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ARTICLES

TITLE: PRINCIPLE OF PROPORTIONALITY AS GROUND OF JUDICIAL REVIEW: THE JURISPRUDENCE IN UNITED KINGDOM AND MALAYSIA

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ABSTRACT

In state administration, the public authority has vast power, especially discretionary powers. If the powers are not closely scrutinized it is open for abuse. As a result, rights of an individual, which includes human rights would be affected. Thus, effective grounds of judicial review to protect human rights against abuse of powers by the authority must be effectively developed. One of the grounds of judicial review over action of the authority is principle of proportionality. According to the principle measure taken by the authority must be proportionate to the pursued objective. If it acted in excess of what is being required, the authority have acted disproportionately. Hence, the action or decision is invalid. Whether action or decision of the authority is proportionate or disproportionate, the court would decide. Hence, the court plays an essential role in developing jurisprudence on the application of principle of proportionality in judicial review. The principle of proportionality that has its originality in Prussia in the 19th Century is well developed and accepted under the European administrative law. Nevertheless, a different attitude was adopted in United Kingdom. The principle was not well accepted during the early years of its development. This is because the English courts belief that the review based on proportionality would touch the merit review of the administrative decisions and it was treated as part of *Wednesbury* unreasonableness. Nonetheless, when *Wednesbury* unreasonableness is insufficient to review the illegal act of the authority that infringe rights protected under the European Convention on Human Rights (ECHR) or Human Rights Act 1988 of an individual, the English judges began to develop jurisprudence on the application of principle of proportionality in judicial review. Eventually, the principle was accepted by the English Courts. The progressive development continued with the establishment of the three and the four steps structure test used in the review of action of the authority that infringed rights under ECHR or Human Rights Act 1988. However, the court did not tie itself to the three or the four steps structure tests in adopting the principle of proportionality as ground of judicial review. What the court look at is the

application of proportionality in the sense of fair balance. Hence, what is important is to review the proportionate action of the authority so that a fair balance or proportionate balance is attain according to the objective to be achieved. If this is not achieved the action would be struck out as disproportionate, thus invalid. The Malaysian Court too recognised the principle of proportionality as one of the grounds for judicial review and this was illustrated in *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Pendidikan, Rama Chandran, R* v *The Industrial Court of Malaysia & Anor* and *Dr. Mohd. Nasir bin Hashim* v *Menteri Dalam Negeri.* The flexible attitude of both the English and the Malaysian courts have contributed to the dynamic development of the jurisprudence of proportionality as one of the grounds in the review of unlawful act of the authorities in administration.

Keywords: *Judicial review, proportionality, structure test, human rights, jurisprudence.*

INTRODUCTION

In state administration, the public authority has vast power, especially discretionary powers. If the powers are not close closely scrutinized it is open for abuse. As a result, rights of an individual, which includes human rights would be affected. Thus, effective grounds of judicial review to protect human rights against abuse of powers by the public authority must be effectively developed. One of the grounds of judicial review over action of the public authority is principle of proportionality. According to the principle measure taken by the authority must be proportionate to the pursued objective. If it acted in excess of what is being required, the authority have acted disproportionately. Hence, the action or decision is invalid. Whether action or decision of the authority is proportionate or disproportionate, the court would decide. Hence, the court plays an essential role in developing jurisprudence on the application of principle of proportionality in judicial review. The principle of proportionality that has its originality in Prussia in the 19th Century is well developed and accepted under the European administrative law. The acceptance of the principle were illustrated in many cases and amongst the cases are the *Skim Milk Powder's* case,[1] *R* v *Intervention Board for Agriculture.*[2] *Internationale Handelsgesellschaft*[3] and *R* v *Intervention Board of Agricultural Produce ex p Mann (Sugar)Ltd.*[4]

According to the principle measure taken by the authority must be proportionate to the pursued objective. If it acts in excess of what is being required, the authority have acted disproportionately. There two main

[1] Case 114/76, *Bela-Muhle Josef Bermgman* v *Grows-Farm* [1977] E.C.R. 1211.
[2] [Case 181/84 [1985] E.C.R. 2889]
[3] Case 11/70 [1970] ECR 1125.
[4] [1985] ECR 2889.

schools of thought which have shaped the historical development of the principle of proportionality are as follow:[5]

(i) the principle of retributive justice (*justitia vindicative*) and appropriate distributive justice (*justitia distributiva*);
(ii) the notion of a liberal state. According to this notion, the state should restrict itself to the achievement of objectives which are limited or capable of limitation.

From the above school of thoughts it indicates that the principle stressed on the assumption that the law must serve its objective it seeks to achieve and must subsequently form part of a quantifiable casual relationship between means and ends in achieving a desired result.[6] Although the principle was well developed under the European Union, it was not well accepted by the English courts during the early developmet. This was because the English courts believed that proportionality amounted to reviewing merits of the administrative decisions and thus, it was treated as part of *Wednesbury* unreasonableness.[7]

EARLY DEVELOPMENT OF PRINCIPLE OF PROPORTIONALITY IN UNITED KINGDOM

The early stage of development of the principle of proportionality in United Kingdom saw a restrictive approach of the English courts. The English judges were reluctant to accept the principle as ground on its own in reviewing actions or decisions of the public authority as they belief that review based on proportionality would touch the merit review. The clear non-acceptance of the principle was clearly illustrated in *Council of Civil Service Unions* v *Minister for the Civil Service (CCSU).*[8] In this case Lord Diplock mentioned that the doctrine of proportionality would be used as ground for judicial review in the future. Similar attitude was adopted by the court in *Brind and others* v *Home Secretary.*[9] According to Lord Ackner, to adopt the doctrine of proportionality would involve review of the merits of the decision.[10] Meanwhile, Lord Lowry in the same was of the opinion that there could be very little room for judges to operate an independent judicial review on proportionality doctrine.[11]

Regardless of the resistance, there were some English cases that had used proportionality in reviewing decision of the authority. For instance, Lord Denning M.R. in *R v Barnesley Metropolitan Borough Council exparte Hook*[12]

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[5] Schwarzw, Jurgen, *European Administrative Law*, (London:Sweet and Maxwell, 1992), 679.
[6] *Ibid.*
[7] *Roberts v Hopwood* [1925] AC 578.
[8] [1985] AC 374, (also known as the GCHQ Case)
[9] [1991] 1 All ER 720.
[10] [1991] 1 All ER 720, 735.
[11] *Id* at 739.
[12] [1976] WLR 1052.

quashed the revocation of the licence of a market stallholder for urinating in a side street after the market had closed on the ground that the punishment imposed was out of proportion to the offence committed. This is one of the cases that shows, although the judicial stand was proportionality was not accepted as ground of judicial review on its own, yet there were judges who were inclined on the application of the principle. Further development indicates that the jurisprudence on the application of principle of proportionality was dynamically developed in cases affecting human rights.

INTERFERENCE WITH FUNDAMENTAL RIGHTS AT COMMON LAW

The later development witnessed the change of attitude of the English courts in the acceptance of principle of proportionality as ground of judicial review, especially in cases of infringement of The European Convention on Human Rights (ECHR) or Human Rights Act 1998 United Kingdom. The reason being, the *Wednesbury* unreasonableness is insufficient to review the illegal act or decision of the authority that infringe rights protected under the ECHR or Human Rights Act of an individual. This was illustrated in several pronouncement of the English courts.

In *R* v *Ministry of Defence ex parte Smith & others*[13] the government's policy that prohibited gays and lesbians from serving in the armed forces were challenged for breach of Article 8 of the Convention.[14] The court commented in its decision that the old *Wednesbury* test was insufficient where human rights were concerned. According to the court, if an administrative decision deals with human rights, the court would require proportionately greater justification before being satisfied that the action was within the range of responses open to a reasonable decision-maker, according to the seriousness of the interference with those rights.[15]

Further, the Court of Appeal in *R (Mahmood)* v *Home Secretary*[16] decided that in reviewing a decision of the authority affecting human rights, the decision of the authority would be made subject to the most anxious scrutiny and where the decision interfered with human rights, the interference could only be justified to the extent permitted by the Convention. It was also held that the court would ask whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention having regard, in accordance with section 2 of the 1998 Act, to European jurisprudence.

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[13] [1996] QB 517.

[14] Article 8 provides for right to respect for private and family life, home and correspondence.

[15] [1996] QB 517 at 554.

[16] [2001] 1 WLR 840.

In *R (on the application of Farrakhan)* v *Secretary of State for Home Department*[17] the Court of Appeal was satisfied that the Secretary of State had provided explanation for a decision that turned on his personal, informed, assessment of risk to demonstrate that his decision did not involve a disproportionate interference with freedom of expression. The Court also ruled that since the Secretary had acted for the purpose of prevention of disorder, which was legitimate aim under Article 10(2) of the Convention; his decision struck a proportionate balance between that aim and freedom of expression.

It is also essential to note the attitude of the House of Lords in *R (SB) Denbigh High School.*[18] According to the Court the application of the principle proportionality involved no shift to merits review, but the intensity of review is greater than previously appropriate and greater even than heightened scrutiny test adopted in *exparte Smith.* The jurisprudence on the principle of proportionality as a ground on its own in judicial review under the English law was further developed with the used of principle of proportionality as a structured test.

PROPORTIONALITY USED AS A STRUCTURED TEST

The English courts made further development on the application of principle of proportionality when the principle is used as a structured test in cases of infringement of rights under the ECHR and Human Rights Act 1988, and constitutional common law rights.[19] The structured test is to engage the court in the exercise of constitutional review to address a series of questions in assessing whether the impugned decision of the public authorities is justifiable.[20]

In *R (Darly)* v *Secretary of State for Home Department,*[21] the issue was whether standard cell search policy amounts to an infringement of the prisoner's right to legal professional privilege.[22] It was held by the House of Lords that a person sentence to custodial order retained not only the right

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[17] (2002) 4 All ER 289.

[18] (2006) UKHL 15.

[19] *R (Darly) v Secretary of State for Home Department* [2001] 2 AC 532, *R v Ministry of Defence ex parte Smith & others* [1996] QB 517, *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, *R (on the application of Farrakhan) v Secretary of Statte for Home Department* (2002) 4 All ER 289, *R(SB) Denbigh High School* (2006) UKHL 15. According to Wade fundamental rights at common law are basic rights which include right to life, freedom of the person, freedom of speech and the right of access to the courts. Refer Wade, Sir William, *Administrative Law,* 9th ed., (Oxford: Oxford University Press, 2004), 392.

[20] Lord Woolf and others, *De Smith's Judicial Review,* 6th ed., (London: Sweet & Maxwell, 2007), 586-587.

[21] [2001] 2 AC 532.

[22] According to the relevant policy, which was introduced in 1995, prisoners were to be excluded during cell searches to prevent intimidation and to prevent prisoners acquiring a detailed knowledge of search techniques. It also allowed the officers to examine, but not read, any legal correspondence in the cell to check that nothing had been written on it by the prisoner, or stored in between its leaves, which was likely to endanger prison security.

of access to a court and legal advice but also the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Therefore, such rights could only be restricted by clear and expressed words and only to the extent reasonably to meet the ends which justified the restriction. It was decided that the policy infringed prisoner's right to legal professional privilege and intruded into the privileged correspondence of prisoners greater than was justified by the objectives it was intended to serve, the policy was unlawful.[23] The policy too was held to have interfered with the applicant's right of his correspondence under Article 8(1) of the Convention because the interference to the prisoner's right was greater than what was necessary for the prevention of disorder and crime. Lord Steyn in this case endorsed the three steps structured test on proportionality formulated by Privy Council in *de Freitas*, which are as follow: [24]

> 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.

The three steps test was further developed by the House of Lords in *Huang v Secretary of State for the Home Department.*[25] In this case the House of Lords made an additional step to the three approaches laid by the Privy Council in *de Freditas* -- to determine whether a measure is proportionate there is a need to balance the interest of society with those of individual and groups.[26] The additional step imposed a more burdensome justification on the government to justify the interference.

With the development of the three steps test and the four steps test, the authority is given the responsibility to provide justification whenever its action or decision affect Convention or Human Rights Act. However, it is essential to note that whether three or four-step approach is adopted it depends on the seriousness of the interference on fundamental rights.[27] The more severe the allegation of infringement the more is required by justification.

However, the court did not tie itself to the three or the four steps structure tests in adopting the principle of proportionality as ground of judicial review. What the court look at is the application of proportionality in the sense of fair balance. This was illustrated in the recent case of *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent).*[28] The issue in this

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[23] [2001] 2 AC 532.

[24] [2001] 2 AC 532 at 547.

[25] [2007] AC 167.

[26] [2007] AC, 167, paras 19-20.

[27] Normawati Hashim, *Malaysian Public Law Jurisprudence: Urgent Need For A Shift Of Focus Towards A Dynamic Regime,* PhD Thesis, Law Faculty, University of Malaya, Kuala Lumpur, 2012. Pg. 78.

[28] [2017] UKSC 51

appeal was whether fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") were unlawful because of their effects on access to justice. It was decided that the imposition of the fees was unlawful under both domestic and EU law because it has the effect of preventing access to justice and the imposition was not justified. In this case the court did not specifically apply the structured test of proportionality in its decision but the application of proportionality is in the sense of fair balance.[29] Hence, what is important is to review the proportionate action of the public authority so that a fair balance or proportionate balance is attain according to the objective to be achieved. If this is not achieved the action would be struck out as disproportionate, thus invalid. With the flexible attitude adopted by the English courts a jurisprudence on the application of principle of proportionality as grounds of judicial review in United Kingdom was able to be developed and used to check upon the proportionate action of the public authority.

PROPORTIONALITY IN MALAYSIA

Malaysia as one of the countries practicing common law in the judicial review system on the actions of the authorities, follows the same development as in United Kingdom. Following the same approach as in United Kingdom, the principle of proportionality as one of the grounds for judicial review was also accepted by the courts in Malaysia. This was illustrated by the Court of Appeal's decision in *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Pendidikan.*[30] In this case, an action was taken against the Appellant, a senior assistant of a primary school for keeping a sum of RM3,170 with him, instead of paying the salary to the school gardener, who was absent for work for months. The Department instructed him to return the money and he finally did. He was convicted and sentenced to six months imprisonment in the Sessions Court. The High Court affirmed the decision but passed an order to be of good behaviour for three year's period. Later, the Education Department wrote to the Education Service Commission requesting them to demote the appellant's rank to an ordinary teacher. Nevertheless, the latter dismissed him. The appellant challenged his dismissal at the High Court on the ground, among others, for breached of rules of natural justice for not giving him the reasonable opportunity of being heard before his dismissal. The dismissal was upheld by the High Court but was later reversed by the Court of Appeal. Gopal Sri Ram JCA who delivered the Court of Appeal's decision ruled that the dismissal was too severe a punishment on the appellant. In his judgement Gopal Sri Ram JCA

[29] Jeffrey JOWELL, « Proportionality in the United Kingdom », Revue générale du droit (www.revuegeneraledudroit.eu), Etudes et réflexions 2018.
https://www.revuegeneraledudroit.eu/wp-content/uploads/coll_par2_20180208_Jeffrey%20JOWELL.pdf

[30] [1996] 1 MLJ 261

commented on the essence of Articles 8(1) and 5(1) of the Federal Constitution:[31]

> the requirement of the fairness which is the essence of Article 8(1) when read together with article 5(1), goes to ensure not only that a fair procedure is adopted in each case on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.

The above case illustrates that based on the spirit of Article 8(1) of the Federal Constitution it is important that when the authorities impose punishment against a person, the punishment, which is part of a procedure, must be fair. To make certain that fairness is achieved the punishment must not be severe and must be proportionate to the facts of the case.

The acceptance of the doctrine of proportionality was also made by the Federal Court decision in *Rama Chandran, R v The Industrial Court of Malaysia & Anor.*[32] According to Edgar Joseph Jr FCJ:[33]

> Turning to Lord Diplock's fourth ground of judicial review – namely, proportionality – there are cases in the United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has been recognised as a general principle of English law, and when applied, it enables that court to review an impugned decision for substance as well as process. I have in mind cases such as *R v Bansley MBS, Ex-parte Hook* [1976] 1 WLR 1052; *Wheeler v Leicester City Council* [1985] AC 1054 and *London Borough of Brent, Ex parte Assegai,* The Times, June 18, 1987.

It is also important to take note of the observation by the Court of Appeal in *Dr. Mohd. Nasir bin Hashim v Menteri Dalam Negeri.*[34] In the present case, the court reminded that the Malaysian Constitution must be given a liberal interpretation, particularly those providing fundamental rights. The Court emphasised that in interpreting the Federal Constitution, the court must bear in Article 8(1)[35] as the Article guarantees fairness of all forms of State action and it also imports the principle of substantive proportionality.[36] Based on this principle not only must the legislative or executive response to state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved.[37] This principle is sometimes referred to as

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[31] [1976] 1 MLJ 261 at 290.
[32] [1997] 1 AMR 433.
[33] *Id* at 472.
[34] [2006] 6 MLJ 231.
[35] [2006] 6 MLJ 213 at 219. Reference was made to the decision of *Om Kumar v Union of India* AIR 2000 SC 3689.
[36] [2006] 6 MLJ 213, 219.
[37] *Ibid.*

'the doctrine of rational nexus'.[38] Hence, based on those reasons the court is entitled to strike down state action on the ground that it is disproportionate to the object ought to be achieved.[39]

CONCLUSION

The principle of proportionality was not well accepted during the early years of its development under the common law system. The reason being the courts were of the view that the review based on proportionality would touch the merit review of the administrative decisions. Hence, under common law, the review is considered as *Wednesbury* unreasonableness. But the weaknesses of *Wednesbury* is, it is insufficient to review the illegal act of the authority that infringed rights protected under the European Convention on Human Rights (ECHR) or Human Rights Act 1988 of an individual. Thus, jurisprudence needs to be developed to overcome the weaknesses under *Wednesbury* unreasonableness. To fill the gap, principle of proportionality was adopted. The jurisprudence on the application of the principle of proportionality went further with the establishment of the three and the four steps structure test used in the review of action of the authorities that infringed rights under ECHR or Human Rights Act 1988. Whether three or four-step approach is adopted it depends on the seriousness of the interference on fundamental rights.[40] Even though the three steps or the four steps test were developed, the court did not tie itself solely to the test when judicial review is made. What the court would look at during the review is whether a fair balance or proportionate balance is attained according to the objective to be achieved. If this is not achieved the action would be struck out as disproportionate, thus invalid. In conclusion, *Wednesbury* unreasonableness is inadequate in providing sufficient grounds of judicial review of action of the public authority in cases of infringement of human rights. To filled in the gap, the English courts have creatively adopted principle of proportionality. A similar approached was adopted by the Malaysian Courts. This was illustrated in *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Pendidikan, Rama Chandran, R v The Industrial Court of Malaysia & Anor* and *Dr. Mohd. Nasir bin Hashim* v *Menteri Dalam Negeri.* With the expansion of governmental powers in the modern administration in both United Kingdom and Malaysia today, the courts now are shouldered with heavy responsibility in controlling powers of the public authorities. Thus, it is vital that the parameters of judicial review are extended so that the review of actions or decisions of public authorities go

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[38] *Ibid.* Also see *Malayan Bar & Anor* v *Government of Malaysia* [1987] 2 MLJ 165.

[39] [2006] 6 MLJ 213,219.

[40] Normawati Hashim, *Malaysian Public Law Jurisprudence: Urgent Need For A Shift Of Focus Towards A Dynamic Regime,* PhD Thesis, Law Faculty, University of Malaya, Kuala Lumpur, 2012. Pg. 78.

beyond the realm of punishment. With the acceptance of the principle, the jurisprudence on application of proportionality is clear and it provides for a better protection of the both normal rights and human rights of an individual against unlawful act of the public authority.

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