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Wednesbury Principle and control of Executive Actions

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The doctrine of the Wednesbury principle was adopted by many common law nations including India as a tool for reviewing administrative action. The Indian Constitution confers power on Supreme Court as well as on the High Court to review an administrative decision or legislative act and nullify the same if it is against the Constitutional principles. The Wednesbury principle developed after the judgement given in the famous case of Associated Provincial Picture House v. Wednesbury Corporation. When an executive action seems to be unreasonable and illogical, it is put to wednesbury test so that it can be reviewed accordingly. The main objective of this research paper is to have an in-depth understanding of the concept of the 'Wednesbury principle'. This paper specifically aims at studying the origin of the Wednesbury principle and the way its meaning and definition have evolved with each case. The author is going to give a detailed analysis of the concept of the Wednesbury principle by referring to important case laws that are relevant in understanding the principle in a better way. Lastly, the author is also going to point out the shortcomings faced by the principle along with stating the reasons for its replacement so that the readers will have a clear idea of this topic. This paper aims at answering the following questions as we progress with the research paper:

- *How has the 'Wednesbury Principle' developed over the years?*
- *What were the shortcomings of the Wednesbury principle of judicial review?*

- *Can we say that 'Doctrine of Proportionality has replaced the application of Wednesbury principle?'*

Keywords: *wednesbury principle, administrative action, unreasonableness, irrationality, proportionality.*

INTRODUCTION

In modern times, judicial review of executive powers remains to be one of the crucial matters of administrative law. "According to Wade, administrative law is the law relating to the control of powers of the executive authorities."¹ We must look back at history to understand the necessity for such a law to be in place. In the 19th century, England was mainly concerned about two things, firstly, protecting the country from foreign invasion, and secondly, maintaining proper law and order in the state of England. So, the laws were mostly simple without any complications. But it is with the industrial revolution taking place in the 18th and 19th centuries that society started expanding and became complicated. The concept of the welfare state was also introduced in the 20th century.² The expansion in the society called for an expansion in the functions of the State as well resulting in the passing of several legislations that delegated powers on executive authorities to perform the state functions. "This has resulted in the modern-day bureaucrat becoming extremely powerful."³ So there was also a need for having a set of legal principles that could control and check abuse of the new powers delegated to the executive authorities. Hence, there was a need for judicial intervention to prevent the misuse of the discretionary powers vested on the executive authorities.

It is a fact that a modern state needs a wide delegation of powers on executive authorities to ensure smooth functioning though there must be a certain limitation on them. If we see it, it is

¹ Justice Markandey Katju, 'Administrative Law And Judicial Review of Administrative Action' (*The Practical Lawyer*) (2005) 8 SCC (J) 25

² *Ibid*

³ Ajoy PB, 'Administrative Action and the Doctrine of Proportionality in India' (2012) 1(6) IOSR Journal of Humanities and Social Science (JHSS) 16-23

not practically possible for the parliament to exercise the required control as it has no time to do so. Therefore, it became the duty of the judges to ensure that there is no misuse of power by the executive authorities but only usage of it for the benefit and interests of the public. So, a body was set up including judges only, and certain legal principles were settled. The judges were supposed to carry out the process of judicial review of executive actions as per the settled legal principles and not arbitrarily. However, *“the scope and ambit of judicial review must be limited to the extent just necessary to prevent the abuse of the discretion conferred on the executive.”*⁴ There were two different processes adopted by the common law systems and civil law systems to limit the power of judicial review. The common law systems adopted the process of the secondary review where *“the courts would strike down administrative orders only if it suffers the vice of Wednesbury unreasonableness which means that the order must be so absurd that no sensible person could ever dream that it lay within the powers of the administrative authority.”*⁵

Previously,⁶ *“the courts were quite reluctant in intervening into the executive actions where a body was conferred with subjectively worded powers and they adopted ‘hands-off’ approach in such cases.”*⁷ *“However, some control over decisions that were within the four corners of the public body’s power was;⁸ however, felt to be warranted and legitimate. This was the rationale for the substantive meaning of unreasonableness.”*⁹ In England, the courts only had the power to intervene in judicial or quasi-judicial matters and not with executive actions till 1947.¹⁰ But after the decision given by Lord Greene in the case of Associated Provincial Picture House Ltd vs Wednesbury Corporation¹¹, there was a shift in the legal position. *“In his judgment, Lord Greene had to go on to consider the extent of the court’s power to intervene. In doing so, he provided the test for unreasonableness, which stated that whether the authority had acted, or reached a decision, in a manner ‘so unreasonable that no*

⁴ *Ibid*

⁵ *Associated Picture House v Wednesbury Corporation* (1947) 2 All ER 74 (CA)

⁶ *Ibid*

⁷ *Liversidge v Anderson* [1942] AC 206

⁸ *Ibid*

⁹ The Origin of Wednesbury Unreasonableness Law Constitutional Administrative Essay, Essays, UK. (November 2013) <<https://www.uniassignment.com/essay-samples/law/the-origin-of-wednesbury-unreasonableness-law-constitutional-administrative-essay.php>> accessed 01 November 2021

¹⁰ *Ibid*

¹¹ *Associated Picture* (n 5)

reasonable authority could ever have come to it."¹² This is what is known as the Wednesbury principle. *"The courts often intervene to quash as illegal the exercise of administrative discretion on the ground that it suffers from Wednesbury unreasonableness."*¹³ While the common law systems adopted the secondary review, the civil law system resorted to the primary review known as the principle of proportionality which is a more rigorous method of judicial review. However, even though the common law countries exercised the secondary review process, they couldn't ignore the principle of proportionality for a long time. The author is going to identify and explain the reasons for the same as we proceed with the research paper.¹⁴

ORIGIN AND DEVELOPMENT OF WEDNESBURY PRINCIPLE

The roots of the Wednesbury Principle can be traced back to the United Kingdom's famous case of **Associate Provincial Picture Houses Ltd vs Wednesbury Corp**¹⁵ where an irrational decision was defined by Lord Greene as a decision that is so unreasonable that no sensible person could ever have thought of making it.¹⁶ *"Lord Diplock beautifully sums up, wednesbury unreasonableness as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."*¹⁷ The Wednesbury principle of judicial review is established on the fundamental that the actions of the executive must not be too unreasonable or drastic simply to meet the certain desired outcome.¹⁸ The rationale behind the observation made in the landmark case of Wednesbury Corporation is that the Courts can step in where it appears that an administrative action taken by the executives is so arbitrary and outrageous that no sensible administration could have ever taken it. This was necessary to keep the action and powers of the executives in check. The judgement was given in the above-mentioned case also considered the extent to which it is proper for the courts to exercise their power to intervene. A judge cannot strike down any decision taken by the administrative body merely because he

¹² *Ibid*

¹³ Justice Markandey Katju (n 1)

¹⁴ *Ibid*

¹⁵ *Associated Picture* (n 5)

¹⁶ *Ibid*

¹⁷ *Council of Civil Service Unions v Minister for the Civil Services* (1984) 3 All ER 935

¹⁸ *Ibid*

doesn't agree with the decision-maker.

Any person in authority who is delegated with discretion must display responsibility and should only consider those matters that are relevant and which he needs to look into compulsorily. He would be considered to be acting unreasonably if he doesn't act according to the rules and go against the laws. This is what is referred to as the Wednesbury principle. In the case of **Dy. Director of Consolidation vs Deen Bandhu Rai**¹⁹, there was an application of exchange made to the officer which was rejected on the ground that it would burden the officers with work.²⁰ The Hon'ble Supreme Court observed that the ground mentioned for the rejection of the application was not relevant and appropriate. In another case of **Barium Chemicals Ltd. vs Company Law Board**²¹, some inspectors were appointed by the Company Law Board Secretary,²² for carrying an inspection into the company affairs as per Section 237(b) of the Companies Act, 1956.²³ The Supreme Court in this case held that the discretion under section 237 of the Act,²⁴ can only be exercised under certain circumstances in which the authority in their opinion feels right as per the grounds given in the Act.²⁵ In a similar case of **Shalini Soni vs Union of India**, the Supreme Court held that *"It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."*²⁶

The meaning of the Wednesbury principle is not properly understood as it is often meant as any action or decision of the executive body which is regarded unreasonable in the opinion of the Court has to be nullified.²⁷ *"The correct understanding of the Wednesbury principle is that a decision will be said to be unreasonable in the Wednesbury sense if (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should*

¹⁹ *Deputy Director of Consolidation v Deen Bandhu Rai* AIR 1965 SC 484

²⁰ *Ibid*

²¹ *Barium Chemicals Ltd v Company Law Board* AIR 1967 SC 295

²² *Ibid*

²³ Companies Act 1956, s 237(b)

²⁴ Companies Act 1956, s 237

²⁵ *Ibid*

²⁶ *Shalini Soni v Union of India* 1981 SCC (Cri) 38

²⁷ *Ibid*

have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached to it.”²⁸ However, there has always been a difficulty in defining the test of unreasonableness since it is very subjective and there can be differing opinions while deciding whether a decision is rational or not.²⁹ “While the *Wednesbury* case has had a profound and permanent impact on administrative law across the common law world, the formulation quoted above is unhelpful, and in the words of Lord Cooke, tautologous”³⁰ Also,³¹ In the case of **British Airways Board vs Laker Airways**³², it was discussed that the courts would find it tough to interfere in political and constitutional matters on the ground of irrationality.³³ Lord Diplock explained the test of unreasonableness in the case of **Secretary of State for Education and Science vs Tameside Metropolitan Borough Council** “where he formulated the test in terms of conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt”³⁴ The definition given by Lord Diplock on irrationality was criticised by Walkers’ Excellent Critic 1995 as his Lordship while redefining the term mentioned both illogicalities as well as immorality.³⁵ Although, there is still some uncertainty regarding whether *Wednesbury* unreasonableness and irrationality mean the same.

CRITICISM OF THE WEDNESBURY PRINCIPLE OF JUDICIAL REVIEW

There have been certain concerns relating to the constitutional and practical extent of the *Wednesbury* principle as a procedure of judicial review. It is often seen that the courts mostly emphasize the outcome of the decision taken by the administrators instead of the process undertaken by them to come to a particular decision. “By holding that an actual decision reached by an administrative body is deficient on its face rather than considering how the decision was made, the courts are arguably usurping the power of Parliament.”³⁶ Also, there have been no formulations that

²⁸ Justice Markandey Katju (n 1)

²⁹ *Ibid*

³⁰ *Regina v Chief Constable of Sussex ex p ITF* [1999] 1 All ER 129

³¹ *Ibid*

³² *British Airways Board v Laker Airways* [1984] UKHL 7

³³ *Ibid*

³⁴ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, para [1064]

³⁵ *Ibid*

³⁶ Jason G Pennell & Yi Hui Shi, ‘The Codification Of *Wednesbury* Unreasonableness – A Retardation Of The Common Law Ground Of Judicial Review In Australia?’ *Aial Forum* No 56

clearly state which kind of decision can be considered to be so unreasonable and irrational that no rational person could have ever made such a determination.³⁷ The Wednesbury principle has not only been regarded as complicated and incomprehensible but also vague and circular. *“The test applies a circular logic, in that it allows the courts to interfere with decisions that are unreasonable, and then defines an unreasonable decision as one which no reasonable authority would take.”*³⁸

In the case of **R vs Chief Constable of Sussex, ex parte International Traders Ferry Ltd**, *“Lord Cooke regarded Wednesbury as a ‘briefly considered’ case which might not be decided the same way today and criticized Lord Greene’s formulation of ‘unreasonableness’ as an unnecessary ‘admonitory circumlocution’ to judges.”*³⁹ Accordingly,⁴⁰ the court went ahead to apply a simple test regarding the concept of unreasonableness in the case of **Secretary of State for Education and Science vs Tameside Metropolitan Borough** *“as to whether the decision in question was one which a reasonable authority could reach.”*⁴¹ There have been efforts to come up with a simplified test for wednesbury unreasonableness.⁴² This was also seen in the case of **Bato Star Fishing (Pty) Ltd vs Minister for the Environmental Affairs**⁴³ where it was observed that the reasonability or rationality of a decision is to be determined depending upon the facts of each case.⁴⁴ In this case, his Honour presented a non-exhaustive list of all the necessary factors that the court may consider while deciding for the rationality of a decision that is in question. *“The list includes the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and wellbeing of those affected.”*⁴⁵

However, the Wednesbury test has always been exposed to criticism because of the strict and uncertain nature of the application. It is argued that simply coming up with the term

³⁷ *Ibid*

³⁸ Hamaad Mustafa, ‘Wednesbury’ Proportionality and Judicial Review

³⁹ *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1999] 1 All ER 129

⁴⁰ *Ibid*

⁴¹ *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665

⁴² *Ibid*

⁴³ *Bato Star Fishing (Pty) Ltd v Minister for the Environmental Affairs* 2004 (4) SA 490

⁴⁴ *Ibid*

⁴⁵ *British Airways* (n 32)

'unreasonableness' is not sufficient as there is a need for a better definition and clearer explanation when it comes to why a certain act is considered unreasonable.⁴⁶ *"The reluctance to articulate a principled justification naturally encourages suspicion that prejudice and policy considerations may be hiding underneath Wednesbury's ample cloak."*⁴⁷ There have been several cases where the principle of Wednesbury was discussed. Moreover, there are certain instances where a decision was deemed to be struck down by the court on the ground of Wednesbury unreasonableness although such decision was also in conflict with other grounds of law other than unreasonableness.⁴⁸ In the case of **R (Daly) vs Secretary of State for the Home Department**, *"Lord Cooke attacked the Wednesbury decision as 'unfortunate and retrogressive' due to the narrow scope of the Wednesbury test."*⁴⁹ Therefore, such criticisms make it clear that the Wednesbury principle is not much of an appreciated manner for conducting the judicial review.⁵⁰ *"Criticisms like these have revealed the extent to which Wednesbury might be a distinctly unsuitable test for the judicial review of administrative action."*⁵¹

DOCTRINE OF PROPORTIONALITY: A SUBSTITUTION FOR THE WEDNESBURY PRINCIPLE?

It would probably be an overstatement to say that doctrine of proportionality has taken the place of the Wednesbury principle. Nowadays, the proportionality test is being used often as there are more cases of human rights violations. There has been an overlap of both the tests and their structure making it difficult to categorise a straight jacket formula and therefore it would not be appropriate to make the statement that Wednesbury unreasonableness has met its judicial burial. The test of proportionality is more of an intensive three-step procedure of judicial review that is in use in the United Kingdom whereas proportionality in India is a revised form of the Wednesbury principle which has replaced the principle without altering it in substance. The principle of Wednesbury unreasonableness is ingrained so strongly in the

⁴⁶ *Ibid*

⁴⁷ Anthony Lester & Jeffrey Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] PL 368, 371

⁴⁸ *Ibid*

⁴⁹ *R (Daly) v Secretary of State for the Home Department* [2001] 1 AC 532

⁵⁰ *Ibid*

⁵¹ Andrew Le Sueur, 'The Rise and Ruin of Unreasonableness?' [2005] JR 32

Supreme Court culture that it is difficult to change it with one judgement or one case.⁵²

The application of the doctrine of proportionality was introduced in India with the case of **Union of India vs G. Ganayutham** where the Supreme Court held that “*the Wednesbury unreasonableness will be the guiding principle in India, so long as fundamental rights are not involved.*”⁵³ Nevertheless,⁵⁴ the court abstained from deciding anything in the matter relating to whether the proportionality test can be applied in the cases concerning violation of fundamental rights. Again, in the landmark decision given in the case of **Omkumar vs Union of India**⁵⁵, the Hon’ble Supreme Court accepted the concept of proportionality in India.⁵⁶ However, a strange thing was discovered by the Supreme Court in this case which is that the courts in India have been using the proportionality test since 1950 while deciding upon the validity of administrative actions relating to fundamental rights violation guaranteed under Article 19(1) of the Indian Constitution.⁵⁷ The Supreme Court after much reviewing concluded that in India,⁵⁸ the decisions concerning administrative actions infringing the Fundamental rights have always been determined on the basis of the proportionality test though it has never been expressly mentioned as such. Therefore, the Court concluded that the executive action or decision infringing Article 19⁵⁹ and 21⁶⁰ of the Indian Constitution would be determined by the application of the doctrine of proportionality whereas,⁶¹ in case of the decisions in violation of Article 14 of the Constitution⁶², the Bench would adopt a primary view. The secondary review of the Wednesbury principle would apply when a decision made by the executive is questioned on the ground of irrationality.⁶³

However, there has been no progress or development seen with respect to proportionality

⁵² *Ibid*

⁵³ *Union of India v G Ganayutham* (1997) 7 SCC 463

⁵⁴ *Ibid*

⁵⁵ *Omkumar v Union of India* AIR 2000 SC 3689

⁵⁶ *Ibid*

⁵⁷ Constitution of India, art 19(1)(a)

⁵⁸ *Ibid*

⁵⁹ Constitution of India, art 19

⁶⁰ Constitution of India, art 21

⁶¹ *Ibid*

⁶² Constitution of India, art 14

⁶³ *Ibid*

doctrine in India even after so many years of Omkumar's judgment. The only development that was seen was in the cases of **Indian Airlines Ltd. vs Praba D. Kanan**⁶⁴ and **the State of UP vs Sheo Shankar Lal Srivastava**⁶⁵ where it was observed that "the doctrine of unreasonableness is giving way to the doctrine of proportionality." In India,⁶⁶ it is seen that most of the administrative decisions are challenged mainly on the ground of arbitrariness which has to be decided only by applying the principle of the Wednesbury test so there is very limited scope for proportionality review in India. The Supreme Court did not state any reason as to why the Wednesbury principle is to be applied while deciding upon the cases relating to arbitrariness. There could be possibly two reasons, first is that that the Supreme Court accepted the same view as it is in England that the Wednesbury principle is to be applied only in the cases where non-convention rights are in question whereas proportionality is to be used in matters concerning convention rights. "Secondly, just like Lord Lowry, the Supreme Court may have feared a docket explosion when the threshold of review is lowered."⁶⁷ After the Omkumer's case,⁶⁸ it was in the case of **Sandeep Subhash Parate vs State of Maharashtra** where the proportionality test was expressly adopted by the Supreme Court. In this case, a student was given admission into an engineering college based on his caste but the same was invalidated later on. However, he was allowed to complete his degree as per an interim order given by the High Court but consequently, he was denied the degree by the University. The High Court regarded the action of the college to be right but on appeal the Supreme Court "directed the university to grant him degree subject to the appellant making a payment of Rupees one lakh, to re-compensate the state for the amount spend on imparting education to him as a reservation candidate."⁶⁹ However, the Supreme Court, in this case, failed to give reasons as to how it concluded upon the proportionality test.⁷⁰

When we talk about proportionality in the Indian context, we can hardly see any significant

⁶⁴ *Indian Airlines Ltd v Praba D Kanan* AIR 2007 SC 548

⁶⁵ *State of UP v Sheo Shankar Lal Srivastava* (2006) 3 SCC 276

⁶⁶ *Ibid*

⁶⁷ *Deputy Director of Consolidation* (n 19)

⁶⁸ *Ibid*

⁶⁹ *Sandeep Subhash Parate v State of Maharashtra* (2006) 7 SCC 501

⁷⁰ *Ibid*

usage of proportionality doctrine although it has been present in Indian law since 2000. There has only been a very limited application of the doctrine by the Supreme Court of India. *“However, though the court has formally adopted the language of proportionality into its decision-making, it has not been able to dismantle its own deep-seated preferences towards a relatively deferential Wednesbury-like test of judicial review.”*⁷¹ Our present-day legal system is dominated by human rights jurisprudence which includes fundamental rights as well as other rights, therefore; the courts should start adopting the doctrine of proportionality as a process of judicial review irrespective of the fact that whether the rights in question are fundamental rights or other rights of the citizens.⁷²

CONCLUSION

The scope of the Wednesbury principle is much wider than what is suggested by the term reasonableness. Every action or decision taken by a public authority who is entrusted with a statutory discretion must be well within the boundaries of law and while determining the lawfulness of such decisions it must be done with respect to the facts and circumstances of the case as ‘context’ is everything in law. While the courts are accustomed to referring to the Wednesbury principle of unreasonableness, some eminent people are proposing that proportionality would be a better and useful test even in those cases which don’t involve non-conventional rights. There has to be intense scrutiny in cases that involves the fundamental rights or interests of others. The Wednesbury test which was applied uniformly in every case is no longer acceptable as every case must be reviewed according to its context. In the case of **Kennedy vs Charity Commission**⁷³, Lord Mance said that *“the advantage of proportionality terminology is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in a judicial review even outside the scope of Convention and EU law.”*⁷⁴ Although the Wednesbury test scrutinizes the

⁷¹ Abhinav Chandrachud, ‘Wednesbury Reformulated: Proportionality and the Supreme Court of India’ (2013) 13(1) Oxford University Commonwealth Law Journal 191-208

⁷² *Ibid*

⁷³ *Kennedy v Charity Commission* [2014] UKSC 20

⁷⁴ *Ibid*

factors leading to a decision the doctrine of proportionality presents a clearer picture making it easier for the court to conduct the inquiry and come to a judgment. The doctrine of proportionality is a heightened judicial review procedure that looks into all the aspects before concluding. It determines whether the decision-maker has maintained a proper balance and considered all the necessary factors before taking an action or making a decision. Therefore, it is high time that the judiciary starts resorting to the doctrine of proportionality while determining the rationality of an executive decision as the Wednesbury unreasonableness is seeing a major decline at the international stage as well.