CHAPTER-V

GROUND OF REVIEW IN LEGITIMATE EXPECTATION IN INDIAN LAW

5.1 INTRODUCTION

The malignancy in the exercise of administrative power by administrative authorities is the main concern of common man nowadays in India. Conferment of legislative and adjudicatory powers on the administrative authorities is an imperative of modern system of governance which has brought the law in prime focus. The law to challenge the administrative action is largely judge-induced and judge-led, consequently thicket of technicalities and inconsistencies surround it. Any one who surveys the spectrum of such law finds that the fundamentals on which courts base their decisions include Rule of Law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action "people-centric". Courts have generally exhibited a sense of self-restraint where judicially manageable standards do not exist for judicial intervention. However, "self-restraint" is not the absence or lack of power in the courts to review the decision. Courts have not hesitated, in exceptional situations, even to review policy matters and subjective satisfaction of the executive.

The power of the courts to set aside the unconstitutional decision of any authority is the basic feature of the Indian Constitution and therefore, cannot be abrogated even by an amendment of the Constitution. However, in view of new economic policy of liberalisation, privatisation and globalisation courts are allowing wider flexibilities to the
administration. Trend of judicial decisions indicate that unless an administrative action is violative of the Constitution or law in clear terms or is arbitrary or mala fide, courts do not interfere with administrative decisions. Fact remains that without a good judicial system review any society would collapse under its own weight making 'development' counter productive.

Generally, any administrative action can be challenged on four grounds i.e. (1) Illegality (2) Irrationality (3) Procedural impropriety (4) Proportionality. These grounds were restated by Lord Diplock in Council of Civil Services Union v. Minister of Civil Services\(^1\). Though these grounds are not exhaustive and cannot be put in watertight compartments yet these provide sufficient base for the courts to exercise their jurisdiction over administrative action in the interest of efficiency, fairness and accountability. However, in the modern era, the rule of estoppel, doctrine of legitimate expectation and doctrine of public accountability are the fine examples by the courts which have extended the basis of judicial review to check the arbitrary exercise of the powers by the administrative authorities. These concepts are related to each other in such a way that one is inseparable from the other. At one time, more than one of these concepts are taken together into consideration by the courts to set aside the administrative / executive decision. At the other time, one concept is replaced by the other. The doctrine of legislative expectation is a fine example of judicial creativity, which has put the great impact in Indian Law. So, there is a need to understand the legitimate expectation relation to these grounds.

\(^1\) (1984) 3 All ER 935 (HL)
5.2 ILLEGALITY

This ground and legitimate expectation is based on the principle that administrative authorities must correctly understand the law and its limits before any action is taken. Therefore, if the authority lacks jurisdiction or fails to exercise jurisdiction or abuses jurisdiction or exceeds jurisdiction, it shall be deemed that the authority has acted "illegally". Court may quash an administrative action on the ground of illegality in following situations. Such as:

5.2.1 Lack of Jurisdiction

An administrative action may be challenged in the count may be on the ground that the authority exercised jurisdiction which did not belong to it. This review power may be exercised inter alia on the grounds that the law under which administrative authority is constituted and exercising jurisdiction is itself unconstitutional, the authority is not properly constituted as required by law, That the authority has wrongly decided a jurisdictional fact and thereby assumed jurisdiction which did not belong to it. some of the essential preliminary proceedings or conditions have been disregarded which were conditions precedent for the exercise of jurisdiction, such as:

(i) Non-formation of necessary opinion before assuming jurisdiction.
(ii) Non-issue of statutory notice.
(iii) Non-institution of proceedings within specified time.

The authority is incompetent to assume jurisdiction in respect of subject-matter, area and parties.

5.2.2 Excess of jurisdiction

This covers a situation wherein though authority initially had the jurisdiction but exceeded it and hence its actions become illegal. This may happen under the situations Continue to exercise jurisdiction despite
occurrence of an event ousting jurisdictions and entertaining matters outside its jurisdiction.

5.2.3 Abuse of Jurisdiction

All administrative powers must be exercised fairly, in good faith for the purpose it is given, therefore, if powers are abused it will be a ground for the aggrieved party to challenge the decision in the court. In following situations abuse of power may arise.

(i) Malfeasance in office. It is a tort doctrine imported into administrative law. The Supreme Court in Lucknow Development Authority v. M.K. Gupta\(^2\), held that where the Minister allotted petrol outlets from his discretionary quota in arbitrary, mala fide and unjust manner, it is misfeasance in office subject to the power of Court to set aside the same.

(ii) Error apparent on the face of the record which may be a result of misinterpretation or misapplication of law.

(iii) Consideration of extraneous material.

(iv) Non-consideration of relevant material.

(v) Colourable exercise of power or misdirection in law. Administrative power cannot be used for the purpose it was not given. Therefore, achieving an unauthorised purpose will be a colourable exercise of power subject to be declared illegal by the courts.

(vi) Malafide exercise of power or bad faith or malice.

No public authority can act in bad faith or from corrupt motives. If any administrative authority has acted in a mala fide manner it will be subject to the review jurisdiction of the court. In case of mixed

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\(^2\) (1994) 1 SCC 243
considerations, courts try to find out the dominant purpose which impelled administrative action. Power is exercised maliciously when action is motivated by personal animosity towards one who is affected by it. It is considered as fraud on power. Mala fide as a ground challenge in the court is not available against legislative action. Even if executive may have ulterior motives in moving a legislation but such malice cannot be transferred to the legislature or an administrative authority exercising rule-making powers.

'Mala fide' is an open textured expression. In *R.S. Garg v. State of U.P.*\(^3\), the Supreme Court explained the ambit of this expression and held that where authority had made up its mind from the very beginning to promote the respondent as approval of the Chief Minister was obtained earlier than the creation of post and order of promotion was issued in haste, it goes to prove that the action of the authority smacks of mala fide.

### 5.2.4 Failure to exercise Jurisdiction

If any administrative authority has been given power by law, no matter discretionary, authority must exercise it in one way or the other. Public power is not a personal power, it is a public trust therefore, must be exercised in public interest. Failure or denial to exercise jurisdiction will be an illegality. Failure to exercise power may arise where authority has sub-delegated its powers without the authority of law, where authority is exercising its power under dictation or transcription, where authority has fettered its powers by self-imposed restrictions unwarranted by law, where authority declines jurisdiction which belongs to it under law and where there is non-application of mind by the authority and is acting in a perfunctory or mechanical manner ignoring conditions precedent.

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\(^3\) (2006) 6 SCC 430
5.3 IRRATIONALITY

Irrationality as a ground and legitimate expectation to challenge of any decision was developed by the Court in Associated Provincial Picture House v. Wednesbury⁴, later came to be known as "Wednesbury test" to determine 'irrationality' of an administrative action. A decision of the administrative authority shall be considered as irrational if it is without the authority of law, if it is based on no evidence, if it is based on irrelevant and extraneous consideration, if it is so outrageous in its defiance to logic or accepted norms of moral, standard that no sensible person, on the given facts and circumstances, could arrive at such a decision. In other words, it is so absurd that no sensible person could ever dream that it lay within the power of the administrative authority. It is the use of the doctrine in substantive sense. Therefore, if the decision of the authority is so capricious, perverse, arbitrary, unreasonable and manifestly unjust that no sensible person can come to that conclusion, court would quash it. However, standard of rationality of administrative action is not to be judged by the standard of 'any person' i.e. man in a Clapham Omnibus. It is a standard indicated by true construction of law, proper or improper use of power and perversity of the decision which no sensible man can arrive at. In applying this test court would not apply 'strict scrutiny' and would not judge adequacy or sufficiency of the material unless fundamental rights are violated, and would not substitute its judgment with the judgment of the administrator unless the decision is perverse and it is so unreasonable that it may be described as done in bad faith.

⁴ (1948) KB 223
Irrationality in its scope may include: (i) Taking into consideration irrelevant material; (ii) ignoring relevant considerations; (iii) using power for improper purpose; (iv) exercising power in mala fide manner. However, when used in 'substantive sense' it may mean that administrative action is so irrational that no public authority could take it.

It is important at the outset to discuss about the limits of judicial intervention over discretion: In the other words, it is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority. They should not intervene, reassess the matter afresh and decide, for example, that funds ought to be allocated in one way rather than another. In R. v. Ministry of Agriculture, Fisheries and Food Ex. p. First City Trading⁵, the court held that the basic conceptions of political theory and the allocation of governmental functions are against this approach Decisions as to political and social choice are made by the legislature, or by a person assigned the task by the legislature. To sanction general judicial intervention simply because the court would prefer a different choice to that of the administrator runs counter to this fundamental assumption, and would entail a re-allocation of power from the legislature and bureaucracy to the courts.

The courts readily accept that it is not their task to substitute judgment. This is clarified by the court in R. v. Cambridge Health Authority⁶ The applicant, B, was a 10-year old girl who was extremely ill. She had received a bone marrow transplant but the treatment had not proven to be effective. The hospital, acting on the advice of specialists, decided that B had only a short time to live and that further major therapy

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⁵ (1997 1 CMIR 205)  
⁶ (1995) 2 All E.R. 129
should not be given. B's father sought the opinion of two further specialists, who thought that a second bone marrow transplant might have some chance of success. Such treatment could, however, only be administered privately because there were no beds in the National Health Service within a hospital which could carry out such therapy. The proposed treatment would take place in two stages, the first of which would cost £15,000 and have a 10 to 20 per cent chance of success; the second stage would cost £60,000 with a similar 10 to 20 per cent chance of success. B's father requested the health authority to allocate the funds necessary for this therapy. It refused to do so, given the limited nature of the funds at its disposal and the small likelihood that the treatment would be effective. B's father then sought judicial intervention of this decision, but failed before the Court of Appeal. Sir Thomas Bingham M.R. recognised the tragic nature of B's situation, but stressed that the courts were not the arbiters of the merits in such cases. It was not for the courts to express any opinion as to the likely success or not of the relevant medical treatment. The courts should, confine themselves to the lawfulness of the decision under scrutiny. The basic rationale for the health authority's refusal to press further with treatment for B was scarcity of resources. The court's role in this respect was perforce limited and the court said that it had no doubt that in a perfect world any treatment which a patient sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they
would like; they cannot purchase all the extremely expensive medical
equipment they would like; they cannot carry out all the research they
would like; they cannot build all the hospitals and specialist units they
would like. Difficult and agonising judgments have to be made as to how
a limited budget is best allocated to the maximum advantage of the
maximum number of patients. That is not a judgment which the court can
make. It is not something that a health authority such as this authority can
be fairly criticised for not advancing before the court.

While all accept that it is not for the courts to substitute judgment,
it is also recognised that there should be some control over the rationality
of the decisions made by the administration. The theme that runs
throughout this area is the desire to fashion a criterion which will allow
judicial intervention, without thereby leading to substitution of judgment
or too great an intrusion on the merits.

In *Associated Picture Houses Ltd. v. Wednesbury Corporation* Lord Greene M.R. used the word unreasonableness in two different
senses. It was used to describe the various grounds of challenge which
went to the legality of the public body's actions. This "umbrella sense" of
unreasonableness was used to describe actions based on illegality,
irrelevancy and the like. He also gave unreasonableness a "substantive"
meaning in its own right. If an exercise of discretion successfully
negotiated the hurdles of propriety of purpose and relevancy it could still
be invalidated if it was so unreasonable that no reasonable body could
reach such a decision.

The two senses of unreasonableness were designed to legitimate
judicial intervention over discretionary decisions, and to establish the
limits to any such intervention. The first meaning of the term allowed the
courts to intervene where the decision was of a type that could not be
made at all and was therefore illegal. It was outside the four corners of
the power that Parliament had given to the decision maker and it was
therefore right and proper for the courts to step in. Where, however, the
primary decision maker was within the four corners of its power then the
courts should be reluctant to interfere. The courts should not substitute
their view for that of the public body, nor should they overturn a decision
merely because they felt that there might have been some other rea-
sonable way for the agency to have done its task. Some control over
decisions that were within the four corners of the public body's power
was, however, felt to be warranted and legitimate. This was the rationale
for the substantive meaning of unreasonableness. If the challenged
decision really was so unreasonable that no reasonable body could have
made it, then the court was justified in quashing it. The very fact that
something extreme would have to be proven legitimated the judicial
oversight and served to defend the courts from the charge that they were
overstepping their remit and intervening too greatly on the merits. It is
clear from Lord Greene M.R.'s judgment that he conceived of it being
used only in the extreme and hypothetical instance of "dismissal for red
hair type of case". Lord Diplock in *GCHQ v. Ministry for Civil Services*\(^8\)
was equally clear that this species of irrationality would only apply to a
decision which is so outrageous in its defiance of logic or of accepted
moral standards that no sensible person who had applied his mind to the
question could have arrived at it".

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\(^8\) (1985) A.C. 374
It should be recognised that the courts have always had an inherent discretion as to whether to classify a case as relating to illegality or unreasonableness in its substantive sense. The classic example of the unreasonable decision, dismissal of a teacher because of the colour of her hair. In *Short v. Poole Corporation* the court said that it can be witnessed for the considerations relevant to dismissal of a teacher are broadly defined as "any physical characteristic" then of course dismissal on the above ground is relevant. However, common sense dictates that this is not the way that we would approach the matter. The question would be posed more specifically, distinguishing between the types of physical characteristics that were felt to be relevant to teaching and those, such as hair colour, which were not. Other decisions could equally be resolved through traditional conceptions of purpose and relevancy for instances the case of *Williams v. Giddy* and *U.K.A.P.E. v. ACAS*.

The Wednesbury test has been the major tool used by the courts to control discretionary decisions, which have passed the legality hurdles of propriety of purpose, etc. The wording of the test, combined with the overlay provided by Lord Greene and Lord Diplock as to when it would apply, might lead one to think that few cases would be condemned. The reality is, however, that the courts have developed the substantive meaning of unreasonableness in two ways, and they have also articulated a test for review independent of Wednesbury, based on abuse of power.

**5.3.1 General Application of Wednesbury Principle**

The courts have applied the Wednesbury test even in cases that have nothing to do with fundamental rights. They have, for example,
applied the test to discretionary decisions that could not, whether right or wrong, be classified as of the "red hair type". In *Halls Co. Ltd. v. Shareham by sea urban*\(^{12}\) the test has been used in the planning sphere to invalidate conditions attached to planning permission. An obligation on the developer to construct an ancillary road over the frontage of the site, to which rights of passage should be given to others, was struck down. So too was an obligation that a property developer should allow those on a council housing list to occupy the houses with security of tenure for 10 years. In *R v. Boundary Commission for England Ex. P. Foot*\(^{13}\). The test has also been adopted in the context of industrial relations. It is, however, difficult to regard the subject-matter under attack as determinations which were so unreasonable that no reasonable authority could have made them, at least not when viewed as Lord Greene M.R. visualised the notion. In *R v. Bridgnorth DC Ex. P. Prime Time Promotions Ltd*\(^{14}\). The test was applied in a way that made it closer to asking whether the court believed that the exercise of discretion was reasonable.

This has become clearer in later cases. In *R. v. Lord Saville etc. of Newdigate E. P.A.*\(^{15}\) Lord Woolt M.R. held that to label a decision as irrational would often not do justice to the decision maker, who could be the most rational of persons. In such cases, the true explanation for the decision being flawed was that although such perversity could not be established, the decision maker had misdirected itself in law. In *R. v. Parliamentary Commission for Administration Ex. p. Balchin*\(^{16}\), Sedley J. held that a decision would be Wednesbury unreasonable if it disclosed an

\(^{12}\) (1964) 1 W.L.R. 240
\(^{13}\) (1983) Q.B. 600
\(^{14}\) (1987) 1 W.L.R. 457
\(^{15}\) (1999) 4 All E.R. 860
\(^{16}\) (1997) C.O.D. 146
error of reasoning, which robbed the decision of its logical integrity. If such an error could be shown then it was not necessary for the applicant to demonstrate that the decision maker was "temporarily unhinged". In *R v. North and East Devon Health Authority Ex. p. Coughlan*¹⁷, the court held that rationality covered not only decisions that defied comprehension, but also those made by "flawed logic". The recognizing of Lord Greene's test received clear support from Lord Cooke in the *R. v. Chief Constable of Sussex Ex p. International Traders Terry Ltd.*¹⁸ when it was regarded the formulation used by Lord Greene as tautologous and exaggerated, necessary to have such an extreme formulation in order to ensure that the courts remained within their proper bounds as required by the separation of powers. He advocated a simpler and less extreme test i.e. was the decision one that a reasonable authority could have reached. Lord Cooke in *R. v. Secretary of State for the Home Department Ex p. Daly*¹⁹ said that that the day will come when it will be more widely recognised that Wednesbury was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial intervention and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field by a finding that the decision under intervention is not capricious or absurd.

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¹⁷ (2001) Q.B. 213  
¹⁸ (1999) 2 A.C. 418  
¹⁹ (2001) 2 A.C. 532
5.3.2 Specific Application of Wednesbury Principle

The courts have varied the intensity with which they apply the Wednesbury test in cases concerned with rights. Before passing of Human Rights Act, 1998, the growing recognition of the importance of rights was accommodated by modification of the substantive meaning of unreasonableness. It is now common to acknowledge that the courts apply the principles of judicial review, including the Wednesbury test, with varying degrees of intensity depending upon the nature of the subject-matter. Lord Bridge in R. v. Secretary of State for the Home Department Ex p. Brind\(^{20}\) said that, in cases concerned with rights, the court must inquire whether a reasonable Secretary of State could reasonably have made the primary decision being challenged. The court should begin its inquiry from the premise that only a compelling public interest would justify the invasion of the right.

In R. v. Ministry of Defence Ex p. Smith\(^{21}\) the court was to consider whether the decision was beyond the range of responses open to a reasonable decision maker, and the greater the interference with human rights, the more the court would require by way of justification.

It is possible to argue that this is merely the Wednesbury test, which is being applied with due regard to the nature of the subject-matter. The idea that heightened scrutiny in cases concerning rights can be seen simply as a variant of the original Wednesbury test is problematic in both linguistic and conceptual terms.\(^{22}\)

In linguistic terms, it is difficult to regard the tests as the same, which is readily apparent when they are juxtaposed. Lord Greene's

\(^{20}\) (1991) 1 AC 696
\(^{21}\) (1996) Q.B. 517
\(^{22}\) P. Craig, "Unreasonableness and Proportionality in UK Law", ju EL Ellis (ed)
formulation required the decision to be so unreasonable that no reasonable public body could have made it. The formula applied in cases concerned with rights directs the court to consider whether the decision was beyond the approach applicable to a reasonable decision maker and the greater the interference with human rights the more the court would require by way of justification. The court does not rest content with inquiring whether the decision of the Minister interfering with rights was so unreasonable that no reasonable Minister could have made it. It is true that there is a great degree of linguistic difference between the two approaches.

In conceptual terms, it is equally difficult to regard judicial intervention in rights' cases merely as a variant of traditional Wednesbury test, since the premises that underlie review in the two contexts differ. The premise that underlies the classic Wednesbury approach, as overlaid by Lord Diplock, is that the courts should be aware of their limited role. Social and political choices have been assigned by parliament to a Minister or agency and it was not for the courts to overstep their legitimate bounds when dealing with such cases. It was this premise which shaped the Wednesbury test itself. The court would intervene to ensure that the agency remained within the four corners of its powers, through concepts such as propriety of purpose and relevancy, but would only exercise very limited control over the rationality of the decision through Wednesbury unreasonableness. The premise differs in cases concerned with violations rights. The courts continue to accept that they should not substitute judgment. It is also generally accepted that traditional notions of sovereignty mean that the courts cannot invalidate
primary legislation on the ground that it infringes rights. The courts do not, however, operate on the assumption that decisions about rights made by the political arm of government, or another public body, must necessarily be accorded the same respect or judicial deference as, for example, allocative decisions of an economic nature. The will of majority is quite properly accorded less force in rights-based cases than in others. It is this premise which serves to explain, and which is reflected in, the different meaning given to "reasonableness review". The level of unreasonableness which the applicant must prove is less extreme than in the traditional Wednesbury formula, and the court requires more compelling justification before it is willing to accept that an invasion of rights was warranted.

5.3.3 Non-Application of Wednesbury in Legitimate Expectation Cases

In R v. North and East Devon Health Authority Ex. p. Coughlan, the court held that judicial intervention could be premised on bare rationality, as reflected in the Wednesbury test. This test was rejected as being insufficiently searching in cases where a public body sought to resile from a substantive legitimate expectation. The court held that intervention could, alternatively, be premised on abuse of power, citing the judgement passed in R. v. Inland Revenue Commissioners Ex p. Preston as the main authority. The court's task was to ensure that the power to alter policy was not abused by unfairly frustrating an individual's legitimate expectations. This standard of review was more far-reaching than bare rationality. While it was for the public body to

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23 Lord Woolf, "Droit Public-English Style" (19951 P.L. 57
24 (2001) Q.B. 213
25 (1985) A.C. 835
decide when to change policy, the applicant's substantive legitimate expectation could not be frustrated unless there was an overriding public interest, and whether this existed or not was a matter for the court. The appropriate standard of review in legitimate expectation cases will depend upon the facts of each case. Two points should be emphasised in the present context. On the one hand, abuse of power may properly be regarded as the conceptual rationale for judicial intervention to protect substantive legitimate expectations. It encapsulates the conclusion that the applicant had some normatively justified expectation, since there would otherwise have been no foundation for finding such an abuse. The term abuse of power can also include in the conclusion that the court has found the public body's argument for going back on the expectation to be unconvincing.

On the other hand, it must also be recognised that abuse of power does not, in itself, furnish a standard of review for deciding whether a public body can resile from a proven substantive expectation. Abuse of power can express the conclusion reached under any such standard, but does not constitute a standard of review itself. The standard should, be more searching than bare rationality. There are two possible standards of review that could be employed in a modified Wednesbury test and proportionality.

5.3.4 Scope of Wednesbury Principle and Legitimate Expectation

The Wednesbury test has occupied a pivotal role in the control of discretion. Its very malleability has helped it to survive. Whether it continues to do so is dependent upon mainly three factors.

First, there is the empirical issue as to how many cases which have, up until now, been adjudicated pursuant to this test, will be recast as
rights-based claims under the Human Rights Act, 1998. There can be no doubt that some factual challenges will be recast in this manner. This is important because, the test for review under the Human Rights Act, 1998 will be different and more demanding than the Wednesbury test as originally conceived. It would, for example, be a "nice" question as to how the factual allegations in Wednesbury itself would be argued under the Human Rights Act, 1998. The applicants might well contend that the restriction imposed in that case, to the effect that a cinema could open on a Sunday, but could not admit children under 15, was contrary to the right to family life or perhaps even free speech. This might be thought to be fanciful, or it might be felt that the courts would decide that there had been no breach of the relevant Convention right. The general point holds true nonetheless: many of the cases litigated under the Wednesbury test could be pleaded under the Human Rights Act, 1998. This is obviously true in relation to cases, which clearly involve rights-based claims. It is, however, also true of other cases, such as those concerning the imposition of conditions on a planning permission. There is little doubt that some of these cases would now be brought under the Human Rights Act, 1998.

The second factor that will affect the status of the Wednesbury test is more normative in nature. This is the impact of the standard of review under European Conventions law and the Human Rights Act, 1998. It is clear that Community law uses proportionality as a criterion for review. It is clear also that proportionality will feature in the test to be applied under the Human Rights Act, 1998.

It may be that Wednesbury will survive and continue to used in cases where there is no link with European Conventions law and where

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26 Sir Robert Carnwath, "The Reasonable Limits of Local Authority Powers" (1996) P L 244
there is no claim under the Human Rights Act, 1998. Indeed, some courts might feel that precisely because there are no connections with European Conventions law or the Human Rights Act, 1998, that therefore the traditional Wednesbury test remains the most appropriate standard for review.

It may, however, transpire that Wednesbury ceases to operate as an independent test in its own right. It might be covered within the purview of the tests used in European Conventions law and the Human Rights Act, 1998. This is true also because a proportionality test can, be applied with varying degrees of intensity. The constitutional concern about the limits of the judicial role that underlies Wednesbury could, therefore, be perfectly well accommodated within a proportionality inquiry. It is in part because it will be increasingly difficult, or impractical, for courts to apply different tests to different allegations made in an application for judicial intervention. It will be common for cases to feature claims under the Human Rights Act, 1998 and independent assertions of ultra vires conduct. It would be possible in theory for courts to use different tests for review in relation to each of these claims. The attractions of applying a single test, albeit one which can be applied with varying degrees of intensity, may, however, prove to be difficult to resist over time. This is particularly so given that the courts will become more accustomed to a proportionality inquiry through Human Rights Act, 1998.

The third factor is related to, but distinct, from the second. This is the precise meaning given to the Wednesbury test. If the courts adopt the modified version of the test, it raises the issue of how different this is from a proportionality test.

Principle of irrationality shares space of rule of law, reasonableness and non-arbitrariness. If the action of the administrative authority violates
any of these principles, court can quash such action as violative of Articles 14, 19 or 21 of the Constitution. Reasonableness besides being a constitutional requirement may also arise from a statutory mandate. Thus where a statute provides, 'if authority has reason to believe', courts have held these words to limit administrative discretion to the extent that the exercise of power must be objective and not subjective. Where there is no express requirement of 'reasonableness' courts have implied this requirement in every administrative action because no administrative action should be irrational, arbitrary and subjective. Therefore, if law allows an administrative authority to take action 'as it may deem fit courts have interpreted these words to mean 'as it may reasonably deem fit'. It is necessary to infuse every administrative action with 'fairness' necessary to build a Rule of Law society.

5.4 DOCTRINE OF PROPORTIONALITY AND LEGITIMATE EXPECTATION

The ordinary meaning of proportionality is that the administrative action should not be more drastic than it ought to be for obtaining desired result. It implies that canon should not be used to shoot a sparrow. In other words, this doctrine tries to balance means with ends. Proportionality shares platform with 'reasonableness' and courts while exercising power of review take into consideration the course of action that could have been reasonably followed'. Indian courts have been following this doctrine for a long time but English Courts have started using this doctrine in administrative law after the passing of the Human Rights Act, 1998.

The doctrine of proportionality is being applied in the situations where administrative action invades fundamental rights. In such a case, courts make strict scrutiny of administrative action and go into the
question of correctness of the choices made by the authority. The Courts would also balance adverse effects on the right and the object sought to be achieved, where question of quantum of punishment imposed by the administrative authority is involved, courts would not make strict scrutiny. Courts follow the principle that though quantum of punishment is within the jurisdiction of the administrative authority but arbitrariness must be avoided. This principle may be titled as 'deference principle' where court show respect to the choice made by the administrative authority except when choice is manifestly disproportionate.

While reviewing an administrative action on the ground of proportionality Courts generally examine two aspects namely:

(i) Whether the relative merits of different objectives or interests have been appropriately weighed and fairly balanced?

(ii) Whether the action under review was, in the circumstances, excessively restrictive or inflicted an unnecessary burden?

In Association Of Registration, Plates v. Union of India\textsuperscript{27}, the Court observed that judicial review of administrative action is limited to consideration of legality of decision making process and not legality of the decision per se. Mere possibility of another view cannot be a ground for interference. Therefore, courts will not interfere unless the decision suffers from illegality, irrationality, procedural impropriety and proportionality deficiency. Mere assertion of these ground is not sufficient, each ground must be proved by evidence on record. The court also emphasised that the doctrine of immunity from judicial review is restricted to cases or class of cases which relate to deployment of troops and entering into international treaties etc. In policy matters and where

\textsuperscript{27} (2004) 5 SCC. 364
subjective satisfaction of the authority is involved, courts will not interfere unless the decision is totally perverse and violates any provisions of the Constitution.

Courts in India, by creatively exercising the power of judicial review of administrative action, have progressively eliminated all 'no-go' areas of the administration. At present, there exists no limitation on the power of judicial review of the Courts except self-restraint. This has put new challenges and opportunities before the court, as it can now do justice in any manner of case to any manner of people.

With the growth of administrative law, a need was felt to control the possible abuse of discretionary powers by the administration. For this purpose, courts have evolved various principles like illegality, irrationality, procedural impropriety, proportionality and legitimate expectation. Proportionality is the latest entrant in administrative law. In *Coimbtore District Central Coop Bank v. Employees Association*\(^{28}\), the Supreme Court held that through the use of the doctrine of proportionality court would not allow administration to use a sledgehammer to crack a nut where a paring knife would suffice. Thus it is a principle where courts would examine priorities and processes of the administration for reaching a decision or recalling a decision. However, courts have always tried to temper this doctrine with the doctrine of 'flexibility'.

Doctrine of proportionality was developed in 19th century in Europe originated in Prussia. In EU jurisdictions courts evaluate the necessity, suitability, utility and desirability of administrative action. However, the courts do not sit as an appellate authority or super legislature and show deference to administrative and legislative

\(^{28}\) (2007) 4 SCC 669
authorities. Nevertheless while applying proportionality test court apply more exacting and intrusive parameters than Wednesbury test of unreasonableness.

Originally the doctrine of proportionality was developed to control the police power of the state but it applies to: (i) Administrative discretionary action; (ii) constitutionality of law where fundamental rights are involved; and (iii) quantum of punishment. While applying the doctrine court examines: (i) Did the action pursue a legitimate aim; (ii) were the measures employed to achieve the aim were suitable; (iii) could the aim would have been achieved by less restrictive/onerous alternatives; (iv) is the restriction/derogation justified in the overall interest of a democratic society and human dignity.

However, the application of the doctrine of proportionality in administrative law is a debatable issue and has not been fully and finally settled. Proportionality is a course of action which could have been reasonably followed and should not be excessive or severe, etc. Proportionality can be described as a principle where the court is concerned with the way in which the administrator 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.\textsuperscript{29} If elaborated further, it is the preparedness to hold that a decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be disproportionate to the aims in view. Deployment of proportionality sets in focus the true nature of the exercise; the elaboration of a rule about permissible priorities. The doctrine of

\textsuperscript{29} Laws, J., Is the High Court the Guardian of Fundamental Constitutional Rights? (1993 PL 59)
proportionality used in fundamental rights' context involves a balancing test and the necessity test. The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interests and a manifest imbalance of relevant considerations. The "necessity test" means that the infringement of fundamental rights in question must be by the least restrictive alternative.\(^{30}\)

In *Associated Provincial Picture Houses v. Wednesbury Corpn\(^{31}\)*, the court held that while judging the validity of an administrative action or statutory discretion, normally the Wednesbury test is applied. According to this test, the court would consider whether irrelevant matters had been taken into consideration or whether relevant matters had not been taken into consideration or whether the action is bona fide. The court would also consider whether the decision was absurd or perverse. Neither the court would go into the correctness of choice made by the administrator amongst the various alternatives open to him nor the court would substitute its decision to that of the administrator. The decision of the administrator must be within the four corners of law and not one which no sensible person could have reasonably arrived at. Besides these, the decision should be bona fide. The decision could be one of many choices open to the authority but it is for that authority to decide upon the choice and the court does not substitute its own view.

In *Council of Civil Services Union v. Minister of Civil Services\(^{32}\)* Lord Diplock summarised the principles of judicial review of administrative action as illegality, procedural impropriety and irrationality. He further said that the doctrine of proportionality as a


\(^{31}\) (1948) 1 KB 223

\(^{32}\) (1984) 3 All ER 935 (HL)
principle of judicial review may become later available in the same manner as is available in several member States of European Economic Community. Illegality means that no authority should act beyond its powers. Therefore, excess of jurisdiction is the basis of judicial review on ground of illegality. Irrationality is Wednesbury test of unreasonableness. It applies to actions which are so outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. Procedural impropriety refers to what may be called procedural ultra vires. Adoption of ‘proportionality’ as a ground of judicial review was left for the future. However, Wednesbury test of reasonableness is not the standard of "the man on the Clapham Omnibus". It is the standard indicated by a true construction of the act which distinguishes between what is authorised and what is not.

The House of Lords in *R. v. Secy, for Home Affairs Brind, ex. p.*\(^{33}\), again reiterated that doctrine of proportionality cannot become a part of administrative law in England unless European Convention of Human Rights and Fundamental Freedoms are incorporated by the Parliament into domestic law. In this case Lord Bridge explained the two judgments which the court can make while exercising power of judicial review of administrative action, primary judgment as to whether the particular competing public interest justifies the particular restriction and secondary judgment as to whether a reasonable administrative officer, on material before him, could reasonably make the primary judgment. It was also held that the Court would make only the secondary judgment and the

\(^{33}\) (1991) 1 All ER 720
primary judgment would be made by the administrative officer whom Parliament has entrusted the discretion. It follows that if the European Human Rights Convention is incorporated into the domestic law of England, Court will be obliged to make the primary judgment also and apply the principle of proportionality in situations involving human rights. Until it is done, the Court would confine itself to making a secondary judgment only.

The same principle was reiterated by Lord Bingham in *R. v. Ministry of Defence*[^34^], *ex parte Smith* and said that in the case appellants' rights as human beings are in issue which are justiciable, the Court can thrust itself into the position of the primary decision maker. With the incorporation of European Human Rights Convention into domestic law of England in 1998 when Parliament passed the Human Rights Act, 1998, reluctance on the part of the English courts in applying the doctrine for determining the validity of an administrative action has now changed and the courts are making use of the doctrine in administrative law, where human rights of the people are violated. However, due to the concept of Parliamentary sovereignty in force, Court merely issue a 'declaration of incompatibility' while reviewing a law, if an interpretation compatible to the Law of Parliament is not possible. This gives an opportunity to the Parliament to rethink the whole issue afresh.

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. In *Laxmi Khandsari v. State of U.P.*[^35^], the Supreme Court held that

[^34^]: (1996) 1 All ER 257
[^35^]: (1981) 2 SCC 600
the law is clear on the point that while deciding the reasonableness of the restriction on fundamental rights, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time should all enter into judicial verdict. Thus while exercising the power of judicial review court performs the primary role in Brind's 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 same view was reiterated in the case of *State of A.P. v. MC Dowell & Co.*

However, it is still not certain whether the courts dealing with executive or administrative action or discretion exercised under statutory powers where fundamental rights are not involved could apply principle of 'proportionality' and take up primary role in *Union of India v. G. Ganayutham*, the Court left this question open because it was not necessary for the decision in the case as the party had not pleaded the violation of fundamental rights. In this case 50% of respondent's pension and 50% of gratuity had been withheld on proof of his misconduct. One of the grounds taken by respondent was that the penalty was excessive. The Central Administrative Tribunal came to the conclusion that the punishment awarded was "too severe", that the lapse was procedural, there was no collusion between the respondent and any party, that the officer had otherwise done excellent work and, therefore, it was a fit case

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36  (1996) 3 SCC 709  
37  (1997) 7 SCC 463
where the withholding of pension of 50% had to be restricted for a period of 10 years instead of on a permanent basis. The Supreme Court allowed the appeal and held that in such cases the judicial review is restricted to secondary judgment\textsuperscript{38} and thus the review court cannot substitute its own views of the punishment. Power of judicial review is limited to illegality, procedural impropriety and irrationality meaning thereby that no sensible person who weighed the pros and cons could have arrived at or that the punishment is outrageous in defiance of any logic or standard of morality. Therefore, as neither the Wednesbury nor proportionality tests had been satisfied, the order of the Tribunal was set aside. It was also emphasised by the Court that unless the Court/Tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to the Wednesbury or based on principle proportionality, the punishment cannot be quashed. Even then, the matter was remitted back to the appropriate authority for reconsideration. In \textit{B.C. Chaturvedi v. Union of India}\textsuperscript{39}, the court held that it is only in a very rare situation in order to shorten litigation that the Court may substitute its own view on punishment. Such a rare situation may include a case where punishment awarded is such which shocks the conscience of the Court/Tribunal. A similar view as taken in \textit{Indian Oil Corpn. v. Ashok Kumar Arora}\textsuperscript{40} when the Court held that in matters of punishment, the Court will not intervene unless the punishment is wholly disproportionate.

The Supreme Court in \textit{Ranjit Thakur v. Union of India}\textsuperscript{41}, had applied the doctrine of proportionality while quashing the punishment of dismissal from service and sentence of imprisonment awarded by the

\begin{footnotesize}
38 (1991) 1 AC 696
39 (1995) 6 SCC 749
40 (1997) 3 SCC 72
41 (1987) 4 SCC 611
\end{footnotesize}
court-martial under the Army Act, 1950. However, while quashing the punishment on the ground of its being "strikingly disproportionate" the Court observed that 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 vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amounts in itself to conclusive evidence of bias. The doctrine of proportionality, and as a legitimate basis of the judicial review, would ensure that even on 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.

Though in this case the court applied the doctrine of proportionality but in fact the court confined itself to the description of irrationality as laid down in \textit{CCSU v. Ministry of Civil Services}\textsuperscript{42}, namely, that it should be in outrageous defiance of logic.

It is a fundamental principle of criminal jurisprudence that the punishment imposed should not be disproportionate to the gravity of offence proved. However, while dealing with a disciplinary matter of a government servant, the Supreme Court in \textit{State of Orissa v. Vidya Bhushan Mahapatro}\textsuperscript{43} 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 order may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed, it is

\textsuperscript{42} (1984) 3 All ER 935
\textsuperscript{43} (1963) Supp (1) SCR 648
not for the court to consider whether that ground alone would have weighed with the authority in dismissing a public servant.

In *Dwarkadas Marfatia v. Board of Trustees of Port of Bombay*\(^4^4\), the Supreme Court said that the jurisdiction of the High Court under Article 226 of the Constitution, is highly limited. It can only go into the questions of illegality, irrationality and procedural impropriety, therefore, it is not within the power of the court to substitute a decision taken by a competent authority simply because the decision sought to be substituted is a better one. Thus it is clear that while deciding the proportionality of a punishment/penalty the court keep in mind that unless the punishment is so outrageous and in defiance of logic that no sensible person could have arrived at it, the court would not interfere.

In *Director NRSA v. G. Radeppa*\(^4^5\), the Supreme Court said that in cases of adjudication under the Industrial Disputes Act, 1947 the principle of proportionality fully applies by virtue of Section 11-A of the Act. The Industrial Court as well as the High Court, on a perusal of the charges and the punishment imposed, can always reduce the punishment if it is disproportionate to the gravity of the charge held proved. Rule of proportionality shares ground with the rule against arbitrariness. Therefore, in the absence of any statutory provision if a major penalty has been imposed for a minor lapse it would be clearly arbitrary falling within the inhibition of Article 14 of Indian Constitution and the same is inviolation of legitimate expectation.

\(^4^4\) (1989) 3 SCC 293
\(^4^5\) (1991) 1 APLJ 243
In *Union of India v. G. Ganayutham*\(^46\), the Supreme Court held that rule of proportionality is fully applicable in constitutional adjudication where the court has to decide on the reasonableness of a restriction on the exercise of fundamental rights. However, its application in the field of administrative law is still in an evolving stage. At the present, the doctrine is not available in administrative law in the sense that the court cannot go into the question of choice made and priority fixed by the administrator. The court can only see if upon given material before the administrative officer he has acted as a reasonable man. In an action for review of an administrative action, the court cannot act as a court of appeal. Even in cases where the validity of a restriction imposed on the fundamental right is involved, the court must exercise self-restraint and allow greater margin of appreciation to the administrator and the legislature in such cases.

In order to maintain the balance between individual rights and societal needs courts have always used the doctrine of proportionality and legitimate expectation with a judicious mix of principle of 'flexibility'. Courts take into consideration factual matrix of the case while applying this doctrine. In *Allahabad Jal Sansthan v. Daya Shanker Rai*\(^47\), the Supreme Court opined that while protecting interest of the workman interest of the employer and the societal needs must be taken into consideration because complete detriment of the employer would only lead towards skewing investment away from labour intensive market, thus strangling economic development. In the same manner in *Hombe*
Gowda Educational Trust v. State of Karnataka\textsuperscript{48}, the Supreme Court observed that though dismissal causes grave hardship but grave misconduct should not go unpunished. Thus Courts are now more willing to provide more space to employers in labour relations in the interest of societal concerns.

In Canara Bank v. V.K. Awasty\textsuperscript{49}, while explaining the applicability of the doctrine of proportionality, the Court observed that in situations where no fundamental freedoms are involved Court will only play a secondary role while primary judgment will remain with the administrative authorities, but in situations where fundamental freedoms are directly and substantially involved, the Court will exercise primary judgment. Regarding application of the doctrine of proportionality to determine quantum of punishment, Supreme Court was of the view that it cannot be a routine matter. If departmental proceedings establish charges of failure to discharge duties with honesty, integrity and diligence scope of judicial review is highly limited to situation of illegality and irrationality only.

While describing the current position about the application of the doctrine of proportionality in administrative law in England and India the Supreme Court in Coimbatore District Central Coop Bank v. Employees Association\textsuperscript{50}, was of the view that with the growth of administrative law, there is a need to control the possible abuse of discretionary powers exercised by the administration. For this purpose, courts have developed various principles. Proportionality principle legitimate expectation are the latest induction. These are the principles where court review the process,

\textsuperscript{48} (2006) 6 SCC 430
\textsuperscript{49} (2005) 6 SCC 321
\textsuperscript{50} (2007) 4 SCC 696
method or manner in which authorities have ordered their priorities or recalled a decision. Doctrine of proportionality includes 'balancing' and necessity tests. 'Balancing test' permits scrutiny of punishments on infringement of rights, interests and a manifest imbalance of relevant considerations. 'Necessity test' requires infringement of fundamental rights to least restrictive alternative. The Supreme Court referred that judgment passed in Associated Provincial Picture Houses v. Corpn. of Wednesbury\textsuperscript{51} and said that to judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker, could, on material before him and within the framework of the law have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choices made by the administrator amongst the various alternatives open to him. The court would substitute its decision to that of the administrator.

The court also affirmed the views expressed in Council of Civil Services Union v. Ministry of Civil Services\textsuperscript{52} and said that the court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English

\textsuperscript{51} (1948) 1 KB 223
\textsuperscript{52} (1984) 3 All ER 935
Administrative Law in future is not ruled out. These are called the Council of Civil Services Unions principles.

The Supreme Court of India also referred judgments of Bugdaycay\textsuperscript{53}, Brind\textsuperscript{54} and Smith\textsuperscript{55} before convention on Human Rights was incorporated into English Law, the English courts merely exercised secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner it has been done. Now when the EU convention on Human Rights has been incorporated in English Law making available the principle of proportionality, the English courts will render primary judgment on the validity of administrative action to find out if the restriction is disproportionate or excessive or is not based upon fair balancing of fundamental freedom and the need for the restriction thereupon. In view of the concept of Parliamentary Supremacy though courts have no jurisdiction to declare the law invalid hence they issue a 'declaration of incompatibility' asking the Parliament to rethink and remedy the situation. Thus English courts, after the passing of the Human Rights Act, 1998, have started making use of this doctrine in administrative law.

The Supreme Court also said that the position in India, in administrative law, where no fundamental freedoms are involved, is that the Courts/ Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles to find out if the executive or administrative authority has reasonably arrived at his decision as a

\textsuperscript{53} (1987) AC 514
\textsuperscript{54} (1991) 1 All ER 720
\textsuperscript{55} (1996) 1 All ER 257
primary authority. The Supreme Court further said that whether in a case of administrative or executive action affecting fundamental freedoms, the courts in India will apply the principle of "proportionality" and assume the primary role, is left open, to be decided in appropriate cases. It will then be necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19 and 21 of Indian Constitution, are involved and not for Article 14. The Supreme Court also referred contents of the judgments passed by it in the case of *P.D. Aggarwal v. State Bank of India*<sup>56</sup>, where it was said that jurisdiction of the Court to interfere with the quantum of punishment is limited to very exceptional circumstance. In the opinion of the Court 'verbal abuse may entail punishment of dismissal from service. The Court applies doctrine of proportionality in a limited manner. In *State of U.P. v. Sheo Shanker Lal Srivastava*<sup>57</sup>, the court held that in the present context, doctrine of proportionality is gaining ground at the cost of Wednesby unreasonableness to make scrutiny of administrative action more exacting and intrusive.

The jurisprudence considered so far has applied proportionality, or legitimate, in specific types of case. More recently, The courts have expressed the view that proportionality should be recognised as a general head of review within domestic law and even without reference to the Human Rights Act, 1998 the time has come to recognise that this principle of proportionality is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to be

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<sup>56</sup> (2006) 8 SCC 776  
<sup>57</sup> (2006) 3 SCC 276
unnecessary and confusing. Reference to the Human Rights Act, 1998 however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.

In _Suresh Madan v. General Medical Council_\(^{58}\) the court held that there was a material difference between a rationality test cast in terms of heightened scrutiny and a proportionality test. The Court accepted that many cases would be decided in the same way under either test, but acknowledged that the intensity of review would be greater under proportionality. Proportionality could require the reviewing court to assess the balance struck by the decision maker, not merely that it was within the range of reasonable decisions. A proportionality test could also oblige the court to pay attention to the relative weight accorded to relevant interests in a manner not generally done under the traditional approach to review. It had to be shown that the limitation of the right was necessary in a democratic society, to meet a pressing social need, and was proportionate to the legitimate aim being pursued.

In _R. v. Secretary of State for the Home Department Ex. P. Adams_\(^{59}\), the Court has applied proportionality in cases which have a Community law element.

It is important at the outset to ascertain the place of proportionality within the general scheme of review and its relationship with other existing methods of control. It is clear, as a matter of principle, that to talk of proportionality assumes that the public body was entitled to pursue its desired objective. The presumption is, therefore, that the general

\(^{58}\) (2001) A.C.D. 3
\(^{59}\) (2001) A.C.D. 3
objective was a legitimate one and that the public body was not seeking to achieve an improper purpose. If the purpose was improper then the exercise of discretion should be struck down upon this ground without any investigation as to whether it was disproportionate. Proportionality should then only be considered once the controls have been satisfied. If we bypass this level of control then the danger is that the courts will assume that the public body was able to use its discretion for the purpose in question, the only main issue being whether it did so proportionately.

It is obvious that at a general level proportionality involves some idea of balance between interests or objectives, and that it embodies some sense of an appropriate relationship between means and ends. There is a need to identify the relevant interests and ascribe some weight to them. A decision must then be made as to whether the public body's decision was indeed proportionate or not. The most common formulation is for a three type analysis. The court considers:

(1) Whether the measure was necessary to achieve the desired objective.

(2) Whether the measure was suitable for achieving the desired objective.

(3) Whether it nonetheless imposed excessive burdens on the individual. The last part of this inquiry is often termed proportionality stricto sensu.

It will be apparent from the analysis that the court will decide how intensively to apply these criteria. It should also be recognised that the criteria may require the court to consider alternative strategies for attaining the desired end. This follows from the fact that the court will, in fundamental rights' cases, consider whether there was a less restrictive method for attaining the desired objective. The need to consider
alternative strategies may well also arise in other cases. Where the
decision is of a technical or professional nature it may require specialist
evidence as to the practicability of alternative strategies.

It is readily apparent that the application of the test might well
produce differing results depending upon the circumstances of the case.

5.4.1 Application of Proportionality for protection of Fundamental
Rights

The first type of situation is one in which the exercise of discretion
and power impinges upon, or clashes with, a recognised fundamental
right. Proportionality is part of the test for review under the Human
Rights Act, 1998 in England. The courts must take the jurisprudence of
the European Court of Human Rights on proportionality into account,
even though it is not binding on them. It is, however, clear as a matter of
principle that some such test should apply in this area, quite apart from
the persuasive force. If we recognise certain interests as being of
particular importance, and categorise them as fundamental rights, then
this renders the application of proportionality necessary or natural, and
easier.

Proportionality is necessary or natural because the very
denomination of an interest as a fundamental right means that any
invasion of it should be kept to a minimum. Society may well accept that
rights cannot be regarded as absolute and that some limitations may be
warranted in certain circumstances. Nonetheless there is a presumption
that any inroad should interfere with the right as little as possible and
nothing more than is merited by the occasion. It is natural therefore to ask
whether the interference with the fundamental right was the least
restrictive possible in the circumstances. In this sense, the recognition of
proportionality is a natural and necessary adjunct to the recognition of fundamental rights.

Proportionality is also easier to apply in such cases. The reason why this is so is that one of the interests, such as freedom of speech, has been identified and it has been weighted or valued.

**Proportionality Against Imposition of Penalty**

The second type of case is that in which it is the penalty which is deemed to be disproportionate to the offence committed. People may disagree as to the precise penalty which is appropriate for a particular offence. It is a recognised principle of justice that penalties should not be excessive, as acknowledged in the Bill of Rights, 1689. In *Commissioners of Customs and Excise v. P&O Steam Navigation Co.* it was said that a court is unlikely to intervene unless the disproportionality is reasonably evident, and judicial review of this kind is to be welcomed. The application of proportionality in this type of case is also made easier because the applicant will not normally be challenging the administrative rule itself but simply the penalty imposed for the breach.

**Application of Doctrine against Unbalancing**

The third type of case is harder. This category includes those situations not dealt with by the previous two. There are no fundamental rights at stake and no excessive penalties. The paradigm of this third category is the case where the public body decides to exercise its discretion in a particular manner, this necessitates the balancing of various interests, and a person affected argues that the balancing was disproportionate. The application of a proportionality test may be more difficult in this type of case.

This is difficult because it requires to weight, many factors. It important part because many administrative decisions involve balancing, which is the essence of political determinations and many administrative choices. It cannot therefore be correct for the judiciary to overturn a decision merely because the court would have balanced the conflicting interests differently. This would amount to substitution of judgment by any other name.

This does not mean that proportionality has no role to play in this type of case. This is especially so given that administrative policy choices should be susceptible to judicial scrutiny. What it does mean is that we must decide on whether the proportionality inquiry is confined to the particular administrative decision under attack, or whether the court is also to consider alternative policy strategies.

Consideration of the former will often push the analysis in the direction of the wider ranging inquiry. What it also means is that we must decide on the intensity with which proportionality will be applied. A less intensive form of review can be utilised for some cases in this area\(^\text{61}\).

5.5 RELATIONSHIP BETWEEN WEDNESBURY PRINCIPLE, PROPORTIONALITY AND LEGITIMATE EXPECTATION

5.5.1 Traditional Wednesbury Principle and Proportionality

The courts could persist with Wednesbury principle as basis for review outside those areas where they have to apply proportionality. Different grounds of challenge would be dealt with under different heads of review, and Wednesbury principle would be interpreted in the traditional sense that the applicant would have to show that the public body's action really was so unreasonable that no reasonable body would

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have made it. It would, however, be accepted that this standard of review could vary in intensity, as exemplified by the application of the test in cases concerned with human rights.

Those who favour this approach would argue that it prevents the courts from intruding too far into the merits and obviates the need for any complex balancing, both of which are said to be undesirable features of proportionality. It is argued that the traditional approach will preserve the proper boundaries of judicial intervention. This claim is, however, undermined, in two ways.

First, it is true that if we take the language literally the need for any meaningful balancing is obviated by the extreme nature of the test, it simply does not use the colour of a person's hair as the criterion for dismissal. The reality is, as if has been seen, that the courts, while preserving the formal veneer of the Wednesbury test, have on occasion applied it to decisions which could not be regarded as having being made in defiance of logic or of accepted moral standards. The realisation that the courts have been applying the test to catch less egregious administrative action casts doubt on the claim that Wednesbury review can be conducted without engaging in some balancing. It raises the question as to the difference between this and the balancing that occurs within proportionality.

Secondly, the juridical device of varying the intensity with which the test is applied functions as a mechanism whereby the courts can exercise the degree of control which they believe to be desirable in a particular area, without thereby being accused of improper intrusion into the merits or inappropriate balancing. The very malleability in the standard of review means, however, that it is within the courts' power to
shift the line as to what is regarded as a proper or improper intrusion into the merits.

5.5.2 Modified Wednesbury Principle, Proportionality and Legitimate Explanation

The courts could, alternatively, retain the Wednesbury test for those areas not covered by the European Conventions or the Human Rights Act, 1998, but give it the tougher meaning ascribed by Lord Cooke. In other words, a decision would be overturned if it was one which a reasonable authority could not have made. This standard of review could also vary in intensity depending upon the subject-matter. This option is, somewhat paradoxically, more unstable than that just considered, and the reasons why this is so are revealing.

The essential premise of Lord Cooke's thesis is undoubtedly correct. His Lordship argued that the proper boundaries between courts and administration could be secured by a test which was less exaggerated than the traditional Wednesbury formulation. To be sure, the courts should not substitute their judgment on the merits for that of the administration, but this could be avoided even where the reasonableness test was formulated in the manner articulated by Lord Cooke.

The instability of this option becomes apparent once it is probe a little further. It should be recalled that the "virtue" of the traditional Lord Greene reading of the test was that there was no need to press further. The really outrageous decision would be all too evident and indefensible. If it is shifted to Lord Cooke's reading of the test this no longer holds true. It would be incumbent on the judiciary to articulate in some ordered manner the rationale for finding that an administrative choice was one which could not reasonably have been made, where that choice fell short of manifest absurdity. If the courts are not obliged to explain their own
findings in this manner then the new test will create unwarranted judicial discretion. It is, however, difficult to see that the factors which would be taken into account in this regard would be very different from those used in the proportionality calculus. The courts would in some manner, shape or form want to know how necessary the measure was, and how suitable it was, for attaining the desired end. These are the first two parts of the proportionality calculus. It is also possible that under Lord Cooke's formulation a court might well, expressly or impliedly, look to see whether the challenged measure imposed excessive burdens on the applicant, the third part of the proportionality formula.

If these kinds of factors are taken into account, and some such factors will have to be, then it will be difficult to persist with the idea that this is really separate from a proportionality test. There will then be an impetus to extend proportionality from the areas where it currently already applies, the European Conventions and the Human Rights Act, 1998, to general domestic law challenges.

Proportionality should neither be regarded as a panacea that will cure all ills i.e. real and imaginary, within our existing regime of review, nor should it be perceived as something dangerous or alien. It seems likely that it will be recognised as an independent ground of review within domestic law. This is because the courts are already applying the test directly or indirectly in some areas. The Wednesbury test itself is moving closer to proportionality; the European Conventions and the Human Rights Act, 1998 will acclimatise our judiciary to the concept; and the concept is accepted in a number of civil law-countries. It might therefore be of help to pull together some of the advantages and alleged disadvantages of this criterion.
A corollary is that proportionality facilitates a reasoned inquiry of a kind that is often lacking under the traditional Wednesbury approach. This is brought out forcefully by Laws J. who stated that under proportionality "it is not enough merely to set out the problem, and assert that within his jurisdiction i.e. the Minister chose this or that solution, constrained only by the requirement that his decision must have been one which a reasonable Minister might make". It was rather for the court to "test the solution arrived at and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable and proportionate to the aim in view". It will often only be possible to test the soundness of an argument by requiring reasoned justification of this kind.

The experience with proportionality in European Conventions law shows full well that the concept can be applied with varying degrees of intensity so as to accommodate the different types of decision subject to judicial review.

On the other hand, it is argued, that proportionality allows too great an intrusion into the merits and demands that the court undertakes a balancing exercise for which it is ill-suited. It is important to address the matter directly since fears in this regard have been so prominent in the debate about proportionality. It should be made absolutely clear at the outset that advocates of proportionality do not favour substitution of judgment on the merits by the courts for that of the agency. It is not the task of the court to decide what it would have done if it had been the primary decision maker, and, as it has recognised, there is nothing in the concept of proportionality which entails this. It is true that proportionality does entail some view about the merits, since otherwise the three-part
inquiry could not be undertaken. The way in which Lord Greene's test has been applied in practice to strike down agency action falling short of the absurd, also demands some view of the merits. The same can be said a fortiori about the revised meaning of the reasonableness test proposed by Lord Cooke.

There are said to be difficulties if we apply proportionality, particularly in those cases which have nothing to do with fundamental rights or penalties. It is right to acknowledge such difficulties, but they should be kept within perspective. The variability in the intensity with which proportionality is applied will itself be of assistance in this regard. It should, moreover, be recognised that analogous difficulties will be equally present if we adopt Lord Cooke's modified reasonableness test. This test can only be applied if we ask questions which are in substance the same as those posed in the proportionality inquiry.

5.6 Doctrine of Public Accountability and Legitimate Expectation

Doctrine of Public Accountability is one of the most important emerging facet of administrative law in recent times. The basic purpose of the emergence of the doctrine is to check the growing misuse of power by the administration and to provide speedy relief to the victims of such exercise of power. The doctrine is based on the premise that the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people. Therefore, the trustee i.e. public servant who enriches himself by corrupt means holds the property acquired by him as a constructive trustee. This is what the doctrine of legitimate expectation aims.
The famous decision of the Privy Council in *A.G. of Hong Kong v. Reid*\(^{62}\) has greatly widened the scope of this principle of jurisprudence in public law adjudication. In the instant case, Lord Templeman observed that engaging in bribery is an evil practice which threatens the foundations of any civilised society and that any benefit obtained by a fiduciary through the breach of duty belongs in equity to the beneficiary i.e. the State, is the basic norm subject to which all legal principles require to be interpreted. The Privy Council further observed that when bribe is accepted by a fiduciary public servant in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value, the fiduciary i.e. public servant must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe and incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of a duty.

The Court further held that a gift accepted by a person in fiduciary position as an incentive for breach of duty constituted a bribe and, although in law it belonged to the fiduciary, in equity he not only becomes a debtor for the amount of the bribe to the person to whom the duty was owed but he also holds the bribe and any property acquired therewith on constructive trust for that person.

The concept of constructive trust and equity to enforce public accountability as laid down in instant case was followed by the Supreme Court of India in *A.G. of India v. Amritlal Prajivandas*\(^{63}\). In this case, the

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\(^{62}\) (1993) 3 WLR 1143
\(^{63}\) (1994) 5 SCC 54
court was dealing with the challenge to the validity of the "illegally-acquired properties" in clause (c) of Section 3(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of the offender or in the name of other parties. The court upheld the validity of the Act.

The Supreme Court in *DDA v. Skipper Construction Co.*\(^{64}\) not only further followed the above principle but enlarged its scope by stating that even if there was no fiduciary relationship or no holder of public office was involved, yet if it is found that someone has acquired properties by defrauding the people and if it is found that the persons defrauded should be restored to the position in which they would have been put for the said fraud, the court can make necessary orders. This is what equity means and in India the courts are not only courts of law but also courts of equity. The Court further held that all such properties must be immediately attached. The burden of proof to prove that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals shall lie on the holder of such properties.

The Court further observed that a law like the SAFEMA has become an absolute necessity, if the canker of corruption is not to prove the death-knell of this nation and suggested to the Parliament to act in this matter if they really mean business. In this case, Skipper is a private limited company which had purchased a plot of land in an auction from the Delhi Development Authority (DDA) but did not deposit the bid amount. When the DDA proposed to cancel the allotment, Skipper
obtained a stay from the High Court. Meanwhile it started selling the space in the proposed building. Thus prospective buyers of space were cheated to the tune of about Rs 14 crore. This was done in violation of the Supreme Court order.

Further elaborating the doctrine of public accountability, the Supreme Court applied the theory of 'lifting the corporate veil' in order to fix the accountability on persons who are the actual operators. The Supreme Court observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegality or to defraud people. In such cases, the court would look at the reality behind the corporate veil so as to do justice between the parties. The Supreme Court further held that in order to compensate those who are defrauded or cheated, the Court can pass necessary orders under Article 142 of the Constitution. The absence of a statutory law like the SAFEMA will not inhibit the Supreme Court while making appropriate orders under Article 142.

Though the Supreme Court took a big step but failed to doctrine of public accountability its due reach. The Court did not express any opinion on the question whether the misdeeds of public servants which are not only beyond their authority but done with mala fide intent would bind them personally or the State/corporation will be vicariously liable. It cannot be over emphasized that if the doctrine of accountability is to be given its full sweep the concept of State/corporation liability be shifted to officer's liability in appropriate cases. This will have an inhibiting effect on the temptation of the public servants to misuse power for personal gains.
In order to strengthen the public accountability further in *State of Bihar v. Subhash Singh*\(^{65}\) the Supreme Court held that the Head of Department is ultimately responsible and accountable unless there are special circumstances absolving him of the accountability. The Supreme Court observed that no matter if there is hierarchical responsibility for decision-making yet the Head of the Department/designated officer is ultimately responsible and accountable for the result of the action done or decision taken. Despite this, if there is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring it to the notice of the court. The controlling officer holds each of them responsible at the pain of disciplinary action. The object thereby is to ensure compliance with the rule of law.

In *State of Bihar v. Subhash Singh*\(^ {66}\) the concept of public liability has been further strengthened by the Court by strictly applying the contempt law. Recently many senior public servants were sent to jail for deliberately violating court orders. The Court has also imposed cost personally against the, erring officer after due notice and hearing for delay in the discharge of duties. In the same manner where the public servant has caused a loss to the public exchequer, the Court in *State of Kerla v. Thressia*\(^ {67}\) has allowed the government to recover such loss personally from the erring officer.

It is now established law that the Supreme Court and High courts while exercising jurisdiction under Articles 32 and 226 of the Constitution can award compensating and exemplary cost for the

\[\text{\textsuperscript{65}} (1997) 4 SCC 430\]
\[\text{\textsuperscript{66}} (1997) 4 SCC 430\]
\[\text{\textsuperscript{67}} (1995) (2) SCC 449\]
violation of a person's fundamental rights and for the abuse of power by the State.

In *Nilabati Behera v. State of Orissa* the Supreme Court held that a claim in public law for compensation for violation of human rights and abuse of power is an acknowledged remedy for the enforcement and protection of such rights. Thus every individual has an enforceable right to compensation when he is victim of violation of his fundamental rights and abuse of power. In such a situation, the Court observed, that leaving the victim to the remedies available in civil law limits the role of constitutional courts as protectors and guarantors of fundamental rights of the citizens. Thus courts are under an obligation to make the State or its servants accountable to the people by compensating them for the violation of their fundamental rights. The view was affirmed in the case of *D.K. Basu v. State of W.B.*

The principle of accountability through compensation was further reinforced by two more principles evolved by the Supreme Court. In *Nilabati Behera v. State of Orissa* the Court laid down that the concept of sovereign immunity is not applicable to the case of violation of right to life and personal liberty guaranteed by Article 21 of the Constitution. In *M.C. Mehta v. Union of India* the Court further held that if the harm is caused due to handling of hazardous material, the liability of the State or its instrumentality will be absolutely strict under the rule of *Rylands v. Fletcher* and such a liability will not admit even the recognised exception of the rule such as an act of God. The compensation, thus,

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68 (1993) 2 SCC 746
69 (1997) 1 SCC 416
70 (1993) 2 SCC 746
71 (1987) 1 SCC 395
72 (1968) LR 3 HL 330
provided under the public law is in addition to the private law remedy for tortuous action and punishment to the wrongdoer under criminal law. Following the principle, the Court in the case of *H.C. Srivastava v. Union of India*\(^73\), awarded a compensation of Rs 10,000 to the legal heirs of each of the deceased who died in a fire in a jhuggi colony caused due to illegal and unauthorised electricity connections given by the employees of the Delhi Electricity Supply Undertaking. The scope of public accountability has been further strengthened by developing such principles as "polluter must pay" in case of environmental pollution and that every administrative authority shall be accountable for the proper and efficient discharge of its statutory duty and in the case of *Municipal Council, Ratlam v. Vardi Chand*\(^74\), the court held that lack of funds will not be defence for the enforcement of statutory duty.

The establishment of Central Human Rights Commission and States Human Rights Commissions under the Human Rights Protection Act, 1993 is also a step in the direction of making the "State accountable for the violation of human rights of the people. These commissions exercise jurisdiction suo motu or on a complaint and provide justice in an informal manner to the victim of violations of human rights and abuse of power.

In *State of Kerala v. Thressia*\(^75\), for abusing the process of court the public officer was held responsible and liable to pay costs from his own pocket. In *State of Maharashtra v. P.K. Pangara*\(^76\), the court held that for adopting casual approach by which the land could not be

\(^{73}\) (1996) 8 SCC 80
\(^{74}\) (1980) 4 SCC 162
\(^{75}\) (1995) Supp (2) SCC 449
\(^{76}\) (1995) Supp (2) SCC 119
purchased by the authority and instead purchased by private builder, held officer personally liable. In *DDA v. Skipper Construction Co*\(^{77}\), the court for irregularities committed in auction of land resulting in loss to public held official responsible for the loss. In *Common Cause Petrol Pump Matter v. Union of India*\(^{78}\), the court for oppressive, arbitrary and unconstitutional actions of public-servants, held that exemplary damages can be awarded. In *Shiv Sagar Tiwari v. Union of India*\(^{79}\), the court said that for abuse of power while exercising discretionary power in granting State largesse in an arbitrary, unjust, unfair and mala fide manner, public servant can be held personally liable. In *Dutta Associates (P) Ltd. v. Indo Mercantiles (P) Ltd*\(^{80}\), the court for abuse of power for extraneous reasons in acceptance of tender, held that all public officers concerned including Minister shall be liable to punishment. In *H.R. Ramachandran v. State of Karnataka*\(^{81}\), the court for granting illegal promotion with retrospective effect which resulted in frittering away huge public funds, held that erring officers shall be personally liable. In *Secretary Jaipur Development Authority v. Daulat Mal Jain*\(^{82}\), the court found that for misuse of public power, not only the Minister but also the official working under him will be personally liable. Thus departmental head is vicariously responsible for the actions of his subordinates, although in actual fact he is not responsible for their use of power which he must, of necessity, delegate to them.

The Central Bureau of Investigation is the prime instrumentality within the area of enforcing accountability. It is under the control of the

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\(^{77}\) (1996) 1 SCC 272

\(^{78}\) (1996) 5 SCC 593

\(^{79}\) (1996) 6 SCC 558

\(^{80}\) (1997) 1 SCC 53

\(^{81}\) (1997) 3 SCC 63

\(^{82}\) (1997) 1 SCC 53
executive so it was functioning in a manner which left much to be desired especially in enforcing accountability in high places. The Supreme Court in a landmark judgment in the case of *Vinit Narain v. Union of India* 83 separated the CBI from the executive by vesting its superintendence in the Central Vigilance Commission and directed a fixed tenure, of at least two years, for its director except in extraordinary circumstances. It also held that the CBI would no longer need government concurrence to investigate corruption cases against government officers of joint secretary level and above. Taking note of the inertia, the Court directed that the Central Vigilance Commission be given statutory status and its superintendence over the functioning of the CBI. In order to ensure independence of the Commission, the Court further directed that the selection for the post of Commissioner would be made by a committee comprising the Prime Minister, Home Minister and the leader of the Opposition from a panel of outstanding civil servants and others with impeccable integrity. Recommendation for the appointment of the CBI Director will be made by a committee headed by the Vigilance Commissioner with the Home Secretary and Secretary (personnel) as members. The Court further said that the CBI Director shall have full freedom to allocate work and constitute investigation teams and the post of the Director of the Enforcement Directorate shall be upgraded to that of Additional Secretary/Special Secretary of the Government. The Court further recommended the constitution of a body on the lines of Director of Prosecution in the U.K. for prosecution of cases. The judges said till the appointment of this body special counsel shall be appointed for the conduct of important trials on the recommendation of the Attorney

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83 (1998) 1 SCC 226
General. The Court directed the preparation of a panel of competent lawyers to act as prosecuting attorneys in cases of significance. Every prosecution which resulted in a discharge or acquittal of the accused must be reviewed and responsibility should be fixed of dereliction of duty, if any. The Court asked the Central government to ask the States to set up similar mechanisms. With all these directions the Supreme Court entertained the belief that the investigative agencies shall function better now and the principle of accountability shall be better served.

Moving towards the strengthening of accountability the Supreme Court in another landmark judgment in the case of *P.V. Narshima Rao v. Union of India*\(^84\), held that Members of Parliament and Members of Legislative Assemblies are public servants under the Prevention of Corruption Act, 1988. The Court observed that there is no doubt that these persons hold an office and are authorised to carry out public duty. The Court clarified that these persons also cannot claim exemption from prosecution under Article 105(2) of the Constitution regarding the protection of privileges as MPs and MLA as for any offence committed outside Parliament/Legislature. The Court held that Article 105(2) could not be interpreted as a charter of freedom of speech and also freedom for corruption. The object of Article 105(2) is to ensure independence to legislators in parliamentary democracy but it cannot put a member above law. This immunity cannot cover corruption and bribery. Though there is no authority prescribed under the Prevention of Corruption Act, 1988, the Court observed, yet prosecution can be launched with the permission of the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha, as the case may be\(^85\). However, the court also held that the officers of

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\(^84\) (1998) 3 SCC 626  
\(^85\) S. 197, Criminal Procedure Code, 1973
government companies or public sector undertakings are not entitled to protection of sanction before prosecution. Thus by redefining the role of the State, rewriting the rules, codes and manuals, relaying decision making, fixing accountability at all levels and providing for transparency in administration the Court is simply trying to make government function better in the interest of the people by swinging public opinion.

While dealing with the subject of public accountability classical observations of the Supreme Court require serious consideration by every thinking individual. The Supreme Court in *DDA v. Skipper Constructions Co.* observed that Some persons in the upper strata have made the 'property career' the sole aim of their life. The means have become irrelevant at a place in a land where its greatest son born in this century said 'means are more important than the ends'. A sense of bravado prevails; every thing can be managed; every authority and every institution can be managed. All it takes is to 'tackle' or 'manage' it in an appropriate manner. They have developed an utter disregard for law—nay, a contempt for it; the feeling that the law is meant for lessor mortals and not for them. The courts in this country have been trying to combat this trend, with some success as the recent events show. But how many matters we can handle? How many of such matters are still there? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even so, to what extent, in the prevailing state of affairs? Not that we wish to launch upon a diatribe against anyone in particular but judges of this Court are also permitted, we presume, to ask in anguish, 'what have we

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86 Section 197, ibid
87 (1996) 4 SCC 622
made of our country in less than fifty years?' Where has the respect and regard for law gone? And who is responsible for it?"

A similar observation was made by the Supreme Court in *Superintending Engineer, Public Health, Union Territory, Chandigarh v. Kuldeep Singh*\(^8^8\) when it observed that Every public servant is a trustee of the society and in all facets of public administration, every public servant has to exhibit honesty, integrity, sincerity and faithfulness in the implementation of the political, social, economic and constitutional policies to integrate the nation, to achieve excellence and efficiency in public administration. A public servant entrusted with duty and power to implement constitutional policy which should exhibit transparency in implementation and should be accountable for due effectuation of constitutional goals.

In *State of Punjab v. G.S. Gill*\(^8^9\) the Supreme Court further observed that many of the functions which the modern State undertakes are designed to make opportunities more nearly equal for everybody and to protect weaker individuals from the rapacity of the strong. In these days of fallen rectitude and honesty in the performance of public duty, the bureaucracy is too willing to sabotage public policy and constitutional philosophy. Judiciary/Tribunal should be astute in the declaration of law or in its solemn power of judicial review or dispensation of justice to issue directions or mandamus against the law, constitutional comments or public policy.

In *Vineet Narain v. Union of India*\(^9^0\), the Supreme Court went on to emphasise that when it comes to corruption, as it exists at different levels,
proves to be both powerful and stubborn to stall any real or superficial moves in that direction. In other words politico-bureaucratic wall proves to be impregnable against all possible onslaughts against corruption. Judicial response has been slow and varied but that is the only response available at the moment. There is no premium on honesty. Every thing is a matter of manipulation. Being a soft state, every thing is circumvented and manipulated. In the name of elimination of corruption.

It was against this conceptual backdrop the Supreme Court decided *P.V. Narasimha Rao v. State*91, popularly known as Jharkhand Mukti Morcha bribery case. In 1991 elections, Congress remained 14 members short of a clear majority in the Parliament. On July 28, 1993 Government faced a no confidence motion which was defeated by 265 to 251. Thereafter, a First Information Report (FIR) was filed with the Central Bureau of Investigation alleging conspiracy of taking and receiving bribe by the members of JMM and others for voting against the motion. It was for-quashing the FIR that a petition was filed with the Delhi High Court which was dismissed. Thus, appeal before the Supreme Court which was heard by a Constitution Bench. The Constitution Bench with a majority of 3 to 2 held that Article 105 of the Constitution confers immunity on the members of Parliament for freedom of speech and the right to give vote in Parliament.

Therefore, those MPs who received bribes and voted in the Parliament cannot be prosecuted. However, those MPs who gave bribes or did not vote can be subjected to criminal proceedings. The Court further held that a member of Parliament is a public servant and therefore, can be proceeded against under the Prevention of Corruption Act, 1988

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91 (1998) 4 SCC 626
and the Indian Penal Code, 1860. This decision of the Court generated a lot of controversy. It was argued that Article 105 of the Constitution does not protect corruption. The purpose of immunity is to preserve legislative independence, but taking bribe is no part of any legislative process. The Court failed to follow its own wisdom reflected in its earlier decision in *Satwant Singh v. State of Punjab*[^92^], aimed at rooting out corruption in high places. It is certain that the object of immunity is to ensure independence of a member of parliament for a healthy functioning and protecting him against crime will be repugnant to any healthy functioning. The object of Article 105 of the Constitution is not to create a superman immune from law of crimes.

Another important case decided by the Supreme Court on public accountability was *Common Cause v. Union of India*[^93^] popularly known as Satish Sharma case. This case was the result of a Public Interest Litigation petition which brought to the notice of the Supreme Court about arbitrary allotment of petrol outlets by the concerned Minister. The Supreme Court cancelled all allotments and also imposed exemplary damages of rupees fifty lakhs for misfeasance of a public servant. In a review petition, reversing its decision, the Court held that imposing of exemplary damages is a concept of tort where it can be awarded for misfeasance if the plaintiff has suffered any loss due to any administrative arbitrary action, and because in a PIL petition, as there is a no plaintiff whose interest is adversely affected, no damages can be awarded. The Supreme Court further observed that merely because a person is elected and inducted as a minister in the government, he cannot be said to be holding a trust on behalf of the people and hence, cannot be

[^92^]: (1960) 2 SCR 89
[^93^]: (1999) 6 SCC 667
said to have committed the criminal breach of trust. The Supreme Court explained that the idea that a person on being elected by the people and on becoming a Minister holds a sacred trust on behalf of the people is a philosophical concept and reflects the image of virtue in its highest conceivable perfection, hence, this philosophy cannot be employed for the determination of the offence of criminal breach of trust. The Supreme Court cautioned that if the Ministers of the government work under threat of being proceeded in a Court of law or work under constant fear of exemplary damages being awarded against them, they will develop a defensive attitude which will not be in the interest of the administration. This case also generated a lot of controversy and it was felt as if a good cause was lost in the abstraction of pure logic and The Supreme Court failed to catch the bull by its horns. Fact remains that law is not pure logic but experience.

After importing the principle of 'public trust' in exercise of administrative power, The Supreme Court focused its attention on government litigation because today, Government has become the biggest litigant in India. Unfortunately, there is no accountability in the government for violating the spirit of Section 80 of the Civil Procedure Code, 1908 which aims at infusing fairness in the administration by curtailing its litigative tendency. Section 80 which provides for two months notice to the Government before filing any suit or proceeding against it aims at providing sufficient time to rethink the whole matter and take suitable action in the case before entering into contestation. However, fact is that in majority of cases either the notice is not replied or if replied, it is vague and evasive. Certainly no effort is made to settle the matter outside The Supreme Court. This defeats not only the purpose of law but also puts heavy cost on the public exchequer besides adding to
the misery of the litigants. Therefore, in *Salem Advocate Bar Assn. (II) v. Union of India*\(^94\), Court issued directions that whenever statute requires service of notice as a condition precedent for filing suit, the Government will nominate, within three months, an officer who shall be made responsible to ensure that replies to the notice under Section 80 CPC are sent within stipulated time after due application of mind. The Supreme Court emphasised that if reply is not sent within time, or is vague or evasive and has been sent without proper application of mind, The Supreme Court must award heavy cost which must be recovered by the government from the officer concerned besides taking appropriate disciplinary action against the delinquent officer. The Supreme Court also directed that the cost awarded in such matter should not be nominal but real cost which may be calculated after taking into consideration: (i) Cost of time spent by the successful party; (ii) cost of transportation and lodging; (iii) court, lawyer and typing fee etc.; and (iv) any other incidental cost. These directives will certainly make administration responsive besides reducing the heavy burden on the public exchequer and the misery of the people.

### 5.7 PROCEDURAL IMPROPRIETY AND LEGITIMATE EXPECTATION

Procedure of a decision is as important as the decision itself because if 'procedure' is not fair, decision cannot be trustworthy. Therefore, Courts have insisted on a 'fair procedure' requirement in every administrative action. Requirement of a 'fair procedure' may arise as a constitutional mandate where fundamental rights of the people are violated. As a statutory mandate, if statute lays down any procedure

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\(^94\) (2005) 6 SCC 344
which administrative authority must follow before taking action, it must be faithfully followed and any violation of the procedural norm would vitiate an administrative action and as an implied requirement where statute is silent about procedure.

Where statute is silent, courts have insisted that administrative authorities must follow the principles of natural justice which provide fair minimum administrative procedure which every administrative authority must follow while taking a decision which has civil or evil consequences. These rules of natural justice which guarantee "fairplay in action" include Rule against Bias i.e. no one should be made judge in his own cause and rule of fair hearing i.e. no one should be condemned unheard.

5.8 PRINCIPLE OF ESTOPPEL AND LEGITIMATE EXPECTATION

A decision may also be final because of the doctrine of estoppel by record or, as it is often known, estoppel per rem judicatam. There are two species of this estoppel. One is known as cause of action estoppel. If the same cause of action has been litigated to a final judgment between the same parties, or their privies, litigating in the same capacity, no further action is possible, the principle being that there must be an end to litigation. The other form of estoppel by record is issue estoppel. A single cause of action may contain several distinct issues. In *R v. Social Security Commissioners*, the Supreme Court of appeal held that where there is a final judgment between the same parties, or their privies, litigating in the same capacity on the same issue, then that issue cannot be reopened in subsequent proceedings.

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96 (2002) A.C.D. 28
The application of the res judicata doctrine in the public law context was reaffirmed in the instant case and held that in relation to adjudication, which was subject to a comprehensive self-contained statutory code, the presumption was that where the statute had created a specific jurisdiction for the determination of any issue which established the existence of a legal right, the principle of res judicata applied to give finality to that determination, unless an intention to exclude that principle could be inferred as a matter of construction from the statutory provisions.

Res judicata expresses the binding nature of a matter litigated to final judgment. In administrative law, jurisdictional matters decided by a tribunal or other public body are not final in this sense. They will be determined by the reviewing court. This is accepted by The Supreme Court in the case of *R. v. Hutchings*.\(^{97}\) In this case, a local Board of Health had applied to the justices under the Public Health Act, 1875 to recover the expenses of repairing a street from a person whose property was on that street. The latter contended that it was a public highway repairable by the inhabitants at large. This contention was upheld by the justices. Some years later the Board of Health made an application against the same person and on this occasion the justices did order payment of expenses. The plea that the matter was res judicata because of the earlier decision was rejected. In *Wakefield Corporation v. Cooke* \(^{98}\) It was held that, on construction, the justices had no power to decide whether the street was or was not a public highway; that was a matter only incidentally cognisable by them. Their only jurisdiction was to determine whether a sum of money should be paid or not.\(^{98}\) Even where

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97 (1881) 6 Q.B.D. 300
the subject-matter is clearly within the jurisdiction of the tribunal, there may be a temporal limit to the conclusiveness of that tribunal's findings which limits the application of res judicata. This is illustrated by cases concerning rating and taxes, for instances in *Society of Medical Officers of Health v. Hopp* 99 and *Caffoor v. Commissioner of Income Tax* 100.

Provided that the issue is within the subject-matter and temporal jurisdiction of the public body, res judicata will prevent the same matter being litigated before the original tribunal over again. Whether the public body is performing administrative rather than judicial tasks is not relevant for the application of res judicata, nor is the existence of a *lis inter partes*.

The label res judicata is, however, only required where an applicant attempts to litigate the matter over again before the original decision maker. In the circumstances where the individual has received one decision from the public body, and then attempts to have this reversed on appeal or review, the label is not really required. If the original decision is intra vires then it is binding simply because it is a lawful decision given by the appropriate body. The term res judicata is of use to prevent frequent attempts to determine the same point. Thus, if an applicant attempts to obtain a decision from one tribunal, fails, tries later on the same point, still fails, and then seeks appeal or review, res judicata is an appropriate label to apply provided that the original decision was intra vires.

### 5.8.1 Essential Qualifications to the Principle of Estoppel

Western Fish therefore reaffirmed the traditional view. Apparent authority cannot allow an officer to do what is assigned to the council. If the representation is ultra vires either because it is outside the powers of

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99 (1960) A.C. 551
100 (1961) A.C. 584
that body, or because, although within its powers, it cannot be delegated to this officer, then it cannot operate as an estoppel. There are three exceptions to this principle.

First, a procedural irregularity may be subject to estoppel. Whether it in fact depends upon the construction of the statutory provision setting out the procedure.

The second exception may be slightly more problematic. It was said that where a power is delegated to an officer to determine specific questions, any decision made cannot be revoked. The breadth of this exception depends upon the way in which two variables are construed. These are the legality of the delegation, i.e. whether the statute allows the powers in question to be delegated and whether they have in fact been delegated.

The first condition is presumably an absolute one. If it is not then the whole force of the basic proposition, that estoppel cannot validate an ultra vires act, is negated. While, it is dubious whether the delegation was in fact lawful there, the case can be reconciled with basic principle by assuming that it was. The development of case law often exhibits such strained interpretation.

This still leaves open the meaning of the other condition. Presuming that delegation is lawful under the statute, how far can the individual assume that it has taken place? The individual neither assume that any resolution necessary to delegate authority has been passed, nor is the seniority of the officer conclusive. If, however, there is some further evidence that the officer regularly deals with cases of a type which the individual might expect that official to be able to determine, this could be sufficient to entitle the individual to presume that delegation has occurred even if in fact it has not. In this residual area apparent authority can,
therefore, have a validating effect in the following sense. Delegation may be lawful, but only when certain formalities have been complied with. It seems that, in certain circumstances, a decision made by an officer, even where those formalities of appointment have not occurred, may still be irrevocable. Whether this actually validates an ultra vires act or not depends upon whether the conditions setting out the means for delegation are mandatory or only directory.

The third exception is that the general rule that estoppel cannot operate so as to validate an ultra vires act will not be applicable where the relevant statute is construed so as to confer validity on, for example, a mistaken certificate unless and until it has been revoked. The view was affirmed in the case of *Ejaz v. Secretary of State for the Home Department*101

Earlier the conceptual language used the word estoppel in the case law. However, in the case of *R. v. East Sussex CC Ex p. Reprotech (Pebsham) Ltd.*102 Lord Hoffmann, giving judgment for their Lordships, held that private law concepts of estoppel should not be introduced into planning law. He acknowledged that there was an analogy between estoppel and legitimate expectations, but held that it was no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Lord Hoffmann recognised that earlier cases had used the language of estoppel, but that was explicable because public law concepts of legitimate expectations and abuse of power were under-developed at that time. Public law had now absorbed whatever was useful from the

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moral values underlying estoppel and the time has come for it to stand upon its own two feet. Three comments are relevant here.

First, it should for the sake of clarity be noted that the shift from the language of estoppel to that of legitimate expectations does not in any way touch the substance of the jurisdictional principle. Representations made by an agent who lacks authority, or representations leading to decisions which are ultra vires the public body itself, will not bind that body. The consequence, prior to instant case was to say that estoppel cannot apply in such circumstances. This result would now be expressed by saying that there was no legitimate expectation in such circumstances. The result in, for example, Western Fish would not have been any different had the language of legitimate expectation been used, rather than estoppel.

Secondly, we should nonetheless be aware of the close analogy between estoppel and legitimate expectations. The foundation of both concepts is a representation, which provides the rationale for holding the representor to what had been represented, where the reliance was reasonable and legitimate in the circumstances. The fact that any remedy against a public body would have to take account of the broader public interest was moreover recognised by those judges who did use the language of estoppel. They recognised that the application of estoppel to public bodies would have to be modified to take this into accounts. Thirdly, cases that would, under the previous terminology, have been pleaded in terms of estoppel, are now considered by the courts under the heading of legitimate expectations.
5.9 JUDICIAL INTERVENTION AND LEGITIMATE EXPECTATION

It is not for the courts to substitute judgment for that of the primary decision maker. This is acknowledged by all. How far the courts should interfere with the merits is still a matter on which opinion differs. The traditional approach has been based on the Wednesbury formula. The controls of purpose and relevancy are used to decide what ends the authority should be entitled to pursue and what considerations must be taken into account. If the authority is within the four-corners of its powers the courts will intervene, but only if the decision is manifestly unreasonable. It is clear that the decision as to what are legitimate purposes, and what are relevant considerations, can never be value-free. The underlying reason is that statutes do not really have "corners" in the neat way postulated by theory. The language is, often elliptical, ambiguous and inherently open-textured. It is not therefore surprising that some decisions in high profile case such as Secretary of State for Education Science v. Fameside MBC\(^{103}\) should be controversial. It is equally clear that the courts possess creative choice as to the general intensity of review that should operate within a particular area. The concepts of purpose, relevancy and reasonableness can be used in an intensive or less intensive fashion. Thus the courts have, for example, limited their intervention in cases concerning homeless persons, using arguments concerning the subjectivity of administrative discretion which found little favour. They have counselled restraint in circumstances where propositions of law are interwoven with issues of social and ethical controversy—concerning the scope of parental rights, in *British Airways*  

\(^{103}\) (1977) AC 1014
Board v. Laker Airways Ltd.\textsuperscript{104} while being more willing to intervene where legal issues are intertwined with questions of social and economic choice in other cases. These points must, nonetheless, be kept within perspective. The value laden nature of determinations concerning propriety of purpose, and the varying intensity of review, will be present in any system of judicial review, even if its formal structure is different from other.

There is little doubt that the courts' reluctance to depart from Wednesbury has been coloured by their desire not to stray beyond their proper role in relation to the political arm of government. It has been the Wednesbury test which has served to define the bounds of judicial propriety. The two senses of unreasonableness employed by Lord Greene M.R. were designed to legitimate judicial intervention over discretionary decisions and to establish the limits to any such intervention. If a decision was outside the four-corners of the power, Parliament had given to the decision maker, it was therefore right and proper for the courts to step in. Where, however, the primary decision maker was within the ambit of its power then the courts should be reluctant to interfere. Some residual control over such decisions was, however, felt to be warranted and legitimate. This was the rationale for the substantive meaning of unreasonableness. If the challenged decision really was so unreasonable that no reasonable body could have made it, then the court was justified in quashing it. The very fact that something extreme would have to be proven to come within this criterion provided both the legitimation for the judicial oversight, and served to defend the courts from the allegation that they were thereby overstepping their remit and intervening too greatly on

\textsuperscript{104} (1985) AC 58
the merits. The desire to remain within the traditional frame is reinforced by the fact that the courts' role in fundamental rights' cases is expressed in terms of Wednesbury unreasonableness. The idea that this can be seen simply as a variant of the original Wednesbury test is, however, strained.

The courts have clung to the legitimating frame of the Wednesbury test, while at the same time exerting more extensive control than would be allowed by a literal reading of the test. They have used the test to intervene in cases where the challenged action could not plausibly be regarded as so unreasonable that no reasonable body would have taken it. The courts have also interpreted the test more intensively in fundamental rights' cases. It might, with some justification, be felt in the light of these developments not that the Emperor has no clothes but rather that they no longer fit. Lord Cooke's contributions are therefore to be welcomed. He recognised the separation of powers principle which underlies this area, but believed that this could be properly respected by framing a reasonableness test in less extreme terms than articulated by Lord Greene.

The alternative approach to substantive review can be presented in such a way that the courts would intervene if the authority exceeded the ambit of its power by acting illegally, in the sense of using that power for an improper purpose, or taking an irrelevant consideration into account. The courts would also intervene if the authority infringed substantive principles of fair administration.\(^\text{105}\) The nature of such principles is, of course, a matter for debate. Obvious candidates for inclusion would include an expanded concept of reasonableness or preferably

proportionality, fundamental rights, legal certainty, legitimate expectations and equality. Procedural principles, such as transparency and the giving of reasons, will often be integrally linked with substantive principles. These principles supplement, not merely implement the legislative intent. The principles will be fashioned by the courts in accord with normative considerations as to the constraints on public power that are felt to be warranted in a democratic society.106

It should be accepted that under this approach there will still be contentious cases as to whether, for example, a purpose was lawful or not. Controversy over such matters is a feature of any scheme of review, irrespective of its particular form. It must also be acknowledged that decisions will still have to be made concerning the intensity with which the principles of judicial intervention are to be applied. This is readily apparent from the previous discussion concerning proportionality. It should also be recognised that the application of substantive principles will require the proper articulation of some background theory which will serve to explain why a principle is said to demand a particular result in a given case. Intellectual honesty does demand a better explanation as to why an act should be struck than that provided through traditional techniques of Wednesbury principle. Concepts such as fundamental rights, proportionality or legal certainty will provide a more finely tuned approach. These concepts are not, however, self-executing. Their content will often be dependent upon the identification of the particular theory that is said to warrant the conclusion being drawn.107 Various background

107 R. Dworkin. Law's Empire (Fontana, 1986).
theories may well recognise the same general right, such as freedom of speech or equality, but the more particular conception of that right may be markedly different. This is equally true in the context of proportionality. Thus, whether a measure which is prima facie discriminatory can be regarded as proportionate to a legitimate aim being pursued may well be viewed differently by a utilitarian, a Rawlsian liberal, or a modern communitarian. Legal labels will not in this instance provide' a ready-made answer. They can only serve as the repository for the conclusion reached from a particular system of political thought. The task will not therefore be an easy one, but intellectual honesty will not be served by assuming that there is any easier route.108

5.9.1 Procedural and Substantive Principles of Judicial Intervention: Inter Relationship

The inter-relationship between procedural and substantive principles is of particular interest and importance in any scheme of review.. This is especially so in relation to procedural notions of reasoned justification. The proper application of, for example, a proportionality test requires that reasoned justification be provided by the agency in order that the court can properly assess whether the parts of the test have been met or not. This is equally true in relation to, for example, governmental justifications for departing from an established policy with respect to a particular individual. It may be difficult to decide how much to demand by way of reasoned justification. There must be enough in order that the principles of substantive review can operate meaningfully. Bland

108 P. Craig, Public Law and Democracy in the UK and the USA (Oxford University Press, 1990);
statements set at a high level of generality, or justifications rationalised ex post facto, do not ensue proper accountability. This is particularly so given that much decision making will take place within "bounded rationality". It will normally be incremental. Officials rarely have the full range of choices before them. Since officials will often not be viewing the whole picture comprehensively, since they will perform be selectively choosing values and acting on limited information, it is all the more important that the reasons why they have chosen a particular course of conduct should be articulated. Moreover, while we should be aware that no official can ever in a literal sense take all relevant considerations into account, the Courts' do have a role in redressing a bureaucratic tendency to adopt a very narrow bounded rationality, which thereby forecloses policy choices. How effective the judiciary can be in fulfilling such a role is another matter. The fact that review may occur relatively rarely for any one agency, the fact that the agency may still be subject to pressures of time and cost which incline it towards a narrow bounded rationality, the relative strength of different interest groups pressing upon the agency, and the competence of the court to assess whether such an authority has improperly excluded a particular policy option, can all combine to limit the effectiveness of this aspect of judicial scrutiny.

The courts should, at the same time, be wary of requiring too much by way of reasoned justification. This is because decisions may have to be made in, for example, areas of scientific uncertainty. Public bodies will make decisions about the level of acceptable risk where there is imperfect information about the consequences of a certain substance on

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the environment or on human physiology. There may well be many instances where "we do not even know what we do not know", but where regulation is nonetheless warranted. To wait until we have more perfect information may mean that the problem cannot be tackled, or that there will already have been consequences that cannot be remedied. To demand "perfect" reasoned justification in such instances would stultify important regulatory initiatives. It could also lead to "paralysis by analysis", whereby those opposed to the regulation seek to use the courts to overturn such initiatives on the grounds that not every piece of data relied on by the agency could be perfectly proven. This can lead to public bodies becoming excessively cautious or unwilling to suggest a regulation unless they have a veritable mountain of data.

The inter-relationship between procedure and substance can be appreciated by a brief look at the standard of review in the United States, in particular the "hard look" test. The term "hard look" evolved by way of contrast with the previous, narrow standard of review generally employed by United States' courts. Agency findings could be set aside if they were found to be "arbitrary, capricious or an abuse of discretion"110. This criterion was narrowly interpreted in a number of cases, it being sufficient for the agency to show some minimal connection between the statutory goal and the choice actually made. The standard of review was akin to having Lord Greene M.R.'s narrow sets of unreasonableness as the only basis for attack111.

The label "hard look" developed because the United States' courts began to desire more control than allowed by this limited test. In the

110 Section 706 (2) (a), Administrative Procedure Act 1946, S.706
Motor Vehicle Manufacturers v. State Farm Mutual Automobile Insurance Co. the Supreme Court founded its intervention on the arbitrary and capricious test, but then gave a broader reading to that phrase than that provided in earlier cases. The court accepted that it should not substitute its judgment for that of the agency. It could, however, intervene if any of the following defects were present: if the agency relied on factors which Congress had not intended it to consider; failed to consider an important aspect of the problem; offered an explanation which ran counter to the evidence before the agency; was so implausible that it could not be sustained; or failed to provide a record which substantiated its findings.

The hard look doctrine therefore represented a shift from a previously more minimal standard of review, where judicial intervention would occur only if there was serious irrationality, to one where the courts would interfere where the broader list of defects set out above are present. That list is clearly analogous to the totality of Lord Greene M.R.’s list, purpose, relevancy and reasonableness. Viewed in this light "hard look" appears as a movement away from the earlier approach of the American courts to the tougher standard which had been in the UK for over 100 years. Moreover, just as English tests can be used more or less intensively, so too can the analogous American doctrines. Controversial issues touching on the merits occur, not surprisingly, just as often in the US case law as they do here. Deciding whether a particular consideration is relevant can often be difficult in complex cases and can indirectly encroach on the merits. Moreover, in so far as the factors which

112 463 U.S. 29 (1983)
113 S. Breyer, "Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy", 91. Herv. L. Rev. 1833 (1978)
make up the "hard look" doctrine look to process, it is equally clear that complex substantive judgments underlie the determination of many ostensibly process-related issues. Whose views should be taken into account and what type of process rights an individual should be given, both entail substantive judgments of considerable complexity\textsuperscript{114}.

The "hard look" test was however a more powerful tool than the Wednesbury formula, because of the greater concern for the provision of reasons and the demand for a more developed record. It also provided a foundation for interested parties to express their views, particularly in the context of rule-making. This is not to say that the system of review in the US has been unproblematic. There have been problems resulting from an excessive demand for information and justification by the courts, which has led to the very phrase "paralysis by analysis\textsuperscript{115}.

The point being made here is, however, a more general one. The substantive principles of review cannot be considered in isolation. Two legal systems can have similar substantive grounds for review, but these may have differing degrees of force as a result of the way in which procedural principles, such as reason giving and the like, are applied.

5.10 CRITICAL APPRAISAL

In India, the Supreme Court and High Courts are empowered to set aside the unconstitutional decision of any legislative, executive and administrative authority. But earlier the trend of judicial decision indicated that unless a decision is violative of Constitution or law in clear terms or is arbitrary or malafide, the courts didn't interfere with the decision. When we talk about the constitutionality of an administrative


\textsuperscript{115} R. Stewart, "The Reformation of American Administration" 88 Harv L. Rev. 1667 (197).
decision, the fundamentals on which courts used to base their decisions include rule of law, administrative efficiency fairness and accountability. In other words, any administrative decision as a matter of right could be challenged on the grounds of illegality, irrationality and procedural impropriety. However, in view of new economic policy of liberalization, privatization and globalization courts by allowing wider flexibilities to the administration, removed the shackles of self restraint for judicial intervention. In other words, rule of ex-toppel, doctrine of proportionality and doctrine of public accountability were included as the grounds of Judicial Intervention in addition to the traditional grounds. A new trend emerged when the doctrine of legitimate expectation was considered as basis of judicial intervention. The doctrine of legitimate expectation is considered as fine example of judicial creativity to check the arbitrary exercise of powers by administrative authorities. The doctrine of powers of administrative authorities. The doctrine of legitimate expectation has also enlarged the scope of the traditional grounds which are made the basis of judicial intervention against the decision of administrative authorities. The doctrine of legitimate expectation has been considered as an independent ground of judicial intervention by the courts in India for the last two decades. In this way, the doctrine of legitimate expectation has put a great impact in India law and a new trend has emerged due to the judicial creativity. The emerging trends regarding legitimate expectation through judicial decision will be discussed in the next chapter.