

A Critical Analysis of the Principle of Proportionality under the Indian Constitution

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ABSTRACT

The doctrine of Proportionality is recognised by many countries as a general principle of law to interpret the fundamentals of the constitutional values because of its relationship and relatableness with constitutional law. The doctrine is utilized by the judges in constitutional and administrative law cases to balance the rights of individual, public interest and to establish an essence of fairness, justice, and equilibrium (constitutional values) which requires that the reasons for transgression must weigh in parity with the rights which are intruded upon by such action. A look, however, into the reality of the application by the court of the test of proportionality shows a different trend and reality. The paper deals with the application of the test of proportionality in India and examines the constitutional challenges currently plaguing the doctrinally of proportionality.

Keywords- *Constitutional law, Administrative discretion, Wednesbury unreasonableness, Judicial review, Proportionality, Fundamental rights, Grundnorm*

INTRODUCTION

Frequently, in administrative action cases, the criterion of proportionality is used as the grounds for judicial review on the basis of its application. Originating in Europe, the theory has now grown to become a significant component of European administrative law. “The concept essentially states that the punishment should not be disproportionate in comparison to the crime committed, and that the administrative procedures employed to achieve a specific goal or result should not be more restrictive than is necessary to achieve that goal or result.”¹

According to Administrative Law, the notion of proportionality applies throughout the Judicial Review process. “According to the idea, there must be a credible connection between the desired goal and the activities taken to attain that conclusion. In the case of certain employees being absent from work, the punishment must be proportionate; for example, the employer may treat it as unpaid leave and issue a warning or perhaps a fine, but permanently firing them from service would be disproportionate and unjustified.

Under the Indian Constitution both Article 14 (which identifies discrimination) and Article 21 of the Indian Constitution are infringed upon by legislation that goes against their intent. When the Supreme Court of India looked into whether the idea of proportionality could be used in administrative action, it came to the same conclusion as the English court had. As the Supreme Court stated, even if the concept of proportionality is not explicitly stated, in India, administrative measures harming core freedoms (Article 19 and Article 21) are always examined on this basis. Since Articles 19 and 21 of India's Constitution are specifically addressed in this case, the Indian Supreme Court said categorically that judicial review is applicable to administrative activities that violate these two articles.

The scope of proportionality review with respect to administrative action in India is severely limited.² This is due to the fact that much administrative activity in India is challenged in court largely on the grounds of arbitrariness, which may only be challenged under the Wednesbury unreasonableness doctrine. As a result, the Om Kumar case had only a little impact on the scope and effectiveness of judicial review in the country.

PROPORTIONALITY & THE RULE OF LAW

The principle of proportionality has always been in challenge in India and different interpretations have been enumerated through judicial and administrative review of the principle. As the basic principle of the Constitution of India there must be a connection between the rule and its object. The principle of proportionality emanates its importance as it goes to the root of the fundamental principles of the constitution.

Article 14 of the Constitution challenges the discretionary nature of an administrative decision, and this concept applies. The Wednesbury³ concept, on the other hand, is adopted when official action is questioned as "arbitrary" under Article 14. Regarding Article 14, Indian courts considered whether the categorization was based on a comprehensible difference and if the

¹ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 (1) COLUMBIA JOURNAL OF TRANSNATIONAL LAW 73 (2008).

² Cora Chan, *Proportionality and Invariable Baseline Intensity of Review*, 33 (1) LEGAL STUDIES 1, 5 (2013).

³7(1948)1 KB 223

difference had a reasonable connection to what the legislature was trying to accomplish. It implied that the courts were looking at the legitimacy and adequacy of the difference.

1. RULE OF LAW

*“The state is ruled by law, not by its ruler or the elected representatives of its people. The Grundnorm⁴ of the country, or even the basic and core law from which all law derives its authority, is the supreme authority of the state in a country that adheres to the rule of law. The monarch or republican representatives are subject to Grundnorm's laws, and their authority is constrained by those same rules. When it comes to king and law, there's no such thing as a monarch”.*⁵

A. V. Dicey's perspective on the rule of law says that. "A government should be built on principles of law and not on men," according to Dicey's idea, this includes three pillars:

i. *Supremacy of Law*

This has always been the underlying principle of the rule of law, which states that the law governs everyone, even those who enforce it. Legislators must justify their actions under the law when they use their legislative and judicial responsibilities.

ii. *Equality Before The Law*

Equal before the law ensures that the law is implemented and enforced in a fair way, while the concept of supremacy of law places checks and balances on the government's ability to make and administer the law. Not only must the legislation be fair, but it must also be implemented fairly. The legislation cannot be used to discriminate on the basis of sex, religion, colour, or any other factor. *“Article 14 of the Indian Constitution and Article 7 of the Universal Declaration of Human Rights codify this idea of the rule of law, respectively.”*

iii. *Pre-Dominance Of Legal Spirit*

A rule of law state is one in which the principles of the rule of law are being observed, according to Dicey's opinion, and this is why he included this as an additional criterion in his definition of rule of law. Dicey was certain that the courts could provide this enforcing power. As enforcers of the law, courts must be completely independent of any outside pressures. As a result, judicial independence is a crucial tenet of a free society.

Many have argued that India's Rule of Law is only a theoretical construct with no real-world implementation. *“According to World Justice Project data, India ranks 37th out of 97 countries surveyed worldwide, first in its region, and second among 23 lower-middle-income countries in the category of limited government powers, which evaluates the checks on government.”* India is ranked 83rd out of 196 countries for its lack of corruption and 96th for its level of law and order.⁶

In spite of these issues, it is crucial to remember there are enough protections in place to ensure that the rule of law will always exist in some form. The role of the courts in interpreting the law is one of the most essential components in preserving the rule of law.

⁴Mridushi Swarup, *Kelsen's Theory of Grundnorm*, MANUPATRA <http://manupatra.com/roundup/330/Articles/Article%201.pdf>.

⁵THOMAS PAINE, COMMON SENSE, (July 4th, 1994).

⁶ Arnav Shastri, *Critical analysis of 'Rule of law' and its application in Indian judiciary*, (2021) RACOLB LEGAL, available at: <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=61fb07af-8c80-4868-b707-b9939e9dae87&txtsearch=Subject:%20Administrative%20Law>.

It is well known that the Indian Supreme Court⁷ has ruled that the government cannot wield authority in an arbitrary way or make laws that are in direct conflict with the rule of law. Additionally, constitutional mechanisms provide independent watchdogs to ensure that justice is administered fairly and consistently. There have been countless scams in the previous few years, but it is equally important to highlight that these scams have been exposed and the legal system has been put in place against the culprits.⁸

CRITICISM AGAINST THE PROPORTIONALITY PRINCIPLE

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 actualization; this is critical. Only acts that are reasonable in view of the information available to the court will be considered by the courts. When you look at an example, it becomes simpler to comprehend. Even if a person is consistently late to work, it would be unreasonable to dismiss them from their position because their employer has decided to treat the lateness as unpaid time away from the office. According to Sir John Laws, proportionality is defined as the order in which a person's priorities are assigned. "This is obviously like attempting to shatter an egg with an egg-crushing apparatus," the judge in [R vs Goldstein 1983 (1) WLR 151] observed.⁹ When determining if fines or rights infringements are excessive or unwarranted, for example, the "proportionality" test is employed to ensure that less restrictive options have been examined. Justice Department control of legislative and executive acts has been one of the most important developments in public law in the twenty-first century. It wasn't until 1803 that the concept of Judicial Review was founded in the pivotal case [Marbury v. Madison, 5 US 137 (1803)], which was a watershed moment in American history. But it was not until after Globe War II that democracy surpassed all other political ideologies as the dominant political philosophy in most nations throughout the world. When Judicial Review was first suggested, administrative law experts were split on whether it should be implemented. According to a recent study, judicial review of executive action (administrative action) has absorbed the greatest amount of content enrichment in the last two decades. Because of the expansion of the contemporary welfare state and the progress of technology, many legislative tasks and powers have been moved to the executive branch of government. In the aftermath of this, bureaucrats now wield considerable authority. When he begins to misuse his authority, he often resorts to the courts for assistance in keeping him in check.¹⁰

1. DIFFERENCES IN DIVISION OF POWERS

Although the courts should refrain from interfering with the work of the executive branch, there should be no danger of this occurring. Therefore, judicial review must be circumscribed in order to avoid the courts from exercising excessive power over the administration. The

⁷ AIR 1978 SC 597

⁸ Ibid.

⁹ E Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights* SA. J of HR, (1994).

¹⁰ D. Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach?* in L Lazarus, *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014).

common law and civil law systems both contributed in various ways to the restrictive purpose of this Judicial Review, which was established by the Supreme Court. Historically, secondary review was used in common law countries in order to accomplish the restricted goal of Judicial Review. [Associated Provincial Picture Houses vs Wednesbury Corporation (1947) 2 All ER 75] If an administrative order is so ludicrous that no reasonable person could have thought it was within the competence of the administrative branch of government, it may be overturned on appeal (CA).¹¹ In civil law regimes where the concept of proportionality-based review (also known as Primary Review) has been established, there is a more expansive Judicial Review process. According to the concept of proportionality, administrative actions should not be carried out in excess of what is necessary to accomplish the desired aim. For common law countries, it was impossible to disregard the need for proportionality-based analysis for very long. A separate pan-European legal system, based mostly on civil law principles, was formed as a result of the advantages of proportionality-based evaluation.¹²

India has inherited the common law system that was established by the British Empire. When India obtained independence from Britain, it was decided that the common law system would be kept in its entirety. When it comes to resolving personal disputes, Indian courts have historically looked to English precedents for guidance. In India, administrative law has developed in a similar manner. Despite the fact that Article 226 and Article 32, when read along with Article 13, offer the Constitutional Courts with far wider opportunity for interfering with Executive Orders, Indian courts have decided to embrace the English idea of Wednesbury's reasonableness.

2. THE PROPORTIONALITY DOCTRINE IN INDIA

As an example, in the case of [Union of India vs. G Ganayutham, (2006) 65 (1) Criminal Law Journal 174] the Indian Supreme Court debated the validity and significance of the notions of proportionality and reasonableness. The Supreme Court of India 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 of 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 judgements. Because of this, the Indian Supreme Court gave an important decision in [Omkumar Vs. Union of India, AIR 2000 SC 3689], which was published in 2000. In this case, there is precedent for a Supreme Court judgement based on the concept of proportionality to be rendered. Since 1950, Indian courts have regularly used the proportionality test to determine whether a piece of legislation is constitutional or not. The proportionality test is specified in Article 19 (1) of the Indian Constitution and has been consistently applied. In recent Supreme Court decisions, judges were given the authority to consider whether limits were excessive rather than just choosing the least restrictive choice. The Indian Constitution's Article 14 (which prohibits discrimination) and Article 21 (which prohibits violence against women) are both violated by current legislation. The Supreme Court of India reached this conclusion after conducting a thorough examination of the United Kingdom's perspective on administrative action proportionality. Despite the fact that the

¹¹ J Griffiths, *The Social Working of Legal Rules* J. of LR. P and Unf. L (2003) 1.

¹² M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture*, (CUP 2013);

concept of proportionality is not directly stated in the Indian Constitution, the Supreme Court of India has consistently applied it to Articles 19 and 21 of the Constitution. The Supreme Court of India ruled in this case that when the Indian Constitution's Articles 19 and 21 are violated, a judicial review is necessary. The Indian Supreme Court has ruled that when a discriminatory administrative action is challenged, it is important to establish whether or not the conduct is fair and reasonable in the first instance.¹³

When an administrative decision is questioned because it seems to be arbitrary, the notion of Secondary Review developed by *Wednesbury* comes into play. Similarly, to the *Wednesbury* principle, the Supreme Court of India has held that only secondary review may be utilised to challenge sanctions imposed under Indian service law.¹⁴ As explained by the Indian Supreme Court, this is because Article 14 of the Indian Constitution does not address the punishments imposed under the country's service legislation. In India, the Supreme Court is in charge. Omkumar's case has not advanced in any way over the course of a decade. According to Omkumar's decision, proportionality is now required under Indian law. A growing body of evidence suggests that the notion of unreasonableness is being phased out in favour of the concept of reasonableness. According to the Supreme Court of India, the legal framework for establishing the proportionality of administrative actions is confined by the country's current legislative structure. The *Wednesbury* unreasonableness criteria, which is only applicable in India, must be used if you wish to assert that anything is arbitrary. Omkumar's case has had no influence on the expansion of the scope of Judicial Review in India as a consequence of the judgement in his favour. When asked in Omkumar's why the *Wednesbury* unreasonableness standard should not be applied to claims based on arbitrary judicial decisions, the Supreme Court fails to provide an adequate explanation. Any of the following factors might have had a role in the incident.¹⁵ Unlike convention rights, non-conventional rights are protected by the *Wednesbury* principle, which is in contrast with convention rights. Another theory is that the Supreme Court was concerned about having an overloaded docket of cases. The second of these two issues are not deserving of a less stringent degree of investigation.¹⁶ As a consequence, decision-makers would be compelled to reevaluate their own decision-making processes and make modifications in order to comply with the new standard of scrutiny established by the courts. It is possible that the number of patients may initially grow. Comparing conventional and non-conventional rights is becoming more difficult when it comes to applying the principle of proportionality for the same reason, the Supreme Court's distinction between arbitrariness and arbitrariness is ambiguous.

3. A NEED FOR MORE GRANULAR DIFFERENTIATION

From the perspective developed so far, it suggests that an arbitrary order is discriminatory or breaches fundamental rights; however, this is not always the case with arbitrary orders. In the vast majority of cases, this is untrue. When the government fires workers who attend religious services, it is violating their basic right to freedom of religion and assembly guaranteed by

¹³ *Supra* note 81.

¹⁴ *Supra* note 77.

¹⁵ A Kavanagh, *Defending Deference in Public Law and Constitutional Theory* (2010) L. QR. REV.

¹⁶ M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (CUP 2013).

Article 19 of the Constitution (1)(b). An arbitrary decree has been issued in this instance, and it also violates two other fundamental rights guaranteed by the Indian constitution. When a government administration refuses to advance a capable government employee while simultaneously promoting another to a similar position, this is referred to as discriminatory treatment by the courts. In order to challenge an administrative decision as arbitrary, a Petitioner must demonstrate that his or her fundamental, statutory, or common law rights have been violated by the decision. First, assuming the Court accepts the Court's classification, it must determine what kind of right has been violated as a result of the Court's judgement. Because to the Supreme Court's interpretation of Article 21 of the Indian Constitution, it is difficult to distinguish between fundamental rights and non-fundamental rights. Administrative processes also often infringe on a wide range of individual freedoms, as previously stated.¹⁷ It will thus need a large amount of judicial labour and time in order to determine the kind of right at issue. Even if this alternative is available, judges' time would be better spent determining whether or not a decision has been reached that strikes a sufficient balance between competing priorities. According to the principle of judicial restraint, proportionality examinations may be conducted in a variety of intensities depending on the subject matter and type of rights at issue. When an administrative decision is said to be arbitrary, it is necessary to consider the *Wednesbury* principle. Take, for example, the way the word "arbitrariness" is used in this phrase to demonstrate how it is used. When it came to deciding whether anything was arbitrary or reasonable, the Supreme Court in [*Shrillekha Vidyarthi Vs. State of U.P.*, AIR 1991 SC 537] equated the terms since the word could not be defined clearly.¹⁸ Because *Wednesbury* unreasonableness is strongly related with arbitrary behaviour, it is possible that the decision maker will be able to evade a complete court examination in this situation. As a result of this, it is constantly changing and developing.¹⁹

Recent Supreme Court decisions have recognised that *Wednesbury* reasoning is being phased out and being replaced by the principle of proportionality. According to the Supreme Court, determining whether or not a decision maker has taken into consideration all relevant variables is completely permissible in a democratic setting.²⁰ The amount of proportionality examination varies from case to case based on the subject matter and the rights that are at risk in each instance. In the decision of [*Sandeep Subhash Parate vs. State of Maharashtra (2006) 1 SCC 501*], the Supreme Court recognised the importance of proportionality in the application of the law. In spite of the fact that the caste certificate given by a student was falsified, the student was enrolled into an engineering programme. He completed the course in accordance with the High Court's instructions. The institution, on the other hand, refused to award him a degree. The University was successful in its appeal to the High Court. Following an appeal, the Supreme Court ordered the university to award him an honorary degree after he paid a one-million-rupee fee to the institution in question.²¹ The concept of proportionality, according to

¹⁷ *Supra* note 87.

¹⁸ *Supra* note 81.

¹⁹ *Supra* note 77.

²⁰ *Supra* note 43.

²¹ *Supra* note 88.

the Supreme Court, had an impact on the decision-making process in question. The Supreme Court, on the other hand, did not decide that all relevant criteria were overlooked while awarding a degree to an appellant who was appealing the decision. When it came to proportionality, the Supreme Court didn't go any farther than presenting the facts of the case; it didn't explain how it arrived at its judgement. This decision was taken in accordance with Article 142 of the Indian Constitution, which was recognised by the Supreme Court. Consequently, Indians will be compelled to make a choice between European and British types of governance. In the opinion of Julian Rivers, the European methodology is the most effective method available.²² In Omkumar's case, the Supreme Court said that legislative and administrative bodies must be permitted to pick from a broad number of possibilities, but that courts have the authority to determine whether the decision infringes on the rights of individuals unreasonably. Based on the European method, it is anticipated that a fair balancing phase (the last step) will be added to the proportionality analysis in the United States. If you are dealing with Indian situations, it is advisable to use European proportionality rules. The notion of proportionality is used to analyse decisions, and it takes into account two criteria in making the decision. You may argue that if the relative benefits of various purposes or interests have been appropriately examined or balanced, they have been done correctly.²³ Second, was the financial toll that the programme took on those who were hurt by it justified? It will not matter if the judgement was accurate or incorrect; the procedure by which it was made will be scrutinised. Court of Appeal decision in *Law Development Corporation v. Maharashtra Law Development Corporation*, 15 SSC 616. (2011) found that when making a judgement, it is necessary to give equal weight to all aspects of the case, which is why proportionality is so crucial. It was decided in the case of *Ranjit Thakur vs Union of India* (1987) 4 SCC 611 that an army commander disregarded a lawful order from his senior officer by refusing to accept meals that were offered to him by his superior. Service members found guilty of wrongdoing were sentenced to a year in solitary confinement, which was the maximum punishment.²⁴

The upshot of his ineligibility was that he was fired from his job and prohibited from applying for any other positions in the future. While judicial review is intended to invalidate a specific judgement, it also has the purpose of reversing the whole process that led to that decision. The Courts will conduct an investigation. A court-martial, which has the ability to decide on punishment, may be convened to make the decision. The penalty, on the other hand, must be customised to the nature of the offence and the individual who committed it. This is not intended to be snarky or derogatory in nature. If the punishment is severe in contrast to the offence, there shouldn't be too much shock value in the outcome of the trial. The idea of proportionality, which is a significant component of the judicial review concept, may be utilised to overturn a sentence if the Court-judgment Martial's decision on a particular issue does not meet the standard of reasonableness required by law. Judges have the authority to grant judicial review in circumstances when the decision is unreasonable or perverse.²⁵

²² *Supra* note 83.

²³ *Id.*

²⁴ *Supra* note 77.

²⁵ A Sweet and J Mathews, *Proportionality Balancing and Global Constitutionalism* 47 Cl. J. T. L (2008) 73.

Every skill has its own set of restrictions. Supreme Court of India decision in the case of Coimbatore District Central Cooperative Bank v. Employees' Association (2007) 4. A small number of workers went on an illegal strike. It was also difficult for others to carry out their tasks because of this. In this case, it was concluded that there had been a large level of misbehaviour. It was proper to withhold yearly increases for employees since they were not unfairly punished for the claims against them that they were found guilty of and convicted of. In [K. S. Puttaswamy vs. Union of India, 2017 (10) SCC 1], the Supreme Court upheld the proportionality test as used by the lower courts. A court has determined that while considering whether a legislation is proportionate, it is necessary to consider people's fundamental rights as well. When it comes to judging the appropriateness of a measure, public concern over its imposition is just as significant as legal and physical limitations. Anuradha Bhasin vs. Union of India [2019 SCC Online SC 1725] was a Supreme Court case in which the plaintiff challenged internet and mobile phone limitations in Indian-administered Kashmir (J&K). How the government must adhere to the principle of proportionality before enacting any legislation that restricts people's fundamental freedoms. Prior to putting any limits in place, it is necessary to identify an overarching objective.²⁶ There should be no space for ambiguity in this situation. Before making a final choice, it's vital to establish whether or not the step that came before it may be omitted from consideration. The success of a policy is determined by the influence on fundamental rights and the need of implementing a measure. When it comes to employing less onerous techniques, a state's other alternatives²⁷ are just out of reach for them. Because of its impact on the fundamental rights of people who are impacted, this order should be supported by credible evidence and subjected to judicial scrutiny before it is implemented.²⁸

CONCLUSION

The new foundation for judicial review of administrative actions is the concept of proportionality. It is well established in the European administrative law system. This concept is said to be able to successfully curb administrative arbitrariness. Jurists are debating whether or not the Wednesbury standard may be used to evaluate the rationality part of reasonableness. Principle of judicial review and notion of proportionality must be reconciled in order for an appellate court to consider a court's judgement in full. This unique principle of law must be properly appreciated and used, even though courts are still dealing with its principles. The examination of case laws must bring out this difficulty. The study of the notion of proportionality is both academically and legally essential since it provides a foundation for judicial review of administrative action.

Since the Indian Constitution includes fundamental rights, courts have traditionally applied the principle of proportionality in determining whether a limitation on such rights is justifiable. A fundamental responsibility for the court in Brind's interpretation is to determine whether the law supports the specific limitation in light of the opposing public interest. Such an instance

²⁶ *Supra* note 83.

²⁷ *Supra* note 97.

²⁸ *Supra* note 81.

occurs when the court must decide whether a statute restricting citizens' enjoyment of basic rights is lawful.

All basic rights in the Indian Constitution are not limited by a single, overarching restriction provision. This means that every right has a corresponding restriction, which may be found in the text or established by the courts (or both). A reasonableness test suggested by this concept has not been explicitly recognised by the Supreme Court, which has declared that the criterion of reasonableness of State conduct goes across the whole fundamental rights chapter. In the absence of such a framework, a plethora of overlapping and even diametrically opposed ways to limiting basic rights exist. Ad-hocism in the Court's rights adjudication has resulted in legal confusion and a lack of responsibility for judicial rulings because of the absence of a uniform methodology.

Even though proportionality was enshrined in Indian law as early as 2000, it is obvious that the notion is seldom used in India. Although the Supreme Court's interpretation of the doctrine has narrowed the scope of its applicability, it has also seen little actual use.

It was in the name of this idea that the authority of the Indian courts was restricted. In addition, the doctrine had a fairly limited scope when it was first promulgated. There are certain circumstances when arbitrary acts by administrative authorities need to be restrained by the theory of proportionality, and it is essential that this doctrine be established in its appropriate form and enforced in order to do so.²⁹

Courts must respect administrative bodies' positions, but it's crucial to keep in mind that this theory isn't meant to weaken any administrative bodies' positions, but to ensure that no action taken by an administrative body is exempt from existing legal norms. Not only does this help to build the country's legal system, but it also helps to protect people's rights as well.

As a matter of course and regardless of whether or not citizens' basic or ordinary rights are at stake, Indian courts will eventually be forced to actively explore adopting the notion of proportionality. Due to human rights jurisprudence predominating the legal system, not just basic rights but additional rights as well have been included. Since steam hammers would be required to shatter nuts if nut crackers were adequate, it's imperative that the theory of proportionality be adopted now.

²⁹ Vikram Aditya Narayan, *A historical argument for proportionality under the Indian Constitution*, INDIAN LAW REVIEW.