Substantive review has always been considered an anathema in judicial review proceedings. When Lord Denning, M.R. stated:

"I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable."

On appeal Lord Chancellor and Lord Brightman lost no opportunity to rebuke such a proposition on the ground that it went against the well-established principles of judicial review viz. that judicial review is not concerned with the decision but with the decision-making process.1 Traditionally in India as well as in England, courts have exercised self-restraint in reviewing the substantive content of the decision rendered by an administrative body. In England, however, it seems that only with the advent of the Human Rights Act, 1998 (HRA) this proposition has become bleary with courts and commentators alike grappling to come to terms with the proportionality test.

With the introduction of the HRA, it is said that the British system stands "at an intermediate stage between parliamentary supremacy and constitutional supremacy" and even though "Parliament remains the sovereign legislature" it is apt to say that "the common law has come to recognise and endorse the notion of constitutional and fundamental rights".2 The proportionality test is a consequence of such constitutionalism. It ensures that State action is not disproportionate to the limitation of a constitutional right.

The theme of this article relates to the doctrine of proportionality and its application to Article 14 of the Constitution. In particular the decision of the Supreme Court in Om Kumar v. Union of India3 and its effect on subsequent decisions will be extensively dealt with. However, before that it is imperative that one details the common and well-treaded ground.

Wednesbury unreasonableness: Ground for judicial review

In Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.4 Lord Greene, M.R. in a classic and oft-quoted passage held that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other following conditions were satisfied viz. the order was contrary to law, or irrelevant factors were considered, or relevant factors were not considered or the decision was one that no reasonable person could have taken. The pertinent question then is who is a reasonable man? As correctly pointed out by Justice M.N. Venkatachaliah in G.B. Mahajan v. Jalgaon Municipal Council5 the test of a reasonable man or "the man on the Clapham omnibus" as known in the law of torts is not applicable in cases of Wednesbury unreasonableness. Hence in condemning unreasonable administrative action the court inquires whether the decision is one which a reasonable body could have reached. In other words, the court allows some latitude for the range of differing opinions which may fall within the bounds of reasonableness.

It is submitted that the latent defect in the Wednesbury test is its acceptance of degrees of unreasonableness i.e. a particular person may find the decision unreasonable but that is not enough for the court to strike down an administrative action. It is however only in those extreme and limited cases of unreasonableness i.e. where no reasonable person can find the decision reasonable, does Wednesbury permit the court to interfere with the decision.

Meaning of proportionality According to De Smith, Woolf and Jowell on Judicial Review of Administrative Action6, there are three principal formulations by which proportionality is tested.

The principle of proportionality evaluates two aspects of a decision:

(1) whether the relative merits of differing objectives or interests were appropriately weighed or "fairly balanced"?

(2) whether the measure in question was in the circumstances excessively restrictive or inflicted an unnecessary burden on affected persons??

Supreme Court on proportionality: a backdrop It must be clarified that none of the decisions that are referred to in this section can be considered to lay down per se that the proportionality test (as is known in the European human rights context) apply in India. However, these cases are essential in one senseâ€”they gave support to the Supreme Court in Om Kumar3 in explaining the nature and functioning of the proportionality test in India. It may perhaps seem coincidental that proportionality has only been analysed in the context of misconduct in service matters in India.
In Bhagat Ram v. State of H.P.8 a forest guard allowed K to cut 21 trees (17 in forest land and 4 in private land of K). K paid compensation for the illegal felling but a disciplinary inquiry was initiated against the forest guard for (i) illicit felling of trees causing loss to the Government, and (ii) negligence in performing his duties. He was removed from service after charges were proved against him. The High Court dismissed his writ petition. On appeal the Supreme Court observed that

"the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14".9

Therefore a minor penalty was ordered keeping in view the nature of misconduct, gravity of charges and no consequential loss.

In Ranjit Thakur v. Union of India10 a signalman in the Army was already serving a 28-day punishment for insubordination. During this period he refused to eat his food even though directly ordered to do so. This further act of insubordination made his Commanding Officer try him for summary court martial. He was subsequently removed from service. The High Court dismissed his writ petition. The Supreme Court after referring to Lord Diplock's classic statement on judicial review in Council for Civil Services Union v. Minister of Civil Service11 and Bhagat Ram8 held:

That a sentence should not be so disproportionate to the offence as to shock the conscience and that the doctrine of proportionality would ensure that if a decision of the court even as to sentence is an outrageous defiance of logic, then it was not immune from correction.12

Sorabjee has argued that the decision in Ranjit Thakur10 "lays the seeds of the proportionality principle in Indian administrative law without recourse to any constitutional principle".13 However, on the contrary it seems evident that in view of the extremely limited scope for judicial intervention viz. where the decision shocks the conscience of the Court or is in outrageous defiance of logic, the Supreme Court was applying the Wednesbury test in the guise of referring to it as "proportionality". This view has subsequently been endorsed by Jagannadha Rao, J. in Union of India v. Ganayutham14 Indeed the Supreme Court in State of A.P. v. McDowell & Co.15 still considered "the applicability of the doctrine of proportionality in the administrative law sphere ... debatable".

In Ganayutham14 a Central excise official was charged for substantial loss of revenue to the Government due to his misconduct. Subsequently he retired and a penalty was imposed by the disciplinary authority of withholding 50% of his pension and gratuity. On judicial review the punishment was interfered with on the ground that it was too severe and should be restricted. The Supreme Court allowed that appeal and held that only "in exceptional and rare cases" where the "punishment imposed by the disciplinary authority shocks the conscience of the court" can the court interfere with the punishment.16 However, the Court in that case went further to analyse the applicability of the doctrine of proportionality in Indian law but left open the issue whether courts will apply the principles of proportionality where administrative action affects fundamental rights.17

Om Kumar case3 is an unfortunate part of the Skipper Construction fiasco in Delhi. Briefly stated, departmental inquiries were initiated against certain officers of the Delhi Development Authority (including Om Kumar) who were connected with the land allotment to Skipper Construction, which subsequently went bust after defrauding thousands of investors. After the penalties had been imposed on these officers, the Supreme Court by an order dated 4 May, 2000 proposed to reopen the issue of quantum of punishment meted out to these officers. It is in this context that the principle of proportionality was analysed.

It must be clarified that the main issue at the fore in Om Kumar3 was the applicability of the principle of proportionality with respect to Article 14 of the Constitution of India. Justice Jagannadha Rao held that the principle of proportionality already applied to legislation and administrative orders when challenged as violative of Articles 19 and 21 of the Constitution of India.18 In Om Kumar3 after due deliberation, Justice Jagannadha Rao concluded that:

"54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of 'proportionality' in the last fifty years even though it has not been expressly stated that the principle that is applied is the 'proportionality' principle."19

At this juncture we must therefore examine the nature and ambit of Article 14 and scrutinise how the courts decide claims
said to be violative of this fundamental right and thereafter see if the courts in India ask the same questions as their European and English counterparts. The applicability of the proportionality test when Articles 19 and 21 are engaged is beyond the scope of this article.

Article 14 vis-à-vis the proportionality test

Article 14 states as:

"14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Before proceeding further, it is vital to comprehend that the structure of an article cannot be considered determinative of the fact whether proportionality may or may not apply. Recourse must also be taken to see how the courts interpret and apply the said article. In other words, just because an article appears to be drafted in "absolute terms" does not conclusively mean that courts apply "merits review" only.

A striking example is Article 14 of the European Convention on Human Rights. It appears to be drafted without any limitation whatsoever but does that mean that the principle of proportionality does not apply to the said article? On the contrary, it has been held that for the purposes of Article 14 of the Convention a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". In Abdulaziz v. United Kingdom the European Court of Human Rights (ECHR) held that the Government's response in refusing permission to the husbands of women settled in the United Kingdom was without any reasonable and objective justification and that "there had been discrimination on the ground of sex, contrary to Article 14, in securing the applicants' right to respect for family life, the application of the relevant rules being disproportionate to the purported aims". (emphasis supplied)

Similarly in India, Article 14 of the Constitution is applied by the courts in the following manner:

There shall be no discrimination except (i) where the classification is founded on intelligible differentia, and (ii) such differentia must have a rational nexus to the object sought to be achieved by the Act.

This is fundamentally how a State action would be challenged as being discriminatory under Article 14.

The "activist approach" of Article 14 In 1974, the Supreme Court in E.P. Royappa v. State of T.N. formulated a "new dimension" to Article 14. Bhagwati, J. after observing that "from a positivistic point of view, equality is antithetic to arbitrariness" held that "where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". This "activist approach" crystallised further in Maneka Gandhi where Bhagwati, J. justified his approach in Royappa on the basis that "equality is a dynamic concept with many aspects and dimensions" therefore it "must not be subjected to a narrow, pedantic or lexicographic approach". Hence "an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence".

In subsequent cases, the purpose of this "new dimension" of Article 14 has been described as to "strike at arbitrariness in State action and ensure fairness and equality of treatment" which "immediately springs into action and strikes down State action " and is therefore considered to be the "golden thread which runs through the whole of the fabric of the Constitution".

There is obviously the logical fallacy of equating arbitrariness with equality. A striking example of the fallacy in equating arbitrariness with equality is given by T.R. Andhyarujina:

"The Queen in Alice in Wonderland acted quite capriciously when she ordered anyone's 'head to be taken off' who irritated her but there was no question of her acting unequally. Similarly, one can act quite 'arbitrarily' to a person or body without violating any concept of equality as when permission is refused to a sole applicant on the ground that the applicant has red hair. No case of inequality also arises if all the applicants have red hair and are capriciously refused permission on the ground that they have red hair. It is only when permission is refused capriciously on the ground that some have red hair and is granted to others because they have black hair that a question of unequal treatment arises, in which case it is the old theory of the absence of a rational reason for the distinction made that comes into operation."
Putting the brakes on the "activist approach"

Conscious of the criticism to this "dynamic concept of equality" the Supreme Court in recent times has tried to dilute its effect. In G.B. Mahajan v. Jalgaon Municipal Council5 a scheme of financing of a project by the Municipal Council contemplating a "developer" was challenged as arbitrary and unreasonable and therefore violative of Article 14. In this context Justice M.N. Venkatachaliah observed that the Court is not to decide such cases by using the test of a reasonable man or "the man on the Clapham omnibus" but by applying the test of Wednesbury unreasonableness.33

The Supreme Court was clearer on this point in State of A.P. v. McDowell15. There the constitutional validity of the A.P. Prohibition Act, 1995 was challenged as it "arbitrarily" prohibited the manufacture and production of liquor (amongst other grounds). Justice B.P. Jeevan Reddy succinctly stated:

"No enactment can be struck down by just saying that it is arbitrary or unreasonable. ... It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down an enactment if it thinks it unreasonable, unnecessary or unwarranted."34

However, the remnants of the practice of challenging statutes on the ground of "arbitrariness" still linger. In Malpe Vishwanath Acharya v. State of Maharashtra35 the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was held to be "arbitrary" but was not struck down as the Act was due to lapse in a few months. Recently, the Supreme Court in Mardia Chemicals Ltd. v. Union of India36 struck down Section 17(2) of the Securitisation Act, 2002 which provided for a pre-deposit of 75% of the amount claimed before an application can be preferred by the borrower to the DRT on the ground that it was unreasonable and arbitrary.

Conclusions drawn regarding Article 14 in Om Kumar

In Om Kumar3 Justice Jagannadha Rao came to the conclusion that "when administrative action is attacked as discriminatory under Article 14" the "court is applying proportionality" but when "administrative action is questioned as arbitrary, the principle of secondary review based on Wednesbury principles applies".37

It has been seen above that the discriminatory test under Article 14 of the Constitution is very similar to the test used by ECHR under Article 14 of the European Convention, therefore the first part of Justice Jagannadha Rao's observations is indeed correct. However, it may well be argued that the second part is unapt in principle. Fundamentally, there is a distinct difference in using the adverb "arbitrarily" which is used in conjunction with a fundamental right such as "arbitrarily deprived of liberty"38 and applying the noun, which signifies a fundamental right of non-arbitrariness.39 The latter obviously encompasses a larger area and is not confined to any particular fundamental freedom. The reason that the Supreme Court could employ the "activist approach" of Article 14 in such an "all-embracing manner" is because it was not confined or restrained by any test or limitation. Indeed it was what the Court thought "arbitrary" that could invalidate a State action under Article 14. G.B. Mahajan5 and subsequent cases seemed to have diluted this raw power by adopting the standard of Wednesbury unreasonableness when a State action was challenged as "arbitrary". But that is a job only half done. It would be foolhardy to believe that the Court cannot use its "activist approach" when applying the Wednesbury test. The briefest glance at English public law would be sufficient to prove this beyond doubt. Lord Cooke of Thorndon has described the Wednesbury test as "tautologous and exaggerated"40 and "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".41

This strong rebuke is the logical conclusion of an enduring debate regarding the redundancy of the Wednesbury test. The impetus was of course given by Jowell and Lester in 1987.42 The writers observed that "justification by reference to principle is intellectually honest, avoiding as it must be the obscurity of a vague test and openly revealing the true reasons for intervention".43 They basically argued that the Wednesbury test was faulty on several grounds and advocated the introduction of the proportionality test. Primarily, it was urged by them that the Wednesbury test was unrealistic as the courts hardly applied the test in the extreme sense it was initially used in. This obviously allowed judges to "obscure their social and economic preference more easily" under the "blunt Wednesbury tool".44 According to Jowell, the courts exercise substantive review in the guise of the Wednesbury test so as "to cover their tracks by laying false clues and donning elaborate camouflage".45 He has therefore advocated a more transparent fourfold proportionality test viz.:

(1) Did the action pursue a legitimate aim?

(2) Were the means employed suitable to achieve that aim?

(3) Could the aim have been achieved by a less restrictive alternative?
(4) Is the derogation justified overall in the interests of a democratic society?46

In the Indian context, the fourfold test therefore may arguably be the most appropriate test to tackle the "highly activist magnitude" of Article 14 and ought to be employed in deciding claims where State action is challenged as "arbitrary".

Error in Om Kumar: equating "strict scrutiny with proportionality"

In Om Kumar3 Justice Jagannadha Rao observed:

"37. The development of the principle of 'strict scrutiny' or 'proportionality' in administrative law in England is, however, recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of 'strict scrutiny'. In the case of these freedoms, Wednesbury principles are no longer applied."47

While the Wednesbury principle no longer applies in England in cases where Convention rights are involved after 2-10-2000, it must be noted that the decision in Om Kumar3 is merely a month after the commencement of the HRA. It is trite knowledge that to overcome the defectiveness of the Wednesbury test and the ever-so-common hauling up by the European Court of Human Rights for human right violations led the English courts to use a modified "anxious scrutiny" test as formulated by Lord Bridge of Harwich in Bugdaycay48 and subsequently adopted in Brind49 In R. v. Ministry of Defence, ex p Smith50 the Court of Appeal formulated the strict scrutiny test based upon the observations of Lord Bridge in Bugdaycay48 and Brind49. The test was stated to be:

"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."51

It is submitted that even by applying this strict scrutiny test, the Court of Appeal could find no fault in the Ministry of Defence’s policy banning homosexuals from the armed forces. However, when the case came to Strasbourg, ECHR noted that:

"The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under Article 8 of the Convention."52

This clearly shows that the strict scrutiny test could not be equated to proportionality. Since then, the House of Lords has come to recognise this and has considered three predominant characteristics of proportionality. First, the doctrine of 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. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R. v. Ministry of Defence, ex p Smith50 is not necessarily appropriate to the protection of human rights.53 Even the recent decision of the House of Lords in R. v. BBC, ex p Prolife Alliance54 confirms that the "(W)ednesbury test was quite strongly reaffirmed, on a human right issue in ex parte Smith".

Justice Jagannadha Rao in Om Kumar3 opined that the principle of "strict scrutiny" or "proportionality" for review of administrative action touching fundamental freedoms, leaving Wednesbury principles to apply to other non-Convention cases had crystallised in England55

and therefore had trouble in appreciating the ITF40 decision and considered it to have "deviated both from proportionality and Wednesbury".56 This may perhaps seem so because in ITF40 Lord Slynn observed that "Wednesbury reasonableness and proportionality in practice may yield the same result" and Lord Cooke advocated the use of a simpler test rather than the "tautologous and exaggerated Wednesbury".

It is submitted that to the contrary, ITF case40 has never been considered as a "deviation" but an authority unbottling a larger issue viz. should proportionality be used as a ground for review in domestic law in non-Convention cases.

Lord Cooke’s subtle attack on Wednesbury has been construed to mean "that the separation of powers principle can be properly respected without the need to cast the (Wednesbury) test in the very restrictive format articulated by Lord Greene".57 The modified test urged by Lord Cooke is considered to give a "change of emphasis which would provide a more intensive and adequate standard of review".58
More importantly, Lord Slynn's remarks in ITF case\textsuperscript{40} have now to be read conjointly with his observations in Alconbury\textsuperscript{59} In Alconbury\textsuperscript{59} the learned Law Lord observed:

"There is a difference between that principle proportionality and the approach of the English courts in the Wednesbury case\textsuperscript{4}. But the difference in practice is not as great as is sometimes supposed. The cautious approach of the courts of justice in applying the principle is shown inter alia by the margin of appreciation it accords to the institutions of the community in making economic assessments. I consider that even without reference to the 1998 Act 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." (emphasis supplied)

It may not be out of place to mention that in a recent Court of Appeal decision in Assn. of British Civilian Internees, Far Eastern Region v. Secy. of Defence\textsuperscript{60} Mr David Pannick, Q.C. argued on a preliminary point, that proportionality exists as a separate ground of review even in cases which do not concern community law or human rights protected by the European Convention on Human Rights. In other words Mr Pannick relying upon the comments of Lord Cooke in Daly\textsuperscript{41} and Lord Slynn in Alconbury\textsuperscript{59}, argued that the time had come to usher in the proportionality test even in domestic law.\textsuperscript{61} While the Court of Appeal did reject that argument it, however, concedingly held:

"We have difficulty in seeing what justification there now is for retaining the Wednesbury test. But we consider that it is not for this Court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion."\textsuperscript{62}

A fortiori it appears to be absurd for the courts in India to retain the Wednesbury test when its future in England is so precariously placed.

Post-Om Kumar: losing track Subsequent to Om Kumar\textsuperscript{3}, the Supreme Court has decided Regional Manager, U.P. SRTC v. Hoti Lal\textsuperscript{63} and Chairman and Managing Director, UCO Bank v. P.C. Kakkar\textsuperscript{64}

Hoti Lal\textsuperscript{63} was really a follow-up to Om Kumar\textsuperscript{3}. In Hoti Lal\textsuperscript{63} there was no question of discrimination in awarding punishment. A bus conductor was found guilty of misconduct for misappropriating funds by not issuing tickets to passengers. His service was terminated in 1991. A Division Bench of the High Court, however, set aside the punishment and directed the disciplinary authority to award any punishment other than removal or termination of service. The Supreme Court after referring to Ganayutham\textsuperscript{14} and Om Kumar\textsuperscript{3} held that only in "rare and exceptional cases" should the High Court interfere while exercising judicial review and that too only if the punishment was "shockingly or grossly disproportionate".\textsuperscript{65} P.C. Kakkar\textsuperscript{64}, however, ought to have been distinguished by the Supreme Court on the ground that the punishment was challenged as discriminatory. In that case disciplinary proceedings were initiated by UCO Bank against P.C. Kakkar for allegedly committing several acts of misconduct while functioning as Assistant Manager. He was placed under suspension from 6-7-1983. On the basis of findings recorded by the inquiry officer and endorsed by the disciplinary authority an order of dismissal was passed on 16-8-1988. The appeal and review were dismissed. However, the High Court interfered with the matter on the basis that in a similar situation, lesser punishment was imposed on one M.L. Keshwani although the allegations against him were of a more serious nature. The High Court held that there ought to be no discrimination in matters of punishment.

Curiously, even after replicating several observations in Om Kumar\textsuperscript{3} and also referring to various other authorities (including Ranjit Thakur v. Union of India\textsuperscript{10} and B.C. Chaturvedi v. Union of India\textsuperscript{66}), the Supreme Court held that a court could not interfere with the quantum of punishment unless it was shockingly or grossly disproportionate.

This seems inconsistent with Om Kumar\textsuperscript{3} because instead of analysing whether the "discriminatory" punishment had any "reasonable or objective justification", the Supreme Court merely stated its non-interference because it was not shown that the punishment was "shockingly or grossly disproportionate".\textsuperscript{67} While such a reason may be appropriate (in light of Om Kumar\textsuperscript{3}) where decisions are challenged as "arbitrary" ("shockingly or grossly disproportionate" being equated to "outrageous defiance of logic"), it is at least completely unwarranted where a decision is challenged as discriminatory.

One aspect of the decision of the Supreme Court in Indian Handicrafts Emporium v. Union of India\textsuperscript{68} is quite puzzling. Here the constitutional validity of the 1991 amendment to the Wild Life (Protection) Act, 1972 was challenged as violative of Article 19(1)(g) as it was not a reasonable restriction provided by Article 19(6). In effect the 1991 amendment banned the trade of imported ivory. The Supreme Court rightly repelled the challenge by holding the amendment as a "reasonable restriction" under Article 19(6). The mystifying part of Justice S.B. Sinha's judgment is the one-line paragraph "the amending Act also satisfy the strict scrutiny test".\textsuperscript{69} The false premise on which the learned Judge based this observation is clearly evident in the connected case of Balram Kumawat v. Union of India\textsuperscript{70} In Balram Kumawat\textsuperscript{70}
the primary question raised was whether "mammoth ivory" would be included within the term "ivory" so as to come within the purview of prohibited trade under the 1991 amendment (presupposing the amendment to be constitutionally valid). In this case, Justice S.B. Sinha records that a submission was made by the counsel that the doctrine of proportionality should be applied in his case.71 Repelling the argument and after referring to Om Kumar3, the learned Judge goes on to hold:

"As indicated in Indian Handicrafts Emporium68 this Court while construing the provisions of the Act vis-\-vis restrictions imposed in terms of clause (6) of Article 19 of the Constitution of India has come to the conclusion that the provisions of the amending Acts satisfy even the strict scrutiny test."72

Apparently the mistake of Justice Jagannadha Rao in Om Kumar3 in equating strict scrutiny with proportionality has been perpetuated. The correct approach ought to have been to state that the doctrine of proportionality is inherent in Article 19 and therefore principles equivalent to the proportionality test were already being applied. But on the contrary for the first time in Indian constitutional law a statute has passed the "strict scrutiny" test when challenged as violative of Article 19 even though such statutes have been scrutinised upon principles equivalent to the proportionality test since 1950.

Recently a Constitution Bench in Saurabh Chaudri v. Union of India73 considered the constitutional validity of reservations based on domicile or institution in the matter of admissions into postgraduate courses in Government-run medical colleges. One of the contentions raised by the petitioners was that such reservation is prima facie impermissible having regard to the constitutional scheme, the same would fall within the purview of "suspected classification" and thus must pass the "strict scrutiny test" as applied by the US courts.

Negating the argument and upholding the validity of such reservation, the majority judgment delivered by Chief Justice V.N. Khare proceeded on the footing that the maxim "ut res magis valeat quam pereat" induces a court to presume the constitutionality of a statute and therefore the strict scrutiny test could not be applied in India. In a concurring judgment, Justice S.B. Sinha approached the issue differently and observed:

"92. Mr Nariman contended that provision for reservation being a suspect legislation, the strict scrutiny test should be applied. Even applying such a test, we do not think that the institutional reservation should be done away with having regard to the present-day scenario. We may notice that such a test has been applied for upholding a statute recently in Balram Kumawat v. Union of India."74

It is submitted that this approach is clearly wrong and is based on a misconceived notion of the "strict scrutiny test" as applied by the US courts.

The strict scrutiny test in the United States is part of a three-tier standard of review used by the US courts in equal protection cases. The most lenient standard of review is the "rational basis" review. US courts will first determine if the policy has a "reasonable purpose" or "rational basis" for being enacted by the legislature. If the answer is yes, the policy is deemed to be "legitimate". The court will then determine if the policy is "reasonably related" to attaining the identified legitimate end. If the answer is yes, the court will go no further and the policy will be upheld.75

Intermediate scrutiny is primarily adopted as a standard of review where a policy makes a gender-based classification. US courts consider a gender-based classification permissible if there is an "exceedingly persuasive justification" for that action. To meet the burden of justification, a State must show "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives".76

On the other hand, strict scrutiny is adopted as a standard of review only in cases where there is a suspect classification. A suspect classification occurs when a policy treats people differently because of race or ethnicity. However, when race-based action is necessary to further a "compelling government interest", such action has been held not to violate the constitutional guarantee of equal protection so long as the narrow tailoring requirement is also satisfied.77

Seen in this light, it appears self-evident that domicile or institutional reservation in Saurabh Chaudri73 was not based on race or ethnicity and therefore could not be considered as a suspect classification. It would follow as a natural consequence that the strict scrutiny test could not be applied by the Supreme Court (even if assuming that such a test was at all applicable in India). Sinha, J. seems to have obfuscated the "strict scrutiny" test (again confused for proportionality) under English public law as a ground for judicial review with the strict scrutiny test applied by the US courts in equal protection cases. For that matter neither Balram Kumawat70 nor Indian Handicraft Emporium68 dealt with a matter that could be classified as a suspect classification (as seen above) and it would therefore not be correct to have held that the strict scrutiny test has been applied for upholding a statute in Balram Kumawat70.

Fresh look indeed the analysis of the judgment in Om Kumar3 has proved so cumbersome that in another recent decision of Dev Singh v. Punjab Tourism Development Corpn. Ltd.78 the Supreme Court reached the same conclusion viz. that there should be no interference with punishment unless it is shockingly or grossly disproportionate by simply referring to Bhagat Ram8 and Ranjit Thakur10. Ganayutham14 and Om Kumar3 are conspicuous by their absence in the...
judgment and it can only be speculated if the Supreme Court has finally realised that Om Kumar3 and Ganayutham14 insomuch as they refer extensively to the principle of proportionality in European human rights law and the "strict scrutiny" test in English public law were a pointless exercise.

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Conclusion It has been seen that the superior courts in India do apply principles equivalent to the proportionality test when dealing with claims in which State action is said to be violative of Article 14 (except when State action is said to be arbitrary under Article 14). It has been argued that the proportionality test ought to also be used to test State action considered to be arbitrary. Most importantly it seems imperative to appreciate that it is not the form but the substance that determines the proportionality test. It has been seen that in Ranjit Thakur10 the Supreme Court expressly approved of the proportionality test but in effect was applying the "irrationality-based Wednesbury test". Similarly the term "shockingly or grossly disproportionate" can only be considered to be a product of the Wednesbury test and it would be deceptive to believe that the proportionality test is being applied when courts consider a punishment to be "shockingly or grossly disproportionate".

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Case-law in India suggests that where Article 14 is engaged, proportionality has never been used in evaluating general policy decisions but has exclusively been considered in cases relating to excessive administrative sanctions. This latter category is simpler to consider because the penalty serves as a yardstick to compare similar administrative decisions. However, the real test for proportionality in the Indian context will be when policy decisions are challenged as "disproportionate" as opposed to "arbitrary". In such a situation, the Court would have to carefully consider whether relevant considerations have been properly weighed or balanced (possibly by applying the fourfold test) rather than merely chanting the magical word "arbitrary" to wish away provisions in Acts of Parliament.

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- + I must express my gratitude to Mr T.R. Andhyarujina, Senior Advocate, Supreme Court for his support and encouragement. However, any shortcomings in this article are mine alone. Return to Text
- ++ Advocate. Return to Text
- Chief Constable of North Wales Police v. Evans, (1982) 1 WLR 1155 at pp. 1160 and 1174. Return to Text
- See however, Lord Irvine: "The Impact of the HRA: Parliament, the Courts and the Executive", (2003) PL 308 at 310. The former Lord Chancellor does not endorse this view and considers that the HRA was "crafted as a settlement" and represents the "reconciliation of effective right protection with parliamentary sovereignty". Return to Text
- (2001) 2 SCC 386 (per Jagannadha Rao, J.) Return to Text
- (1947) 2 All ER 680 (CA) Return to Text
- (1991) 3 SCC 91 at 110 Return to Text
- 5th Edn. (1995), Sweet and Maxwell at pp. 595-96. Return to Text
- Ibid. at p. 598. Return to Text
- (1983) 2 SCC 442 Return to Text
- (1983) 4 SCC 611 Return to Text
- (1983) 1 AC 768 Return to Text
- Supra fn 10 at p. 620, para 25. Return to Text
- (1997) 7 SCC 463 at 473 Return to Text
- (1996) 3 SCC 709 at 738 per B.P. Jeevan Reddy, J. Return to Text
- Supra fn 14 at p. 480. Return to Text
- ibid. at p. 479. Return to Text
- Supra fn 14 at p. 479. Return to Text
- Supra fn 14 at p. 480. Return to Text
- ibid. at p. 508, para 54. Return to Text
- See the contrary view taken by Ian Leigh in Taking Rights Proportionally: Judicial Review, the Human Rights Act and Strasbourg, (2003) PL 265 at 284. Prof. Leigh argues that proportionality has no place under the Strasbourg jurisprudence where convention rights have no limitations, nor where the limitations are specific. He therefore concludes
that proportionality is inapplicable to Article 14 of the European Convention (right to equality) as it has no express limitations. Return to Text

- Article 14 states: Prohibition of discrimination.-The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Return to Text
- Belgian Linguistics case, (1968) 1 EHRR 252 at para 10. Return to Text
- 1985 7 EHRR 471 at para 77. Return to Text
- (1974) 4 SCC 3 Return to Text
- Ibid. at p. 38, para 85. Return to Text
- Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489 at 511. Return to Text
- See a more elaborate discussion on this point in H.M. Seervai: Constitutional Law of India, 4th Edn., 1991 at pp. 436-42. Return to Text
- Supra fn 5 Return to Text
- Supra fn 15 return to Text
- (1998) 2 SCC 1 Return to Text
- (2004) 4 SCC 311 at 354. Return to Text
- (2001) 2 SCC 386 at para 68. Return to Text
- That seems to be the effect of the decisions from E.P. Royappa onwards. Return to Text
- Ibid. at p. 372. Return to Text
- Supra fn 3 at p. 402, para 37. Return to Text
- (1996) 2 WLR 305 : (1996) 1 All ER 257 (CA) Return to Text
- Ibid. at p. 336 : All ER p. 263 Return to Text
- (2001) 2 SCC 386 at para 50. Return to Text
- Ibid. at p. 699. Return to Text
- Ibid. at para 32. Return to Text
- Ibid. at paras 34-35. Return to Text
- (2003) 3 SCC 605 (per Arijit Pasayat, J.) Return to Text
- (2003) 4 SCC 364 (per Arijit Pasayat, J.) Return to Text
- See fn 63 at pp. 613-14. Return to Text
- (1995) 6 SCC 749 Return to Text
- See fn 64 at p. 376. Return to Text
- (2003) 7 SCC 589 Return to Text
- Ibid. at p. 609, para 55. Return to Text
- (2003) 7 SCC 628 Return to Text
- Ibid. at p. 641. Return to Text
- Ibid. at p. 642, para 42. Return to Text
- (2003) 11 SCC 146 Return to Text

Ibid. at p. 182, para 92. See the classical example of Williamson v. Lee Optical Co., (1955) 348 US 483 where the Supreme Court upheld a law granting optometrists but not opticians the right to replace eyeglass lenses, even though opticians were perfectly capable of doing so. Still, the Court upheld the law because it believed a non-insane legislature might have believed that overall, the more highly-trained optometrists might perform this simple function better. See Craig v. Boren, 429 US 190 (1976) and United States v. Virginia, 518 US 515 (1996). See Korematsu v. United States, 323 US 214 (1944); Richmond v. JA Croson, 488 US 469 (1989); Adarand v. Pena, 515 US 200 (1995) and Grutter v. Bollinger, decided by the US Supreme Court on 23-6-2003. (2003) 8 SCC 9 at 11-12 per N. Santosh Hegde, J. decided on 2-9-2003.