of proportionality is to be applied with respect to those cases involving infringement of fundamental rights[43].

Subsequently came the historic decision of the Supreme Court in *Omkumar* v. *Union of India*[44]. It was in this case that the Supreme Court accepted the application of proportionality doctrine in India. However, strangely enough the Supreme Court in this case suddenly discovered that Indian courts had ever since 1950 regularly applied the doctrine of proportionality while dealing with the validity of legislative actions in relation to legislations infringing the fundamental freedom enumerated in Article 19 (1) of the Constitution of India. According to the Supreme Court the Indian courts had in the past in numerous occasions the opportunity to consider whether the restrictions were disproportionate to the situation and were not the least restrictive of the choices[45]. The same is the position with respect to legislations that impinge Article 14 (as discriminatory), and Article 21 of the Constitution of India[46]. With respect to the application of the doctrine of proportionality in administrative action in India, the Supreme Court after extensively reviewing the position in England came to a similar conclusion. The Supreme Court found that administrative action in India affecting fundamental freedoms (Article 19 and Article 21) have always been tested on the anvil of proportionality, even though it has not been expressly stated that the principle that is applied is the proportionality principle[47]. Thus the court categorically

[38] *Id.,* p.174
[39] *Id.,* p. 203
[40] *Ibid*
[41] *Supra* n. 24
[42] (1997) 7 SCC 463
[43] *Id.,* p.479
[44] AIR 2000 SC 3689
[45] *Id.,* p. 3697
[46] *Id.,* p.3698
[47] *Id.,* p.3702

held that the doctrine of proportionality is applicable to judicial review of administrative action that is violative of Article 19 and Article 21 of the Constitution of India. With respect to Article 14 of the Constitution of India, Supreme Court concluded that when an administrative action is challenged as discriminatory the courts would carry out a primary review using the doctrine of proportionality. However when an administrative action is questioned as arbitrary the principle of secondary review based on wednesbury principle applies[48]. The Supreme Court also held that punishment in service law is normally challenged as arbitrary under Article 14 of the Constitution, and hence only secondary review based on wednesbury principle would apply[49]. This according to the Supreme Court is because in such matters relating to punishments in service law, no issue of fundamental freedom or of discrimination under Article 14 applies[50].

However even after a decade since the decision in Omkumar's case, no further progress has been made. The law regarding proportionality in India remains at what has been stated in Omkumar's case. The only advancement could be the vague observation in a few subsequent judgments that the doctrine of unreasonableness is giving way to the doctrine of proportionality[51].

Thus, in India, under the current state of law, as declared by the Supreme Court, proportionality review with respect to administrative action has only limited scope. This is because, in India much of the administrative action is challenged before the courts primarily on the ground of arbitrariness and this can be challenged only on the ground of wednesbury unreasonableness. Thus in reality the decision in Omkumar's case has not significantly enhanced the scope of judicial review in India. No reason as such is given by the Supreme Court in Omkumar's case as to why doctrine of wednesbury unreasonableness alone should be applied to challenges under the head of arbitrariness. However there can be at least two reasons for this. First of all, the Supreme Court was simply accepting a similar classification in England by which proportionality review was applicable only when convention rights were involved and wednesbury principle alone was applicable when non convention rights were involved[52]. Secondly, just like Lord Lowry[53]the Supreme Court may have feared a docket explosion when the threshold of review is lowered.

The latter of these two reasons cannot and should never be the reason for not allowing a better and more intensive standard of review. Initially there may be a increase in the number of cases, but when it becomes clear to the decision makers that the judiciary is adopting a much more intense standard of review, they would themselves reassess their decision making process and bring their decisions in tune with the new standard of review. As for the former reason, the distinction between convention and non convention rights as regards application of proportionality is fast disappearing[54]. Further more, the Supreme Court's distinction based on arbitrariness is not conceptually strong. First of all, the assumption behind this classification is that an administrative order which is arbitrary would seldom be violative of fundamental rights or is discriminatory. This is patently erroneous in most cases. For e.g., suppose a government employee is dismissed from service under the service law for attending a religious congregation, then the order is not only arbitrary but also violative of at least two of his fundamental rights namely his freedom of religion[55] and his freedom to assemble[56]. Similarly an administrative act denying promotion for a sufficiently experienced government employee and at the same time promoting similarly placed persons will be *per se* not just arbitrary but also discriminatory. Secondly, when a petitioner having sufficient locus standi challenges an administrative act as arbitrary, he is doing so only because one or other of his rights - fundamental, statutory or common law - has been violated. If the classification made by the Supreme Court is adopted then the first task before the court is to determine which type of right has been affected. This is not an easy task for there can be no clear cut boundaries between fundamental rights and non fundamental rights particularly when the Supreme Court has itself given a very broad meaning to Article 21 of the Constitution of India. This task becomes even more difficult, when one considers the fact that usually an administrative act is violative of more than one right. Hence much of judicial time would be wasted in deciding the nature of the right. In the alternative, the judicial time could be effectively used in evaluating whether the decision maker has properly balanced the priorities while taking the decision. Obviously a variable intensity of proportionality review - based on the concept of judicial deference and judicial restraint - can be adopted depending upon the subject matter and the nature of the rights involved.

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[48] *Id.*,p.3704
[49] *Ibid*
[50] *Id*., p. 3705
[51] See for e.g., *Indian Airlines Ltd.* v. *Praba D. Kanan* AIR 2007 SC 548; *State of U.P.* v. *Sheo Shankar Lal Srivastava* (2006) 3 SCC 276
[52] *Brind* v. *Secretary of State for the Home Department*, (1991) 1 All ER 720 p. 723
[53] *Id.*, p. 739.
[54] See *R (AlConbury Developments Ltd.)* v. *Secretary of State for Enviroment, Transport and Regions* (2001) 2 All ER 929.
[55] Article 25 of the Constitution of India
[56] Article 19 (1) (b) of the Constitution of India

Equally important is the consideration whether the administrative action challenged as arbitrary should remain within the purview of wednesbury principle. For this, it is pertinent to look at the meaning of the word 'arbitrariness'. It is never an easy term to define with precision and hence the Supreme Court in the case of *Shrillekha Vidyarthi* v. *State of U.P*[57]equated 'arbitrariness' with 'reasonableness'[58].

By equating arbitrariness with wednesbury unreasonableness, the decision maker escapes serious judicial review. But this is fast changing. Proportionality is fast replacing wednesbury reasonableness which the Supreme Court itself has observed in a large number of recent cases[59]. After all there is nothing wrong in a modern democratic society if the court examines whether the decision maker has fairly balanced the priorities while coming to a decision. At any rate, the intensity of proportionality review is variable depending upon the subject matter and the nature of rights involved.

The next question to be addressed is regarding which model - British or European - is to be adopted in the Indian context. A review of the various judgments of the Supreme Court would show that the Supreme Court has hardly given any consideration to this issue. This is primarily because the Supreme Court has never had a real opportunity to apply the doctrine of proportionality in judicial review of administrative action. Till now the Supreme Court has been merely stating the legal position of the doctrine of proportionality in the Indian legal system without actually applying the doctrine of proportionality in the sense it is today understood internationally.

After the conscious adoption of the doctrine of proportionality into Indian law in the Omkumar's case the only case where the Supreme Court has expressly adopted the doctrine of proportionality is the case of *Sandeep Subhash Parate* v. *State of Maharastra*[60]. In that case a student obtained admission to engineering course based on a caste certificate, which was subsequent to the admission, invalidated. However, he completed the course based on an interim order of the High Court. Yet the university refused to grand him the degree. This action of the university was held to be correct by the High Court. The Supreme Court in appeal directed the university to grand him degree subject to the appellant making a payment of Rupees one lakh, to re-compensate the state for the amount spend on imparting education to him as a reservation candidate. This, the Supreme Court claimed was done having regard to the doctrine of proportionality[61]. But the Supreme Court did not come to a finding that the university had failed to balance the various considerations before refusing to grant the appellant the degree. Also, the Supreme Court apart from mentioning the facts of the case failed to explain how it came to the conclusion regarding proportionality. At any rate the Supreme Court itself admitted that it was taking the decision under Article 142 of the constitution[62].

Hence the choice between the European model and the British model in the Indian context will be a purely academic exercise. As suggested by Julian Rivers[63] the choice would be in favour of the European model. Further such a selection gets some judicial backing from the decision of the Supreme Court in Omkumar's case wherein the Court while defining proportionality held that the legislative and administrative authority must be given a range of choice, but the courts can decide whether the choice infringes the rights excessively or not[64].This would indicate that the Supreme Court does intent that the fair balance stage (last stage) of the European model must be part of proportionality review. Hence the conclusive argument would be that the European conception of proportionality review should be the appropriate test that should be applied in the Indian context.

V. Conclusion

From the above analysis it is patently clear that at the international level wednesbury unreasonableness is on a terminal decline. It is fast being replaced by the doctrine of proportionality which is a much more intense form of review which seeks to see whether the decision maker has properly balanced the various factors that he has to take into consideration before rendering a decision. Further there are two competing models of proportionality, namely, European model and the British model. Of the two the European model is more efficient and objective.

In the Indian context it is amply clear that even though proportionality was made part of the Indian law as early as 2000, there is hardly any significant use of doctrine in India. Not only has the doctrine as adopted by the Supreme Court, limited application, but even within that applicable range, it has hardly been used.

[57] AIR 1991 SC 537
[58] *Id.*, p.554
[59] See *Supra* n. 51
[60] (2006) 1 SCC 501
[61] *Id.*, p.508
[62] *Id.*, p.507
[63] *Supra* n. 24
[64] *Supra* n. 22 at p. 3697

However sooner or later courts in India will have to actively consider implementing the doctrine of proportionality in all cases coming before it irrespective of whether fundamental or ordinary rights of citizens / persons are involved. This is because of the fact that human rights jurisprudence that has come to dominate the legal system includes not just fundamental rights but other rights also. Hence the urgency of adopting the doctrine of proportionality cannot be overlooked for otherwise steam hammers would increasingly be used to crack nuts even if nut crackers are sufficient.

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