11

Wednesbury and Proportionality Principles

Youdhvir Singh*

A standard of unreasonableness used in assessing an application for judicial review of a public authority's decision. A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (Associated Provincial Picture House Ltd. v/s Wednesbury corporation (1948)1KB223. The test is a different (and stricter) test than merely showing that the decision was unreasonable. The Wednesbury principle is a principle of administrative law where the court sits as a judicial authority over the local authority to see if the local authority has acted in a manner that exceeded its powers, and not as an appellate authority to override a decision of a local authority. Proportionality is a general principle in law which covers several special (Although related) concepts. The concepts of proportionality is used as a criterion of fairness and justice in Statutory interpretation process especially in constitutional law, as a logical method intended to assist in discerning the correct balance between the restriction imposed by a corrective measure and the security of the nature of the prohibited act within Criminal law, it is used to convey the idea that the punishment of an offender should fit the Crime. Under International Humanitarian Law governing the legal use of force in an armed conflict proportionality and distinction and important factor in assessing military necessity. The principle of proportionality envisages that public authority ought to

* **Associate Professor, Department of Law, N.A.S. Post-graduate College, Meerut, Uttar Pradesh (India) E-mail: <hodlawnas26@gmail.com>**

CONTEMPORARY SOCIAL SCIENCES, Vol. 29, No. 4 (October-December), 2020
Peer Reviewed, Indexed & Refereed International Research Journal

maintain a sense of proportion between his particular goals and the means he employees to achieve those goals, so that his action impinges on the individual rights to the minimum extent to presence public interest.

The Indian Supreme Court consciously considered the application of the Concept of Proportionality for the 1st time in the case of (Union of India v/s G. Ganagatham (2006) 65(1) 6Lj174P 175) in that case the S.C. after extensively reviewing the law relating to Wednesbury unreasonableness and Proportionality prevailing in England held the Wednesbury unreasonableness will be the guiding principle in India's so long as fundamental rights are not involved. However, the court refrained from deciding whether the doctrine of proportionality is to be applied with respect to those cases involving infringement of fundamental rights subsequently come the historic decision of the Supreme Court in (Om Kumar vs. Union of India AIR 2009 S.C. 3689). Thus, when the legislative or administrative act is challenged as being arbitrary under Article 14, the Wednesbury principle is applied and when it is challenged as being discriminatory, the proportionality test is applied.

[**Keywords :** Wednesbury, Proportionality principles, Constitutional law, Administrative discretion]

1. Introduction

In Om Kumar v. Union of India,[1] the Supreme Court has held that when the legislative or administrative action is challenged as being discriminatory under Article 14, the proportionality test is applied and in such condition Wednesbury principles are not applied. When the action is challenged as arbitrary under Article 14, Wednesbury principles are applied.

Grounds of reasonable classification are as follows :

1. Age
2. Sex
3. Geographical or territorial basis
4. Nature of business or profession
5. Nature of source of authority
6. Nature of offences and offenders
7. Basis under tax laws
8. State of Government
9. Single individual or body as a class.

It has recently been ruled in Union of India v. M.S.M. Rawther,[2] that if an order passed by the Executive is not justiciable on

Wednesbury Principles, the Court can only set it aside and remit the matter back to the Executive for a fresh decision but the Court cannot assume the power of the Executive.

2. Administrative Discretion – Wednesbury Test

It is a trite that all exercise of statutory discretion must be based on reasonable grounds and cannot lapse into arbitrariness or caprice, which is to be anathema to the Rule of Law envisaged in Article14.[3]

Although discretionary powers are not beyond the pale of judicial review, the Courts, it is trite, allow the public authorities sufficient elbow space/play in the joints for a proper exercise of discretion.[4] In the matters of appointment or renewal of terms of a professional, such as Public Prosecutors/District Government Counsel, the jurisdiction of the Courts would be to invoke the test of unreasonableness, for judging the arbitrariness of the order, as laid down in Associated Provincial Picture House v. Wednesbury Corporation.[5]

It is settled position that all actions of the State including its instrumentalities, including those in relation to contractual sphere, have to be tested not only on contractual basis but on the anvil of Article14, as well.[6]

It has been ruled that the Court should not interfere with the administrator's decision unless it is in defiance of logic or moral standards. It is thus held that an administrative action is subject to control by judicial review on the following three grounds,[7] namely :

- if it is illegal;
- that it is irrational; or
- that it suffers from procedural impropriety.

The scope of judicial review is limited to the deficiency in the decision making process and not decisions.[8]

With respect to judicial review of administrative action, the modern trend points to judicial restraint. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision.[9]

The judicial review is the supervisory jurisdiction.[10] It is concerned not with the merit of a decision but with the manner in which the decision was made.[11] The Court will see that the decision

making body acts fairly. It will ensure that the body acts in accordance with the law. Whenever its act found unreasonable and arbitrary it is declared ultra vires and, therefore, void. In exercising the discretionary power the principles laid down in Article 14 of the Constitution have to be kept in view. The power must be exercised in non-arbitrary and reasonable manner.

When the legislative or administrative act is challenged as being arbitrary under Article 14, the Wednesbury principle is applied and when it is challenged as being discriminatory, the proportionality test is applied.

Wednesbury Principles may be summed up as follows :

When a statute gives discretion to an administrator to take a decision, the scope of judicial review will remain limited. The interference is not permissible unless one of the following conditions is satisfied :

- the order is contrary to law; or
- relevant factors have not been considered; or
- irrelevant factors have been considered; or
- the decision is one which no person would have taken.

If the administrative decision relating to punishment in disciplinary cases is challenged as being arbitrary under Article 14, the court is confined to Wednesbury principle stated above.[12]

Actually when the legislative or administrative action is challenged as being discriminatory under Article 14, the proportionality test is applied and in such conditions Wednesbury principle is not applied. When the action as challenged as arbitrary under art. 14 Wednesbury principles are applied where, an administrative action is challenged as arbitrary under Article 14 (as in cases where punishments in disciplinary cases are challenged) the question will be whether the administrative order is rational or reasonable and the test, then, is the Wednesbury test. The courts would then be confined only to secondary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factor 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.[13]

The court has held that where an administrative decision relating to punishment in disciplinary cases is questioned as

arbitrary under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedom nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts and in such extreme or rare cases can the courts substitute its own view as to the quantum of punishment.

In the exercise of the power of judicial review the court cannot enter into a political issue. Thus, ordinarily the political questions are not justiciable. In Gurudevdutta V.K.S.S.S. Maryadit v. State of Maharashtra,[14] the Supreme Court has held that the concept of political question doctrine, being basically of American origin, cannot possibly be confidently reached, until the matter is considered with special care, upon bestowing proper attention and in the event of a conclusion which lead credence to the question raised viz., as to whether the question is political question or not, judicial inclination to interfere cannot be faulted though, however, not otherwise. Judicial reluctance cannot be faulted in any way, unless, of course, an element of constitutionality of the legislation comes up for consideration. The political question doctrine has, however, to be treated to be a tool for maintenance of governmental order, but there is no blanket rule of judicial reluctance since the question arises as to whether the case represents the political question and for this purpose, facts of each case shall have to be considered in its proper perspective so as to assess the situation.

3. Meaning of Proportionality Principle

In Om Kumar v. Union of India,[15] the Supreme Court has explained the meaning of the proportionality principle. The Court has observed :

> "By proportionality, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order as the case may be."

Thus, under this principle the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they have intended to serve. The Legislature and administrative authority are, however, given an area of discretion or a range of choice, but as to whether the choice made infringes the rights excessively or not. is for the Court, that is what is meant by proportionality.

The principle of proportionality has been applied vigorously to legislative and administrative action in India. The reasonable restrictions under Article 19(2) to (6) can be imposed on the freedoms guaranteed by Article 19(1) (e.g. freedom of speech and expression, freedom to assemble peaceably, freedom to form associations or unions, freedom to move freely throughout the territory of India etc.) only by legislation and court can consider the proportionality of the restrictions. The restriction should not be excessive, *i.e.*, it should not be beyond what is required for achieving the objects of the legislation. The legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness unless it struck a proper balance between the rights guaranteed and the control permissible under Article 19(2) to (6). Otherwise it must be held to be wanting in that quality.[16]

Article 21 guarantees liberty and has also been subjected to the principle of proportionality.[17]

So far as Article 14 is concerned, the courts in India have examined w} her the classification is based on intelligible differentia and whether the differentia has a reasonable nexus with the object of the legislation. When the court considers the question as to whether the classification is based on intelligible differentia, it examines the validity of the differences and adequacy of the differences. This is nothing but the principle of proportionality.[18]

Thus, the principle that the legislation relating to restrictions on the Fundamental freedoms can be tested on the anvil of proportionality has never been doubted in India. This is called "primary review" by the courts of the validity of legislation which has offended the Fundamental freedoms.[19]

The principle of proportionality has always been applied to administrative action affecting the Fundamental freedoms, although the word "proportionality" has not been used.

The Court has held that where the administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here, the court deals with the merits of the balancing action of the administrator and is in essence applying 'proportionality and is a primary reviewing authority.

In India the position is that Fundamental Rights form a part of the Constitution. The courts have, therefore, used the doctrine of proportionality in judging the reasonableness of a restriction on the enjoyment of fundamental rights. The principles of law on this point are clear that while determining the reasonableness of the restriction on fundamental rights the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions of the time should all enter into judicial verdict.[20] However it is not certain whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are involved would apply principle of "proportionality" and play primary role. In Union of India v. G. Ganythan,[21] the Supreme Court left this question open because it was not necessary for the decision.

Rajesh,[22] furnishes an example of application of the doctrine of proportionality. In this case applications were invited by the C.B.I. for filling up 134 posts of constables. The selection process consisted of a written examination and a viva voice test. There were some allegations of favouritism and nepotism while conducting the physical efficiency test ; there were also irregularities committed during the written examination. As a result thereof, the entire selection list was cancelled. This was challenged in the High Court through a writ petition. The High Court after reviewing the various reports and the entire process categorically rejected the allegations of favouritism and nepotism. The Court also ruled that there was no justification for cancelling entire list when the impact of irregularities in the evaluation of merits could be identified specifically. On a reconsideration of the entire record, the Court found that only 31 specific candidates were selected undeservedly. The High Court allowed the writ petition.

On appeal the Supreme Court upheld the High Court. The Court ruled that when only 31 cases were tainted, there was hardly any justification in law to deny appointments to the other selected candidates whose selection was not vitiated in any manner. The Court observed :

> "Applying a unilaterally rigid and arbitrary standard to cancel the entirety of the selections du spite the firm and positive information that except 31 such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies giving complete go-by to contextual considerations throwing to the winds the principle proportionality in going far the than what was strictly and reasonably to meet the situation. In short, the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections wholly unwarranted even on the factual situation found too; and totally in excess of nature and gavity of what was at stake, thereby virtually rendering such decision to be irrational."

4. Exclusion of Judicial Review

Judicial review has been held to be a part of the basic structure of the Constitution and therefore it cannot be taken away by any statute.[23] The judicial review provided under Articles 32, 136, 226 and 227 cannot be barred even where the Constitution makes the action of the administration final.[24] In Union of India v. J.P. Mitter,[25] the Court has held that in spite of Article 217(3) which makes the order of the President final, in cases of the dispute as to the age of a Judge, the judicial review is not excluded.

Footnotes

1. AIR 2000 SC 3689.
2. AIR 2007 SC 3014.
3. B.E.M.L.E.H.B. Co-opt Society Ltd. v. State of Karnataka, AIR 2004 SC. 5054. See also Government of Andhra Pradesh v. P.L. Devi, (2008) 4 SCC 720.
4. See A.N. Bhati v. State of Gujrat, AIR 2005 SC 2115.
5. (1947) 2 All ER 640.
6. Food Corpn. of India v. SIEL Ltd., AIR 2008 SC 1101.

7. See State of Kerala v. Manager, Nimala Public School, AIR 2008 Ker. 197.
8. Rameshwar Prasad v. Union of India, AIR 2006 SC 980.
9. Tata Cellular v. Union of India, AIR 1996 SC 11 at 28.
10. R.V, Panel on Take Overs and Mergers, ex Guiness Plea, (1990) 1 QB 146.
11. Tata Cellular v. Union of India, AIR 1996-SC 11 at 32.
12. Om Kumar v. Union of India, AIR 2000 SC 3689.
13. Ibid.
14. Om Kumar v. Union of India, AIR 2000 SC 3689.
15. Ibid.
16. Chintaman Rao v. Stte of U.P., AIR 1951 SC 118.
17. Om Kumar v. Union of India, AIR 2000 SC 3689.
18. Ibid.
19. Ibid.
20. Laxami v. State of U.P., AIR 1981 SC 873; Trivedi v. State of Gujarat, AIR 1986 SC 1383; State of A.P. v. McDowll and Co., (1996) 3 SCC 709.
21. (1997) 7 SCC 463.
22. Union of India v. Rajesh P.U. Puthuvainikathu, (2003) 7 SCC 285.
23. Deokinandan Prasad v. State of Bihar, AIR 1957 SC 1409.
24. Indian Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299; Kihoto v. Zachilhu, AIR 1993 SC 412.
25. AIR 1971 SC 1093.

References

All Indian Reporter (A.I.R.), avail able at : https://www.aironline.in › all-india-reporter-online.

Narender Kumar, ***Introduction to The Constitutional Law of India***, Allahabad : Law Agency, 2019.

Rai, Kailash, ***The Constitution Law of India***, Allahabad : Central Law Publications, 2010.

Supreme Court Cases (SCC), avail able at : https://www.supreme court cases.com.

Upadhyaya, J. J. R., ***Administrative Law***, Allahabad : Central Law Publications, 2016. ★

Article Received on November 16, 2020; Accepted on December 28, 2020