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ADMINISTRATIVE ACTIONS IN INDIA AND DOCTRINE OF PROPORTIONALITY Vis-a-Vis THE COMMON MAN

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ABSTRACT

In India, the post independence period has witnessed a tremendous growth in administration, because it was ushered into a welfare state. But unfortunately, the administration may become authoritative, trampling the civil liberties of the people. Doctrine of Proportionality is the latest recruit for checking the abuse of exercise of administrative power. The article explores the effectivity of the doctrine and its need for application in cases of different types to fulfill the growing needs of justice,

1. INTRODUCTION

Justice Cardozo has said: "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future"[1]

The Supreme Court of India has accordingly, empowered by the Constitution, come up with many innovative principles, especially in the field of judicial review of administrative actions.

Judiciarie's role is not only regulative but also reformative. Rules and principles have been evolved for controlling the actions of administrative authorities.

Actually, it became the duty of the Judges though unelected, to become representatives of the people and ensure that executive authorities do not abuse their powers, but instead use it in the public interest.

The growth of modern welfare state coupled with the technological advances has resulted in wide areas of discretion being left with the administrative authorities, thus making the bureaucrat extremely powerful, often leading to misuse of discretion, thus requiring frequent judicial intervention. Unfortunately, impatient of the democratic process, the administrative adventurists may often slip into authoritarianism, not hesitating to trample upon the civil liberties of the people, thus making all material growth pretence of tyranny.

A long list of concepts has been fashioned by the courts to check the abuse of the exercise of administrative power and the latest recruit to this list is the Doctrine of Proportionality.

"You must not use a steam hammer to crack a nut if a nut cracker would do", a statement by Lord Diplock is nothing but the classical definition of proportionality.

The doctrine is of European origin and very much entrenched in the European Droit Administratiff.

2. INDIAN JUDICIARY ON ADMINISTRATIVE ACTIONS AND DOCTRINE OF PROPORTIONALITY, WITH RESPECT TO HUMAN RIGHTS

As far as India is concerned, the administrative actions affecting fundamental freedoms have always been tested on the anvil of proportionality. "The administrative action in our country has to be tested on the principle of proportionality just as it is done in the case of main legislation."[2]

Actually, the Indian legal system could not remain closed for long and the doctrine was accepted as a part of Indian law in 'Omkumar v. Union of India AIR 2000 SC 3689.

In India, Human Rights in the form of fundamental rights form a part of the Indian Constitution, thus courts have always used the doctrine in judging the reasonableness of a restriction on the exercise of fundamental rights. It is worthwhile to note that the judiciary acts as a secondary reviewer of administrative action so as to maintain separation of powers, but assumes a primary role only in cases where fundamental rights of the citizens are being affected, by invoking the doctrine of proportionality.

The principle of proportionality is based in the Constitution in India, which ensures the fundamental rights as opposed to the statutory basis in England.

One of the main provision under which an administrative action can be reviewed is Article 14 of the Constitution.

Under the principle the courts see to it that the administrative authority maintains a proper balance between the adverse effects which the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose for which they were intended to serve.

Way back in Chintaman v. State of Madhya Pradesh' AIR 1951 SC 118 the court has stated that while asserting the constitutional validity of a statute or an administrative order, vis a vis, fundamental rights, the court always does the balancing act between a fundamental right and the restriction imposed thereon. A restriction which is disproportionate or excessive can always be struck down.

In 'Omkumar', the Supreme Court has stated: "If, under Art.14 administrative action is to be struck down as discriminatory, proportionality applies and it is primary review."

The Supreme Court has further observed:

"There are hundreds of cases dealt with by our courts. In all these matters, the proportionality of administrative action affecting the freedoms under Art.19 (1) or Art 21 has been treated 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."[3]

Reference has been made to some of the decisions of the Supreme Court which over the years have applied the doctrine to specific fact situations.

In 'Hind Construction & Engineering Co. Ltd. v. Workmen[4], the decision of the court dealt with a situation where some workers had remained absent from duty treating a particular day as holiday and were thus dismissed. The court observed : "It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner".

In 'Bhagat Ram v. State of Himachal Pradesh[5], the Supreme Court held that if the penalty is disproportionate to the gravity of the misconduct it would be violative of Article 14 of the Constitution.

In 'Ranjit Thakur v. Union of India & Ors[6], The Supreme Court was dealing with a case where the petitioner had made a representation about the maltreatment given to him directly by the higher officers. He was sentenced to rigorous imprisonment for one year for the offence and later even dismissed from service when he declined to eat food while serving the sentence. This court held that the punishment imposed upon the delinquent was totally disproportionate to the gravity of the offence committed by him.

Similar observations were made in cases like 'Ex-Naik Sardar Singh v. Union of India & Ors[7], Federation of Indian Chambers of Commerce and Industry v.Workman, Shri R.K.Mittal[8],

The quantum of punishment is a discretionary matter for the administration or the executive and the Supreme Court does not interfere with it but in a few cases like 'Dev Singh v. Punjab Tourism Development Corporation[9], the court has intervened.

In 'Mani Shankar v. Union of India[10], and 'Coal India Ltd.v. Mukul Kumar Choudhari[11], the Supreme court has held that the administrative action must not be excessive.

Very recently, a bench headed by Justice A.K.Sikri, held that, "it is only in exceptional circumstances, where it is found that the punishment/penalty awarded by the disciplinary authority /employer is wholly disproportionate, that too to an extent that it shakes the conscience of the Court, that the court steps in and interferes."[12]

In 'Union of India v. G.Ganayutham[13], the Indian Supreme Court considered the application of the concept of proportionality consciously for the first time and held that the 'Wednesbury' unreasonableness will be the guiding principle in India, so long as involvement of fundamental rights in not there.

Subsequently, in the historic landmark case, 'Omkumar v. Union of India, AIR 2000 SC 3689' the Supreme Court accepted the application of proportionality doctrine in India.

The court categorically held that the doctrine is applicable to judicial review of administrative action that is violative of Article 19 and Article 21 of the Constitution of India. With respect to Article 14, the Supreme Court concluded that when an administrative action is challenged as discriminatory, the courts would carry out a primary review using the doctrine.

But cases like 'State of U.P. v. Sheo Shankar Lal Shrivastava[14], and 'Indian Airlines ltd v.Praba D. Kanan[15] have given clear recognition to the doctrine.

In 'Sadhuram v. Pulin Behari Sarkar[16], the Supreme Court gave a pace-setting decision and observed that in certain situations, social justice must prevail over the technical rules.

In 'Union of India v. S.B.Vohra[17], it was held that the court in exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizens' right of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads, and the like, or overseas aid, or compensating victims of crime.

3. CONCLUSION

At present, the distinction between convention and non convention rights as regards application of proportionality is fast disappearing. There are also no clear cut boundaries between fundamental rights and non fundamental rights.

Docket explosion should never be the reason for not allowing a better and more intensive standard of review and the need of the hour is to increasingly apply the doctrine in India to review administrative actions to safeguard all the human rights to the maximum level.

Jurisprudence today has shifted away from technical rules to the recognition of human beings as human beings because any science of law would become jejune without this approach and even the Indian Supreme Court, during the last few years, has developed a fine jurisprudence of mobilisation of rights and affirmative action for the enforcement of public duties is being prominently registered.

Today, the conditions are changing fast and there is nothing wrong in a modern democratic society, if the court examines whether the decision maker has fairly balanced the priorities while coming to a decision.

Sooner or later, the courts in India will have to actively consider implementing the doctrine of proportionality in all cases which are placed before it, irrespective of whether fundamental or ordinary rights of citizens/persons are involved. This is due to the fact that the legal system today is being dominated by human rights jurisprudence which includes all types of rights. Thus the urgency of adopting the doctrine cannot be overlooked. It however cannot be denied that the doctrine is alive and slowly gaining ground in India too, so that steam hammers are not used to crack nuts when nut crackers are sufficient.

4. SUGGESTIONS

- Since Article 21 of the Constitution has been given a very broad meaning now and usually an administrative act is violative of more than one right, a variable intensity of proportionality review based on the concepts of judicial deference and judicial restraint can be adopted upon the subject matter and the nature of rights which are involved.
- Metrices dealing with good governance which have attributes like public accountability and transparency should be incorporated.
- Involvement of civil society in correcting and setting things in society right is needed because there should be no silent majority
- To complement proportionality, a supportive legal and political culture and a generous approach towards interpretation of rights is necessary. A great shift is the demand of the hour in judicial attitude towards a broader conception of law and democracy.
- A progressive change in the administrative culture is required too. The decision maker must keep an open mind and be prepared to consider if an exception to a general policy should be allowed.
- Possible parameters can be developed to redetermine the constituency of public law review so as to cover every possible violation of public and private right through an administrative action.
- It is also suggested that to allow the ample use of the more intrusive doctrine of proportionality, Art. 14 be applied for all administrative discretions whether discriminatory or arbitrary.

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