FROM WEDNESBURY TO PROPORTIONALITY: A CRITICAL ANALYSIS OF THE EVOLUTION OF JUDICIAL REVIEW OVER ADMINISTRATIVE DISCRETION IN INDIA

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ABSTRACT

The growth of the administrative and regulative state has allowed the executive branch greater discretionary authority. The main question of administrative law is how to establish a standard of judicial review that puts a check on arbitrary executive action without displacing the administrative role. Over decades, Indian jurisprudence was based on the English doctrine of Wednesbury unreasonableness, which is characterized by such a high level of judicial deference and insistent observance of the separation of powers. But the constitutionalization of rights discourse brought to light the shortcomings of the Wednesbury standard in protecting basic liberties. As such, the Indian judiciary has over time adopted the proportionality doctrine, a multi-pronged, structured doctrine which was imported into the European jurisprudence. This critical analysis of this jurisprudential transition is presented as a doctrinal paper. The paper will contend by deconstructing some of the most important case laws and scholarly writings that proportionality is being proclaimed as the victory of human rights, but it will necessarily force the courts to conduct reviews based on merit. This change upsets the balance of power, making the judiciary a secondary reviewer of process, instead of a primary evaluator of administrative policy.

I. Introduction: The Dilemma of Administrative Discretion

The legislature in the modern welfare and regulatory state is simply unable to imagine and enact laws to cover all contingencies. As such, enormous discretionary authority is devolved to administrative authorities. The modern state thrives on administrative discretion permitting flexibility, expert knowledge, and personalized justice. But, as Lord Acton was fond of warning us, unchecked power is tyranny. The administrative law offers the judicial review mechanism to avert arbitrary use of the executive discretion. The extent and severity of this review are highly controversial in terms of jurisprudence. By being too lenient in reviewing the administrative decisions, courts will be justified in validating the abuse of power by the executive and they will have failed in their constitutional role of defending the citizens. On the other hand, when courts are overly active in questioning decisions, they are infringing the separation of powers and are imposing their own policy preferences in place of the democratically accountable and technically qualified executive branch[1]. On the other hand, when they are too aggressive in the decisions they scrutinize, then the courts are usurping the policy preferences of the democratically accountable and technically competent executive branch.

The paper follows the effort of the Indian judiciary to overcome this tension by abandoning the old, highly deferential Wednesbury unreasonableness test in favor of the new, stringent doctrine of proportionality. It does not simply describe these notions but it critically analyzes the institutional implications of this turn. In particular, this paper will discuss the issue of the adoption of proportionality in India, although strengthening fundamental rights, whether it is predisposed to judicial overreaching by the blurred boundary between judicial review and appellate merits-review.

II. The Fortress of Wednesbury: Institutional Deference and its Boundaries

A. Formulations of Lord Greene

The classic formulation of the test of reviewing administrative discretion was the landmark case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation[2] which appeared to mark the end of discretionary power to grant licenses to cinemas by a local authority under

[1] PP Craig, Administrative Law (7th edn, Sweet & Maxwell 2012) 612
[2] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA)

a condition it felt fit to impose. Lord Greene MR enunciated a standard of review which was precisely aimed at ensuring that judiciary was not involved in the sphere of administration. According to the Wednesbury doctrine, a court may only invalidate an administrative decision when it is tainted by illegality, procedural impropriety or irrationality. This narrow definition of irrationality was given: an action is unreasonable only so far as it is so absurd that no reasonable person can ever conceive that the action is within the powers of the authority[3].

This is formulated based on the constitutional theory of ultra vires and separation of powers[4]. Hence, the court is only supervisory. It should look at the decision-making procedure- were irrelevant factors taken into account or relevant factors ignored but it should never call into question the substantive merits of the decision itself.

B. The Tautological Trap and Indian Adoption

The Wednesbury standard was first embraced with enthusiasm by Indian courts, who used it to protect economic policies, award tenders, and disciplinary measures against judicial interference. In the landmark case of Tata Cellular v Union of India, the Supreme Court of India reiterated that the court is not a court of appeal to the decisions made by the administrative bodies expressly referring to Wednesbury to demonstrate judicial restraint[5].

But critical analysis shows that there are serious structural defects in the doctrine of Wednesbury. First and foremost it is tautological and subjective. The applicant must satisfy an almost impossible evidentiary burden to establish that a decision is so unreasonable that no reasonable person could have arrived at it. Moreover, the unreasonable is based purely on the personal moralistic conscience of the judge in the case. It does not have a systematic, objective approach.

What is more frightening is that Wednesbury is used as a rudimentary tool in cases where administrative discretion is violated against constitutional rights. An administrator could ruthlessly interfere with a fundamental right under Wednesbury, and the court would then have to sanction the move provided the administrator had taken into account the appropriate factors and the ruling was not unintelligent. With the development of human rights jurisprudence the

[3] ibid 230 (Lord Greene MR)
[4] MP Jain and SN Jain, *Principles of Administrative Law* (7th edn, LexisNexis 2017) 1032
[5] Tata Cellular v Union of India (1994) 6 SCC 651, 675

dawning of the realization was that fundamental liberties needed a more strict shield than the porous protection provided by Wednesbury deference.

III. Architecture of Proportionality: A Systematic Investigation

A. Conceptual Anatomy: The global public law saw a change towards the doctrine of proportionality to cure the deficiencies of Wednesbury. Proportionality, first developed in 19thcentury Prussian administrative law and later to be developed by the European Court of Human Rights, is a structured, four-step approach to the methodology of evaluating the legality of state action[6]. Proportionality, in contrast to the monolithic Wednesbury test, breaks down the judicial inquiry:

1. Legitimate Aim: Is the administrative action directed toward a legitimate objective that is constitutional?

2. Suitability (Rational Connection): Does the measure have a rational relationship to the attainment of that objective?

3. Necessity (Minimal Impairment): Does it have a less restrictive, equally effective alternative available?

4. Balancing (Proportionality stricto sensu): Is the benefit to society of accomplishing the goal greater than the loss to the infringed right of the person?

B. Scholarly Division: Rights vs. Balancing

The embracing of proportionality has created a deep polarization in the scholarly circles, which is critical to the understanding of the doctrine. The main argument by critics, led by Stavros Tsakyrakis, is that proportionality is an offence against human rights[7], and that it commodifies human rights and makes them a weighable interest, subject to general policy. Human rights, according to this criticism, are to be trump cards against the action of the state, not variables of a utilitarian calculus.

On the other hand, proponents of the doctrine, like Madhava Khosla, claim that proportionality

[6] Craig (n 1) 620
[7] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) International Journal of Constitutional Law 468, 470

plays an essential role in a contemporary democracy[8], and that constitutional rights are often incompatible with each other, as well as with compelling interests of the state. Proportionality does not violate rights, but inculcates transparency and analytical rigor into the unavoidable process of establishing these conflicts and compels the state to empirically justify any invasion of liberty.

IV. The Indian Trajectory: Hesitation to Constitutional Embedding

Wednesbury was not dumped by the Indian judiciary overnight. A gradual, careful assimilation of proportionality marked the transition, a profound fear of judicial overreach[9].

A. The Watershed Dichotomy of Om Kumar: The turning point of Indian administrative law was in Om Kumar v Union of India[10]. It was in this case that the Supreme Court clearly charted out the lines of both systems of judicial review and laid down a bi-polar system of judicial review. The Court acknowledged that Wednesbury was not adequate to safeguard the inherent rights in Articles 14, 19 and 21 of the Constitution.

The Court developed a two-track strategy:

1. **Primary Review (Proportionality):** The court should conduct a primary review by applying the proportionality doctrine when the administrative action at issue deprives the plaintiff of fundamental freedoms. The court determines independently, whether the restriction is necessary and proportional.

2. **Secondary Review (Wednesbury):** In cases where the administrative measure does not directly challenge fundamental rights, e.g. in an economic policy case, award of a contract, or tariff setting, the court will undertake a secondary review which will be limited to Wednesbury unreasonableness.

Om Kumar is a bright, but delicate, judicial compromise. It enabled the judiciary to strengthen its examination in situations where constitutional freedoms were involved and retain executive

[8] Madhava Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8(2) International Journal of Constitutional Law 298, 301
[9] Chintaman Rao v State of Madhya Pradesh AIR 1951 SC 118. (An early example of the Indian Supreme Court utilizing a standard akin to proportionality by assessing the "reasonableness" of restrictions under Article 19)
[10] Om Kumar v Union of India (2000) 7 SCALE 524

discretion in the day-to-day administrative and economic management.

B. Modern Jurisprudence: The proportionality doctrine received a constitutional preeminence in India when the nine-judge bench in Justice KS Puttaswamy (Retd) v Union of India[11] decided that any state infringement of the fundamental right to privacy had to meet the four-pronged proportionality test. Later cases have eloquently illustrated the doctrine biting into administrative discretion. Applying proportionality to the strike down of administrative notifications, the state of Gujarat in Gujarat Mazdoor Sabha v State of Gujarat, the Supreme Court deliberated the humane rationale by the state in exempting factories of labor welfare legislation in the face of the COVID-19 pandemic[12], directly opposite to the deferential attitude a Wednesbury review would have brought.

V. Critical Synthesis: Institutional Cost of Proportionality

Although a move towards proportionality is being widely heralded in the rights-discourse, a doctrinal critique must consider the tremendous institutional costs of such a move. Proportionality essentially changes the separation of powers by necessarily requiring a review of merits of administrative action.

A. The Illusion of Deference under the Prong of Necessity: The most controversial of the proportionality tests is the necessity test or the minimal impairment test. This prong involves the judge determining that the administrator had the option of attaining their policy goal in a less restrictive manner. Importantly, in order to answer this question, the judge has to put himself/herself in the place of the administrator. The court has to consider the alternative policies, and determine their viability and efficiency. This is not a review of the process anymore, this is a review of the content of the policy itself. Administrative officials have institutional benefits, including empirical evidence, field experience, and democratic responsibility, which judges do not have. Courts have the effect of crippling the administrative efficiency by requiring that the administrators demonstrate that they adopted the least restrictive policy, which in turn replaces the judicial preference with executive expertise.

B. Balancing: The Subjectivity of It: In addition, proportionality as a test is purportedly a structured and objective test, but the ultimate balancing (proportionality stricto sensu) is

[11] Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1
[12] *Gujarat Mazdoor Sabha v State of Gujarat* (2020) 10 SCC 459

purely subjective and, how does a judge weigh the right to privacy and national security scientifically? No standard measure. Finally, the balancing phase is dependent on the personal moral and political philosophy of the judge, and once again, it brings the subjectivity so abhorred by critics in the Wednesbury unreasonableness rule.

C. The Blurring Boundaries: Lastly, the Om Kumar dichotomy, of proportionality to rights, and Wednesbury to policy, is becoming more and more problematic in practice. Virtually any administrative policy can be imaginatively construed in the modern regulatory state to affect a fundamental right, notably the broad interpretation of the Right to Life of Article 21. With all policy decisions being considered as rights-issues, the Wednesbury standard would be completely overshadowed, and all of the administrative state would be subjected to the exacting, merit-based test of proportionality. This infiltrating growth is likely to make constitutional courts into super-legislatures and super-administrators.

VI. Conclusion

The historical development of judicial review over administrative discretion in India, the bastion of judicial review being Wednesbury, and the test of proportionality the analytical crucible of judicial review, is a paradigm change in judicial review philosophy. Wednesbury unreasonableness was a contemporary doctrine, aimed at safeguarding the separation of powers and giving the then swelling administrative state the space it needed to rule. Its tautological character and excessive deference, however, made it constitutionally inefficient in the confrontation of state usurpation of basic human rights. Proportionality as adopted (through cases such as Om Kumar, and solidified by Puttaswamy) is a coming of age of Indian constitutionalism. It substitutes arbitrary judicial subjectivity with a systematic approach that requires empirical rationalization on the part of the state. It acknowledges that administrative convenience can never be a justification to the unwarranted loss of individual liberties.

However, this shift should be regarded critically. The proportionality is not a panacea of jurisprudence. Proportionality, by compelling the courts to assess the needfulness of administrative acts and weigh conflicting interests, is unquestionably dragging the judiciary towards a merits-review, which overstresses the separation of powers and puts a lot of faith in the institutional ability of judges to assess complex socio-economic policies. The future of Indian administrative law is not, however, to be found in the complete elimination of Wednesbury, but in the judicious exercise of the Om Kumar dichotomy-in ensuring that the

courts are the strict guardians of fundamental rights and not degenerate into unelected administrators.