A Study of Recent Development in the Grounds for Judicial Review: Where are we heading?

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This paper aims to study the effect and influence of European Community law and European Convention for Human Rights on two grounds of judicial review, i.e. Wednesbury unreasonableness (including super Wednesbury) and proportionality principle, to the English legal system. Moreover, grounds of review in Hong Kong are also studied because Hong Kong courts are increasingly faced with conflicts between the mainland jurisprudence and the common law reasoning by virtue of the Basic Law. As such, judicial review cases are studied to see how the courts of Hong Kong view the decisions made by the English courts, which do not have binding authority but highly persuasive.

It is found that the traditional Wednesbury unreasonableness has fallen short of a useful and coherent ground and the shortcomings are escalated in review related to European Convention for Human Rights. It is submitted that two developments would follow: Firstly, the super Wednesbury principle (also known as anxious scrutiny) would continue to evolve to supplement the ordinary Wednesbury. Yet, the ground itself is not clear and certain. Secondly, the proportionality principle, adopted from the European legal system, would gain importance given the disadvantage of Wednesbury in Convention rights case. It is predicted that the application of proportionality test would be extended to other cases as well but in the near future it is unlikely to replace ordinary Wednesbury altogether.

In the Hong Kong, Wednesbury remains to be an important ground of review. Proportionality test was at first regarded as a branch of Wednesbury. It was later evolved into an important, separate ground of review. Yet, anxious scrutiny is not recognized as a separate ground. It is submitted that Hong Kong courts are not under stress to deviate from the Wednesbury test and the problems substantiated in England are not highlighted in Hong Kong.
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A STUDY OF RECENT DEVELOPMENT IN THE GROUNDS FOR JUDICIAL REVIEW: WHERE ARE WE HEADING?

INTRODUCTION

Judicial review is an important process in administrative law through which the Courts of Law review the legality of the decision made by the Executive. Currently, there are more than 10 separate grounds for review\(^1\). Yet, new cases and legal principles arise, setting against the established grounds for judicial review. Historically, domestic administrative law in England was a purely national matter. However, in recent years the English law has increasingly become subject to two powerful European legal forces, i.e. The European Convention on Human Rights and European Community Law.

The first shaping force is imposed by the European Community, mainly through the European Court of Justice (hereafter as ECJ). The ECJ is the supreme adjudicating body of European Community law. After the United Kingdom joined the Community, all judicial matters in England concerning Community affairs could be referred to ECJ after preliminary ruling in domestic court\(^2\). By virtue of the European Communities Act 1972, ECJ’s decision binds by all English courts. As ECJ follows the continental European legal systems and adopts on civil law principles, British judges are obliged to consider civil law principle when necessary\(^3\). This brings the civil law traditions into the realm.
The second shaping force is the European Convention of Human Rights. The European Convention on Human Rights is an international treaty signed by most European states. The treaty, contrary to a common misconception, is not one of the European Union treaties. The Convention is governed by the Council of Europe, instead of the European Union. Even though the British government has signed the Convention for a long time, the obligations imposed had not been incorporated into the domestic law in the realm. Thus, at that time British citizens seeking redress under the Convention had to resort to the European Court of Human Rights at Strasbourg. The Human Rights Act 1998 came into force in October 2000 with a view to partially ‘bringing Convention rights home’. This Act is considered to be able to achieve the aim as half of the review claims is related to the Act.

As provided in the Act, the English judiciary has an obligation to, inter alia, consider all the relevant cases in European Court of Human Rights. Yet, there is no express statutory duty to follow the established European case. However, in Alconbury, it was decided that the jurisprudence of the European Court of Human Rights should be, prima facie, binding. Thus, it greatly affects the development of grounds for judicial review because of the indirect incorporation of the European jurisprudence.

Without exception, recent development in grounds for review in England have been immensely influenced by the two shaping forces. It is said that the development in judicial review is undergoing an “Europeanisation” process. As a result of the abovementioned development, some grounds for judicial review have undergone the most dramatic changes in recent years and are most debated. They are the Wednesbury unreasonableness (including the
super Wednesbury) and proportionality principle.

In the context of Hong Kong, judicial review offers a very important administrative check in Hong Kong. After the handover of sovereignty of Hong Kong in 1997, the number of review increased from 119 cases per year to 3869 cases in 2001. To successfully lodge a review, first and foremost, a ground for review has to be formulated. By virtue of the Basic Law, the courts of Hong Kong has to “interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region”. In Ng Ka Ling v Director of Immigration (1999), the Court of Final Appeal held that it was appropriate to apply a purposive approach to the construction of the Basic Law since it is the constitution of Hong Kong. However, does it mean the court should interpret the law in accordance with the civil law tradition in the mainland or the common law tradition in Hong Kong? In the case, a critical term “necessity condition” was referred to. Should the term be construed in the sense of the civil law jurisprudence, or the common law jurisprudence? Should the necessity condition be interpreted as a sort of proportionality test? Should the court of Hong Kong embrace a more judicial-active reasoning?

Summarizing the abovementioned rapid developments, two major questions arise:

Firstly, how would the courts in England view the principles established by the precedent cases? Would they re-interpret these grounds with a view to extending the current development under the influence of European law?

Secondly, how would the courts of Hong Kong respond to the decisions made by the English courts? Would the Hong Kong courts take into consideration of the decisions made in England despite their persuasive, but not binding, authority?
This study will answer the two questions by examining cases in England, Europe and Hong Kong. The reason why European cases and Hong Kong cases are chosen is because the mainland drafters of the Basic Law actually referred to the European system as a precedent for the scheme of the Law. It is hoped that this study can shed light on current ambiguity and confusion among the many regarding the constitutional and administrative development of Hong Kong from the perspective of judicial review. The study will start by examining the reasoning in the related judicial review cases judgments themselves, and then move on to more general principles and consideration. The pros and cons of different grounds will be assessed and discussed, and predicted development would be suggested.

2. THE DEFICIENCY OF WEDNESBURY

Wednesbury unreasonableness has been an important ground for judicial review. It was first defined by Lord Greene as “...[a] decision on the competent matter is so unreasonable no reasonable authority could ever have come to it, then the courts can interfere.” However, it can easily be seen that this definition of unreasonableness is nothing but tautology. It is also submitted that the definition begs the question of what truly constitute an unreasonable conduct of the administration. Thus, in 1985, Lord Diplock attempted to offer a better exposition by classifying and defining different grounds for review in the GCHQ case. In his speech, Lord Diplock distinguishes between procedural impropriety, illegality and irrationality. The latter two category can be said to grounds for substantive review for they challenge the merits of administrative discretion while the former is concerned with the legality of the procedures the administration have observed. Besides, irrationality is generally taken to be synonymous with the Wednesbury unreasonable, and defining it as “ 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”.

It can be seen that unreasonableness as a ground of review is straightforward, easy to comprehend. However, a closer examination reveals that it fails to objectively define what can be amounted to unreasonableness. To solve the problem, in the ensuing years the simple concept had evolved into a sophisticated and complex principle. Besides, the test remains stringent and subjective as any reasonable people may have different moral standard and rigour in their moral fibres. Moreover, the test is stringent in a sense that the court will only consider cases with serious violation of rights such that a high burden is placed on applicants. As a result, it is regarded as the hardest ground for a claimant to win on. The European Court of Human Rights and the House of Lords have also made criticisms concerning the application of Wednesbury unreasonableness. For example, Lord Cooke commented that:

“And I think that the day will come when it will more widely recognized that the 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 few extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.”

3. HOW “ANXIOUS” SUPER WEDNESBURY IS?

Although the Wednesbury principle has fallen short as an effective and cohesive ground of review, the English courts, prior to the enactment of the Human Rights Act 1998 (HRA), were
reluctant to change by virtue of the doctrine of stasis decisis. Even if the English courts acknowledged the impact of administrative decisions under the European Convention on Human Rights and subjected its decisions to “anxious scrutiny” in the case of Bugdaycay, the level of scrutiny is generally regarded to have been less than that which the European Court for Human Rights apply and preferring to base the review on the Wednesbury. Yet, in R v Ministry of Defence ex p. Smith, a modified Wednesbury test was applied. It was decided that:

“The court may not interfere with the exercise of an administrative discretion on substantial 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 the 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…”

The case is developed in the Smith case as a response to the Smith and Grady case of the European Court of Human Rights so that the anxious scrutiny test can be levelled to be in conformity with the European standard. It is seen that the intensity of review is stricter than the unreasonableness test. Moreover, the onus of providing justification lies on the public authority. As such, the modified Wednesbury is known as the super Wednesbury, anxious scrutiny approach or rigorous scrutiny (See Prolife Alliance case and case analysis). However, it can be observed that there are a few problems with this approach. Firstly, in the pre HRA era, one has to find a “human rights” or “fundamental rights” recognized by the common law in order to rely on anxious scrutiny. In that case, even if a right is provided in the Convention, provided that it is not recognized by the common law, no review could be sought by the claimant.
Secondly, even though the administration has to justify the interference with human rights, they are allowed a “margin of appreciation” and the immunity zone was not defined. Thirdly, it is not explicitly explained what “substantial justification” is. In R v Secretary of State for the Home Department ex p. Simms\textsuperscript{30}, it can be seen that although the court followed a similar reasoning by making it clear that infringement of human rights can be lawful only if justified by reference to legitimate objectives, the Simms case differs in that it requires the decision-maker to satisfy the court that the infringement serves “a pressing social need“ and is necessary that it restricts the right not further than is required. In essence, the margin of appreciation, the discretionary power enjoyed by the decision-maker is thus reduced and the level of justification required by the court increases, lowering the threshold of review and increasing the intensity of review (See Table 1: Intensity of Review).

Table 1: Intensity of review: It can be seen that the anxious scrutiny approach has the highest intensity among other members of the Wednesbury family.\textsuperscript{31}

<table>
<thead>
<tr>
<th>Type</th>
<th>Threshold of review</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quasi-Wednesbury</td>
<td>“[S]o absurd that the decision-maker must have taken leave of his senses”</td>
<td>Nottinghamshire County Council [1986]\textsuperscript{32}</td>
</tr>
<tr>
<td></td>
<td>“[S]o unreasonable no reasonable authority could ever have come to it”</td>
<td>R v Ministry of Defence ex p. Smith [1995]\textsuperscript{33}</td>
</tr>
<tr>
<td>Ordinary-Wednesbury</td>
<td>“[A] decision that elicits the exclamation ‘my goodness, that is certainly wrong!’”</td>
<td>R v Devon County Council ex p. George\textsuperscript{34}</td>
</tr>
<tr>
<td></td>
<td>“[S]o outrageous in its defiance of logic or of accepted GCHQ case”</td>
<td>GCHQ case\textsuperscript{35}</td>
</tr>
</tbody>
</table>

\textsuperscript{30} R v Secretary of State for the Home Department ex p. Simms.

\textsuperscript{31} Table 1: Intensity of review.

\textsuperscript{32} Nottinghamshire County Council [1986].

\textsuperscript{33} R v Ministry of Defence ex p. Smith [1995].

\textsuperscript{34} R v Devon County Council ex p. George.

\textsuperscript{35} GCHQ case.
moral standards that no sensible person who had
applied his mind to the question to be decided could
have arrived at it”

| Anxious scrutiny or Wednesbury | “Reasonableness in such cases in not, however, synonymous with ‘absurdity’ or ‘persersity’. Review is stricter and the courts ask the question posed by the majority in Brind, namely, ‘whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression was justifiable’. This test lowers the threshold of unreasonableness. In additional, it has been held that decisions infringing rights should receive the “most anxious scrutiny” of the courts. “The court may not interfere with the exercise of an administrative discretion on substantial 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 the 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 |
In additional to the benefits of increased intensity of review, in the post HRA era, the courts are able to enforce the provisions of the Convention direct and thus anxiously scrutinize if any administrative decisions made have infringed the rights of the claimant. As such, all the rights provided in the Convention could be enforced in domestic court directly. The only remaining puzzle thus lies with “substantial justification”.

The court obvious agreed that the problem needs to be addressed. In R (Mahmood) v Secretary of State for the Home Department, Lord Phillips said that:

"[T]he court can no longer uphold the decision on the general ground that there was ‘substantial justification’ for interference with human rights. Interference with human rights can only be justified to the extent permitted by the Convention itself...When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, 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. When considering “the best of necessity” in the situation, the court must take into account the European jurisprudence”

The difficulty faced by the court is that, even though Lord Phillips felt that there is a need to modify the pre-HRA approach in the Smith and Simms cases, it is difficult to see how the approach was modified. It is believed that the phase “European jurisprudence” alluded the
incorporation of the proportionality principle, an European ground of review, could be introduced into the anxious scrutiny approach\textsuperscript{40}. The belief was confirmed, beyond doubt, in \textit{R v Secretary of State for the Home Department ex p. Daly}. Lord Bingham, who gave the leading speech, held that interferences with common law rights would be lawful only if it was necessary to achieve a competing public interest: it could not go beyond what is necessary. It is submitted that, inter alia, the decision has two major importances.

Firstly, the approach in Daly confirmed the prior decisions and make it explicit the what could be done by the administration could not exceed what is necessary. In essence, this is what the proportionality principle is. Hence, giving rise to the speculation that the Wednesbury unreasonableness would subsequently replaced by the proportionality principle. Secondly, even though Daly was concerned with judicial review of an administrative decision which violated a common law constitutional right, the judgment explicit mentioned that the same approach should be applied to Conventions rights in HRA cases, extending the application of the approach. It is submitted that the above implications of the case would be an enormous impact of the grounds of review. However, before moving into what the change would the case lead to, it is better to have a look at what proportionality principle is.

4. THE EMERGING PROPORTIONALITY PRINCIPLE

Proportionality principle is originally a European administrative law principle which is frequently used by the German jurists and is recognized in public international law\textsuperscript{41}. This principle requires a reasonable relationship between an administrative objective, particular legislative or administrative means\textsuperscript{42}. To achieve its objectives the administration must adopt
effective means of policy implementation because it is the reason why public administration shall exist: to realize collective goals through programmes of state action. Inevitably, when the executive does so, the interests of individual may be adversely affected. Very often private interests have to give way to the greater public good. As such, it is submitted that the proportionality principle would be an effective means to examine the effectiveness of actions taken by the executive, ensuring that the executive’s interference to the individual’s interests would be necessary and proportionate.\textsuperscript{43}

The early study of application of doctrine of proportionality as a ground for judicial review dates back to the 1970s, while the first established authority on the use of proportionality principle in the English legal system is the speech given by Lord Diplock in GCHQ case. He commented that proportionality might be adopted as a separate ground of review, giving a green light on the use of this European ground of review. However, it is deemed that the application of the principle was limited: It did not attract much attention and relied upon until after the enactment of Human Rights Act 1998 (the HRA). The HRA incorporates the European Convention for Human Rights into the English legal system. The HRA also requires that a court or a tribunal must take into account of, inter alia, judgment, decision, declaration or advisory opinion of the European Court of Human Rights. In so doing, proportionality principle is brought into the English legal system via this Act by taking account of the judgment of the European Court of Human Rights. However, it is submitted that the incorporation can only be said to be a limited one since the proportionality principle can only be sought in cases related to the Convention rights.
It is interesting to note that before the enactment of the HRA, the flexible proportionality principle only had a limited application. It is submitted that the reasons of this trend might be attributable to three main reasons. Firstly, the introduction and the use of proportionality as a head of review is inconsistent with the constitutional role of English courts; Secondly, the traditional judicial role played by of court make it is difficult to apply the test. As such, the court was, in the past, reluctant to embrace the concept explicitly. Thirdly, it is a result in decisions in case law. Lastly, the control conferred to by the proportionality test is redundant and ineffective.

4.1 The Constitutional Order of the Courts of Law

Before the HRA has come into force, the proportionality was established in case law in a piecemeal manner. As mentioned, the test considers the ends and to evaluate whether the means is justified. Hence, by definition this test is very flexible in natural. Let alone the controversy that the flexibility would render the law uncertain, and the flexible would give chances for judicial creativity. When a flexible law is enacted, the legislature delegates some of the decision making power to regulate “whatever area of activity is at issue from itself to those who are responsible for that law’s application”. It follows that when the court incorporates the proportionality test in the form of common law, i.e. without the explicit approval of the legislature, the doctrine of parliamentary sovereignty would be violated. The doctrine is a fundamental rule of the common law. It contends that parliament is the supreme law making body and may enact laws on any subject matter and that no person or body, in including any courts of law, may question the validity of parliament’s enactments. Moreover, it is submitted that the separation of power, a fundamental constitutional concept, would not be observed.
This line of argument is flawed because the traditional, ordinary Wednesbury unreasonable is neither expressly endorsed nor voted by the Parliament. Nowhere can anyone argue that this ground, which has been developed by the court and have been relied on for many years, is any less legitimate because of the lack of approval by the Parliament. As mentioned, the proportionality test was introduced to the English legal system in 1983 in GCHQ case that since then it has been possible to be an independent ground of review. Besides, the time is long enough firstly, for the Parliament to take notice of the common law and review its appropriateness and take actions and secondly, for a change to take place so slowly that legal certainty could be maintained. Besides, in the post HRA era, the Parliament has made it explicit that the English court shall consider the use of European jurisprudence. By virtue of the act, the constitutional order is observed even if the proportionality principle is applied in the English court.

4.2 The Judicial Role of a Court

The second objection against the incorporation of proportionality as a ground of review is concerned with the difficulty of applying the test. To illustrate, it is helpful to have in mind the “fact sensitivity” of a law. The fact sensitivity of a law is “the degree to which the outcome of applying it depends on the detailed factual context in which it is applied”\(^4^9\). If a law is expressed in simple and rigid terminology by referring to precise, concise legal concepts then the law can be said to be fact insensitive. For example, if a law prescribes that anyone person who commits burglary shall be subject to a ten-year imprisonment, such law would be fact insensitive because whoever commits the crime would be sentenced to a ten-year imprisonment without taking into account of the seriousness of the crime committed. The limitation of a law that is fact insensitive
is that the sentence, or the decision, is dependent on only one variable, which is whether the defendant has committed burglary or not. In the context of any particular case, it is illustrated that fact insensitive law might be a cause of unfair or unjust decision because the court could not take into consideration of more relevant facts of the case and decide in the light of the merits of individual case. As such, in law related to human rights, the law should be more fact sensitive in order to provide a better protection of human rights. Generally speaking, a law can be made more fact sensitive by two ways. Firstly, by making the law more detailed by taking account of a wilder variety of variables relevant to the case. In the example, the economic loss caused by the burglary might be taken into account of by the court when deciding the length of sentence. Secondly, a law may be made more fact sensitive by increasing the discretion it allows to the judiciary which applies the law. While it is impossible to include all the variables into a law, the second approach would be more effective in human rights protection case because it would be much easier to tailor the rules to the particular circumstances of individual case. Normally, Wednesbury unreasonableness is a less fact sensitive test (as the only criteria of unreasonableness is whether it is unreasonable or not) whereas proportionality test is a more fact sensitive test (as it considers all the relevant facts regarding the ends and to weight the means in achieving the ends). It must be emphasized that, nonetheless, although proportionality test is a fact sensitive test, but whether the proportionality test should be incorporated into the common law is a question of law, but not a question of fact. The two concepts are related but are different.

As illustrated, fact sensitive test allows a degree of flexibility of application. Yet, other than the problem related to doctrine of parliamentary sovereignty in regard of the exercised of discretion by a court, the flexibility allows judges to adjudicate the merits of the administration in
a more liberal manner. However, the English judges, by virtue of the doctrine of separation of power, often have limited expertise or practical knowledge of the wider problems of administration because “judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge an advice, to decide the answer to an administrative problem where the scales are evenly balanced”\(^{50}\). Thus, it is argued when a highly fact sensitive proportionality test is applied, the decisions would be problematic. It is submitted that this line of argument could not stand. Firstly, the doctrine of separation of power is present in many European countries. There is no reason why the doctrine would only impose limitation on the English legal system not the others. Furthermore, English judges are high competent and knowledgeable. Lord Mackay, the former Lord Chancellor, commented that, inter alia, to be appointed as a judge, a person must possess:

“…good sound judgment based upon knowledge of the law, a willingness to study all sides of an argument with an acceptable degree of openness, and an ability to reach a firm conclusion and to articulate clearly the reasons for the conclusion.”\(^{51}\)

As shown, any person appointed as judge should be wary of reviewing cases requiring detailed knowledge of and expertise in matters that he lacks. Lest, he would not have been appointed as a judge from the outset. Moreover, there have been initiatives taken by the judiciary to train the legal personnel as well\(^{52}\).

With the benefit of hindsight, the biggest flaw with this objection is that in the post HRA era, the court is obliged to interpret Convention rights by European jurisprudence, i.e., the proportionality principle. Even though the application of the test in these cases is far from perfect,
there is no serious problem identified. Thus, the argument that a fact sensitive proportionality test is overly difficult to apply in court is unsound and unconvincing.

4.3 Decisions in case law

In the 1980s, Lord Diplock commented that proportionality principle might be established as a separate ground of review and anticipated that “someday”\(^{53}\) it would be recognized in the English common law. Then, in the early 1990s, Lord Roskill delivered the judgment on \textit{ex p. Brind}\(^{54}\) case, saying it was “not today”. As the number seminal judicial review cases regarding the debate of proportionality that eventually heard in House of Lords was limited, for a very long while the Court of Appeal lacked clear direction as to how cases should be decided. Moreover, common law proportionality was regarded as a matter without pressing need by the many thanks to the statutory proportionality test via the HRA\(^{55}\).

4.4 Redundancy and ineffectiveness of proportionality?

The last argument that Wednesbury should not be used as a ground of review is based on the reasoning that there is a pre-existing Wednesbury unreasonable, so that the proportionality test is redundant. According to Wong (2000), there are two branches to this argument. First, some questioned whether the use of proportionality was a separate ground of review and regard the test as a mere aspect of or indication of irrationality. This line of argument is supported by the decision in \textit{R v General Medical Council ex p. Coleman}\(^{56}\) by Gibson L.J, quoting the judgment in the \textit{ex p. Brind} case mentioned earlier in this paper. The judge then moved on to conclude that proportionality was not an independent head of review, but “an aspect of the submission based on Wednesbury unreasonableness”. The second line of reasoning
acknowledges that the Wednesbury test has some deficiencies, and yet the proportionality test would be ineffective in solving those problems. No matter what, for illustration purposes a comparison between the Wednesbury unreasonableness and proportionality test must not be avoided.

5. PROPORTIONALITY AND WEDNESBURY

As illustrated above, both Wednesbury and proportionality principles are substantive review in a sense that the should side aside executive decisions on the basis of their substantive content, rather than the way in which decisions are made as in the procedural impropriety (See Magill v Porter on procedural fairness). At this stage, it is preferable to distinguish the common law proportionality, which is established by case law, and the HRA and European Communities Act defined proportionality test, which is established by the HRA. Since the proportionality test is incorporated into the English in regard of the HRA and Convention rights, the analysis would be confined the application of the test to the Convention rights.

5.1 Application in relation to Conventions rights

By virtue of the European Communities Act 1972, the meaning or effect of EC legislative provisions is required by the Act to be interpreted by the executive and the judiciary in accordance with EC law, including the jurisprudence of the European Court of Justice. Together with the HRA, provisions in EU law and European Convention on Human Rights have now to be read in accordance with European jurisprudence. In this regard, the ordinary Wednesbury obviously was not a desirable ground of review, as illustrated in the Table 2 below.
Table 2: The fate of Wednesbury in Convention right contexts

<table>
<thead>
<tr>
<th>Art. 2</th>
<th>Art. 3 (at least in immigration and asylum)</th>
<th>Art. 5(4) (at least in mental health cases)</th>
<th>Arts 8-11</th>
<th>Arts 14 (at least in cases with DNA sample)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The CA is close to accepting that irrationality review must be so intense that it is in effect merits review (plus some deference)(^59)</td>
<td>Irrationality review does provide an effective remedy, but there must be anxious scrutiny(^60)</td>
<td>Irrationality review is not an effective remedy as it excludes adequate examination of merits(^61)</td>
<td>Irrationality is no longer appropriate; instead use proportionality plus deference(^62)</td>
<td>Proportionality is used, yet the test appears to be in some aspect similar to Wednesbury – named as “proportionality in motion”(^63)</td>
</tr>
<tr>
<td>R(Bloggs 61) v Secretary of State for the Home Department [2003](^64)</td>
<td>R v Secretary of State for the Home Department ex p. Thangarasa [2002](^65)</td>
<td>HL v United Kingdom (2004)(^66)</td>
<td>Daly case(^67)</td>
<td>Marper(^69) case and S case(^70), citing Handyside v UK (1979)(^71)</td>
</tr>
</tbody>
</table>

It is illustrated, in Table 2, that only regarding Article 3 of the Convention that the court accepts that the super Wednesbury, or the anxious scrutiny, does provide an effective remedy. In
relation to Articles 2, 5(4), 8-11 of the Convention, the court even make it clear that the ordinary Wednesbury is not an affective remedy. In contrast, the proportionality is virtually applicable to all provisions in the HRA and Convention rights as provided in the Act per se. Regarding Articles 8 to 11, it is crystal clear that the preferred ground is proportionality test. These decisions could be explained by the fact that European Court of Human Rights views that a law may give rise to disproportionate interferences with Convention rights if a more fact sensitive principle could more realistically have been used to achieve the policy objective at issue. This is observed in cases such as Campbell v UK72, Tinnelly and McElduff v UK73 and Papachelas v Greece74. In all three cases, the European Court of Human Rights held that there had been a disproportionality and disapproved of a more fact insensitive rule and preferred a more fact sensitive approach. In the area of Convention rights, the proportionality principle has a dominating role over Wednesbury unreasonableness and might even replace it in this regard75.

6. THE CASE FOR A COMPLETE INCORPORATION

As illustrated in the Deficiency of Wednesbury part above, Wednesbury has evolved into a complex and difficult to comprehend concept. As shown, proportionality principle is, in a material sense, same as the Wednesbury principle yet having the benefits of flexibility, clarity and simplicity. There is no reason why the court should “steam hammer to crack a nut, if a nutcracker would do”76. It is submitted that proportionality principle should be fully incorporated into the English law instead of partial incorporation via the HRA. There are a number of reasons supporting this argument.
6.1 Acknowledging the status quo

First and foremost, even thought it is admitted that the proportionality test is a separate ground of review but not a branch of Wednesbury unreasonableness, it is not difficult to see that the ordinary Wednesday and the proportionality test have significant similarity. It is submitted that judges, for many years, have borrowed ideas from proportionality principle without admitting it. Moreover, the proportionality principle has been applied effectively in Convention rights cases; it would be absurd if the application of this principle is limited only to rights prescribed by the Convention only. Furthermore, It is argued that it is shown in the Farrakhan case that principle of proportionality is de facto a part of English administrative law so that even if Convention rights are not engaged (as the claimant was living in the USA) the court could apply the principle.

6.2 Dissatisfaction with Wednesbury

The second argument for the incorporation of proportionality as a ground of review lies in dissatisfaction with the status quo. As illustrated earlier, Wednesbury test is not a satisfactory test and recently sentiment was expressed in the House of Lords by Lord Cooke in R v Chief Constable of Sussex, ex p. International Trader’s Ferry Ltd [1999]. It is submitted that there are three reasons why Wednesbury is unsatisfactory.

Firstly, the to state the obvious, Wednesbury unreasonableness is a tautological per se. From the mere definition of Wednesbury unreasonableness, it is difficult to see why it is justifiable for judicial intervention in administrative decisions and set aside the doctrine of separation of power. An asserting or stating that an administrative decision is irrational does not
justify why the court should intervene. Instead, it is more important to elaborate and illustrate why a decision was, in the eyes of the court, unreasonable\textsuperscript{80}. Yet, the tautology merely states that what is irrational is something irrational that no rational man would do it, which in essence means nothing and explains nothing. It can be thus concluded Wednesbury unreasonableness is no longer adequate because there is a change in society in praise of better governance in the government as well as in the public sector as observed in Britain and in Hong Kong. On the other hand, proportionality principle is a much more principled and coherent form of review.

Secondly, the Wednesbury unreasonable is in theory not a fact sensitive form of review. Yet, in reality, the court often applies a differential standard of judicial protection which varies depending on the impact of public power upon individual, i.e., more fact sensitive. Nonetheless, when comparing with the proportionality principle, Wednesbury is much more rigid. It is viewed that the monolithic, fact insensitive standard of Wednesbury unreasonableness is an imperfect an inappropriate mechanism for the development of differential standards in judicial review: “When a public authority takes a decision affecting an individual’s fundamental rights, it should consider the priority to the affected right, unless it can provide substantial justification for overriding it and not stepping out of the margin of appreciate.”\textsuperscript{81}

6.3 Cohesive legal framework

The final reason advanced for an incorporation of proportionality is because, as mentioned, there is a change in the public culture which demands better governance. The traditional conception of Wednesbury unreasonableness fails to provide a constructive and cohesive response to attaining social needs. Lord Scarman once described the landscape of English administration law as “an assortment of bits and pieces … no more than an ad hoc bunch
of restraints, controls, and procedures”. Currently, rights involving Community law and Conventions are under the armpit of proportionality test thanks to the decision in R v Secretary of State for the Home Department, ex p. Simms illustrated earlier. Yet, administrative decisions outside of the abovementioned areas are in effect immune from judicial check on grounds of proportionality. To state the obvious there is a lack of consistency in common law. As such, it is submitted that so long as it is agreed that, to do justice, the like should be treated fairly and equally, then there is no reason why there should not be a judicial check of proportionality test on the executive should not be incorporated into the English legal system.

Due to the three reasons mentioned above, it is submitted that the proportionality principle should be incorporated into the English legal system. However, it is important to note that there are a number of problems need to be addressed.

7. TOWARDS INTEGRATION OF PROPORTIONALITY

As pointed out, the proportionality principle should be incorporated into the English legal system. Yet, a number of problems and questions need to be addressed. Firstly, the courts need to be oriented towards the public functions of government and adopt a more purposive approach to statutory interpretation. This is well documented and practised in the continental Europe. Secondly, will proportionality principle replace Wednesbury unreasonableness and rendering Wednesbury as “dead”? It is submitted this is an overreaction. Rather, proportionality principle would be viewed as a complement ground that parallels and in part overlaps the Wednesbury unreasonableness. The reason is because the even though in many areas Community law or Convention rights are better protected under the proportionality test, in some areas of Community
the Wednesbury unreasonableness is adhered to\textsuperscript{84}. It is submitted that, even though the English grounds of review are somehow “Europeanized”\textsuperscript{85}, to some extent the European law is “Englishized” by the interaction with domestic courts as well. As such, Wednesbury unreasonableness would survive as a separate ground of review, complementary to the proportionality principle. Moreover, it is viewed that the super Wednesbury (or anxious scrutiny) has in material aspect integrated elements of proportionality principle in the Simms case, because the court introduced the idea of necessity, pressing social need and proportionality in the ratio decidendi of the case. This shows that even though the two strands of law are conceptually different and each of them stands separately, the difference might not be as much as was initially thought of as a result of the integration of the English and the European legal systems.

8. DEVELOPMENT IN HONG KONG

8.1 Hong Kong Courts’ review different grounds for review

The law courts of Hong Kong are not subject to appellate decisions of the European Court of Human Right and the European Court of Justice. However, the Basic Law, the written constitution for the Hong Kong SAR, was enacted by the National People’s Congress (hereafter as NPC). As such, before moving on the explore the situation in Hong Kong, it is important to have a basic understanding of the concepts and structure of the law courts of Hong Kong and of the Chinese constitutional system. Even though the People’s Republic of China (the PRC) has a civil law legal system with a written Constitution, it is of paramount importance to understand that courts do not have the power of judicial review and cannot quote the articles of the constitution for a judgment (except under very limited occasions in the Supreme People’s Court). As a result, the written constitution is not enforceable (in the context of review of the
constitutionality of legislative acts or acts of government) by any courts of law in the mainland China, unlike the situation in common law jurisdictions like the USA, Canada, Australia or India.

Since 2002, there has been a special committee of the Standing Committee of the National People's Congress which has reviewed laws and regulations for constitutionality. Yet, thus far, there has not been any case adjudicated and it is different from the judicial control conferred to the administration through judicial review in other common law jurisdictions. Therefore, it can be seen that it is highly improbable, if not impossible, that any progress and changes in the grounds of review in Hong Kong would be influenced by the judicial review cases in the mainland. The two potential forces to influence the Hong Kong courts would thus be: Firstly, the persuasive power of cases in other common law jurisdictions, most notably England; Secondly, via the interpretation of the Basic Law issued by the Standing Committee of the NPC.

Before the handover of sovereignty of Hong Kong to the PRC in 1997, the Privy Council in England was the court of the highest hierarchy in the Hong Kong legal system. The application of the Wednesbury unreasonableness was introduced into Hong Kong under this relationship. As for proportionality, one of the most seminal case is Ming Pao Newspapers Limited and Others v. The Attorney General of Hong Kong [1996]. In this case, the exact test used was not proportionality test but necessity test. This test was affirmed later in a seminal case Ng Kung Siu & others v HKSAR. Necessity test is defined in the De Freitas case (a Privy Council case). It was decided that necessity test is one of the criteria of a proportionality test. Thus, it can be viewed that in some aspect the two tests are the same. This view is confirmed in
HKSAR v Leung Kwok Hung and Others [2005], where the courts stated that “the constitutional requirement of necessity involves the application of a proportionality test”. Since then, the proportionality principle could be found in the ratio decidendi in a number of Hong Kong judicial review cases.

However, the views of the judges in Hong Kong are found to be different from that in the England (See Table 3 Summery of Hong Kong Cases using proportionality test or anxious scrutiny test).

Table 3 Summery of Hong Kong Cases using proportionality test or anxious scrutiny test

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HKSAR v Leung Kwok Hung and Others [2005] 93

Public Order Ordinance, Cap. 245
Requirement of necessity involves the application of a proportionality test

Basic Law, Art. 39
Whether restrict to rights is proportionate to the aims to be achieved

Acknowledges the importance of
“rigorous scrutiny”

8.2 Proportionality test in Hong Kong

In its early application in Hong Kong courts, proportionality test was regarded as branch of ordinary Wednesbury rather than standing alone as a separate ground 94. Later, study of case law demonstrates that there is a trend in the court to regard proportionality test as a separate ground. It is suggested that the main reason for the incorporation of proportionality test in Hong Kong is attributable to the Basic Law. To ensure that rights of Hong Kong people prescribed under the Basic Law are protected, as provided by the provision in the Law, the court has to access whether the administrative decision is a necessary one (the necessity test mentioned above). With this constitutional requirement, it naturally follows that the court should only resort to substantive test in reviewing whether administrative decision is “necessary”. It is submitted that the obvious choices would be amongst two tests: Either the Wednesbury test or the proportionality test. The court used the proportionality test in the Leung Kwok Hung case 95. Yet, the court did not explicitly explain why proportionality test is preferred over the Wednesbury test, but listed out the reasons for the use of proportionality test. The case is concerned with the rights to freedom peaceful assembly protected under the Basic Law. In the view of the court, a proper balance should be struck between “the interests of society” on one hand and “the individual’s
right of peaceful assembly” on the other hand, and the proportionality test could aptly do this job. The judges of the case relied on prior case Ng Kung Siu & others v HKSAR\textsuperscript{96} while Ng Kung Siu case relied on the Ming Pao Newspapers case in 1996 \textsuperscript{97}. Having demonstrated that, the proportionality principle could be said to have been introduced into the Hong Kong legal system by the Privy Council before the handover of sovereignty. In the judgment, the Council took into consideration of numerous cases, even though a number of them only had persuasive authority:

“[I]t must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong. This is particularly true in the case of decisions of the European Court of Human Rights”\textsuperscript{98}.

Nonetheless, the court adopted the necessity test and applied proportionality principle. The reason was obvious: Because once the court looked into the European human rights cases, it would be very inclined to use proportionality principle because of the principle’s tempting and overriding benefits in its application to the European law. The benefits are put forward in earlier in this study.

As the Basic Law\textsuperscript{99} has made explicit, the laws previously in force in Hong Kong before the handover of sovereignty, encompassing the common law and ordinances enacted before the handover, are to be maintained unless that they conflict with the Basic Law. It is submitted that as the proportionality principle was introduced to the Hong Kong common law direct from the Privy Council in its entirety has a significant impact due to the fact that right after the handover this principle could be immediately applied in judicial review regarding the Basic Law. As
mentioned, the Basic Law is a piece of legislation from a civil law jurisdiction, then, provided that the court can choose from either Wednesbury or proportionality, the use of proportionality principle would be deemed to be more appropriate and effective.

However, in the course of the search of case law, it is observed that the number of relevant cases regarding anxious scrutiny was very limited. It is postulated that the ordinary Wednesbury principle in Hong Kong does not face intense stress to derive from the ordinary Wednesbury so that the review or modification of the ordinary Wednesbury is not an agenda of the court. It is submitted that the problems substantiated in England are not highlighted in Hong Kong. It is suggested that it may be due to two reasons. Firstly, it is also envisaged that the European Court of Human Rights and European Court of Justice are much more active in their interpreting and adjudicating capacities while the National People’s Congress’s Standing Committee is much more reserved for fear of being criticized of intervening the autonomy of the courts in Hong Kong (this would be against the spirit of the Basic Law Art. 85)\textsuperscript{100}. In essence, it is suggested that the reserved role played by the NPC prevents the Hong Kong courts from conflicts of jurisprudence between civil and common law. Furthermore, the fact that the mainland does not have a formal judicial review system ensures that Hong Kong courts would not, under any circumstances, be obliged to construe the meaning of Basic Law by referring the judicial review case in the mainland direct. In other words, even though the courts of Hong Kong is required to adopt a teleological interpretation approach, the courts of Hong Kong do not have to (and cannot) find the intent of the Law from judicial review cases in mainland because there are simply no such cases. In contrast, when interpreting European laws, English courts are often under stress to resort to European cases to find out the true intent of a law.
9. CONCLUSION

The study has identified some of the issues relating to the development in two grounds of judicial review, namely **Wednesbury** unreasonableness and proportionality principle, in common law. It can be concluded that regarding European Convention of Human Rights and European Community law, Wednesbury unreasonableness has fallen short of a useful and coherent ground of review. In this regard, the courts should employ the proportionality principle to examine the appropriateness and necessity of administrative action. It is submitted that proportionality principle should be incorporated into the English law completely so that the use of this principle is not only limited to cases related to Convention rights. The benefits of this incorporation would:

- First, supplement the dissatisfactory Wednesbury unreasonableness;
- second, increase the cohesion of the legal system;
- thirdly, facilitate the constitutional role played by courts of law.

Although the Wednesbury unreasonableness is far from effective, it is postulated that the ground would not be replaced by proportionality principle even though both of them are substantive review tests. The reasons of this future development are that, one the one hand, Wednesbury itself is evolving into a so-called **super Wednesbury** ground, which is also known as “anxious scrutiny” approach or the “rigourous scrutiny” approach, fixing some of the defects in the ordinary Wednesbury unreasonableness. On the other hand, while English legal system is being “Europeanized”, the European legal system is also influenced by the English legal system in a way that the in some occasions the European courts find Wednesbury unreasonableness as useful ground of review. It can be concluded that proportionality should better be deemed to supplement Wednesbury rather than as a threat to the very existence of this ground.

In the Hong Kong, Wednesbury remains to be an important ground of review. It is submitted that the Hong Kong courts are not under intense pressure to improve or modify the
ordinary Wednesbury unreasonableness. This might be attributable to the fact that Standing Committee of the National People’s Congress is relatively not very active in its judicial capacity. As such, the courts of Hong Kong, when handling Basic Law cases, are not under constant stress to refer to the Committee’s civil law jurisprudence based interpretation of the Law, limiting the conflicts that may arise from the two inherently different legal systems. Nonetheless, it is deemed that the proportionality principle, a civil law principle, should be adopted in judicial review cases in relation to the Basic Law, which is member of a civil law family.
ENDNOTES


7 Section 2(1), Human Rights Act 1998


10 From “Introduction to Judicial Review in Hong Kong”, by Olley, K. JR, 2003, Judicial Review, 8, 109-115

11 From “Introduction to Judicial Review in Hong Kong”, by Olley, K. JR, 2003, Judicial Review, 8, 109-115

12 Article 158, the Basic Law

13 Ng Ka Ling v Director of Immigration (1999) 2 HKCFAR 4


16 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

17 Council of Civil Service Unions v Minister for Civil Service [1985] AC 374


19 The threshold can be highlighted by the emphatic expressions used by the court, such as ‘totally unreasonable’ in Champion v Chief Constable of the Gwent Constabulary [1990] 1 WLR at 5.


22 R v Secretary of State for the Home Department ex p. Daly [2001] UKHL 26
23 R v Secretary of the State for the Home department ex parte Bugdaycay [1987] AC 514


25 Smith and Grady v UK (1999) 29 EHRR 493


27 From “Anxious Scrutiny, the Principle of Legality and the Human Rights Act”, by Fordham, M., & de la Mare, T., 2000, Judicial Review, 5, 41-43.

28 R (ProLife) v. BBC [2004] 1 AC 185


30 R v Secretary of State for the Home Department ex p. Simms [2000] 2 AC 115


32 Nottinghamshire County Council [1986] AC 240


35 Council of Civil Service Unions v Minister for Civil Service [1985] AC 374


39 R (on the application of Mahmood (Amjad)) v Secretary of State for the Home Department [2001] 1 WLR 840 (CA)


45 Section 2 (1) (a), Human Rights Act 1998


As per Lord Ackner in ex p. Brind case.


Council of Civil Service Unions v Minister for Civil Service [1985] AC 374

R v Secretary of State for the Home Department ex parte Brind [1991] 1 ALL ER 720


R v General Medical Council ex p. Coleman [1990] 1 All ER 489

Magill v Porter [2001] UKHL 67

Section 2 and Schedule 2, European Communities Act 1972 (1972, c.68)


64 R(Bloggs 61) v Secretary of State for the Home Department [2003] EWCA Civ 686 [2003] 1 WLR 2724


66 HL v United Kingdom (2005) 40 EHRR 32

67 R v Secretary of State for the Home Department ex parte Daly [2001] UKHL 26


69 R (Marper) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275

70 R (on the application of S) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275

71 Handyside v UK (1979) EHRR 737

72 Campbell v UK (1992) 15 EHRR 137


74 Papachelas v Greece (2000) 30 HER 923.


76 As per Lord Diplock, R v Goldstein [1983] 1 WLR 151 at 155.
77 R. (on the application of Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606


80 From “Towards the Nutcracker Principle: Reconsidering the objections to proportionality”, by Wong, G., 2002, Public Law, 94


86 From The Court of Final Appeal’s Ruling in the “Illegal Migrant” Children Case: Congressional Supremacy and Judicial Review (p. 4), by Chen, A.H.Y., March 1999, Hong Kong: Hong Kong University
87 Ming Pao Newspapers Limited and Others v. The Attorney General of Hong Kong [1996] UKPC 12

88 Ng Kung Siu & others v HKSAR FACC No. 4 of 1999

89 De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 (PC(Ant))


91 HKSAR v Leung Kwok Hung and Others [2005] FACC 1,2/2005

92 Nomura International (Hong Kong) Ltd & Others v Securities and Futures Commission [1998] CA CACV 34/98

93 HKSAR v Leung Kwok Hung and Others [2005] FACC 1,2/2005

94 Nomura International (Hong Kong) Ltd & Others v Securities and Futures Commission [1998] CA CACV 34/98

95 HKSAR v Leung Kwok Hung and Others [2005] FACC 1,2/2005

96 Ng Kung Siu & others v HKSAR FACC No. 4 of 1999

97 Ming Pao Newspapers Limited and Others v. The Attorney General of Hong Kong [1996] UKPC 12

98 Ming Pao Newspapers Limited and Others v. The Attorney General of Hong Kong [1996] UKPC 12

99 Article 8, the Basic Law

BIBLIOGRAPHY

Legislation

   - Section 2, Schedule 2
2. European Communities Act 1972
4. The European Union Treaty
5. Basic Law of the Hong Kong Special Administrative Region (Peoples Republic of China)
   - Article 8, 85,158

Books:


Journal articles and papers:


Materials read but not cited in text:


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7. HKSAR v Leung Kwok Hung and Others [2005] FACC 1,2/2005
8. HL v United Kingdom (2005) 40 EHRR 32
12. Ng Ka-ling and Others v Director of Immigration [1999] 1 HKLRD 315 (1999) 2 HKCFAR 4
13. Ng Kung Siu & others v HKSAR FACC No. 4 of 1999
16 R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and
the Regions [2001] 2 ALL ER 929

17 R (Marper) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275

18 R (on the application of Holding & Barnes Plc) v Secretary of State for the Environment,
Transport and the Regions [2001] UKHL 23

19 R (on the application of Mahmood (Amjad)) v Secretary of State for the Home
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20 R (on the application of S) v Chief Constable of South Yorkshire [2002] EWCA Civ 1275

21 R (Pro-life Alliance) v BBC [2004] 1 AC 185

22 R v Barnsley Metropolitan Borough Council ex parte Hook [1976] 1 WLR 1052

23 R v Chief Constable of Sussex ex parte International Trader’s Ferry Ltd (1999)


29 R v Secretary of State for the Environment, ex parte Nottinghamshire County Council
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1 AC 920

31 R v Secretary of State for the Home Department ex parte Brind [1991] 1 ALL ER 720

32 R v Secretary of State for the Home Department ex parte Daly [2001] UKHL 26

33 R v Secretary of the State for the Home department ex parte Bugdaycay [1987] AC 514
34  R(Bloggs 61) v Secretary of State for the Home Department [2003] EWCA Civ 686
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35  R. (on the application of Farrakhan) v Secretary of State for the Home Department [2002]
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36  Re S (Children) (care Order; Implementation of Care Plan) [2002] UKHL; [2002] 2 AC
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37  Smith and Grady v UK (1999) 29 EHRR 493

Cases referred to in the materials used but not cited direct in the paper
39  A (Children) (Conjoined Twins: Medical Treatment) (No.1), Re [2001] Fam. 147 (CA)
40  A an others v Secretary of State for the Home Department and Conjoined cases [2005]
    UKHL 71
41  A Solicitor v The Law Society of Hong Kong[2003] FACV 7/2003
42  Airedale NHS Trust v Bland [1993] A.C. 789 (HL)
43  Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
44  Attorney General for Hong Kong v Ng Yuen Shiu [1983]
45  Birkdale District Electricity Supply Co. Ltd v Southport Corporation [1926] AC 355
46  Blackstock v United Kingdom (2006) 42 EHRR 2
47  Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155
49  Coghurst Wood Leisure Park Ltd v Secretary of State for Transport, Local Government
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50 Cooper v Wandsworth Board of Works [1893] 14 CB (NS) 180
51 Dimes v Grand Junction Canal Ltd [1852] 3 HL Cas 759
52 Flanagan and Flanagan v South Bucks District Council [2002] JPL 1465
53 Flannagan v South Bucks District Council (2003)
54 Gough v Chief Constable of Derbyshire [2002] EWCA Civ 351
55 H v Secretary of State for the Home Department [2003] UKHL 59
57 HKSAR v Ng Kung Siu and Others [1999] FACC 4/1999
58 International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158
59 Lam Yuet Mei v Permanent Secretary for Education and Manpower [2004] 3 HKLRD 471-652
60 Lo Siu Lan v Hong Kong Housing Authority [2005] 3 HKLRD 149-290
61 New World Development Co Ltd & Ors v Stock Exchange of Hong Kong Ltd [2005] 2 HKC 506
62 Ng Siu Tung & Others v Director of Immigration [2002] 1 HKLRD 561
63 O'Reilly v Mackman [1983] 2 AC 237
64 Pearlman v Keepers and Governors of Harrow School [1979] QB 56
65 Pine Valley Developments Ltd v Ireland (1992) 14 EHRR 319
66 Procurator Fiscal v Watson and Burrows [2002] UKPC D1
67 R (Association of British Civilian Internees Far Eastern Region) v Secretary of State for Defence [2003] EWCA Civ 473
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Human Rights Act 1998

Section 2
- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section-

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.
Schedule 2

REMEDIAL ORDERS

Orders  1. - (1) A remedial order may-

(a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;

(b) be made so as to have effect from a date earlier than that on which it is made;

(c) make provision for the delegation of specific functions;

(d) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes-

(a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and

(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A remedial order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure  2. No remedial order may be made unless-

(a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or

(b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft  3. - (1) No draft may be laid under paragraph 2(a) unless-

(a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and

(b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing-

(a) a summary of the representations; and
(b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases 4. — (1) If a remedial order ("the original order") is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—

(a) a summary of the representations; and

(b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must—

(a) make a further remedial order replacing the original order; and

(b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions 5. In this Schedule—

"representations" means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

"required information" means—

(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and

(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods 6. In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which—

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.
The Basic Law of Hong Kong

Chapter IV: Political Structure

Article 85

The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

Chapter VIII: Interpretation and Amendment of the Basic Law

Article 158

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.