Page 1174 - 1191 **DOI:** *https://doij.org/10.10000/IJLMH.117604*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 3

2024

Comparative Jurisprudence: Unraveling The Doctrine of Proportionality in the USA, UK, and India

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ABSTRACT

The expansion of the welfare state and technological advancements have empowered executives and bureaucracies worldwide, necessitating robust judicial review. The principle of Wednesbury reasonableness, dominant in common law countries like the UK and India, has gradually given way to the doctrine of proportionality. This doctrine ensures a balanced approach, minimizing intrusions on citizen rights while upholding legitimate government goals. The UK, unlike India, has not formally adopted proportionality, but elements of it are increasingly evident in judicial reasoning. The USA, on the other hand, relies heavily on a balancing test that shares some similarities with proportionality but operates within a distinct legal framework. Despite adopting proportionality in 2000 (Omkumar v. Union of India), India's application remains limited. This research paper delves into the concepts of proportionality, Wednesbury reasonableness, and the margin of appreciation. It analyzes the shift from Wednesbury to proportionality across common law jurisdictions, comparing the British and American Law. The paper argues for a more robust application in India, drawing insights from the UK's evolving approach, to effectively safeguard human rights. With the administration's ever-increasing influence on individual lives, the doctrine of proportionality offers a crucial tool for judiciaries to check potential excesses of power. This research highlights the progressive trend in Indian courts and emphasizes the urgent need for a more comprehensive implementation of proportionality, informed by the experiences of the UK and USA.

***Keywords**: Disproportionate, Administrative Action, Judicial Review, Unreasonableness, Arbitrariness.*

I. INTRODUCTION

Since then, the extent of judicial review has been widely discussed and debated in administrative law. The evolution, growth and development of welfare have caused the Legislature to confer a 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

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powerful. In such a scenario, there is a high chance of abuse of discretion and power related thereto by the administrative authority which gives rise to the need for judicial review.[2] However, such intervention must not cause the Judiciary to encroach into areas that have specifically been reserved for the Executive. 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 an order appeared to be "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[3] 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 an order appeared to be "more drastic than was necessary for attaining the desired result". Primary review or proportionality-based review thereafter slowly but steadily made its way into common law systems due to its inherent benefits. The doctrine of proportionality is applicable in cases where rights are violated by administrative action and the courts scrutinize administrative conduct specifically and go to the courts' issue about the accuracy of the authority's choices. The ordinary sense of proportionality is that it should not be more extreme than it should be to achieve desired results. It means cannot use canon to fire a sparrow. This philosophy, in other words, seeks to balance means with ends.

(A) Meaning of the doctrine

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by the courts. If an action taken by any authority is contrary to law, improper, unreasonable or irrational, a court of law can interfere with such action by exercising the power of judicial review. One such mode of exercising power is the doctrine of proportionality.[4]

The doctrine, simply, explains that it is not permissible "to sledge-hammer to crack a nut" or that "where paring knife suffices, battle axe is precluded Thus, if an action taken by the authority is grossly disproportionate, the said decision is not immune from judicial scrutiny.

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[2] Aditi Mallavarapu, "*Judicial Review of Administrative Discretion in Awarding Government Contracts: The Indian Perspective*", Journal of Global Research & Analysis, 48-54 (2016)
[3] L. Peiris, "*Wednesbury Unreasonableness: The Expanding Canvas*", The Cambridge Law Journal, 53-82 (1987).
[4] C.K. TAKWANI, "LECTURES ON ADMINISTRATIVE LAW", (Eastern Book Company, 5th Edn,2012).

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In the case of ***Council of Civil Service Vs Minister of Civil Service***[5] 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 the European Economic Community.

(B) Nature and scope of the doctrine

The Supreme Court explained that the principle of proportionality envisages that, a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that, administrative action impinges on individual rights to the minimum extent, to preserve public interest, thus implying that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred.[6]

The principle implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question unless the impugned administration action is advantageous and is in the public interest, such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred. Thus, while exercising a discretionary power, any administrative authority will have to establish that its decision is balanced and in proportion to the object of the power conferred.

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 administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve." In case, the Legislature or the Administrative Authority is given an area of discretion or a range of choices, whether the choice made infringes the rights excessively or not, is for the Court to decide. This is what is meant by proportionality. Jurisprudentially, 'proportionality' can be defined as "the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. "

(C) Origin And Evolution Of The Doctrine

The emergence of proportionality in public law is generally traced to nineteenth-century Prussian and then German administrative law.[7] After the Second World War, in the 1950s and

[5] (1984) 3 All ER 935 (HL).
[6] Maharashtra Land Development Corporation Vs State of Maharashtra, 2004(1) BOMCR24.
[7] Alec Stone Sweet And Jud Mathews, *"Proportionality, Balancing And Global Constitutionalism*", YALE Journal, (2008)

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early 1960s, proportionality gradually became a central aspect of German constitutional law.[8] During the 1970s, the European Court of Justice and the European Court of Human Rights adopted the doctrine, which then led to very rapid developments. Indeed, it has been observed that proportionality went "viral". Not only did it spread to every continental Western European jurisdiction during the 1980s, but it spilled over into Eastern Europe, Asia (Hong Kong, India, South Korea) and Latin America (Brazil, Colombia, Mexico, Peru).[9] After initial resistance, the U.K. paved the way for the absorption of proportionality into its jurisdiction with the enactment of the Human Rights Act in 1998.[10]

While the U.S. does not recognize proportionality as a constitutional doctrine, judges, including Justice Breyer of the U.S. Supreme Court, in dissent, have referred to it in constitutional cases, and the topic is alive and well in academia.[11] In international law, proportionality is now seen as a general principle,[12] and is central to humanitarian law.[13] It has been used to interpret and apply the International Covenant on Civil and Political Rights, and international commerce institutions such as the World Trade Organization and the International Center for the Settlement of Investment Disputes are basing their jurisprudence on this principle.[14]

The principle of proportionality has influenced national legislation in many fields and has been imported into the judicial review process in many European jurisdictions (for example, Germany, France, Greece, Sweden, and Denmark). It is often used as a general starting point for public authorities in making administrative decisions. This means the decisions of officials should be judged not just against the criteria of legality and rationality, but against a benchmark that says that limitations on fundamental rights must be necessary to meet a legitimate end in a democratic society, and must not infringe a basic right to a greater extent than is required to achieve that end. Finally, It is argued that these jurisprudential and legislative developments increase the judicial protection of the individual and modify the structure of traditional judicial review by attributing a new role to national courts.

1. Position Of Doctrine in England

[8] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, (Duke University Press, 2nd Edn,1997)
[9] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge University Press, 2012)
[10] AHARON BARAK, PROPORTIONALITY UNDER THE UK HUMAN RIGHTS ACT (Cambridge University Press, 2009)
[11] District of Columbia v. Heller, 554 US 690
[12] Thomas M. Franck, "*Proportionality in International Law*", Law and Ethics of Human Rights (2010).
[13] Georg Nolte, "*Thick Or Thin: The Principle Of Proportionality In International Humanitarian Law"*, Law and Ethics of Human Rights (2010).
[14] Axel Desmedt, "*Proportionality in WTO law*", Journal of International Economic Law (2001).

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In England, while judging the validity of an administrative action or statutory discretion, the "principle of reasonableness" has become the most active and conspicuous among the doctrines, which have vitalised Administrative Law there. "[15] Though the principle is ancient in origin, it was in 1968 in the landmark decision in Padfield v. Minister of Agriculture Fisheries and Food[16] wherein the House of Lords asserted legal control over the absolute discretion of the Minister of Agriculture. Lord Reid said:

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court.

Since the Padfield case, the "principle of reasonableness" has contributed to Administrative Law on the substantive side, and equally natural justice on the procedural side.

"Unreasonableness", say Wade and Forsyth, has become a generalised rubric covering not only sheer absurdity or caprice but merging into illegitimate motives and purposes, a wide category of errors commonly described as relevant considerations and mistakes and misunderstandings which can be classed as 'self-misdirection' or 'addressing oneself to the wrong question However, one principle, recognised as an accepted standard of reasonableness, requires that the exercise of power must be confined within the true scope and policy of the Act.

In Britain, the Principle of Proportionality has, for so long, been treated as a part of Wednesbury's Principle of reasonableness which postulated the basic standard of reasonableness that ought to be followed by a public body in its decisions. It stated that if a choice is so unreasonable to the point that no sensible expert could ever take those actions or employ the methods adopted, then such activities are subject to be liable and quashed through Judicial Review.

Although the Doctrine of Proportionality has been dealt with as a part of the Wednesbury's Principle, the Courts have adopted a different position when it comes to the Judicial intervention in terms of the Judicial Review. It has been held that the principle entails the reasonableness test with heightened scrutiny.

In other words, to apply this doctrine, not only do the decisions have to be within the limits of reasonableness, but only, there has to be a balance between the advantages and disadvantages in the outcome that has been achieved through the administrative action. Therefore, the extent of Judicial Review is more intense and greater on account of the 'proportionality' test than the

[15] WADE AND FORSYTH, ADMINISTRATIVE LAW, (OUP Oxford, 12th Edn,2022).
[16] 1968 AC 997 .

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'reasonableness' test. Furthermore, the Court while applying the rule of proportionality will think about the public and individual interest in the matter which is not done while applying the Wednesbury's principle of unresaonableness.

The British model of proportionality was propounded by Lord Stynn in the case of ***Regina v. Secretary of State for the Home Department***.[17] In this case, The Home Secretary issued a document requiring prisoners to be removed from their cells during routine searches, including examination of legal correspondence on the suspicion that the contents are of a criminal nature.

Daly applied for judicial review on the basis that these searches breached his common law right to the confidentiality of privileged legal correspondence. Lord Steyn argued that the intensity of review is greater under proportionality for the following reasons:

(i) The doctrine of proportionality may require the reviewing court to assess the balance that the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions

(ii) The proportionality test may go further than the traditional grounds of review since it may require attention to be directed to the relative weight accorded to interests and considerations

(iii) Even the heightened scrutiny test applied in Smith is insufficient to protect human rights as it fails to consider weight and balance, following Smith and Grady v UK

The concept, however, first originated in the case of ***De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing and Ors*** wherein a civil servant participated in certain demonstrations against government corruption in the Antigua and Barbuda *Civil Service Act*. The Public Service Commission under Public Service Commission Regulations, 1967 and Section 10 (2) (a) of the Civil Service Act, interdicted the Civil Servant from his Office. Section 10(2) (a) states that:

"A civil servant may not in any public place or in any document or any other medium of communication whether within Antigua and Barbuda or not, publish any information or expressions of opinion on matters of national or international political controversy."[18]

The matter came up before the Court. The Court held that Section 10 (2) (a) of the Civil Service Act was unconstitutional. It took the view that it had not been demonstrated that section 10(2) fell within the permissible limits prescribed by the Constitution.

[17] UKHL 33, 2 AC 115
[18] The Civil Service Act,1861, Section 10 (2) (a).

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wherein Lord Clyde devised a three-stage test for the application of the doctrine as follows:

1. Whether the legislative objective is sufficiently important to justify limiting a fundamental right?
2. Whether the measures designed to meet the legislative objective are rationally connected to it?
3. Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

It was said that the first two of these criteria could be met in the case of civil servants once it is noticed that their special status, with its advantages and restraints, is recognised as proper in the administration of a free society. However, the third criterion raises a question of proportionality. The blanket approach taken in section 10 imposes the same restraints upon the most junior of the civil servants as are imposed upon the most senior. There are classes of civil servants related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression. It was held that the restraint imposed on civil servants amounted to more than what was necessary to pursue the public interest, and consequently, the claimant's constitutional right has been unlawfully infringed.

However, in the case of ***Brind Vs Secretary of State for the Home Department***[19] it was observed that 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 the Wednesbury principle alone was applicable when non-convention rights were involved.[20]

Secondly, just like Lord Lowry 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 an 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 the application of

[19] (1991) 1 All ER
[20] 1991 1 All ER 720 P. 723

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proportionality is fast disappearing.[21]

At the same time, the court also has to give due regard to administrative discretion and not intrude or interfere with the same unnecessarily. This is mostly achieved through judicial deference and judicial restraint.

2. Position of doctrine in the USA

Officially, there is no such thing as "proportionality review" in American administrative law. The Administrative Procedure Act (APA) of 1946, the framework statute governing administrative law, does not recognize proportionality as a general head of review. Nor have American courts ever developed a judge-made doctrine of proportionality as such, either prior to or following the APA's enactment. While the immense scholarly literature on proportionality continues to grow by leaps and bounds, virtually nothing has been written about proportionality in American administrative law, no doubt in part because it is assumed there is nothing to write**.**

"Proportionality" is today accepted as a general principle of law by constitutional courts and international tribunals around the world. "Proportionality review," a structured form of doctrine, now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims. The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.[22]Yet some areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law[23], or contain other elements of the structured "proportionality review" widely used in foreign constitutional jurisprudence[24], including the inquiry into "narrow tailoring" or "less restrictive alternatives" found in U.S. strict scrutiny.[25]

Justice Stephen Breyer has suggested that there are other areas in which the appropriate standard of judicial review would involve examining the proportionality of government regulation. For example, in ***United States v. Alvarez***,[26] Justice Breyer's concurrence, joined by Justice Kagan, associated proportionality review with intermediate scrutiny and applied this standard to evaluate a First Amendment challenge to the Stolen Valor Act. In his dissent in ***District of Columbia v. Heller***[27], Justice Breyer explicitly invoked the idea of proportionality as a guide to

[21] R (AlConbury Developments Ltd.) Vs. Secretary of State for Environment, Transport & Regions, (2001) 2 All ER 929.
[22] Moshe Cohen-Eliya & Iddo Porat, T*he Hidden Foreign Law Debate In Heller: The Proportionality Approach In American Constitutional Law*, San Diego Law Review (2019).
[23] Graham v. Florida, 560 U.S. 48, 59 (2010).
[24] Steven Gardbaum, "*The Myth and Reality Of American Constitutional Exceptionalism*", Michigan Law Review (2008).
[25] Richard H. Fallon, "*Strict Judicial Scrutiny"*, UCLA Law Review (2007).
[26] 567 U.S. 709 (2012).
[27] 554 U.S. 570 (2008).

permissible regulation under the Second Amendment. This explicit invocation of proportionality led some scholars to begin to consider, critically, the prospects of proportionality review, as it has developed elsewhere in the world, being more fully embraced in the United States.

Given developments within and outside the United States, the time is ripe to take a fresh look at proportionality, both as a general principle in constitutional analysis and as a structured doctrine of potential benefit to discrete areas of U.S. constitutional law. However, these earlier U.S. debates could not have been informed by the subsequent course of proportionality review in other countries. Foreign courts' experience with proportionality review casts new light on these enduring questions in ways that suggest that U.S. constitutional law would benefit from a moderate increase in the use of proportionality.

If an infringement on interests protected by a right is shown, and if the challenged action has been "prescribed by law" sufficiently precisely and for a legitimate and sufficiently important purpose, then the constitutionality of the means used is examined through a three-fold inquiry into (a) rationality; (b) minimal impairment; and (c) proportionality as such. Several of these criteria correspond with elements in U.S. "strict," "intermediate," or "rational basis" scrutiny: the need for a sufficiently important or "compelling" government purpose; the rational connection required between the means chosen and the end; and the "minimal impairment" inquiry into whether there are less restrictive means towards the same goal.

Americans are already familiar with the legal principle of proportionality in constitutional law. The Eighth Amendment's case law has long recognized that punishments grossly disproportionate to the severity of the offence are prohibited as cruel and unusual punishment,[28] although the Court's willingness actually to scrutinize the proportionality of sentences has varied over time and contexts.[29] The Excessive Fines Clause of the Eighth Amendment has also been understood to impose proportionality limits. Since the 1990s the Court has invoked proportionality in several other constitutional contexts. For example, under the Due Process Clause, courts must now ensure that the measure of punitive damages in civil cases "is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[30] Under the Takings Clause, conditions for zoning permits must have "rough proportionality" to the effects of the proposed use of the property. Furthermore, the "undue burden" standard is now the controlling inquiry in the Court's abortion cases,

[28] Graham v. Florida, 560 U.S. 48, 59 (2010).
[29] United States v. Bajakajian, 524 U.S. 321 (1998).
[30] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408.

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invoking in its language .and application a concern for the reasonableness of regulations affecting women's choices to abort their pregnancies prior to viability. All of these standards invoke proportionality in resolving individual rights questions, as do Justice Breyer's First Amendment opinions. Moreover, the Court has extended proportionality standards to federalism issues: as of 1997, legislation under Section 5 of the Fourteenth Amendment must have "congruence and proportionality" to conduct that Section 1 prohibits.

II. JUDICIAL INTERPRETATION OF DOCTRINE OF PROPORTIONALITY IN INDIA

Proportionality is the most emerging concept of Administrative Law in India. However, administrative action, in India, affecting fundamental freedoms has always been tested on the anvil of proportionality, though not expressly stated so.[31]It enjoins that if the administrative authority attempts to achieve a goal, then the means employed to achieve that goal should be such that they should infringe the Fundamental Rights to the minimum extent, i.e., it should be proportionate to the object sought to be achieved.

The Indian Supreme Court consciously considered the application of the concept of proportionality for the first time in the case of the ***Union of India Vs. G. Ganayutham***[32]wherein the respondent who was working as the Superintendent of Central Excise was subjected to the punishment of withholding 50% of the pension and 50% of the gratuity. A writ petition was filed in the High Court which was later moved to the Administrative Tribunal. The tribunal holding the punishment too severe reduced the same. The matter then came before the Supreme Court by the way of appeal. The Court set aside the order of the Tribunal and restored the original punishment saying that the punishment was 'not' irrational according to the Wednesbury test. In this 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. The Court would not interfere with the administrator's decision unless it was illegal suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety.

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. Subsequently came the historic decision of the Supreme Court in ***Omkumar Vs. Union of India***[33]**.** Wherein a

[31] Om Kumar Vs Union of India, 2000 SC 3689.
[32] (2006) 65 (1) C.L.J.174.
[33] AIR 2000 SC 3689.

Skipper construction obtained possession from the Delhi Development Authority (DDA) without paying the consideration in full, advertised and collected crores of rupees from would-be purchasers. In that process, it collected amounts from more persons than there were flats. The officers of the DDA who dealt with these matters at the relevant time here were responsible for handing over the possession of the suit land before receiving the auction amount in full and also in "conniving" at the construction thereon as well as at the advertisements given by it for bookings in the building in question. Disciplinary proceedings were initiated against five officers. The matter with regard to Sri Om Kumar and Sri Virendra Nath was referred to the Department of Personnel as there was a difference in opinion between the competent authority and the advice of the U.P.S.C. One of them was given major punishments and the other was given minor punishments for corruption. The question of the applicability of the doctrine of proportionality, especially with respect to Article 14 of the Constitution of India was raised.

The Court after considering the facts and the legal principles that are discussed below, concluded that in the Case of Sri Om Kumar, the choice of awarding 'censure' as punishment was not violative of the Wednesbury rules. There was no omission of relevant facts nor were irrelevant facts taken into account. The Court found no illegality committed by the administrative authorities.

It was in this case that the Supreme Court accepted the application of the 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 legislation 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 on numerous occasions the opportunity to consider whether the restrictions were disproportionate to the situation and were not the least restrictive of the choices. The same is the position with respect to legislations that impinge Article 14 (as discriminatory), and Article 21 of the Constitution of India. 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) has 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. Thus, the Court categorically held that the doctrine of proportionality is applicable to Judicial

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Review of administrative action that is violative of Article 19 & Article 21 of the Constitution of India.

With respect to Article 14 of the Constitution of India, the 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 the Wednesbury principle applies. The Supreme Court also held that punishment in service law is normally challenged as arbitrary under Article 14 of the Constitution of India, and hence only Secondary Review based on the Wednesbury principle would apply.[34]

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 of the Constitution of India applies.

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. [35]

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 the doctrine of Wednesbury unreasonableness alone should be applied to challenges under the head of arbitrariness.

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.

[34] Ajoy P.B, *"Administrative Action and the Doctrine of Proportionality in India*", Journal of Humanities and Social Science, Volume 1, Issue 6.
[35] NARENDER KUMAR, NATURE AND CONCEPTS OF ADMINISTRATIVE LAW (Allahabad Law Agency,2022).

Hence much of Judicial time would be wasted in deciding the nature of the right.

In the alternative, Judicial time could be effectively used in evaluating whether the decision maker has properly balanced the priorities while making the decision. Obviously, a variable intensity of proportionality review - based on the concept of Judicial deference and Judicial restraint can be adopted depending on the subject matter and the nature of the rights involved. Equally important is the consideration of whether the administrative action challenged as arbitrary should remain within the purview of the 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 Vs. State of U. P*** [36]equated arbitrariness with reasonableness.

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. 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.

After the conscious adoption of the doctrine of proportionality into Indian law in Omkumar's case, the only case where the Supreme Court has expressly adopted the doctrine of proportionality is the case of ***Sandeep Subhash Parate Vs. State of Maharastra***.[37]

In that case, a student obtained admission to an Engineering Course based on a Caste Certificate, which was subsequent to the admission, invalidated. However, he completed the course based on an interim order from the High Court. Yet the University refused to grant 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 grant him a degree subject to the appellant making a payment of Rupees One lakh, to re-compensate the State for the amount spent on imparting education to him as a reservation candidate. This, the Supreme Court claimed was done having regard to the doctrine of proportionality. However, 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

[36] AIR 1991 SC 537.
[37] (2006) 1 SCC 501.

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proportionality. At any rate, the Supreme Court itself admitted that it was taking the decision under Article 142 of the Constitution of India.

(A) Proportionality and legislative action

The Court observed that in India the principle of 'proportionality' was vigorously applied in India to the legislative action. While deciding the validity of legislation infringing Article 19(1) of the Constitution, the Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were the least restrictive of choices. The burden of proof to show that the restriction was reasonable lay on the State. 'Reasonable restrictions' under Article 19(2) to (6) could be imposed on these freedoms only legislations. The Court relied on ***Chintaman Rao v. State of UP***[38], ***State of A.P Vs Mc Dowell & Co***.[39] So far as Article 14 is considered, the Court observed that the validity of legislation action was examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. The courts were examining the validity of the differences and the adequacy of the differences. The same is done under the principles of proportionality. The court concluded that in India the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of 'proportionality' has never been doubted in India. This is called a 'primary' review by the Courts of the validity of legislation that offended fundamental freedoms.

(B) Proportionality and administrative action

The Court observed that in cases where legislation gives the administrative authorities power or discretion while imposing restrictions in individual situations, the court has tested those actions on the principle of 'proportionality'. The court relied on ***R.M. Seshadri v. Dist. Magistrate Tanjore and Anr***[40] wherein the Court declared the condition in the licence regulating the length of an approved film is unreasonable under Article 19(6). and ***Union of India v. Motion Picture Association.***[41]

In ***S. Rangarajan v. Jagjivan Ram and ors***[42] an order refusing permission to exhibit a film in relation to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a).

The Court relied on the law laid down by the Supreme Court of Israel where 'proportionality'

[38] 1951 AIR 118, 1950 SCR 759
[39] 1996 (3) JT (SC) 679.
[40] 1954 AIR 747, 1955 SCR 686.
[41] 1999 AIR SCW 2432.
[42] 1989) 2 SCC 574.

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is recognized as a separate ground in administrative law, different from unreasonableness. It consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such men that do not injure the individual more than necessary. Third, the injury caused to the individual by the exercise of the power should not be disproportional to the benefit that accrues to the general public.

In ***E.P. Royappa v State of Tamil Nadu***[43], another test for the purposes of Article 14 was laid down. It states that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle was then uniformly followed in all courts. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable. If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, the Wednesbury principle applies and it is secondary review by the Court.

The court in ***G.B. Mahajan vs. Jalgaon Municipal Council***[44] opined that, when an administrative action is challenged as 'arbitrary' under Article 14, the question will be whether the administrative order is'rational' or 'reasonable' and the test then is the Wenesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally, omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.

(C) Proportionality and service law

In the case of ***Ranjit Thakur Vs Union of India***[45] wherein, an Army Officer disobeyed the lawful command of his superior officer by not eating food offered to him. Court Martial proceedings were initiated and a sentence of one year of rigorous punishment was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

It was held that Judicial Review, generally speaking, is not directed against a decision, but is

[43] AIR 1974 SC 555.
[44] AIR 1991 SC 1153.
[45] (1987) 4 SCC 611

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directed against the decision-making process. 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 shouldn't be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.

The doctrine of proportionality, as part of the concept of 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 recognized grounds for Judicial Review. All powers have legal limits.

In the case of ***Coimbatore Distt. Central Co-operative Bank Vs. Employees Association***[46]Certain Employees went on illegal strike. They also prevented others from discharging their duty. It was held that the acts amounted to Serious misconduct. The punishment imposed on the employees of stoppage of increment could not be said to be disproportionate to the charges levelled and proved against employees.

Similarly in the case of ***C.M.D United Commercial Bank v P.C. Kakkar***[47], a Writ Petition was filed in the High Court by an employee of the Bank who was alleged to have committed several acts of misconduct while he was the Assistant Manager in the Bank. Inquiry proceedings were initiated and several charges were found to be established against him. A punishment of dismissal was imposed on him. The High Court held the punishment to be excessive. The matter then came in appeal before the Supreme Court. The Court considered the question of the scope of judicial review of disciplinary punishments. The Court referred to the principles enunciated in Om Kumar & Ors v Union of India and held that where punishments in disciplinary cases are challenged as arbitrary under Article 14 of the Constitution the court would act as a secondary reviewer.

In the case of Hind ***Construction Co v. Their Workmen***,[48]Some workers are absent from duty treating a particular day as a holiday. They were dismissed from service. The industrial tribunal set aside the action. The court held that they could have been warned and fined instead of terminating all such employees. It was held invalid as the dismissal was gross punishment.

Similarly in the case of ***Sardar Singh v. Union of India***,[49] an army Jawan was granted leave

[46] (2007) 4 SCC 669
[47] 2003 (4) SCC 364.
[48] 1965 AIR 917, 1965 SCR (2) 85.
[49] 1992 AIR 417.

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while going to his own town he purchased 11 bottles of Rum from the army canteen though he was entitled to buy four bottles of rum. He was terminated from service and was given 3 months of rigorous punishment and dismissal from service. Supreme Court set aside the order saying that the punishment was arbitrary and severe.

The same view was taken in the case of Madhya ***Pradesh Electricity Board v. Jagdish Chandra Sharma***,[50] the appeal was made to the Supreme Court by the employer. The employee was working as a muster roll labourer in the employer organisation. While in employment, he allegedly physically assaulted a superior officer A.K. Singh, a Sub-Engineer. He hit him with a tension screw on his back and on his nose. The blow on the nose allegedly resulted in a fracture of the nose and severe bleeding. The employee remained unauthorizedly absent for about three weeks. A show cause notice was served on him. He was charged with violating the service rules of the employer organisation. A proper enquiry was held. Thus, the Supreme Court held that the Labour Court and the Industrial Court could review the quantum of punishment only when the punishment awarded was grossly disproportionate and harsh. Their Lordships further held that the award of punishment of removal from service was proportionate to the act committed by the employee.

In the case of ***Canara Bank v. V.K.Awasthy***[51], the Supreme Court held that courts cannot interfere in an Administrative Action on the grounds of being Disproportionate unless it is a "Prima Facie" case of irrationality or Perversity. Though the Apex Court in ***Indian Airlines Limited. v. Praba D. Kanan, State of Uttar Pradesh v. Sheo Shankar Lal Srivastava*** 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. er is"rational" or "reasonable" according to the Wednesbury test.

In the landmark case of ***K. S. Puttaswamy Vs. Union of India***[52] The test of proportionality was upheld by the Hon'ble Supreme Court. It was held that the case of proportionality of a measure must be determined while looking at the restrictions being imposed by the State on the fundamental rights of citizens. It is not just the legal and physical restrictions that must be looked at, but also the fear that these sorts of restrictions engender in the minds of the populace

[50] *2005 105 FLR 155 SC.*
[51] 2005 (6) SCC 321.
[52] 2017 (10) SCC 1.

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while looking at the proportionality of measures. Most recently, in the case of ***Anuradha Bhasin Vs. Union of India***[53]wherein, the validity of internet shutdown and movement restrictions in J&K was challenged in the Hon'ble Supreme Court. It was held that the requirements of the doctrine of proportionality must be followed by the authorities before passing any order intending to restrict the fundamental rights of individuals.

In the first stage itself, the possible goal of such a measure intended to impose restrictions must be determined. It ought to be noted that such a goal must be legitimate. However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such a measure.

It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications for the fundamental rights of affected parties, the same should be supported by sufficient material and should be amenable to judicial review.

III. CONCLUSION

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 that seeks to see whether the decision maker has properly balanced the various factors that he has to take into consideration before rendering a decision.

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.

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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[53] 2019 SC 1725.

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