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With this thought, we hereby present to you

DOCTRINE OF PROPORTIONALITY IN INDIA - A STUDY OF IT'S APPLICABILITY THROUGH THE JUDGMENTS OF THE SUPREME COURT FROM THE LAST THREE DECADES

AUTHORED BY - PAYEL GHOSH¹

Abstract

The origin of doctrine of proportionality can be found in the European administrative law. It has been invoked in the Wednesbury unreasonableness which is a tool to control possible abuse of discretionary powers by various administrative authorities. The doctrine of proportionality in India is based on the Indian Constitution which guarantees fundamental rights. It is the concept of Judicial Review which ensures as the exclusive power of the court which the administrative action could not be immune from correction. Perversity and irrationality of the State actions are subjected to judicial review. The doctrine has been adopted by constitutional and human rights courts across the world as the powerful medium and just standard for adjudicating the validity of limitations on fundamental rights. Over the years, Indian courts sporadically referenced this doctrine as a potential instrument in discussing the nature of judicial review of state actions. This paper aims to seek how far the Indian judiciary came in these last three decades after conscious adoption of this doctrine from *Ranjit Thakur v. Union of India* to *Anuradha Bhasin v. Union of India* & others, to keep alive the balance between state action and citizen's rights in its four part doctrinal form as a standard for reviewing rights limitations in India. Additionally, the paper aims to examine and interpret the judicial interpretation of the doctrine in the Indian Context. It also strives to analyse the court's approach to protect and uphold citizen's fundamentals rights by discarding unreasonable, unjustified and arbitrary actions of State.

Key words : Proportionality, Unreasonableness, State Action, Fundamental Rights, Judiciary

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INTRODUCTION

According to the words of Wade, administrative law is the law relating to the control of powers of the executive authorities or governmental power.² K. C. Davis also mentioned that administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action. From the very beginning of India's constitutional republic to modern times, judicial review of executive and legislative powers remains to be one of the crucial matters in the field of administrative law. Judicial review of executive and legislative action has been one of the most important developments in the ground of public law in the last century.³ Between executive and legislative action, it is the executive action for which judicial review has assimilated most content enrichment in the last three decades. Judicial review enlarged and grew to a stage when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review, namely 'illegality', 'irrationality' and 'procedural impropriety'.⁴ With the expeditious growth of administrative law, there was requirement and exigency to control possible abuse of administrative action and to control that possible abuse, courts have introduced and evolved various principles namely illegality, irrationality, procedural impropriety and proportionality.

DOCTRINE OF PROPORTIONALITY – MEANING AND CONCEPT

The origin of doctrine of proportionality can be found in the European administrative law. It was originated in Prussia and developed in Europe in the 19th century.⁵ In European administrative law, the concept of proportionality has been described as the most significant general legal principles amongst all.⁶ The doctrine has been invoked when fundamental freedoms are sought to be restricted. In England, the doctrine came into the picture only when courts started reviewing administrative actions with reference to the rights contained in the European Convention on Human Rights and Fundamental Freedoms.⁷ It has been invoked in the *Wednesbury*

² C. K. Takwani, Lectures on Administrative Law 03 (6th ed 2017)

³ Ajay P. B. Administrative Action and the Doctrine of Proportionality in India, IOSR Journal of Humanities and Social Science (JHSS), Volume 1, Aug. 17, 2023, 3.30 PM www.iosrjournals.org

⁴ Council of Civil Service Unions v. Minister for the Civil Service 1985 AC 374 (HL)

⁵ I. P. Massey, Administrative Law 378 (10th ed 2022)

⁶ Kaushik Deo, The Doctrine of Proportionality under the Indian Legal System, Aug 17, 2023, 4.00 PM ilsijlm.indianlegalsolution.com

⁷ S. P. Sathe, Administrative Law (7th ed 2004)

unreasonableness which is a tool to control possible abuse of discretionary powers by various administrative authorities. The doctrine of proportionality in India is based on the Indian Constitution which guarantees fundamental rights. It is the concept of Judicial Review which ensures as the exclusive power of the court which the administrative action could not be immune from correction. Perversity and irrationality of the State actions are subjected to judicial review. The doctrine has been adopted by constitutional and human rights courts across the world as the powerful medium and just standard for adjudicating the validity of limitations on fundamental rights. Over the years, Indian courts sporadically referenced this doctrine as a potential instrument in discussing the nature of judicial review of state actions. In the case of *Ajay Hasia v. Khalid Mujib*,⁸ the Supreme Court held that the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole fabric of the Constitution.⁹ Recently, in *Shayara Bano v. Union of India*,¹⁰ it has been mentioned by the Supreme Court that the thread of reasonableness runs through the entire chapter of fundamental rights.¹¹

Proportionality deals with the way in which the decision-maker has ordered his priorities, the very essence of decision-making consists in the attribution of relative importance to the factors in the case.¹² Thus, it can be said that it is a principle where the court is concerned with the process, method or manner through which the decision-maker has ordered his priorities to reach a conclusion or to arrive at a decision.¹³ According to the human rights context, proportionality is concerned with the ‘balancing test’ and the ‘necessity test’.¹⁴ The balancing test is the scrutiny of excessive, extreme and onerous penalties or infringements of rights or interests and a manifest imbalance of relevant considerations. The necessity test, on the other hand, connotes that the infringement of fundamental rights in question must be by the least restrictive alternative.¹⁵ The proportionality test provides a ‘heuristic tool’ to determine the constitutionality of an action that limits a fundamental right.¹⁶

⁸ AIR 1981 SC 487

⁹ J N Pandey, *The Constitutional Law of India* (48th ed 2011)

¹⁰ (2017) 9 SCC 1

¹¹ Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?* University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

¹² *Union of India v. G. Ganayutham* (1997) 7 SCC 463, 473

¹³ *Coimbatore District Central Coop Bank v. Employees Association* (2007) 4 SCC 669

¹⁴ C. K. Takwani, *Lectures on Administrative Law* 338 (6th edn., Eastern Book Company, 2017)

¹⁵ I. P. Massey, *Administrative Law* 379 (10th edn., Eastern Book Company, 2022)

¹⁶ Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?* University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

WEDNESBURY UNREASONABLENESS, DOCTRINE OF PROPORTIONALITY AND DOCTRINE OF JUDICIAL REVIEW

Initially, the concept of irrationality was associated with Wednesbury unreasonableness, a principle that originated in the case of *Associated Picture House v. Wednesbury Corporation*.¹⁷ The principle indicates that the discretion that has been conferred on the administrative authorities should be exercised reasonably and properly in accordance with the law.¹⁸ 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. Similarly doctrine of proportionality basically prescribes that decisions and orders of the administration should only be as restrictive as absolutely necessary for public purpose and public welfare. As opposed to the Wednesbury unreasonableness principle, the proportionality doctrine has objective criteria for analysis and review which can be applied on case to case basis through predetermined tests. Proportionality and Wednesbury unreasonableness are widely considered to be sub-procedural irrationality.¹⁹ Thus, it can be said that doctrine of proportionality has taken the place of Wednesbury unreasonableness principle. Today the proportionality test is being used often by the Indian courts as there are more cases of violation of fundamental rights by the action of administrative authorities.²⁰

In other words, while applying this doctrine, not only the decisions have to be within the limits of reasonableness, but also there has to be a proper balance between the merits and demerits in the result that has been achieved by the administrative action. Therefore, the extent of judicial review is more intense and greater on the account of the proportionality test than the reasonableness test.

The underlying object of judicial review is to ensure that the authority does not abuse or misuse its power and the people receive just, fair and reasonable treatment and not to ensure that the authority reaches a conclusion in the eye of law.²¹ The Supreme Court of India held that the

¹⁷ (1947) 2 ALL ER 680 (CA)

¹⁸ Nimita Aksa Pradeep, Doctrine of Proportionality in Indian Administrative Law: An analysis, Indian Journal of Law, Polity and Administration Aug 28, 2023 2.00 PM www.ijlpa.com

¹⁹ *ibid*

²⁰ Padmalaya Kanungo, Wednesbury Principle and Control of Executive Actions, Jus Corpus Law Journal, Aug 23, 2023 12.00 PM <https://www.juscorpus.com/wp-content/uploads/2021/12/10.-Padmalaya-Kanungo.pdf>

²¹ C. K. Takwani, Lectures on Administrative Law 288 (6th ed 2017)

Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality, validity and constitutionality of administrative action and legislation.²² This power is an integral part of Indian Constitution and also has been mentioned as one of the basic features by the Supreme Court. The doctrine of proportionality, as a part of judicial review ensures that a decision otherwise within the province of administrative authority must not be arbitrary, unjust, irrational or unreasonable. Though in judicial review the court is not concerned with the correctness of the decision but the way in which the decision has been taken, the very decision-making process involves attributing relative significance to various aspects in the case and there the doctrine of proportionality makes the entry.²³

The doctrine of proportionality, being a part of the concept of judicial review, would guarantee that even on an aspect which is, otherwise, within the discretion of the authority, 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. Perversity and irrationality are well recognised grounds of judicial review.²⁴

DEVELOPMENT OF THE DOCTRINE IN INDIA THROUGH THE INTERPRETATION AND APPLICABILITY BY THE SUPREME COURT

There may be a situation when an Act or a statute, instead of making the classification or protecting a group of people, confers power on the Executive in that regard. In such cases, if the Act confers unregulated discretion on the Executive, the Act itself would be void. Also, a provision cannot be held unconstitutional merely because the authority vested with the power may abuse the power.²⁵ But the executive action, taken by the administrative authority acting arbitrarily, would be struck down.²⁶ In India, the Supreme Court has always been there as the guardian and protector of the Indian Constitution. Part III of the Indian Constitution deals with the fundamental rights which are a set of basic and fundamental rights that are guaranteed to every citizen to ensure their dignity, freedom and well-being. Courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights guaranteed by the Constitution. The court stated that it always attempts to

²² *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 625, 677-678

²³ C. K. Takwani, *Lectures on Administrative Law* 341 (6th ed 2017)

²⁴ *Ranjit Thakur v. Union of India* (1987) 4 SCC 611

²⁵ *A. N. Bhati v. State of Gujarat* AIR 2005 SC 2115

²⁶ *Suman Gupta v. State of J & K*, AIR 1983 SC 1235

balance the fundamental rights of the citizens and the restrictions that have been imposed while checking the constitutional validity of a legislation or an executive action.²⁷ Soon thereafter, in the case of *V G Row v. State of Madras*,²⁸ the court, while examining the reasonableness of restrictions on fundamental rights, held that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the same time should all enter into the judicial verdict. It is a well established principle of criminal jurisprudence that the punishment imposed should not be disproportionate with the nature and depth of the offence proved. To deal with a disciplinary matter against a government servant, the Supreme Court held in the case of *State of Orissa v. Bidyabhushan Mahapatra*²⁹ that if the High Court is satisfied that some but not all the findings of the tribunal were unassailable, then it had no jurisdiction to direct the disciplinary authority to review the penalty.

In the case of *Hind Construction and Engineering Company Limited v. Workmen*,³⁰ few workmen were dismissed from service on the ground that they were absent from duty on a particular day which was considered as a holiday. The court, in this case, opined that no reasonable employer would have imposed such an extreme punishment in this manner. The court opined in the case of *Bhagat Ram v. State of Himachal Pradesh*³¹ that if the punishment imposed is disproportionate to the gravity of the offence committed, then Article 14 of the Constitution would be violated. In this case, a forest guard allowed a person to cut twenty one trees who consequently paid compensation for the illegal hacking down. But a disciplinary action and inquiry was initiated against the forest guard for illicit felling of trees causing loss to the government and negligence in performing his duties. The charges were proved and he was dismissed from his service. He moved before the High Court and filed a writ petition which was dismissed. On appeal, the Supreme Court observed that punishment and gravity of offence should be balanced and proportionate. Therefore, a minor penalty was observed keeping in view the nature of misconduct, gravity of charges and no consequential loss.³²

In the case of *Ranjit Thakur v. Union of India*,³³ the Supreme Court had applied the doctrine of

²⁷ Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118

²⁸ AIR 1952 SC 196

²⁹ AIR 1963 SC 779

³⁰ AIR 1965 SC 917

³¹ (1983) 2 SCC 422

³² Ashish Chugh, Is the Supreme Court disproportionately applying the proportionality principle? Sep 2, 2023 10.00 AM https://www.ebc-india.com/lawyer/articles/2004_8_33.htm

³³ (1987) 4 SCC 611

proportionality while quashing the punishment of dismissal from service and sentence of imprisonment awarded by the court martial under the Army Act, 1950. In this case the petitioner was sentenced to one year rigorous imprisonment of an offence and later on dismissed from service when he declined to eat food in the period of imprisonment. The court stated that the penalty imposed had been disproportionate to the gravity of the misconduct. The court also observed that the question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But on the other hand, the sentence has to suit the offence and the offender. It should not be vengeful or unduly harsh. 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*.³⁴ In this landmark case, the Supreme Court reduced the punishment given by the disciplinary committee by applying doctrine of proportionality. The appellant was an employee of the corporation for 20 years and there was no allegation of misconduct against him in his entire career. In this case also, a disciplinary enquiry was initiated against him for misplacing a file entrusted to him which amounted to a misconduct as per law. The enquiry committee reached to a conclusion that this was a case where removal from the service would be appropriate and consequently he was removed from the post. When his appeal before the High Court got dismissed he moved before the Supreme Court. The Apex court refused to accept that misplacement of a file is such a grave misconduct as to remove him from the service. The court observed that it was not a case of deliberate misplacement of a file after going through his record with the corporation for 20 years. Thus, the act of negligence and removal from service was absolutely disproportionate. The court ruled in this case that court will not interfere with the punishment imposed by the disciplinary committee unless it is disproportionate to misconduct.

The application of the doctrine of proportionality was formally introduced in India with the case of *Union of India v. G. Ganayutham*³⁵ where the Supreme Court held that the Wednesbury unreasonableness will be the guiding principle in India, so as long as fundamental rights are not involved. Nevertheless, the Court abstained from deciding anything in the issues relating to whether the proportionality test can be applied in the cases concerning infringement of fundamental rights.

Again, in the landmark decision given in the case of *Omkumar v. Union of India*,³⁶ the Supreme

³⁴ AIR 2003 SC 3712

³⁵ (1997) 7 SCC 463

³⁶ AIR 2000 SC 3689

Court accepted the concept of proportionality in India. However, a peculiar thing was discovered by the Supreme Court in this case that the Indian courts have been using the proportionality test since 1950 while deciding upon the validity and constitutionality of administrative actions relating to violation of fundamental rights guaranteed under Article 19 (1) of the Indian Constitution. The Apex court came to the conclusion that the decisions concerning administrative actions infringing the fundamental rights have always been determined on the basis of the proportionality test though it has never been expressly mentioned as such.³⁷ However, after conscious adoption of doctrine of proportionality in this case, there has been no significant development or progress with respect to the application of the doctrine in India for a long time. The only development has been seen in the cases of *State of Uttar Pradesh v. Sheo Shankar Lal Srivastava*³⁸ and *Airlines Ltd. v. Praba D. Kanan*³⁹ where it was observed by the Court that the doctrine of unreasonableness is giving way to the doctrine of proportionality.⁴⁰

In 2007, the Court moved towards adopting a structured proportionality test by the landmark case of *Anuj Garg v. Hotels Associations of India*.⁴¹ In this case, the constitutional validity of Section 30 of Punjab Excise Act, 1914 was challenged for judicial review. The above mentioned section, inter alia, prohibited the employment of women in premises where alcohol was consumed by public.⁴² As per the argument before the court, the eclipsed aim of the provision was women's security.⁴³ To determine whether the restriction was justified and reasonable, the court went through an examination whether the measure's legitimate aim of protecting the interests of women are proportionate to other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy etc. Proportionality between means and ends was to be judged on a scale capable of being called reasonable in the modern democratic society. It was the state who had burden of proof to justify that the measure was reasonable and proportionate. The court stated that the measure was not justified since enhancing women's security and empowering them was a more tenable and socially wiser approach than placing curbs on their freedom. The court appeared to use strict scrutiny and proportionality interchangeably in its judgement, however and did not expressly lay out the contours of proportionality analysis in a structured way, though it

³⁷ Padmalaya Kanungo, *Wednesbury Principle and Control of Executive Actions*, Jus Corpus Law Journal, Aug 23, 2023 12.00 PM <https://www.juscorpus.com/wp-content/uploads/2021/12/10.-Padmalaya-Kanungo.pdf>

³⁸ (2006) 7 SCC 501

³⁹ AIR 2007 SC 548

⁴⁰ Padmalaya Kanungo, *Wednesbury Principle and Control of Executive Actions*, Jus Corpus Law Journal, Aug 23, 2023 12.00 PM <https://www.juscorpus.com/wp-content/uploads/2021/12/10.-Padmalaya-Kanungo.pdf>

⁴¹ (2008) 3 SCC 1

⁴² Gautam Bhatia, *The Transformative Constitution* (1st ed 2019)

⁴³ *Anuj Garg v. Hotel Association of India* AIR 2008 SC 663, Gautam Bhatia, *The Transformative Constitution* (1st ed 2021)

did seem to have applied the standard.⁴⁴

In *Sahara India Real Estate Corporation Ltd. v. SEBI*,⁴⁵ the Supreme Court had adopted a limited structured proportionality test. To determine, whether and when courts can order postponement of publication of a sub-judice matter, the court mentioned that such an order of postponement has to be passed only when other alternative measures are not available. To pass such order, courts have to keep in mind the principle of proportionality and the test of necessity.

It is very recently in 2016, in the case of *Modern Dental College & Research Centre v. State of Madhya Pradesh*,⁴⁶ the Supreme Court expressly stated that it would adopt and apply the structured four part proportionality test i.e. legitimacy test, suitability test, necessity test and balancing test. In this case, the Court was in such a position where it had to decide whether the impugned legislation and rules made thereunder that sought to regulate admission process, fees and affirmative action in certain private colleges, impermissibly interfered with the right to freedom of occupation under Article 19 (1) (g) of the Indian Constitution. Justice A.K. Sikri held that the test for determining reasonableness of restrictions under Article 19 was one of the proportionality. Since proportionality was already part of Article 19, the existing evidential standards for deciding the reasonableness of restrictions under Article 19 were applicable to the proportionality analysis, including those relating to the presumption of constitutionality, burden of proof and judicial defence.⁴⁷ It was observed by the court that the courts would presume that the legislature understands the needs of the people and they would set aside a law which clearly violates fundamental rights.

Soon after this case, the Court delivered its judgment in *Subramanian Swamy v. Union of India*.⁴⁸ Here, the Court had to decide the constitutionality of provisions relating to criminal defamation contained in sections 499 and 500 of Indian penal Code 1860 and section 199 of the Code of Criminal Procedure 1973. These provisions were challenged for violating the freedom of speech and expression in Article 19 (1) (a) of the Constitution. This was an opportunity for the court to apply the doctrine of proportionality not least because it already had an alternative, less intrusive means to consider civil defamation. Therefore, it was perfectly placed to evaluate the necessity

⁴⁴ Aparna Chandra, Proportionality in India: A Bridge to Nowhere? University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

⁴⁵ (2012) 10 SCC 603

⁴⁶ AIR 2016 SC 2601

⁴⁷ See principles laid down in *Mohd. Hind Qureshi v. State of Bihar* (AIR 1958 SC 731), *P. P. Enterprise v. Union of India* (AIR 1982 SC 1016) and *MRF Ltd. v. Inspector Keral Government* (1998) 8 SCC 227

⁴⁸ (2016) 7 SCC 221

of the doctrine of proportionality.⁴⁹ The Court held that the impugned provisions were not a restriction on free speech that can be characterised as disproportionate since individuals have a right to reputation and therefore the right to free speech does not include the right to defame others. The Court did not explain why civil defamation was not sufficient to protect the right to reputation or why given the importance of free speech and impact that criminal defamation has on such speech, the balance struck in favour of the measure.⁵⁰

In the case of *K.S. Puttaswamy v. Union of India*,⁵¹ which is also known as right to privacy case, the Supreme Court had to decide whether the right to privacy was guaranteed as a fundamental right by the Indian Constitution. It was held by the court unanimously that Indian Constitution protects that the right to privacy. It was also mentioned by the Court that the individual's right to privacy against the State action or against an action of an individual or a corporation the Honourable Courts would be guided by three tests, namely the test of arbitrariness, test of reasonable nexus to the purpose aims to be achieved and the test of proportionality. As the court had the opportunity and power to examine the existence and scope of the right to privacy and to impose reasonable limits to it, this was an opportunity to elaborate more on the doctrine of proportionality, unhampered by the need to apply the test of facts. The court held that doctrine of proportionality has to be satisfied to make a limitation on the right to privacy valid. The judges differed on their opinion. The plurality of opinion stated that only interference with the right to privacy has to meet the three-fold criteria of legality, legitimacy of aims and proportionality and these requirements emanate from the procedural and content based mandate of Article 21. Subsequently it was held that the limb of proportionality ensures a rational nexus between the objects and the means adopted to achieve them.

The Court got an opportunity to clarify the proportionality test in the main Aadhaar challenge⁵² and this time a much more stringent proportionality test has been applied. The Court decided the challenge to various parts of the Aadhaar Act and various notifications, rules, orders and circulars that had been issued under the Act or other laws pertaining to Aadhaar. While arguing before the Court, the State had mentioned that the failure to establish the identity of beneficiaries of various welfare programme was leading to a lot of leakage and corruption and was causing an impediment

⁴⁹ Aparna Chandra, Proportionality in India: A Bridge to Nowhere? University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

⁵⁰ *ibid*

⁵¹ AIR 2017 SC 4161

⁵² *K.S. Puttaswamy v. Union of India* (2019) 1 SCC 1

to their successful implementation.⁵³ For this reason, some provisions of Aadhaar Act were inserted to identify beneficiaries of various government schemes in a manner that eliminated duplication or fraud. The State also argued that it was pursuing a legitimate aim, that Aadhaar would help achieve that aim. The opinions of the Bench demonstrate the variability of the proportionality doctrine both in substance and in evidential requirements and also highlight the importance of engaging with the evidential questions because the intensity of review can be varied without changing the substantive standards of review. It also demonstrates that proportionality does not necessarily require the Court to go into disputed questions of fact, but only to allocate the burden of factual uncertainty.

In the very recent case of *Anuradha Bhasin v. Union of India and ors.*,⁵⁴ the Court held that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Articles 19 (1) (a) and 19 (1) (g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) & (6) of the Constitution inclusive of the test of proportionality. It was also held that any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond necessary duration. It was also held that while exercising the power under section 144 CrPC, the Magistrate is duty bound to balance the rights and restrictions based on the principles of proportionality and thereafter, apply the least intrusive measure.

DISPROPORTIONATE APPLICATION OF THE DOCTRINE OF PROPORTIONALITY

It is well noted that according to the idea of the concept of proportionality, there must be a credible connection between the desired goal and the activities taken to attain that conclusion. A fundamental element of administrative and constitutional law is the notion of proportionality, which guides the conduct of judicial review. The notion states that there must be a logical relationship between the desired objective and its actualisation. Though the doctrine has developed in India in the last three decades through the judgments of Supreme Court, there are certain loopholes which need to be filled up. In the case of *Union of India v. G. Ganayutham*,⁵⁵ the Supreme Court debated the validity and significance of the notions of proportionality and

⁵³ *ibid*

⁵⁴ 2020 SCC Online SC 25

⁵⁵ (1997) 7 SCC 463

reasonableness. The Court declared that, in the absence of essential rights, India will adopt the ‘Wednesbury’ unreasonableness criteria from the United Kingdom as a substitute. Regarding the question whether the concept of proportionality should be used when fundamental rights are infringed, the Supreme Court did not express an opinion on the subject in its judgments.

Regulated powers have been given to Indian courts in the name of this doctrine and the doctrine took a very narrow and circumscribed approach in its existence. During its existence, the doctrine followed a rather restricted and limited approach. In *Canara Bank v. V. K. Awasthy*,⁵⁶ the Apex Court had explained the scope and ambit of the power of judicial review of administrative and legislative action relating to the ground of proportionality. Instead of breaking the new ground and analysing the concept thoroughly, the Apex Court simply restated the position as laid down in *Om Kumar case*.⁵⁷ In fact, in this process, the court created more confusion instead of elucidation or clarification when it mentioned that where departmental proceedings reveal several acts of misconduct and charges. The Apex Court is still groping in the darkness so far as the scope of proportionality is concerned.

It has been argued that the decision in *Ranjit Thakur case*⁵⁸ laid the seeds of the doctrine of proportionality in Indian administrative law without recourse to any constitutional principle. However, on the contrary, it seems apparent and obvious that in view of the extremely limited scope for judicial intervention, where the decision shocks and startles the conscience of the court or is in outrageous defiance of logic, the Apex Court was applying the Wednesbury test in the guise of referring to it as proportionality. This view has subsequently been endorsed in *Union of India vs. Ganayutham*.⁵⁹ In the famous case of *State of Andhra Pradesh v. Mc.Dowell & Co.*,⁶⁰ the Supreme Court still considered the doctrine of proportionality in the administrative law sphere debatable.⁶¹ In this case, it was succinctly stated that no enactment can be struck down by just saying that it is arbitrary or unreasonable. The meaning of the statement that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and the meaning of the statement that the court can strike down an enactment if it thinks it unreasonable, unnecessary and unwarranted are completely different.⁶²

⁵⁶ AIR 2005 SC 2090

⁵⁷ AIR 2000 SC 3689

⁵⁸ (1987) SC 611

⁵⁹ (1997) 7 SCC 463

⁶⁰ AIR 1996 SC 1627

⁶¹ Ashish Chugh, Is the Supreme Court disproportionately applying the proportionality principle? Sep 2, 2023 10.00 AM https://www.ebc-india.com/lawyer/articles/2004_8_33.htm

⁶² Ashish Chugh, Is the Supreme Court disproportionately applying the proportionality principle? Sep 2, 2023 10.00 AM https://www.ebc-india.com/lawyer/articles/2004_8_33.htm

The Supreme Court, while addressing on the limitation in applying the doctrine of proportionality, after referring to the case of *Ganayutham*⁶³ and *Om Kumar*,⁶⁴ held that the interference of the High Courts will be justified in the time of exercising judicial review only in exceptional and unusual cases and that too only if the punishment was shockingly or abruptly disproportionate. According to the words of the Apex Court, the court could not interfere with the quantum of punishment unless it was shockingly or grossly disproportionate. This statement was inconsistent with the case of *Om Kumar*⁶⁵ because instead of analysing whether the ‘discriminatory’ punishment had any reasonable or ‘objective justification’, the Supreme Court merely stated its non-interference because it was not shown that the punishment was shockingly, unexpectedly or abruptly disproportionate.

In *Canara Bank v. V. K. Awasthy*,⁶⁶ while explaining the applicability of the doctrine, the Court observed that in situations where no fundamental rights or freedoms are involved, the court will only play a secondary role, while primary judgement will remain with the administrative authorities. However, in situations where fundamental rights are directly and substantially involved, the court will play the primary role in the judgement. Regarding the application of the doctrine of proportionality to determine quantum of punishment, the Supreme Court was of the view that it can not be a routine matter. If departmental proceedings establish charges of failure to discharge duties with honesty, integrity and diligence, the scope of judicial review is highly limited to situations of illegality and irrationality only.⁶⁷

The Court delivered its Aadhaar Judgment in September 2018. In this year, the Court also decided other landmark fundamental rights cases under the Constitutionality. However, those other cases did not engage with the cursory manner.⁶⁸ It is, therefore, not clear whether the proportionality test is here to stay in Indian Jurisprudence or not.⁶⁹

⁶³ (1997) 7 SCC 463

⁶⁴ AIR 2000 SC 3689

⁶⁵ AIR 2000 SC 3689

⁶⁶ AIR 2005 SC 2090

⁶⁷ I. P. Massey, Administrative Law (10th ed 2022)

⁶⁸ K.S. Puttaswamy v. Union of India (2019) 1 SCC 1

⁶⁹ Aparna Chandra, Proportionality in India: A Bridge to Nowhere? University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

CONCLUSION AND SUGGESTIONS

The legal parameters of judicial review has undergone a change. It is clear from the above analysis of the judgments given by the courts that the doctrine of proportionality, being a part of judicial review ensure that a decision otherwise within the province of administrative or legislative authority must not be arbitrary, unjust, irrational or unreasonable. The proportionality test though gaining ground, has not completely replaced the Wednesbury test of unreasonableness. But it is going to be 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.

If the Court is indeed inclined to move towards a structured proportionality test, then it's present approach needs course correction. The Court's engagement with the structured proportionality test has been inconsistent and incoherent. Further, the Court has tended to set out substantive standards of scrutiny of proportionality that are at odds with the evidential standards that are drawn from previous case laws.⁷⁰ This leads to an internal absurdity in the structure of proportionality. On the other side, the Court articulates a very high standard of substantive scrutiny, implying thereby that rights are of great normative significance and can be overcome only in exceptional circumstances. A theme running through the above discussed cases is the Court's assertion that the proportionality test has always been part of the Indian constitutional landscape, it has always been applied by the Indian courts and it is 'well-settled' in constitutional jurisprudence.

It may be noted that adopting of the proportionality test does not unsettle or disrupt pre-existing relationship structure between the citizens and the State regarding rights or between the judiciary and other branches of the government. It has been noticed that by assimilating the proportionality test into existing approaches to judicial review, the Court severely restricts the ability of the doctrine to re-shape legal culture.

Since proportionality is supposedly already a part of the Court's rights review standards, the invocation of proportionality does not make much difference in the outcomes of specific cases or re-configuration of existing power dynamics. In this regard proportionality must be accompanied

⁷⁰ Aparna Chandra, Proportionality in India: A Bridge to Nowhere? University of Oxford Human Rights Hub Journal, Vol 3(2), 2020 Aug 16, 2023 4.00 PM ohrh.law.ox.ac.uk

by a well-thought-out, clear, consistent and principled approach to its content and structure. It can be really dangerous if proportionality test becomes nothing more than a label attached to the outcome of a judge's consideration of the facts in cases. The Indian Supreme Court's approach to proportionality appears to be an apt demonstration of these concerns.

However, in near future, Indian Courts will have to actively consider the application of proportionality in all situations and in all cases which come before them regardless the citizens's or person's fundamental right or ordinary right. It is because of the development of human rights jurisprudence which has expanded to monitor and control the legal system which encompasses not only fundamental rights but also the rights which do not come under the purview of fundamental rights. As a result, the importance of adopting the proportionality approach cannot be overstated because even if the nut crackers are sufficient, steam hammers will be increasingly employed to shatter nuts. All exercise of statutory discretion and administrative action must be based on reasonable grounds and cannot lapse into arbitrariness or caprice, which is repugnant to the Rule of Law. But at the same time, the Court should not interfere with the administrator's decision unless it is illogical or suffers from procedural impropriety or is shocking to the conscience of the court, in the sense that it is in defiance of logic or moral standards.