THE RELEVANCE OF ‘WEDNESBURY UNREASONABLENESS’ IN THE LIGHT OF ‘PROPORTIONALITY’ AS A GROUND FOR JUDICIAL REVIEW

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The principle of primary review and proportionality on the one hand and the principle of secondary review and Wednesbury reasonableness on the other hand gave a new dimension to Administrative Law, the former applying in the case of fundamental freedoms and the latter, in other cases. Proportionality as a legal test is capable of being more precise than a reasonableness test, besides requiring a more intrusive review of a decision made by a public authority. Judicial verdicts have not openly held that the proportionality test may replace the Wednesbury test. Practically what is found is that the proportionality test is applied more and more, when there is violation of human rights and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there are violations of a citizen’s ordinary rights.

THE CONSTITUTIONAL Courts in the matters of Judicial review exercise a collateral review, examining the constitutionality or the legality of a decision by an administrative authority. The reviewing Court will not go into the correctness or otherwise of a decision, but will examine the legality or propriety of the decision-making process by the authority. In other words, judicial review of administrative action is concerned with the lawfulness of administrative action and not with the merits of the decision. The actual characteristics of judicial review that it is not concerned with the ‘decision’ but with the ‘decision-making process’ was re-emphasised by Lord Brightman in Chief Constable of North Wales Police v. Evans.1

Collateral judicial review is of two types, based on the action that is

1(1982) 1 WLR 1155.
being challenged under the review jurisdiction. One is against the administrative action of the State and the other is directed against the Legislative action. Judicial review is considered to be the assertion of the rule of law as controlling State action. The basis of judicial review of administrative action is primarily the lack of jurisdiction. It is a well known aspect of judicial review that when an administrative authority is entrusted with the power to act under a Statute or to decide a matter, the power can be exercised only if the jurisdictional conditions are satisfied. Unreasonableness of decisions of administrative bodies has been held to be a ground for judicial review since a considerable period of time as highlighted in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.

**Wednesbury Unreasonableness**

In the initial period of development of Administrative Law, the judiciary had shown a strong dependency on the ‘Wednesbury unreasonableness’ to test the validity of administrative decision-making. In this case, the Court held that it could not intervene and turn down the decision of the Corporation simply because the Court disagreed with it. The Court observed that discretion must be exercised ‘reasonably’. This brings in the expression, ‘unreasonable’. The expression is frequently used as a general description of things that must not be done. A person who is exercising discretion must look into things that must be considered and not what is irrelevant. Where discretion is exercised in disregard of these guidelines one is said to be “acting unreasonably”. Even judges are bound by these and other stringent rules in exercising discretion. At this juncture the words of Justice Cardozo are noteworthy. According to him, the Judge, “even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity of order

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3Conditions like the existence of jurisdictional facts, improper exercise of discretionary powers, error of law on the face of the record, etc. are in mind.

4[1947] 1 KB 223. In this case, a Cinema Company, Associated Provincial Picture Houses, was granted a licence by the Wednesbury Corporation, to operate a Cinema Theatre on condition that “No children under the age of fifteen years shall be admitted to any entertainment, whether accompanied by an adult or not.” This condition was imposed under Section 1, sub Section 1 of the Sunday Entertainments Act of 1932. The Picture Houses sought a declaration that such a condition was unacceptable and outside the power of the Corporation.
in social life.”5 If judges are bound by these stringent guidelines, what is the extent of care to be taken by an administrative authority while exercising discretionary powers?

Some actions may be so absurd that one could not envisage that it lay within the powers of an authority. Lord Justice Warrington in Short v. Poole Corporation,6 gave the example of the red-haired teacher who was dismissed because she had red hair. This is unreasonable in one sense and in another sense it is taking into consideration extraneous matters. “It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”7

Dismissing the Appeal in the Wednesbury Case, the Court summarised the principle applicable and observed:

“The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.”8

In other words, to have the right to intervene, the Court would have to form the following conclusions:

(i) Whether the Wednesbury Corporation, in making that decision, took into account factors that ought not to have been taken into account, or
(ii) the Corporation failed to take into account factors that ought to have been taken into account, or

6[1926] Chancery 66, at pages 90 and 91, as cited in the Wednesbury case, ibid.
8Ibid.
(iii) the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The Court felt that that none of the conditions imposed by the Corporation fell into any of these categories and rejected the claim of the appellants. However, opinions are not static and hence there would be changes in individual thinking with regard to the exercise of discretion. So also, law cannot be static and so are the judicially developed principles. The Wednesbury principle was no exception to this universal rule. Subsequently, jurists started to look at the principle with a bit of skepticism. Subsequently, jurists started to look at the principle with a bit of skepticism. The general criticism of unreasonableness as a basis of review is well-known and often repeated. These conceptual weaknesses have led to proposals for the common law to search for other substantive principles in place of unreasonableness. The doctrine of proportionality is one of the prominent ones among them.

*The Wednesbury Test – Critical Views*

Unreasonableness, an apparently straightforward and simple test may fail in objectively assessing what would amount to ‘unreasonable’. There is also an inherent complexity in a large amount of subjectivity playing a major role in identifying unreasonableness. Hence, the *Wednesbury* principle was subjected to a critical juristic scrutiny examining its suitability as a test for administrative exercises of power. The observation of Lord Cooke of Thorndon in this regard is noteworthy when he observed that,

“… I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 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.”

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10Some such observations are that, it is a circular definition; it is an uncertain guide as to the extent of the “margin of discretion” to be permitted to a public authority in any given situation or the intensity of review to be conducted by the Court and it is a cloak which may tempt lawyers and Courts to deal with the merits of grievances rather than questions of legality. See, Andrew Le Sueur, “The rise and ruin of unreasonableness?”, available at <www.adminlaw.org.uk/docs/ALBA-A Le Sueur paper ->, (Visited on July 1, 2012).

11In *Regina v. Secretary of State For The Home Department, Ex Parte Daly*, [2001] UKHL 26, para 32.
The crux of the judicial opinion was that the depth of judicial review varied with the subject matter. An individual may find an administrative decision unreasonable, but that is not enough for the Court to strike down that administrative action as ‘unreasonable’. It is only in those extreme and limited cases of ‘unreasonableness’, where no ‘reasonable person’ can find the decision ‘reasonable’, does the Wednesbury principle permit the Court to interfere with the administrative decision. So much so, there can be a large amount of subjectivity ruling the judicial mind in applying the Wednesbury test. Hence, as mentioned above, jurists had to look for alternatives. A strong alternative approach was the doctrine of proportionality.

The Doctrine of Proportionality

The spirit of the doctrine of proportionality could be found in the ancient Greek dictum, *pan metron ariston*, but today as a general principle of law, it is inspired by underpinning liberal democracy, the concern to protect the individual against the State and an assurance that regulatory intervention must be suitable to achieve its aims.

The doctrine of proportionality is understood in the legal fraternity in two different perspectives. *First*, under the municipal law, it refers to a doctrine which suggests that a punishment afforded to a guilty should match the offence. In this context, it may also be noted that in relation to punishment, Jeremy Bentham inspired by the work of Cesare Beccaria, who had stressed the importance of deterrence, proportionality and certainty in punishment and related them systematically to the principle of utility. The *second* one is under International Humanitarian Law, where the doctrine refers to the use of legal force in armed conflict. It is believed that the concept was first applied in Prussia in the late 18th Century as the law

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12The meaning of the expression “*pan metron ariston*” is more or less that, excellence is to be found in the balance and not in the size of things. The secret seems to be in the proportions and the interrelationships and not in the quantity of things. In otherwise, it means, “everything in moderation”.


14This approach may be explained in the field of Criminal Law with the Retributive Theory of Punishment, i.e., An eye for an eye and a tooth for a tooth. The doctrine may be applicable in the case of private defence also, where exceeding the right of private defence is not judicially accepted.

was codified on *Rechtsstaat* lines. Subsequently, the German Courts refined it and made use of it in reviewing police action in Germany in the late 19th Century. The principle of proportionality as a doctrine was an important instrument in the introduction of individual rights into an authoritarian legal system. Hence, it could be regarded as a post World War II phenomenon. The doctrine of proportionality which originated in Prussia and the post World War II German Jurisprudence found a place in the German Constitutional law. By insisting that the government choose only such means that are least harmful to individual rights, the use of proportionality set a formal limitation on the exercise of police powers, thus introducing the notion of rights into German public law. In the German legal system, the principle applies to legislative, judicial and administrative actions and decisions of the State at all levels. As a consequence, disproportional restrictions or measures taken by administration will be considered illegal and voidable and illegality is not considered a repairable action. An unbalanced, but lawful decision in German law can be void and be repaired only by a new balanced and lawful decision. Accordingly, proportionality includes three conditions, viz.,

(i) The means which is applied by public authorities should be available to achieve the aims and should be effective or in other words, suitable.

(ii) The means should be necessary to realise the aims and should not be more than what is necessary to fulfill the aim as showed in the laws.

(iii) The means which causes a burden for individuals should be proportionate to the aim.

The restriction by an administrative action and fundamental right of an individual should be balanced and should include a clear proportionality

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16*Rechtsstaat* means Constitutional State.


between the parties. In short, the gain or loss to the community which is necessary for public interest and the loss or gains to individuals should be balanced. The modern use of the doctrine at an International level could be traced to the European Union Law, under which four stages are identified with proportionality.21

The European doctrine of proportionality means that, ‘an official measure must not have any greater effect on private interests than is necessary for the attainment of its objective’.22 The approach of the American Supreme Court23 in this regard is that the Court would compare:

(i) the nature and gravity of the offence and the harshness of the penalty;
(ii) the sentences imposed on other criminals in the same jurisdiction; i.e., whether more serious crimes are subject to the same penalty or to less serious penalties, and
(iii) the sentences imposed for commission of the same crime in other jurisdictions.

In Australia, the High Court in *Nationwide News Pty. Ltd. v. Wills*,24 while examining the various aspects of the Australian Constitution, discussed the concept of proportionality and explained that there should be a reasonable relationship between the end, and the means used to achieve that end.

Peter Leyland and Gordon Anthony are of the view that,

“Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision”.25

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21P. Craig and G de Burca, in *EU Law*, (5th Edn.) Oxford University Press, (2011), p. 526 identifies the following:
a. there must be a legitimate aim for a measure; b. the measure must be suitable to achieve the aim (potentially with a requirement of evidence to show it will have that effect); c. the measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it and d. the measure must be reasonable, considering the competing interests of different groups at hand.
The doctrine of proportionality emphasises that an official measure must not have any greater effect on private interests than is necessary for the attainment of its objective.²⁶ It may be noted that the modern procedural definition of the proportionality test is relatively clear. Tom Hickman²⁷, while acknowledging various different models, identified the most common formulation as a three-part procedure. According to him, the reviewing Court must consider the following aspects:

(i) Whether the measure was suitable to achieve the desired objective;
(ii) Whether the measure was necessary for achieving the desired objective;
(iii) Whether, even so, the measure imposed excessive burdens, on the individual it affected.

The third element is often termed proportionality in the strict sense and is the provision that requires balancing of interests.²⁸ Proportionality requires the Court to judge whether the action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the ‘aims and intention’ of the decision-maker and whether the decision-maker has ‘achieved more or less the correct balance or equilibrium’. The Court entrusted with the task of judicial review has to examine whether the decision taken by the authority is proportionate, i.e., well balanced and harmonious and to this extent the Court may indulge in a merit review and if the Court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate, i.e., if the Court feels that it is ‘not well balanced or harmonious and does not stand to reason’ it may tend to interfere.

In short, the principle of proportionality envisages that an administrative action could be quashed by a reviewing Court, if the action was disproportionate to the mischief which was sought to be remedied. The measures adopted by the administration must be proportionate to the objective to be achieved. In other words, it is the duty of the administration to choose its actions so as to safeguard the rights of citizens and to ensure a fair balance between individual rights and public interest. Proportionality as a legal test is capable of being more precise than a reasonableness test, besides requiring a more intrusive review of a decision made by a public authority by which the Courts have to assess the ‘balance or equation’ struck by the decision-maker. Juristic thought has moved in favour of

²⁶See Konninklijke Scholton-Honig v. Hoofproduktchap voor Akkerbouwprodukten, supra.
²⁸Ibid.
proportionality as a correct test for judicial review as against the Wednesbury principle. Jurists’ prediction about the future of this test may be seen in the observation by Wade and Forsyth that the “Wednesbury doctrine is now in terminal decline but the coup de grace has not yet fallen, despite calls for it from very high authorities” and further opined that in some jurisdictions the doctrine of unreasonableness was giving way to the doctrine of proportionality.

**Deviation from Wednesbury to Proportionality—The English Experience**

The Courts while exercising the power of judicial review examined administrative decisions for any unreasonableness. As mentioned earlier, the Wednesbury principle was the primary rule which governed judicial review for a long time in the commonwealth countries and other countries in the world. Lord Greene MR held that unreasonableness was an umbrella concept and pointed out that the Court could interfere with a decision if it is so absurd that no reasonable decision-maker would come to such a decision. Subsequent to the Wednesbury case, in *Mahon v. Air New Zealand*, in answering a question relating to the quality of material to support a finding by an authority Lord Diplock while delivering the judgement of the Privy Council opined that a finding must be based on some material which tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

The decision in the Wednesbury case and the said principle continued until the GCHQ case, which gave a new dimension to judicial review.

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31(1984) 3 All ER 201;[1984]AC 808. In this case, an Air New Zealand sightseeing Flight collided with Mount Erebuson in Antarctica, killing all 237 passengers and 20 crew on board, on November 28, 1979, commonly known as the Mount Erebus disaster. A Royal Commission of Inquiry was ordered under the chairmanship of Justice Peter Mahon. The Court was of the view that the observation/finding of the Commission that, a plan of deception through destruction of documents, was a breach of procedural fairness as there was no probative evidence for such an observation.


33*Council of Civil Service Unions v. Minister for the Civil Service*, [1985] AC 374; [1984] 3 All ER 935, popularly known as the GCHQ case as the case related to the Government Communications Headquarters (GCHQ) a British intelligence agency responsible for providing signals intelligence and information assurance to the UK Government and armed forces.

34The Court found that exercises of the Royal Prerogative were generally subject to judicial review, with certain exceptions such as matters of national security. This was a significant break from the previous law, which was that prerogative powers were not in any way subject to judicial review.
Lord Diplock classified the following three grounds on which administrative action would be subject to judicial review, viz., (i) Illegality, (ii) Irrationality and (iii) Procedural impropriety.35

Lord Diplock explained the meaning of the aforesaid terminology in the decision and explained ‘Irrationality’ thus:

“By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury’s unreasonableness” … It applies 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 to be decided could have arrived at it.”36

While relying on the above principle Lord Diplock did not rule out the possibility of future developments. He said:

“… further development on a case by case basis may in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’ which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose off the instant case the three already well-established heads that I have mentioned will suffice.”37

It may be noted here that the Courts in England could not expressly apply ‘proportionality’ in the absence of a Convention but tried to safeguard the rights zealously by treating the said rights as basic to Common Law and the Courts then applied the strict scrutiny test. This development could be seen in R. v. Secretary of State for the Home Department ex parte Brind.38

The House of Lords re-examined the reasonableness of a notice issued by the Home Secretary banning the transmission of speech by representatives of the Irish Republican Army and its political party, viz., Sinn Fein. Exercise of the Home Secretary’s power according to the Court did not amount to an unreasonable exercise of discretion despite the issue involving a denial of freedom of expression. The House of Lords emphasised that in all cases raising a human rights issue ‘proportionality’ is the appropriate standard of review. The extent of prohibition was linked with the direct statement made by the members of the organisations. It did not however, preclude the broadcasting by such persons through the medium of a film, provided

35Referred to as the triple ‘I’s.
36[1984] 3 All ER 935 at 951.
37Ibid.
there was a ‘voice-over’ account, paraphrasing what they said. The applicant’s claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English Law but stated that freedom of expression was basic to the Common Law and that, even in the absence of the Convention, English Courts could go into the question.

Another significant contribution of this case to the Administrative Law was the introduction of the concept of ‘Primary’ and ‘Secondary’ reviews by Courts. Lord Bridge observed that where the Convention rights were in question the Courts could exercise a right of primary review. However, the Courts would exercise a right of secondary review based only on the Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the Courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

“The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment.”

Again, the principle of proportionality and the primary role of the Courts where fundamental freedoms were involved were further developed by Simon Brown LJ in the Divisional Court in *R. v. Ministry of Defence. Exp. Smith.* Adverting to the primary role of the Court in cases of freedoms under the Convention, the learned Judge observed:


\textsuperscript{40}(1996) Q.B. 517 at 541. The four appellants in this case, a lesbian and three homosexual men, were administratively discharged from the respective armed forces in which they served pursuant to a Ministry of Defence policy. The policy, made jointly by the three armed services in the exercise of prerogative powers, prohibited homosexual men and women from serving in the armed forces and required the discharge of any serviceman or woman found to be of homosexual orientation. All four appellants had exemplary service records and in no case was it suggested that their sexual orientation had affected their ability to carry out their duties or had had any adverse effect on discipline in the units in which they served. The appellants sought judicial review of the policy, contending \textit{inter alia} that (i) in restricting as it did, the appellants’ fundamental human rights and discriminating against them on the grounds of sexual orientation, the policy was in breach of both the European Convention for the Protection of Human Rights and Fundamental contd...
“If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we are accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown disproportionate to its benefits, then clearly the primary judgment (subject only to a limited ‘margin of appreciation’) would be for us and not for others; the constitutional balance could shift.”

So far as the position before the Convention was adopted (in 1996), the Judge opined that the Courts had then only to play a secondary role and apply the Wednesbury rules. The learned Judge pointed at the limitation of the Court when he observed:

“In exercising merely secondary Judgment, this Court is bound, even though acting in a human rights context, to act with some reticence.”

On appeal, the above principles were affirmed by the Court of Appeal. According to Lord Bingham M.R. the Court, in the absence of the Convention was not thrown into the position of the decision-maker. Lord Justice Henry further observed:

“If the Convention were part of our law, then as Simon Brown LJ said in the Divisional Court, the primary judgment on this issue would be for the judges. But Parliament has not given us that primary jurisdiction on this issue. Our present Constitutional role was correctly identified by Simon Brown LJ as exercising a secondary or reviewing judgment, as it is, in relation to the Convention, the only primary judicial role lies with the Europe Court at Strasbourg.”

Thus, it may be seen that the principle of Primary review and proportionality on the one hand and the principle of secondary review and Wednesbury reasonableness on the other hand gave a new dimension to

Freedoms and Council Directive (EEC)76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, (ii) the threshold of reasonableness should be lowered to take account of the human rights dimension, and (iii) on any test of reasonableness the policy was irrational in the light of changing moral standards and the changing treatment of homosexuals in armed forces and other related services both around the world and in the United Kingdom. The Court held that the Ministry of Defence’s policy was lawful and dismissed the applications. Aggrieved by this decision an Appeal was filed.


*Id.* p. 272.
Administrative Law; the former applying in the case of fundamental freedoms and the latter, in other cases.

Lord Justice John Dyson followed Brind’s case in the Court of Appeal and reiterated that proportionality was strictly applicable to cases with a European Union dimension or subject to the Human Rights Act. Lord Justice Dyson observed that:

“the Wednesbury test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests ... the result that follows will often be the same whether the test that is applied is proportionality or Wednesbury unreasonable-ness”.

In this case, the Court proceeded on the basis that the Wednesbury test did exist. Further, the Court expressed that the correct test to be applied in such a case, which did not involve Community law and did not involve any question of rights under the European Convention of Human Rights, was the Wednesbury test.

How did the Courts approach issues of proportionality? An answer could be seen in de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing. The Privy Council adopted a three stage test. The Court observed that in determining whether a limitation imposed by an Act, Rule or decision is arbitrary or excessive, the Court should ask itself:

“… whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Subsequently, the House of Lords in R (Daly) v. Secretary of State for the Home Department demonstrated how the traditional test of ‘Wednesbury unreasonableleness’ has moved towards the doctrine of necessity and proportionality. Lord Steyn in this case noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between

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43(1991) 1 All ER 720.
44Ibid.
45Id. para 32 and 34. See also Lord Hoffmann “A Sense of Proportion”, John Maurice Kelly Memorial Lecture, University College Dublin, 1996, p. 13.
47Id. at p. 80, per Lord Clyde.
48(2001) 2 AC 532.
the two:

1. Proportionality may require the reviewing Court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions.

2. Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

3. Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

Lord Steyn also felt that most cases would be decided in the same way whatever be the approach that is adopted, though, he conceded that for human right cases, proportionality was the appropriate test. In this case, the House of Lords considered both Common Law and Article 8 of the Convention, and ruled that the policy of excluding prisoners from their cells while prison officers conducted searches, which included scrutinising privileged legal correspondence, was unlawful.

The Human Rights Act, 1998 and further Developments

Further development in the English Law in this field was related to the Human Rights Act, 1998. In R (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions the question arose as to whether the doctrine of proportionality would apply only where fundamental human rights were in issue or in all aspects of judicial review. Here also the opinion of Lord Steyn regarding the principle of proportionality is noteworthy. He observed:

“I consider that even without reference to the Human Rights Act, 1998 the time has come to recognise that this principle 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 me to be unnecessary and confusing”

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49 Id. para 27.
50 This Act imposed a duty on public bodies to operate within the confines of the European Convention on Human Rights. If they failed to do so, then their actions may automatically become ultra vires and thus judicially reviewable. In principle, therefore, the Act considerably extended the ability of the Courts to quash administrative decisions on human rights grounds.
51 (2001) 2 All ER 929.
52 Id. para 51.
This opinion suggests that according to Lord Steyn, the difference between both these principles was in practice much less than it was sometimes suggested and whatever principle was applied, the result was the same. A significant question ‘whether the principle of proportionality would ultimately supersede the concept of reasonableness or rationality’ was considered in R. (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence per Lord Justice Dyson. The Court of Appeal had to examine whether proportionality existed as a separate ground of review in a case which does not concern Community law or human rights protected by the European Convention on Human Rights as a preliminary issue. The claimants submitted that it does; but according to the Secretary of State, the Court of Appeal was bound by previous authority to hold that it did not.

Later, in Huang’s case, the House of Lords had to examine the question whether denial of asylum infringes Article 8 of the Human Rights Act, 1998 regarding the ‘Right to Respect Family Life’. The House of Lords ruled that it was the duty of the authorities when faced with individuals who did not qualify under the rules, to consider whether the refusal of asylum status was unlawful on the ground that it violated the individual’s right to family life. A structured proportionality test emerged from that decision in the context of the violation of human rights.

It is pertinent to note here that both the cases of Daly as well as Huang were primarily concerned with the violation of human rights under the Human Rights Act, 1998 and demonstrated the movement away from the traditional test of Wednesbury unreasonableness towards the test of proportionality. However, it may not be right to conclude that the principle

53[2003] QB 1397, per Lord Justice Dyson. The Court of Appeal had to examine whether proportionality existed as a separate ground of review in a case which does not concern Community law or human rights protected by the European Convention on Human Rights as a preliminary issue. The claimants submitted that it does; but according to the Secretary of State, the Court of Appeal was bound by previous authority to hold that it did not.

54Huang v. Secretary of State for the Home Department, (2007) 4 All ER 15 (HL).

55The structured proportionality test requires the decision maker to answer the following four questions.

(1) Whether the legislative objective is sufficiently important to justify limiting a fundamental right,

(2) Whether the measures designed to meet the legislative objective are rationally connected to it, (3) Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective and (4) Whether a fair balance has been struck between the individual and the interests of the community which is inherent in the whole of the Convention. The fourth question is also known as ‘narrow proportionality’.

(1) Whether the legislative objective is sufficiently important to justify limiting a fundamental right,
of *Wednesbury* unreasonableness has been replaced by the doctrine of ‘proportionality’.

Another milestone was the decision of the House of Lords in *R. (Pro-life Alliance) v. BBC*\(^6\). According to the Court of Appeal, the broadcaster, BBC acted unfairly in denying the Pro-life Alliance, an election broadcast. Refusing the Alliance permission to apply for judicial review, Justice Scott Baker of the High Court of Justice, (Administrative Court) said that there was no duty to allow someone from a political party “to broadcast any images he likes, however offensive they may be”.\(^5\) A conceptual conflict between irrationality and proportionality could be seen in the words of Lord Walker of Gestingthorpe while allowing the appeal. According to him, “The *Wednesbury* test, for all its defects, had the advantage of simplicity”. He acknowledged the fact that there existed a strong view that the Wednesbury rule is unsatisfactory and that it must be replaced by a much more complex and contextually sensitive approach, when human rights are in play. But the scope and reach of the Human Rights Act is so extensive that there is no alternative. He further observed that, “It might be a mistake, at this stage in the bedding-down of the Human Rights Act, for your Lordships’ House to go too far in attempting any comprehensive statement of principle. But it is clear that any simple ‘one size fits all’ formulation of the test would be impossible.”\(^5\) Whatever that may be, in the English Administrative Law, both tests, ‘Wednesbury’ and ‘proportionality’ co-exist. Courts have not openly held that the proportionality test may replace the Wednesbury test. Practically what is found is that the proportionality test is applied more and more, when there is violation of human rights and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there are violations of a citizen’s ordinary rights.

\(^5\)\([2003]\) 2 All ER 977. The Pro-life Alliance is a political party that campaigns for absolute respect for innocent human life from fertilization until natural death and therefore opposes abortion, euthanasia, destructive embryo research and human cloning. The case was on a video that showed the results of an abortion. The video was held to violate statutory regulations requiring public broadcast to be decent. After extensive legal proceedings, the Court of Appeal ruled in favour of the Pro Life Alliance. The disputed video, the House of Lords while over-ruling the said decision said, showed “the products of a suction abortion: tiny limbs, bloodied and dismembered, a separated head, their human shape and form plainly recognizable. There are some pictures showing the results of the procedures undertaken to procure an abortion at later stages ... They are, I think, certainly disturbing to any person of ordinary sensibilities.”

\(^5\)\(\text{See }<http://www.telegraph.co.uk/news/uknews/1331526/ProLife-Alliance-loses-broadcast-challenge.html>\) (Visited on August 1, 2012.)

\(^5\)\(R. \text{ v. British Broadcasting Corporation, ex parte Prolife Alliance, } [2003] \text{ UKHL 23, para 144.}\)
In short, it may rightly be said that, the proportionality principle has not so far replaced the Wednesbury principle and the time has not become ripe enough to say good bye to Wednesbury much less its burial. As discussed above, in the cases of Huang and Daly, the English Courts have considered both Common Law and Article 8 of the Human Rights Act, 1998. Both the cases were concerned with the violation of human rights and demonstrated a deviation from the traditional Wednesbury test of unreasonableness and shown leniency towards proportionality. In spite of these cases, it is not safe to conclude that the principle of Wednesbury unreasonableness has been completely replaced by the doctrine of proportionality in England.

In conclusion, it is appropriate to quote Wade and Forsyth\textsuperscript{59} who modified their earlier stand\textsuperscript{60} and observed:

“Notwithstanding the apparent persuasiveness of these views the coup de grace has not yet fallen on Wednesbury unreasonableness. Where a matter falls outside the ambit of the 1998 Act, the doctrine is regularly relied upon by the Courts. Reports of its imminent demise are perhaps exaggerated.” (Emphasis supplied)


\textsuperscript{60}See \textit{supra}, n. 29.