**Doctrine Of Proportionality: Its Relation With Wednesbury Unreasonableness**

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***Abstract***

*In democratic legal systems, judicial review is considered to be the most significant factor for promoting and maintaining constitutionalism to protect and preserve the fundamental rights and freedoms of the people. There are diverse grounds on which the higher judiciary can make the evaluation of legislative and administrative actions for this purpose. In the area of public law and particularly administrative law, the Wednesbury unreasonableness and proportionality have been very popular grounds of judicial review. There has often been the discussion with respect to the relation, distinction and preference in these two grounds of judicial scrutiny and appraisal. It happens because of the fact that some scholars are of the opinion that proportionality is an aspect of Wednesbury Principle and both are the mutable concepts. Therefore, in academic explorations, it certainly becomes significant to find out the relationship between these two so that one may understand whether these grounds of judicial review are similar and entirely distinct from each other. If these two are found to be distinct, it similarly becomes important to see that which one should be the preferable option for an effective, operative and productive judicial review? In this background, the present paper discusses the meaning and evolution of proportionality as the ground of judicial review in the area of public law and its relation with the Wednesbury unreasonableness principle. The paper also deals with the question of preferential option by assuming that the doctrine of proportionality is an established concept and it works more in concrete than in abstract. The author concludes that the proportionality test is distinct from, and provides for a more intense test of, judicial review than Wednesbury unreasonableness principle and therefore, it should be the preferable option, particularly, in matters of violation of basic rights and freedoms of individuals.*

***Key Words***:Judicial Review, Proportionality, Wednesbury Unreasonableness, Rights, Freedoms, Public Law, Constitution, Democracy.

1. **Introduction:**

Judicial review of legislative and executive action has been recognized as one of the most significant developments in the field of public law in the last century. Though it is believed that the law relating to judicial review was developed in 19th century when the Supreme Court of United States recognized the judicial review as a legal concept in the famous case of *Marbury* v. *Madison[[2]](#footnote-3)*,it could find wide application only in the later 20th Century. In the aftershock of the Second World War, democracy emerged as the leading political principle of governance throughout the world. Since then, the scope and ambit of judicial review has become the dominant theme of the study and research in the area of constitutional law and administrative law.[[3]](#footnote-4) Judicial review is one of the important factors that make the Constitution of a country as democratic by developing, maintaining and ensuring the constitutionalism in that Constitution. Supremacy of the Constitution with the requirement that ordinary laws conform to the requirement of the law of the land, the concept of limited government, rule of law and the doctrine of separation of powers seem to be the foundational elements in the development of the concept of judicial review. The Supreme Court of India has observed that:

“If there is one principle which runs through the entire fabric of the Constitution, it is the principle of ‘rule of law’ and it is the judiciary which is entrusted with the task of keeping every organ of the State within the limit of law thereby making rule of law more meaningful and effective”.[[4]](#footnote-5) It has also been held that “rule of law is the foundation of a democratic society. The judiciary is the guardian of rule of law. In a democracy like ours where there is a written Constitution which is above all the individuals and institutions and the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform i.e. to see that all the individuals and institutions, including the executive and legislature, act within the framework of not only law but also the fundamental law of the land”.[[5]](#footnote-6)

In India, the higher judiciary consisting of High Courts and the Supreme Court of India are vested with the power of judicial review and this power of judicial review of higher courts has been recognized as an essential component of the basic structure of Indian Constitution.[[6]](#footnote-7) The concept of judicial review is placed on very high stand by declaring it as the part of the basic structure of Indian Constitution and therefore, the power of judicial review of the High Courts and the Apex Indian Court cannot be dowsed, rescinded or watered down even by making an amendment in the Constitution.[[7]](#footnote-8) The Indian Supreme Court is of the opinion that the duty of courts to protect and preserve the people’s fundamental rights is dependent on the protection of their power of judicial review. Fundamental rights would become non-enforceable and thus worthless if the courts are deprived of their power of judicial review and *“in the absence of judicial review the written Constitution will be reduced to a collection of platitudes without any binding force*.”[[8]](#footnote-9) The judicial review of an administrative action can be made by the higher courts on certain grounds and the doctrine of proportionality has been recognized as one of such a ground of judicial review. Proportionality is a principle that is applied to the constitutional and administrative adjudication in determining the conflicts between conflicting rights or between the rights and interests, and also a method for dealing with such disputes.[[9]](#footnote-10) The idea of proportionality seems to be fundamental to the determination of rights and interests in democratic world.[[10]](#footnote-11) It generally involves four stages.[[11]](#footnote-12) On every occasion of infringement of rights, freedoms and liberties of people by the government, the doctrine of proportionality requires that the government must be capable of showing firstly that the objective of the government is lawful and significant, secondly that the means adopted by the government have a rational connection to the objective sought, thirdly that the least drastic means available were adopted and fourthly that the advantage from appreciating the objective is more in proportion to the damage to the right. The two striking and prominent features of the doctrine of proportionality are that “it is standard-based rather than categorical and it is result oriented rather than being a formal and conceptual doctrine”.[[12]](#footnote-13) Proportionality is an idea that has a noble lineage in ancient and classical conceptions of law and justice[[13]](#footnote-14) and presently it marks its presence in all the areas of modern conception of law and justice.[[14]](#footnote-15) The present paper focuses on the doctrine of proportionality in the domain of public law. It discusses the evolution of proportionality as the ground of judicial review and makes an effort to find out the relationship of doctrine of proportionality with the Wednesbury unreasonableness as the ground of judicial review. In making this study, the author assumes that the doctrine of proportionality is an established concept as it works more in concrete than in abstract and it is distinct from, and provides for more intense test of, judicial review than Wednesbury unreasonableness principle.

1. **Evolution Of Doctrine Of Proportionality:**

The term ‘proportional’ as defined by dictionaries refers to “properly related in size or degree or other measurable characteristics”.[[15]](#footnote-16) The term “proportional” is usually employed as a qualifying adjective and refers to the relationship or balance among the parts of something. As a general principle of law, the concept of proportionality is introduced as a technique of addressing tensions and conflicts between individuals and government, and for harmonizing their contending entitlements and determinations.[[16]](#footnote-17) In the field of criminal law, the doctrine is used to carry the idea that the penalty and the punishment awarded to an offender should be in accordance with the crime. Under international humanitarian law governing the use of force in an armed conflict, proportionality is a dominant factor in evaluating the necessity of military action. In this evaluation it is to be seen that if total anticipated devastation due to the use of force must be outweighed by the good to be achieved. Thus, the principle of proportionality requires that action undertaken must be proportionate to its objectives.[[17]](#footnote-18) It seems that the principle of proportionality, in the area of public law, has been developed to restrict the misuse and abuse of power and to prevent the instances of violation of the basic rights of human beings by the public officials to the minimum that is necessary in a given circumstance. In its philosophical conception, the doctrine of proportionality may be traced back to the ancient Indian moral and ethical principle “that which is hateful to you, don’t do to your fellow.”[[18]](#footnote-19) Proportionality has been described as, “You must not use a steam hammer to crack a nut, if a nutcracker would do.”[[19]](#footnote-20) The proportionality principle seems to be incorporated in Babylonian Law *i.e.* the Code of Hammurabi when it states “an eye for an eye, and a tooth for a tooth”. The proportionality principle is a reprimand to ensure that the punishment should always be in accordance with the severity of crime and therefore, “the police should not shoot at sparrows with cannons.”[[20]](#footnote-21) Essentially, the principle of proportionality apprehends the rational idea that, in every action of the government, the means it adopts should be well adapted to achieve the ends it is pursuing. The courts manifest the idea of proportionality as a ground of judicial review of governmental actions with a prearranged system of gradually strict legal tests for determining whether the measure in fact interferes disproportionately with the rights or interests of an individual.[[21]](#footnote-22) In its modern meaning, proportionality has been defined in terms of procedure and this procedural test of proportionality is comparatively clear. Tom Hickman,[[22]](#footnote-23) while recognizing several models, identified a general formulation to the meaning of proportionality as a three-part procedure. According to him, the court, while reviewing the action, must consider three questions:

1. if the measure adopted by the authority was appropriate to the objective looked-for,
2. if the adopted measure was obligatory for accomplishing the objective and
3. if the measure adopted imposed unnecessary burdens on the affected individuals.[[23]](#footnote-24)

It means that the doctrine of proportionality involves ‘necessity test’[[24]](#footnote-25) followed by the ‘balancing test’[[25]](#footnote-26) in determining the validity of a governmental action dealing with the rights and liberties of an individual. Proportionality is, originally, a moral principle and in it cannot always be incorporated and observed in administration of law and justice but the benchmarks of this global philosophical and moral thought cannot be undervalued in administering law and in dispersing justice to common people.[[26]](#footnote-27)

The roots of the doctrine of proportionality can be found in ancient Hindu law,[[27]](#footnote-28) Roman law[[28]](#footnote-29), Babylonian Law,[[29]](#footnote-30) Magna Carta[[30]](#footnote-31) and the English Bill of Rights, 1969.[[31]](#footnote-32) It is also believed that the doctrine of proportionality came out when legal philosophers of the late-nineteenth century prescribed the directions and rules for governing and regulating the powers of police in the light of the first principle of political philosophy. According to this first principle of political philosophy, the people submit to the rule of the sovereign so that the sovereign can advance their common welfare.[[32]](#footnote-33) If this bargain and agreement is the source of the authority of the state to act, it certainly specifies certain limitations of state’s authority and the most basic limitation is that the state is justified in acting only to the extent that its action promotes public welfare. Applying it to the police law, jurist Günther Heinrich Von Berg states that “the police law may abridge the natural freedom of the subject, but only insofar as its lawful goal requires.”[[33]](#footnote-34)The modern understanding of the concept was introduced by German post-war legal thinking when it was incorporated in the German Constitution.[[34]](#footnote-35) Later, it was taken up by the European Court of Human Rights when this court was instituted in 1959. Subsequently, it was adopted by the young European Community as a conceptual ‘meta principle of judicial governance’.[[35]](#footnote-36) The modern, multistep proportionality framework seems to be the innovation of the approach of Germany’s Federal Constitutional Court to adjudicate constitutional rights claims for more than half a century.[[36]](#footnote-37) Proportionality is now well established as a general principle of European Community law in the form of a ground of judicial review in the area of public law. According to this general principle, any law restricting the rights of individuals is to be assessed on the touchstone of proportionality. The doctrine of proportionality in its present form is of European origin. In U.K. the administrative action was traditionally being tested on the ground of illegality, irrationality, procedural impropriety and Wednesbury principle *i.e.* unreasonableness but presently administrative actions affecting the freedom, rights and liberties of people are examined, reviewed and declared invalid on the ground of proportionality. The doctrine of proportionality is so logical that one would expect its origin from common law. But in fact, it is not the derivative of the common law or statutory law of the U.K. Nevertheless, it can be said that proportionality is an ancient concept and its precise origin has always been the matter of debate and discussion because it has its origin in different ancient cultural, religious, moral, and ethical thoughts and finds its presence in early literature and ancient jurisprudence.

1. **Doctrine Of Proportionality VersusWednesbury Unreasonableness:**

In the English Legal System, for examining the legitimacy of an administrative action or statutory discretion, usually the Wednesbury test is applied. According to this test the court would see whether irrelevant considerations had been taken into account in making the decision or taking the action or whether the action is bonafide? Some scholars are of the view that the proportionality is an aspect of Wednesbury principle and this opinion has gathered the support of some judicial decisions[[37]](#footnote-38) and the commentators like Rivers,[[38]](#footnote-39) Taggart[[39]](#footnote-40) and Elias.[[40]](#footnote-41) This argument has some force in the sense that both the standards of judicial review are variable and give the discretion to the courts to determine the validity of administrative action. The traditional Wednesbury test confers a limited discretion on the adjudicator and if the adjudicator remains within the limits of the conferred discretion, his determination is considered to be legitimate. According to Lord Green M.R., this limit of discretion includes all those determinations which are not “so unreasonable that no reasonable authority could ever have come to them”.[[41]](#footnote-42) According to classical formulation of Wednesbury, this limit of discretion seems to be very wide. The principle is not rigid and inflexible[[42]](#footnote-43) but it is a changing standard of judicial review and therefore, it is also termed as ‘Variable Wednesbury Reasonableness’. The core of the Wednesbury principle affirms that more considerable justification is required if the action has more severe impact on the individual affected by the action and thus, the justification required on the part of the authority taking the action or making the decision is relative to the severity of the effect of that action on the rights and liberty of individual.[[43]](#footnote-44) It seems that when the decision has more severe impacts on the individual concerned, the limit of discretion of the decision maker decreases and the standard of review by the court becomes more strict. It happens particularly with the cases where the issue of deprivation of rights and liberties of an individual is involved.[[44]](#footnote-45) This feature of variable Wednesbury principle requires more incisive tests in cases of deprivation of basic rights and less insightful tests in economic and policy matters.[[45]](#footnote-46) It means that the intensity of review depends on the nature of the case in hand and the seriousness of the impact of the decision on the individual concerned.[[46]](#footnote-47) It also means that with reference to Wednesbury principle, the grounds of review like ‘irrationality’ and ‘perversity’ have now become obsolete and the ground of ‘variable reasonableness’ has become the benchmark of judicial review. Some academicians opine that proportionality is also notably variable concept[[47]](#footnote-48) and it has been accepted that intensity of review on the ground of proportionality also depends on the nature of the decision and its effect on the individual’s rights and interest.[[48]](#footnote-49) Due to this attribute of proportionality test, it is easy to state in abstract form[[49]](#footnote-50) but the exact nature of the test is far easy to define.[[50]](#footnote-51) The courts are also of the view that the test of proportionality might be applied with more or less gravity.[[51]](#footnote-52) But it may be argued that this proposition is disingenuous because the measure adopted would either be proportionate or not. In this regard proportionality tests seem to be more accurate and sophisticated criteria as compared to the traditional Wednesbury ground. Though, at initial stage, there may be the overlapping between criteria of Wednesbury reasonableness and the standard of proportionality and the cases may be decided in the same way by applying either of the tests but it seems that the intensity of review is rather higher under the proportionality test.[[52]](#footnote-53) These two tests remain distinct in both the form and substance.

The proportionality test is diverse from Wednesbury in form because of dissimilarity in its process. While applying the Wednesbury test, the court is to see the range of permissible decisions within its discretionary limits and identify whether the decision falls within this range.[[53]](#footnote-54) But under the process of review on the ground of proportionality, the court is required also to make an assessment on the basis of ‘necessity’ and ‘balance’ test in addition to see the range of reasonable decisions.[[54]](#footnote-55) In the proportionality test, the court is to see the justifications for the restrictions on the rights and interests of the person concerned in addition to taking into account all the considerations.[[55]](#footnote-56) This is contrast with the Wednesbury test wherein the decision maker is the focal point in the process of reviewing the decision[[56]](#footnote-57) and the party affected becomes the central point in the test of proportionality.[[57]](#footnote-58) One more point of distinction has been pointed out that “Wednesbury unreasonableness is a residual category to be applied at the end of the court’s review[[58]](#footnote-59) and proportionality is the methodology that the reviewing court starts with”.[[59]](#footnote-60)In terms of substance also, the proportionality test yields different outcomes from the test of wednesbury unreasonableness[[60]](#footnote-61) despite the acknowledgement that these two methods often produce the similar result. The authenticity of this statement lies in the fact that a decision that is considered to be reasonable under the Wednesbury test may be found to be disproportionate.[[61]](#footnote-62) Conversely, it may also be possible that a decision that is considered to be proportionate under proportionality test may be found as unreasonable.[[62]](#footnote-63) In English Law, with respect to the relationship between Wednesbury and proportionality tests, it has been recognized that the proportionality test becomes more intensive than Wednesbury principle for protecting the basic rights and liberties of people.[[63]](#footnote-64) It is evident from the judgement in the cases *R.* v *Ministry of Defence Ex p. Smith,[[64]](#footnote-65), Daly* v. *Secretary of State for the Home Department[[65]](#footnote-66)* and *Begum* v. *Tower Hamlets London Borough Council.[[66]](#footnote-67)*

In *Smith's case*, homosexuals were prevented from serving in armed forces by a policy of the Department of Home. It was contended that the policy violated the right to respect and right to privacy of the applicant and therefore, is illegitimate. The court applied the test of Wednesbury unreasonableness and grudgingly held the policy lawful on the ground that it was not so unreasonable that no reasonable decision maker could reach to such a decision[[67]](#footnote-68) but on appeal, the test of proportionality was applied by the European Court of Human Rights and the decision was held disproportionate and thus illegal.[[68]](#footnote-69) In the Dalycase, while discussing the Smithcase, Lord Styen observed that “there is material difference between Wednesbury grounds of review and the approach of proportionality”.In the case of *Begum,* it was the opinion of Lord Bingham that “intensity of review under proportionality is greater than was previously appropriate, and greater even than the heightened scrutiny test”. It follows that though the proportionality and the Wednesbury unreasonableness both are flexible and inconstant standards of review but at the same time they are two discrete grounds of judicial review of an administrative action in their form as well in the substance. Therefore, valid questions arise whether the test of ‘Wednesbury unreasonableness’ be replaced with the test of ‘proportionality’? and if the Wednesbury test be preserved and continued with respect to the decisions other than the cases of the violation of the human rights and fundamental freedoms and liberties of the people? There are the arguments in favor of affirmative answers to both the questions. Some researchers argue that the proportionality test provides a more structured, transparent and intense ground of judicial review and therefore, it should replace uncertain, opaque and decisionmaker oriented Wednesbury principle.[[69]](#footnote-70) On the contrary, it is also argued that the proportionality test poses the risk for the doctrine of separation of powers and it has its own limitations. The limitations of proportionality test include its non-suitability to review the omissions and inactions on the part of the governments and the decisions which are strange, ridiculous and incongruous but not disproportionate.[[70]](#footnote-71)

1. **Conclusion:**

The foregoing discussion confirms that the principle of proportionality is an ancient notion rooted in the ancient Indian knowledge system and other ancient civilizations. It also supports the assumption of the author that doctrine of proportionality is an established concept as the ground of judicial review in modern legal and judicial systems. It works more in concrete than in abstract and it is distinct in its form and substance both from Wednesbury unreasonableness principle. The proportionality test provides for a more structured, transparent, and intense test of judicial review to examine the reasonableness of administrative actions as it provides a robust logical basis to guide the investigation. With respect to the relationship between Wednesbury and proportionality tests, it seems that the proportionality test becomes more intensive than Wednesbury principle in matters of the infringement of basic rights and liberties of the people. As to the preferable option to challenge the fairness of an administrative action, it may be argued that proportionality test should be preferred particularly in the cases involving the violation of the basic rights, freedoms, and liberties of an individual because it gestures a modification in judicial approach towards a more rigorous inquiry. In the context of the limitations of proportionality test and its non-suitability to review the omissions and inactions of the government and the decisions which are strange, ridiculous, and incongruous but not disproportionate, the Wednesbury unreasonableness is still a workable ground of judicial review and therefore, it may be suggested that in such cases the Wednesbury test may be a preferential option.

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2. 5 US 137 (1803). [↑](#footnote-ref-3)
3. P.B. Ajoy, “Administrative Action and the Doctrine of Proportionality in India”, 1(6) *IOSR Journal of Humanities and Social Science,* Sep-Oct. 2012), pp.6-23. Availableat: *www.iosrjournals.org.* [↑](#footnote-ref-4)
4. *C. Ravichandran Iyer* v. *J. A. M. Bhattacharya,* (1995) 5 SCC 457. [↑](#footnote-ref-5)
5. *In Re, Vinay Chandra Mishra,* (1996)2 SCC 534. [↑](#footnote-ref-6)
6. *L. Chandra Kumar* v*. Union of India*, AIR 1997 SC 1125. [↑](#footnote-ref-7)
7. M.P. Jain, *Indian Constitutional Law*, (New Delhi: Wadhwa and Company, 5th Edn., 2003) Chapter XLI, Section F, pp.1926-1935. [↑](#footnote-ref-8)
8. *Kesavananda Bharti* v. *State of Kerala*, AIR 1973 SC 1461. [↑](#footnote-ref-9)
9. Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism”, 47 [*Columbia Journal of Transnational Law*, 2008, pp.68](about:blank). Available at: [*https://papers.ssrn.com*](https://papers.ssrn.com)*.* (Accessed on 12/11/2024). [↑](#footnote-ref-10)
10. Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations,* (Cambridge University Press, 2012); David Beatty, *The Ultimate Rule of Law, (*Oxford University Press, 2004); Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe,* (Oxford- Hart Publishing, 1999); Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post Communist States of Central and Eastern Europe, (*Dordrecht: Springer, 2005). [↑](#footnote-ref-11)
11. The number of the stages involved in the application of the doctrine of proportionality is not exhaustive and it may be less than four also depending on the perspective. [↑](#footnote-ref-12)
12. Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture,* (Cambridge University Press, 2013) at 2. Available at: *https://academic.oup.com/icon/article/13/3/769/2450814.* [↑](#footnote-ref-13)
13. Thomas Poole, “Proportionality in Perspective”, *N.Z. L. Rev.* 2010, at 369. Available at: [*https://www.google.com/search?q=Thomas+Poole%2C+%E2%80%9CProportionality+in+Perspective*](https://www.google.com/search?q=Thomas+Poole%2C+%E2%80%9CProportionality+in+Perspective). (Accessed on 13/12/2024); Mark Antaki, “The Rationalism of Proportionality’s Culture”, in Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning,* (Cambridge University Press, 2014) at 305. [↑](#footnote-ref-14)
14. Beverley McLachlin, “Proportionality, Justification, Evidence and Deference: Perspectives from Canada”, Speech of Chief Justice of Canada, available at: [*https://www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality*](https://www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality)*.* (Accessed on 13/12/2024) [↑](#footnote-ref-15)
15. According to the meaning given to the term ‘Proportional’ as an adjective by Vocabulary.Com, available at: *https://www.vocabulary.com/dictionary/proportional.* [↑](#footnote-ref-16)
16. Kai Moller, “Proportionality: Challenging the critics”,10(3) *International Journal of Constitutional Law,* July 2012, pp.709-73. Available at: *https://academic.oup.com/icon/article/10/3/709/673485.* [↑](#footnote-ref-17)
17. “Note On the Legal Doctrine of Proportionality”, *Children’s Rights Alliance*, 2007, available at: *https://www.google.com/search?q=Note+On+the+Legal+Doctrine+of+Proportionality%2C+Children’s+Rights+Alliance%2C+2007&oq* [↑](#footnote-ref-18)
18. *Padma Purana*, 1.19.335. (Sristi Khand, Chapter No. 19, Shloka No. 335). [↑](#footnote-ref-19)
19. As per Lord Diplock in *R* v. *Goldstein*, [1983] 1 WLR 151, 155. [↑](#footnote-ref-20)
20. The Statement of Renowned Administrative Law Scholar, Fleiner, quoted in George Barrie, “The Application of the Doctrine of Proportionality in South African Courts”, 91(11) *Unisa Press Journal,* 1985, available at: *https://unisapressjournals.co.za* [↑](#footnote-ref-21)
21. Mathews, Jud, “Proportionality Review in Administrative Law”, 2017, available at: *http://elibrary.law.psu.edu/book\_contributions/* [↑](#footnote-ref-22)
22. Tom Hickman is a leading public and constitutional law barrister at Blackstone Chambers and Professor of Public Law at University College London (UCL). He is author of Public Law After the Human Rights Act, 2010 (Inner Temple Book Prize 2008-11 (new author)); co-author of Human Rights: Judicial Protection in the United Kingdom (2008). Tom was Awarded the Sutherland Prize for Legal History by the American Society of Legal History in 2016 for an essay on the law of seditious libel in eighteenth century England. [↑](#footnote-ref-23)
23. Jaswinder Kaur, “Doctrine of Proportionality: Whether it is Goodbye to Wednesbury Unreasonableness in Present Scenario”, 4(9) *Indian Streams Research Journal,* Oct. 2014. [↑](#footnote-ref-24)
24. The ‘necessity test’ requires that the least restrictive alternative, that is necessary in a given circumstance, should be used in taking the action affecting the rights of the people. [↑](#footnote-ref-25)
25. The ‘balancing test’ mandates that the measures adopted or action taken should not impose excessive onerous burdens on the rights and interests of the individuals and there shall always be a balance between the severity of measures adopted and the objective sought. [↑](#footnote-ref-26)
26. [Jeffrey Jowell](https://www.revuegeneraledudroit.eu/blog/author/jeffreyjowell/), “Proportionality in the United Kingdom, Le Principe de Poportionnalité, Conférence Débat du CDPC”, 8 Février 2018, available at: *https://www.revuegeneraledudroit.eu/blog/2018/11/15/proportionality-in-the-united-kingdom/.* [↑](#footnote-ref-27)
27. Mahamahopadhyaya Kamla Krishna Smrititirtha, “*Dandaviveka of Bardhamana*”, (Oriental Institute, Baroda, 1931). [↑](#footnote-ref-28)
28. Jan Hallebeek, “Some Remarks on Laesio Enormis and Proportionality In Roman-Dutch Law and Calvinistic Commercial Ethics”, 21 *Fundamina*, 2015, pp.14-32. Available at: *https://scielo.org.za/pdf/funda/v21n1/02.pdf.* [↑](#footnote-ref-29)
29. The Code of Hammurabi, a Babylonian code, dates from about 1772 BC. [↑](#footnote-ref-30)
30. Magna Carta, 1215, Chapter 20-22., see *Solem* v. *Helm,* 463 U.S. 277 (1983) “The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that “amercements” may not be excessive. And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments . . . . When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional.” *See*, *e.g., Hodges* v*. Humkin,* 2 Bulst. 139, 140, 80 Eng.Rep. 1015, 1016 (K.B. 1615) (Croke, J.) (“imprisonment ought always to be according to the quality of the offence”); *See* *also,* Craig S. Lerner, “Does the Magna Carta Embody A Proportionality Principle?”, 25(3) *George Mason University Civil Rights Law Journal*, 2015. [↑](#footnote-ref-31)
31. Peter Murrell, “Design and Evolution in Institutional Development: The Insignificance of the ENGLISH Bill of Rights”, 45 *Journal of Comparative Economics,* 2017, pp.36-55, available at: *https://www.econ.umd.edu/sites/www.econ.umd.edu/files/users/pmurrell/Design\_and\_Evolution\_JCE\_February\_2017.pdf.* [↑](#footnote-ref-32)
32. According to Gottileb Svarez, the leading legal scholar and the architect of General Land Law in Prussia, “The rights of command in a state or a ruler cannot be derived from an unmediated divine blessing, or from the right of the stronger, but they must be derived from a contract, through which the citizens of the state have made themselves subject to the order of the ruler for the advancement of their own common happiness”. [↑](#footnote-ref-33)
33. Quoted in Würtenberger (1999), Moreover, over the course of the nineteenth century, the dominant opinion on what constituted lawful goals for the police contracted, from the general welfare to promoting public safety (Heinsohn 1997, 34), Cited in Jud Mathews, “Proportionality Review in Administrative Law”, *School of Advanced Studies, University of London,* available at: *https://www.docsity.com/en/docs/1-proportionality-review-in-administrative-law-jud-mathews/8993623/.* [↑](#footnote-ref-34)
34. Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence”, 57(3) *University of Toronto Law Journal,* 2007, pp.383-397. [↑](#footnote-ref-35)
35. Jaswinder Kaur, “Doctrine of Proportionality: Whether it is Goodbye to Wednesburry Unreasonableness in the Present Scenario”, 4(9) *Indian Streams Research Journal*, Oct. 2014. [↑](#footnote-ref-36)
36. Apothekenurteil (Pharmacy Case, 1958) as quoted in Mathews, Jud, “Proportionality Review in Administrative Law”, 2017. Available at: *http://elibrary.law.psu.edu/book\_contributions/9.* [↑](#footnote-ref-37)
37. *R.* v*. Chief Constable of Sussex Ex p. International Trader's Ferry Ltd*. (1999) 2 A.C. 418 HL*., Begum* v*. Tower Hamlets,* (2003) 2 A.C. 430 at (47), available at: [*https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd981111/chief01.htm*](https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd981111/chief01.htm)*.* (Accessed on 15/12/2024) [↑](#footnote-ref-38)
38. Julian Rivers, “Proportionality and Variable Intensity Review”, 65(1) *Cambridge Law Journal,* 2006, pp.174-207, available at: *https://www.jstor.org/stable/4509179.* [↑](#footnote-ref-39)
39. M. Taggart, “Proportionality, Deference, Wednesbury”, *New Zealand Law Review,* 2008, at 423, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2528019* [↑](#footnote-ref-40)
40. Elias, “Righting Administrative Law” in Dyzenhaus (eds), A Simple Common Lawyer Essays in Honour of Michael Taggart (Oxford, Hart Publishing, 2009), available at: *https://www.jstor.org/stable/24311897.* [↑](#footnote-ref-41)
41. *Associated Provincial Picture Houses Ltd* v*. Wednesbury Corp* (1948) 1 K.B. 223 at 230, available at: [*https://judicialacademy.nic.in/sites/default/files/1453025380\_Wednusbury%20case.pdf*](https://judicialacademy.nic.in/sites/default/files/1453025380_Wednusbury%20case.pdf)*.* As per Lord Diplock: a decision “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” in *Council of Civil Service Unions* v*. Minister for the Civil Service* (1985) A.C. 374 at 410, available at: *https://www.casemine.com/judgement/uk/5a938b3e60d03e5f6b82ba42* [↑](#footnote-ref-42)
42. Christopher Forsyth and Ivan Hare, *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford Clarendon Press, 1st edn., 1998) at 185. [↑](#footnote-ref-43)
43. *R.* v. *Secretary of State for Education and Employment Ex p. Begbie,* (2000) 1 W.L.R. 1115, available at: *https://www.casemine.com/judgement/uk/5b46f1f62c94e0775e7ef1a0* [↑](#footnote-ref-44)
44. *R.* v*. Ministry of Defence Ex p. Smith*, (1996] Q.B. 517, available at: *https://www.casemine.com/judgement/uk/*

    *Bugdaycay* v*. Secretary of State for the Home Department,* (1987) A.C. 514 at 531G per Lord Bridge and at 537H per Lord Templeman, available at: *https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd6e9* [↑](#footnote-ref-45)
45. *R.* v*. Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC*, (1991) 1 A.C. 521, available at: *https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd709.* [↑](#footnote-ref-46)
46. *R. (on the application of Mahmood)* v*. Secretary of State for the Home Department*, (2001) 1 W.L.R. 840, available at: *https://www.casemine.com/judgement/uk/5a8ff8cc60d03e7f57ecd96d* [↑](#footnote-ref-47)
47. Supperstone and Coppel, “Judicial Review after the Human Rights Act”, 3 *E.H.R.L.R.,* 1999, at 315, as cited in Jame Goodwin, “The Last Defence of Wednesbury”, *Westlaw India*, 2012, available at: [*delivery\_westlaw india 2.pdf*](about:blank) [↑](#footnote-ref-48)
48. *R. (on the application of Daly)* v*. Secretary of State for the Home Department*, (2001) 2 A.C. 532 HL at [28] per Lord Steyn, available at: *https://lawprof.co/public-law/irrationality-review-cases/r-daly-v-home-secretary-2001-ukhl-26-2001-2-ac-532/* [↑](#footnote-ref-49)
49. That the measure adopted or the action taken or the decision made should not be excessive i.e. more punishing than it is required in a given circumstance. [↑](#footnote-ref-50)
50. *Haung* v. *Secretary of State for the Home Department,* 2006 Q. B. 1 at 45, available at: *https://publications.parliament.uk/pa/ld200607/ldjudgmt/jd070321/huang%20-1.htm* [↑](#footnote-ref-51)
51. *R (on the application of British American Tobacco UK Ltd.)* v*. Secretary of State for the Home Department*, available at: *https://www.casemine.com/judgement/uk/5a8ff74f60d03e7f57eab252.* [↑](#footnote-ref-52)
52. As per opinion of Lord Bingham in the case of *R (Daly) v. Secretary of State for the Home Department*, (2001) 2 WLR 1622 at para 27, cited in Hamaad Mustafa, “Wednesbury, Proportionality and Judicial Review”, available at: [*https://sahsol.lums.edu.pk/sites/default/files/2022*](https://sahsol.lums.edu.pk/sites/default/files/2022)*%20Proportionality%20and%20Judicial%20Review.pdf.* [↑](#footnote-ref-53)
53. *Boddington* v. *British Transport Police*, 1999 2 A. C. 143 at 175 H, available at *https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd980402/bodd01.htm.* [↑](#footnote-ref-54)
54. *R (Daly)* v. *Secretary of State for the Home Department*, (2001) 2 A. C. 532 HL at 27 [↑](#footnote-ref-55)
55. *Wood* v. *Commissioner of Police of Metropolis*, (2009) EWCA civ. 414 at 84, available at: *https://www.casemine.com/judgement/uk/5a8ff7b660d03e7f57eb16d9.* [↑](#footnote-ref-56)
56. *R* v. *Ministry of Defense Ex. p. Smith,* (1996) Q. B. 517 at 545, as cited in Swati Jhaveri, Michael Ramsden, “Judicial Review of Administrative Action Across the Common Law World”, Cambridge University Press, available at: *https://www.marcialpons.es/media/pdf/9781108481571\_frontmatter.pdf.* [↑](#footnote-ref-57)
57. M. Taggart, ‘Proportionality, Deference, Wednesbury’ (2008) New Zealand Law Review 423 at 439, available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2528019* [↑](#footnote-ref-58)
58. Le Sueur, “The Rise and Ruine of Unreasonableness”, 2005, available at:

    [*https://adminlaw.org.uk › wp-content › uploads.*](about:blank) [↑](#footnote-ref-59)
59. M. Taggart, *supra* n, 56, at 438. [↑](#footnote-ref-60)
60. *R (on the application of Association of British Civilian Interneesfor Eastern Region* v. *Secretary of State for Defence*, (2003) Q. B. 1397, available at: *https://www.casemine.com/judgement/uk/5b46f1ec2c94e0775e7ee2de* [↑](#footnote-ref-61)
61. *R (Daly)* v. *Secretary of State for the Home Department*, (2001) 2 A. C. 532 HL at 27. [↑](#footnote-ref-62)
62. Wade and Forsyth, *Administrative Law,* (Oxford University Press, 10th edn., 2009), at 314. [↑](#footnote-ref-63)
63. In ‘*Daly’* case, the House of Lords repudiated the viewpoint of Lord Phillips M.R. in the case of ‘*Mahmood’* whereby the case of human rights infringement was reviewed on the standard of Wednesbury reasonableness test. They also criticized the premise in R (on the application of Isiko) v. Secretary of State for the Home Department, (2001) 1 FCR 633 that proportionality and Wednesbury reasonableness require equitable standards of judicial review. [↑](#footnote-ref-64)
64. (1996] Q.B. 517. [↑](#footnote-ref-65)
65. (2001) 2 A. C. 532 HL [↑](#footnote-ref-66)
66. (2003) 2 A.C. 430, available at: *https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030213/begum-2.htm* [↑](#footnote-ref-67)
67. (1996) Q.B. 517. [↑](#footnote-ref-68)
68. (1999) 29 E.H.R.R. 493. [↑](#footnote-ref-69)
69. Hamaad Mustafa, “Wednesbury, Proportionality and Judicial Review”, 2 *LUMS Law Journal*, 2018, available at: [*https://sahsol.lums.edu.pk/sites/default/files/202209/Wednesbury%2C%20Proportionalit*](https://sahsol.lums.edu.pk/sites/default/files/202209/Wednesbury%2C%20Proportionalit) *20JudicialReview.pdf* [↑](#footnote-ref-70)
70. Tom Hickman, *Public Law after the Human Rights Act*, (Hart Publishing, 2010), at 285. [↑](#footnote-ref-71)