DOCTRINE OF PROPORTIONALITY: EXPANDING DIMENSIONS OF JUDICIAL REVIEW IN INDIAN CONTEXT

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Abstract

The doctrine of proportionality is emerging as another new ground of judicial review of administrative action. It is very well entrenched in the continental system of administrative law. It is claimed that this doctrine is capable to control arbitrariness in the administrative action effectively. Whether it replaces the outdated Wednesbury principle to determine the rationality aspect of the reasonableness is an important debate in the juristic circle. The principle of judicial review that court cannot go into the merit of the decision and the doctrine of proportionality that allows the reviewing court to probe some aspect of the merits of the case is the matter of reconciliation. Although the courts are still grappling with the fundamentals of this concept but the analysis of the case laws has to bring out this dilemma of the court to correctly appreciate and apply this novel principle of law. Being an important juristic principle and ground of judicial review of administrative action the research on doctrine of proportionality is of great academic as well as legal interest.

Introduction

With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts.

If an action taken by any authority is contrary to law, improper, unreasonable

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or irrational, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power is the doctrine of proportionality.

The application of the doctrine of proportionality in administrative law is a debatable issue and has not been fully and finally settled. Proportionality covers sound common ground with reasonableness. It is a course of action which could have been reasonably followed and should not be excessive. Proportionality can be described as a principle where the court is "concerned with the way in which the administration has ordered his priorities; the very essence of decision-making consists, surely, in the attribution of relative importance to the factors in the case. This is precisely what proportionality is about."[1]

The doctrine of proportionality used in fundamental rights context involves a balancing and the necessity test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interest and a manifest imbalance of relevant consideration. The "necessity test" means that the infringement of fundamental rights in question must be by the least restrictive alternative.[2]

The principle of proportionality is very well entrenched in the continental droits administratif.[3] For example, the Federal German Constitutional Court has defined the proportionality principle as follows:[4]

"The intervention must be suitable and necessary for the achievement of its objectives. It may not impose excessive burdens on the individual concerned, and must consequently be reasonable in its effect on him".

There are three elements in this formulation:-

(i) State measures concerned must be suitable for the purpose of facilitating or achieving the pursued objectives.

(ii) The suitable measures must also be necessary, in the sense that the authority concerned has no other mechanism at its disposal. Thus, it is not the method used which has to be necessary, but "the excessive restriction of freedom involved in the choice of method".

1. Quoted in U.O.I. v. G. Ganayutham (1997) 7 SCC 463, 473.
2. De Smith, Woold and Jowell; Judicial Review of Administrative Action, (1995) 601-605.
3. Schwarze, European Administration Law, 677-866.
4. Ibid, at 687.

(iii) The measure concerned may not be disproportionate to the restrictions which it involves. The principle of proportionality has been characterised as "the most important general legal principle in the common market law".

The court of justice of the European Communities has laid down the principle of proportionality as follows:[5]

"In order to determine whether a provision of community law is consonant with the principle of proportionality it is necessary to establish, in the first place whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievements".

DEVELOPMENTS IN INDIAN LAW

i) Introduction

In India Fundamental Rights form a part of the Indian Constitution, therefore, courts have always used the doctrine of proportionality in judging the reasonableness of a restriction on the exercise of fundamental rights. Thus while exercising the power of judicial review court performs the primary role in *Brind's*[6] sense of evaluating if a particular competing public interest justifies the particular restriction under the law. This situation arises when the court is deciding on the constitutionality of a law imposing unreasonable restriction on the exercise of fundamental rights.

The principle of proportionality originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European Countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that the Indian Supreme Court has applied the principle of proportionality to legislative action since 1950.

5. Denkavit France v. Fonds D' Orientation, (1987) 3 C.L.R. 202. Also, Buitoni SAV Fonds D'Orientation Et. De Regularisation Des Marches Agricoles (1979) 2 C.N.L.R. 665.
6. R v. Secretary of State for the Home Department ex. p Brind(1991) 1 AC 696

This principle applied when the administrative action is attacked as discretionary under Article 14 of the constitution. However where administrative action is questioned as 'arbitrary' under Article 14 then the Wednesbury's [7] principle applied.

So far as Article 14 is concerned the courts in India examined whether the classification was based on the intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. It mean that the courts were examining the validity of the difference and the adequacy of the difference. This is again the principle of proportionality.

In India, in the case not involving fundamental freedoms, the role of our courts/ tribunals in administrative law is purely secondary and while applying Wednesbury and CCSU[8] principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the courts can only go into the matter as a secondary reviewing court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on the material before them in the light of Wednesbury and CCSU tests. The choice of the option available is for the authority. The courts/tribunals cannot substitute the view as to what is reasonable.

ii) Application of Proportionality

Here are some cases on the point:

In *Hind Construction Co. v. Workman*[9] conforming the order of the tribunal, the Supreme Court observed that the absence could have been treated as leave without pay. The workman might have been warned and fined. Brief facts are: some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. Court further said, "it is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this matter".

In *Ranjit Thakur*[10] case, The Apex Court had applied the doctrine of proportionality while quashing the punishment of dismissal from service and

7. 7(1948)1 KB 223
8. Council of Civil Services v. Minister of Civil Services, 1985 AC 374
9. AIR 1965 SC 917
10. Ranjit Thakur v. U.O.I. (1987) SC 611, 620.

sentence of imprisonment awarded by the court martial under the Army Act. The brief facts of the case are: an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court martial proceedings were initiated and sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment. The said order was challenged inter alia on the ground that the punishment was grossly disproportionate. Upholding the contention, following CCSU[11] case the court observed:-

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be indicative or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as a part of the concept of judicial review, would ensure that even as an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review".

Same was re-siterated by the Supreme Court in the case of B.C.Chaturvedi that the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review. Consequently the order and sentence imposed by the court martial on the appellant was quashed by the court.[12] The point is that all powers have legal limits. Judicial Review generally speaking, is not directed against a decision, but is directed against the "decision making process".

In *State of Orissa v. Vidya Bhushan Mahapatra*,[13] while dealing with a disciplinary matter of a government servant, the Apex court held 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. "If the

11. Council of Civil Service v. Minister of Civil Services, 1985, AC 374.
12. B.C. Chaturvedi v. Union of India, 1995 (6) SCC 749.
13. AIR 1963 SC 770: 1963 Supp. (1) SCR 648.

order may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed, it is not for the court to consider whether that ground alone would have weighed with the authority in dismissing a public servant."

In *Union of India v. Parma Nanda,*[14] the Supreme Court took a very narrow view. In that case, an employee was charge sheeted along with two other employees for preferring false pay bills and bogus identity card. In inquiry all of them were found guilty. A minor punishment was imposed on two employees, but the petitioner was dismissed from service, since he was 'master-mind' behind the plan. His application before the Central Administrative Tribunal was partly allowed and the penalty was reduced in the line of two other employees. Union of India approached the Supreme Court. The appeal was heard by a Division Bench of three judges. Allowing the appeal, setting aside the judgement of the tribunal and considering the decision in *Bidyabhushan Mahapatra*[15] and other cases[16] court had made wider observation and stated; "If the penalty can lawfully be imposed and is imposed on the proved misconduct, the tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter of the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the inquiry officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter".

It is submitted that the observation made by the Supreme Court did not lay down the correct law in as much as the doctrine of proportionality in awarding punishment has been recognized by the Indian courts since long. It is no doubt true that in the facts and circumstances of the case, the punishment awarded could not be said to be excessively high or grossly disproportionate to the charges leveled and proved against him.

If the punishment imposed is excessively harsh or disproportionate, a High Court or the Supreme Court in exercise of the powers under Articles 32, 226, 136

14. AIR (1989) 2 SCC 177: AIR 1989 SC 1185.
15. State of Orissa v. Bidyabhushan Mahapatra, (1963) SC 779; 1963, Supp.(1) SCR 648.
16. Dhirajlal V.CIT, AIR 1955 SC 271; State of Maharashtra v. B.K. Takkamore, AIR 1967 SC 1353; (1967) 2 SCR 583; Zora Singh v. J.M. Tandon (1971) 3 SCC 834; AIR 1971 SC 1537.

and 227 of the Constitution of Indian can interfere with it. If the Central Administrative Tribunal could be said to be 'substitute' of a High Court, the tribunal undoubtedly possessed power to interfere with the order of punishment.

Sardar Singh v. Union of India,[17] in this case a jawan serving in an Indian Army was granted leave and while going his home town, he purchased eleven bottles of rum from army canteen though he was entitled to carry only four bottles. In court martial proceedings, he was sentenced to undergo rigorous imprisonment for three months and was also dismissed from service. His petition under Article 226 of the Constitution was devised by the High Court. The petitioner then approached the Supreme Court. The Supreme Court observed that the main submission and perhaps the only submission if we may say so, in this appeal is that the sentence awarded to the appellant is wholly disproportionate to the offence committed by him. Court considered the case of *Ranjit Thakur*[18] in the matter of awarding punishment under the Army Act. Applying these principles to this case the court observed that there is an element of arbitrariness in awarding these severe punishments to the appellant.

Jayachandra Reddy J. further said that we are satisfied that an interference is called for and the matter has to be remanded on the question of awarding any of the lesser punishment. Accordingly we set aside the punishment of three months rigorous imprisonment and dismissal from service and remand the matter to the court martial which shall award any of the lesser punishments having due regard to the nature and circumstances of the case and in the light of the above observation made by us....

In *Union of India v. G. Ganahyutham*[19], The respondent was working as Supdt. Central Excise while in service on 14/11/77 charged with a memo of 8 charges. Inquiry officers found him guilty of charges (except 4 & 8 partly). UPSC was consulted and held that charges 4 & 6 not proved but concurred with Inquiry Officer's Report. Respondent retired in 1978. A penalty of withholding 50% pension and 50% of gratuity was awarded in 1984. A writ petition was filed in High court of Madras, later on transferred to CAT which held that the punishment awarded was

17. (1991) 3 SCC 213.
18. AIR 1987 SC 2387.
19. AIR 1997 SC 3387.

too severe that lapses were procedural. The withholding of the pension of 50% had to be restricted for a period of 10 years instead of permanent basis. Secondly, pension does not include gratuity as defined in Rule 3(1)(o). So withholding of gratuity is not allowed. The Union of India filed an appeal. During pendency respondent died his Legal Representative have been brought on record. Supreme Court overruled Tribunal and held that pension include gratuity as defined in R 3(1) (o).

The *Wednesbury case*[20] was discussed, the CCSU Case[21] was analysed as to future adoption of proportionality. *Ranjit Thakur*,[22] as first decision on proportionality was also discussed which treated proportionality as part of judicial review in administrative law. It was followed in *Naik Sardar Singh* case.[23]

De Smith, Woolf and Jowell[24] point out that proportionality used in human right context involves a balancing test and the necessity test. The balancing test means scrutiny of excessive onerous penalties or infringement of rights or interest and manifest imbalance of relevant consideration. The necessity test means that infringement of Human Rights in question must be by the least restrictive alternative.

R. v. Home Secretary exp. Brind[25] was referred in *Tata Cellular v. Union of India*[26] and *State of Andhra Pradesh v. McDowell & Co*.,[27] Supreme Court held that it is debatable whether proportionality is applicable in Indian law. Thus it struck a different note from that of *Ranjit Thakur*[28] case.

Supreme Court observed that McDowell, however makes it clear that so far as the validity of a statute concerned, the same can be judged by applying the principle of proportionality for finding out whether the restrictions imposed by the statute are permissible and within the boundary prescribed by our Constitution. So a statute can be struck down. The principle of proportionality is applied in Australia & Canada to test the validity of statute.

20. (1948) IKB 223
21. (1985) AC 374.
22. Ranjit Thakur AIR 1987, SC 2387.
23. Sardar Singh v. Union of India (1991) 3 SCC 213.
24. Judicial Review of Administration Action 5th Ed. (1995) pp. 101-105.
25. (1991) IAC 696.
26. AIR 1994, SC 3344.
27. AIR 1996 SC 1679.
28. Ranjit Thakur v. Union of India, (1987) 4 SCC 611.

iii) Distinction between Primary and Secondary Roles

Human Rights Courts at Strasbourg exercises primary role in enforcing European Human Right Conventions. But in the absence of incorporation of the convention in English Law (now incorporated by 2002 Human Right Act), the English Court would be left with Wednesbury & CCSU tests. There the courts role would only be a secondary one while the primary role would remain with administrator. It meant that in secondary role the English courts would only consider whether the administrator act reasonably to his primary decision on the material before him.

Margin of appreciation and judicial restraint applied in *Manohar Lal v. State of Punjab*[29] cited while testing the validity of legislative measures in the context of Article 19(2) to (6). Position summarized by the Supreme Court: To judge the validity of any administrative order or statutory discretion; normally the Wednesbury Test is to be applied. The possibility of other tests including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

As *Bugdaycay, Brind, Smith* as long as convention is not incorporated into English Law, the English Courts exercised secondary judgement. If however, convention is incorporated in England makes available the principle of proportionality, then the English Courts will render primary judgement.

The position in our country in administrative law where no fundamental freedoms as aforesaid are involved, the courts/tribunals will only play a secondary role while the primary judgement as to reasonableness will remain with the executive or administrative authority. The secondary judgement of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock.

Whether in the case of administrative or executive action affecting fundamental freedom, the courts in our country will apply the principle of proportionality and assume a primary role is left open to be decided in an appropriate case where such action is alleged to offend fundamental freedom. It will be necessity to decide whether the courts will have a primary role only if the freedom under Articles 19, 21 etc. involved and not for Article 14.

29. AIR (1961) SC 418.

In *Ranjit Thakur* this court interfered only after coming to the conclusion that the punishment was in outrageous defiance of logic and was shocking. It was also described as perverse and irrational. In other words Wednesbury and CCSU tests were satisfied.

B.C. Chaturvedi v. U.O.I.[30] followed and so the Court would not intervene unless punishment is wholly disproportionate. In the case of *Om Kumar v. Union of India*,[31] the proceedings arising out of an order of Supreme Court dated 4-5-2000 proposing to reopen the quantum of punishments imposed in departmental inquiries on certain officers of the Delhi Development Authority who were connected with the land of the DDA allotted to M/S Skipper Construction Co. It was proposed to consider impositions of higher degree of punishments in view of the role of these officers in the said matter. After directions were given by this court that disciplinary action be taken and punishments were awarded to the officers in accordance with well known principles of law.

In this case court observed that so far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. It means courts were examining the validity of the differences and the adequacy of the differences. This is nothing but the principle of proportionality.

In the Indian context the existence of a charter of fundamental freedom from 1950 distinguishes our law and has placed our courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action.

Under Article 19(2) to (6) restriction on fundamental freedom can be imposed only by legislation. In cases where such legislation is made and restriction are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situation, question frequently arises whether a wrong choice is made by the Administrator for imposing restriction or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such case

30. AIR 1995, SC 4374.

court observed that such action has to be tested on the principle of proportionality.

Administrative action in India affecting fundamental freedoms has always been tested on the anvil of proportionality in the last fifty years even though it has not been expressly stated the principle of proportionality. Some of the cases are as under:

(i) R.M. Seshadri v. Distt. Magistrate Tanjore.[32]

(ii) Union of India v. Mohan Picture Association.[33]

(iii) S. Rangarajan v. P. Jagjivan Ram.[34]

(iv) Malak Singh v. State of P & H.[35]

(v) Bishambhar Dayal Chandramohan v. State of U.P.[36]

In all the above case the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was.

In India where 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 courts deal with the merits of the balancing action of the Administrator and is, in essence, applying proportionality and is a primary reviewing authority.

But where an administrative action is challenged as arbitrary under Article 14 on the basis of *Royappa*[37] (punishment 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 court would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevance factors into consideration or whether his

31. AIR 2000 SC 3684.
32. AIR (1954) SC 747.
33. (1999) 6 SCC 150.
34. (1989) 2 SCC 574
35. (1981) 1 SCC 420; AIR 1981 SC 760.
36. AIR (1982) SC 33.
37. E.P. Royappa v. State of Tamilnadu (1974) 4 SCC 3: AIR 1974 SC 555.

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.

Thus, when administrative action is attracted as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principle applies.

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 be court substitute its own view as to the quantum of punishments.

iv) An Appraisal of the Recent Judicial Trends in Proportionality in Punishment Cases

Before *Ranjit Thakur*[38] in 1987, the Supreme Court had been applying the principle of proportionality mostly in punishment cases as a general proposition not in the technical modern sense. For the first time, the apex court made a passing reference to the doctrine of proportionality without delineating its nature, definition or scope in the *Ranjit Thakur* case which was also a punishment case. Again in *Ganayutham* case in 1997, the question whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are involved could apply the principle of proportionality and take up primary role was left open for future. Again the court did not go into detailed analysis of the concept. However, in 2000 in *Om Kumar v. Union of India*[39] the Apex Court gave some explanation of the doctrine of proportionality and analysed some of the English decisions, especially, *Brind's* case. The position in England has undergone substantially since *Brind's* case. The Human Rights Act, 1998 has come into force and the courts are compelled to apply proportionality in Human Right and European Community law context. Now it is being suggested by

38. AIR 1987 SC 2387.
39. AIR (2000) SC 3689.

eminent jurists and judges to adopt a uniform test of proportionality even in domestic law also in lieu of Wednesbury or CCSU principles.

Therefore, in *Om Kumar*, the Supreme Court reconsidered the whole situation and laid down some principles for future application. The court held that so far fundamental right, except Article 14, are concerned the principle of proportionality is applicable and in fact, the courts have been applying it since 1950 after the commencement of the Constitution. So far Article 14 is concerned it is divided into parts. In cases of discrimination i.e. cases of classification, proportionality will apply. However, if the administrative action is challenged as arbitrary and ordinary cases of abuse of power under the statutory authority proportionality will not apply as such, the reasonableness of the action in such cases will be determined by Wednesbury or CCSU principles unless the administrative action shocks the conscience of the court or tribunal as in the case of *Ranjit Thakur*. When proportionality is applied, the court exercises primary role i.e. puts itself in the same position as the authority itself. But when Wednesbury principle is applied, the role of the court is secondary and judicial review would apply under those conditions without going into the merits of the case. The Supreme Court applied the above principle of *Omkumar* in *C.M.D. United Commercial Bank v. P.C. Kakkar*[40] again in disciplinary punishments. The petitioner was dismissed from the Bank services after the charges were established against him. The High Court set aside the punishment to be excessive and reduced it to a loss of 75 per cent of salary. Action was challenged as arbitrary under Article 14 of the Constitution. The apex court held, 'unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the court or tribunal, there is scope for interference. When the court feels that the punishment is 'shockingly disproportionate it must record reasons for coming to such a conclusion. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. The Supreme Court set aside the decision of the High and sent the matter back for fresh consideration only on the question of the punishment aspect.

40. AIR 2003, SC 1571.

However, in *Dev Singh v. Panjab Tourism Development Corp.*[41] is one case where the Supreme Court did interfere with the punishment of dismissal imposed on the appellant. The court found the punishment 'too harsh' 'totally disproportionate to the misconduct alleged and which certainly shocks our judicial conscience'.

Again applying the principle of proportionately to a case[42] where the authority in exercise of its statutory powers resumed the property and also forfeited the deposit amount without establishing dishonest intention or motive on the part of allottee, the court held that such a drastic measure was unwarranted on the ground of proportionality. Thus the court firmly laid down that the exercise of statutory power of discretion by the administrative authority affecting fundamental rights should be in consonance with the doctrine of proportionality.

In *Canara Bank v. V.K. Awasthy,*[43] the Apex Court had the opportunity of explaining the scope and ambit of the power of judicial review of administrative action relating to the ground of proportionality. Instead of breaking the new ground and analyzing the concept thoroughly, the Apex Court simply restated the position as laid down in *Om Kumar* case above. In fact in this process, the court created more confusion rather than clarification when it said that where departmental proceedings reveal several acts of misconduct and charges clearly establish failure in discharge of duties with utmost integrity, honesty, devotion and diligence, the scope of judicial review on the ground of proportionality is highly limited to situation of illegality and irrationality. It may be remembered what is said in the beginning of this topic that in applying proportionality it is assumed that the grounds of illegality are not there, since if those grounds are there, the decision will be set aside without going into proportionality. The principle of proportionality replaces the second sense of Wednesbury or irrationality ground only. And even when misconduct and charges are clearly established there is scope for proportionality in seeing whether the punishment imposed is suitable and also necessary in view of the gravity of misconduct or charges established. It is regrettable that the Apex Court is still groping in the darkness so far as the scope of proportionality is concerned.

41. AIR 2003 SC 3712.
42 . Teri Oat Estate (P) Ltd. v. U.T. Chandigarh, (2004) 2 SCC 130.
43. (2005) 6 SCC 321

The Apex Court has produced another controversial decision in *Food Corp. of India v. Bhanu Lodh*,[44] where the court observed that while determining the constitutionality of delegated legislation, no strait- jacket approach is desirable and the intensity of review in public law depend on the subject matter in each individual case. The court emphasized that there is difference in approach between the traditional grounds of review of delegated legislation and proportionality approach. It is important that in cases involving serious violation of public interest proportionality approach may produce better results. As a comment on the above observation, first of all proportionality is applied primarily to determine unreasonableness or irrationality of the exercise of discretionary power in purely executive or administrative decision. It is not suitable for delegated legislation. That is how it is understood in the European law. Secondly, FCI being an autonomous statutory body the government under the Act could issue only 'Policy instructions' of general nature and not routine instructions in its day to day acts. Cancellation of irregular appointment by such order is not authorized by the Act. Illegal acts should have been checked not by administrative order but by other remedies. The apex court justifies the government action on the basis of serious violation of public interest on the ground of proportionality. This is quite unwarranted and out of scope of the proportionality to say the least.

v) Application of Proportionality to Other Cases than Punishments

The principle of proportionality is inherent in cases of punishments. This is also the basis of awarding punishments in the criminal law. For the first time, in *Union of India v. Rajesh*,[45] the Supreme Court applied the principle of proportionality to an area other than that of punishments. In this case 134 posts of constables were to be filled up for which written test and viva voce were held. As a result of allegations of favoritism and nepotism in conducting the physical efficiency test, the entire selection list was cancelled. This was challenged in the High Court through a writ petition. Allowing the writ, the High Court found that there were only 31 specific cases of irregularities. On appeal the Supreme Court upheld the High Court.

44. (2005) 3 SCC 618.
45. (2003) 7, SCC 285.

Applying the principle of proportionality the Apex Court observed that the "competent authority completely misdirected itself in taking such an extreme and unreasonable decision of canceling the entire selections wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational.

It would not have been possible for the court on Wednesbury principle to set aside the authority's decision to cancel the entire selection, because the decision could not be characterized as 'so absurd that no sensible person could ever dream that it lay within the powers of the authority". But the court held it to be arbitrary and not reasonable, thus adopting a lower threshold of unreasonableness than the Wednesbury or the CCSU test.

Conclusion

In conclusion it may be said that though the Rajesh Case is a single instance of this type of non-punishment case, the courts in India are mostly concerned with the punishment aspect only. To say that the courts have been applying the principle of proportionality since 1950 is nothing but exaggeration and manipulation of the true nature and scope of proportionality in the modern concept. The essential ingredients of the principle have not been properly appreciated by the courts. The principle requires first of all balancing of the priorities by the authority. In fundamental and human rights the priorities are already determined by their status. In such cases merits review becomes inevitable if the court should hold that the balance tips so heavily one way that only one decision is possible. The Court of Appeal explained this clearly in the case of a Nigerian woman who had lived for ten years in England as an illegal immigrant and had raised a family, but whom, with her children, the Home Secretary decided to deport.[46] The balance had then to be struck between the right to respect for family life (Article 8) and the need for effect immigration control. Allowing the mother's appeal, the court held 'there really is only room for one view as to how the balance between these competing interests should be struck although the Immigration Appeal Tribunal had held the contrary view. The court put strong emphasis on the harm to the children which would be

caused by separation from their father, a British citizen, but apparently little on the need for effective immigration control Simon Brown J. said that, the balance struck by the Secretary of State was simply wrong and outside the range of permissible responses. He further said that if our view differs from the tribunal's, then we are bound to say so and allow the appeal, substituting our decision. That is how the proportionality is to be applied in rights cases.

It is heartening that the courts are making references to the Doctrine of Proportionality and such cases are growing in number in the reports. However it is regrettable that this principle is not properly appreciated and applied in letter and spirit. The critical appraisal of the recent decisions bring out this sad state of the principle. It is hoped that in future the concept would be analysed and applied properly in the right context. This principle has great utility in the judicial review of administrative action and should be applied properly. We have a long way to go in this regard.