Wednesbury, Proportionality and Judicial Review

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This article argues in favour of the proportionality test as the standard for the judicial review of executive actions in Pakistan. It begins by tracing out the origins of the prevailing Wednesbury unreasonableness test as well as the proportionality test, both in Pakistan and in common law jurisprudence generally. It then juxtaposes the two tests, and argues that both attempt a review of the calculus undertaken by the primary decision-maker tempered with the appropriate amount of deference given to him. However, the analytically clearer framework provided by the proportionality test means that it is able to channel this inquiry in a more transparent and accurate manner, and as such, provides a more reliable test for the review of executive actions.

Introduction

A fundamental requirement of justice is that an aggrieved person should be able to challenge state action before an independent court. The grounds on which such a challenge will be accepted must be clear – they must not unduly fetter the discretion of the democratically accountable decision-makers, while at the same time demarcating the four corners within which this discretion must operate. In delineating the scope of this discretion, two distinct standards of review have been used in common law jurisprudence – the Wednesbury unreasonableness test and the proportionality test. In the *Dr Akhtar Hassan* case in 2012, the Supreme Court of Pakistan reiterated Wednesbury unreasonableness as the sole standard for judicial review of executive or administrative action.[1] At the same time, proportionality is not an alien concept for jurisprudence in Pakistan. In the *DG Cement* case, the Lahore High Court declared it as the standard for the review of legislation on the touchstone of constitutionality.[2] The jurisprudence of the superior courts suggests, thus far, that proportionality and Wednesbury are to be treated as distinct tests, compartmentalised in their own respective areas and having no necessary overlap with each other. At the same time, close parallels may be drawn between how the judiciary has developed and used the two tests, and the content of the two tests as understood by the judiciary. This article argues that the proportionality and the

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[1] [2012] SCMR 455.
[2] [2013] PLD Lahore 693.

Wednesbury unreasonableness tests are different formulations of the same criteria, since both provide for a *context-specific variable intensity* review. It borrows from the debate prevailing in the United Kingdom – where both tests exist as possible standards for judicial review of administrative action – and argues that while both tests answer the same fundamental question, the proportionality inquiry provides a clearer mechanism through which the soundness of a decision may be judged. It also argues that the two tests should be merged, and that proportionality provides the best analytical framework for a unified test for the judicial review of legislation as well as administrative action.

Part I: The History and Content of Wednesbury

In *Dr Akhtar Hassan Khan v Federation of Pakistan*, the Supreme Court reiterated that the standard for judicial review of administrative action can be found in the Wednesbury unreasonableness test.[3] Justice Tassaduq Hussain Jillani outlined three grounds on which administrative action may be challenged. These include illegality, which means the decision-maker must understand the law that regulates his decision-making power and must give effect to it; irrationality, namely, Wednesbury unreasonableness; and procedural impropriety, which is governed by the rules of Natural Justice. A more elaborate articulation of the same principle can be found in the judgment of Iftikhar Muhammad Chaudhry, CJ, in *Asaf Fasihuddin Khan Vardag v Government of Pakistan*, where he states:

> It has also been held by the Courts that in matters of judicial review the basic test is to see whether there is any infirmity in the decision making process. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its decision for that of the decision maker. *The interference with the decision making process is warranted where it is vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it is actuated by mala fides.*[4] (Emphasis supplied)

As Justice Tassaduq Jillani acknowledges, the irrationality principle mentioned above has its roots in the seminal United Kingdom Court of Appeal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, where Lord Greene MR termed an irrational decision to be one that is 'so unreasonable that no reasonable authority could ever have come to it'.[5] While the *Wednesbury* case has

[3] (n 1).
[4] [2014] SCMR 676, para [46].
[5] [1948] 1 KB 223, 230.

had a profound and permanent impact on administrative law across the common law world, the formulation quoted above has been found to be unhelpful, and in the words of Lord Cooke, tautologous.[6] A gloss was provided by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* where he formulated the test in terms of 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'.[7] He further elaborated on the meaning in *CCSU v Minister for the Civil Service*, stating, '[b]y 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'.... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'[8]

It is immediately noticeable that none of the formulations of the Wednesbury unreasonableness test state precisely which sort of decision is *so outrageous that no reasonable decision maker could have made it.* The test applies a circular logic, in that it allows the courts to interfere with decisions that are unreasonable, and then defines an unreasonable decision as one which no reasonable authority would take. Lester and Jowell elaborate upon this critique when they argue that, '[t]he incantation of the word 'unreasonable' is not enough.... Intellectual honesty requires a further and better explanation as to why the act is unreasonable. The reluctance to articulate a principled justification naturally encourages suspicion that prejudice and policy considerations may be hiding underneath Wednesbury's ample cloak.'[9] Criticisms like these have revealed the extent to which Wednesbury might be a distinctly unsuitable test for the judicial review of administrative action.[10]

Part II: The History and Content of Proportionality Test

The advent of the Human Rights Act 1998, which codified the provisions of the European Convention on Human Rights (ECHR) into domestic law for the United Kingdom, brought with it the European test for judicial review of administrative actions – the *proportionality* test. Initially, the debate as to whether the proportionality test would lead to a different outcome than Wednesbury was

[6] *Regina v Chief Constable of Sussex ex p ITF* [1999**]** 1 All ER 129.
[7] [1977] AC 1014, para [1064].
[8] [1985] AC 374, 410.
[9] Anthony Lester and Jeffrey Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] PL 368, 371.
[10] For further detail on criticisms see also, Andrew Le Sueur, 'The Rise and Ruin of Unreasonableness?' [2005] JR 32; Paul Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265.

confined largely within academia. This changed with the decision of the European Court of Human Rights (ECtHR) in *Smith and Grady v UK*.[11] The ECtHR unanimously found that the investigation into and subsequent discharge of personnel from the Royal Navy on the basis that they were homosexuals was a breach of their right to a private life under Article 8 of the European Convention on Human Rights. The case was significant because domestic courts within the United Kingdom had previously found there to be no breach of the principles of legality, including Wednesbury unreasonableness. The ECtHR, applying the European proportionality test, found a breach, thus highlighting the difference between the two tests. The revelation that the two tests can lead to a different outcome led to the United Kingdom having to resort to the proportionality test for all cases falling under the Human Rights Act 1998, lest it is held in non-compliance of its international obligations. The proportionality test hence became the standard for review of all cases involving human rights, while traditional Wednesbury standard persevered for non-human rights cases. A formulation for the proportionality test can be obtained from the Privy Council decision in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, where it was held that:

> In determining whether a limitation is arbitrary or excessive he said that the court would ask itself whether: (i) the legislative [or administrative] 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.[12] (Parenthesis supplied)

The test was endorsed by the House of Lords in *Daly v SSHD*;[13] while an important gloss of 'striking a fair balance between rights of individual and interest of community' was laid down by the House in *Razgar*[14] and underlined in *Huang v Secretary of State for the Home Department*.[15] Initially, the proportionality test was confined to cases that fell under the Human Rights Act 1998, but it slowly crept into other areas of law. *Daly* suggests the use of the proportionality test for human rights cases even outside the domain of the Human Rights Act 1998, and the Court of Appeal has also mentioned the strong case for combining the two tests in recent

[11] [1999] 29 EHRR 493.
[12] [1999] 1 AC 69, 80 (Lord Clyde).
[13] [2001] 2 WLR 1622, para [27] (Lord Bingham).
[14] [2004] UKHL 27.
[15] [2007] UKHL 11.

dicta.[16] At least two reasons, which will be further elaborated below, can be identified for this gradual spread of proportionality test in the English administrative law. Firstly, proportionality test provides a clearer and more transparent analytical framework than the opaque and circular Wednesbury unreasonableness test. Secondly, proportionality standard is an extremely versatile test, with the ability to vary the intensity of review depending on the context. This means that the proportionality test is able to effectively replace Wednesbury across a variety of contexts. It was perhaps this realisation that led Lord Cooke in *R (Daly) v Secretary of State for the Home Department* to state:

> I think that the day will come when it will be more widely recognised that Wednesbury was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.[17]

The proportionality test was brought into Pakistani jurisprudence by Justice Mansoor Ali Shah in his celebrated judgment in the *DG Cement v Federation of Pakistan*, where he states:

> Comparative international jurisprudence has moved on from the generic public interest argument to a more structured approach in assessing the impact of sub-constitutional limitation on the constitutional right by applying the principle of proportionality to balance and weigh the competing interests of an individual and the society, in order to maintain constitutional equilibrium….
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> Proportionality is a legal construction. It is a methodological tool. It is made up of four components; proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional

[16] *R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473 (Dyson LJ).
[17] [2001] UKHL 26, 49.

> right…[18]

DG Cement evaluated the extent to which a constitutional right can be limited via sub-constitutional legislation, as opposed to administrative action. Thus far, the test has not been extended to executive action in Pakistan, and remains limited to legislation, although the scope for such an expansion exists. Even if it is to be accepted that the proportionality test provides a more exacting standard of review than Wednesbury, there is little logic in applying a more deferential test for the judicial review of the actions of the executive as opposed to those of the legislature – especially considering that such action will often be taken *under* a statute. Indeed, the legislature is granted special deference by the judiciary, evidenced, for instance, by the maxim that *mala fide* cannot be attributed to it. The feasibility of an extension of proportionality test to the review of administrative actions must therefore be seriously considered.

Part III: The Relationship between Wednesbury and Proportionality

Having touched upon the history and content of the two tests, we may now move on to their relationship with one another. This was addressed by the House of Lords in *Daly*, where Lord Bingham, speaking of the proportionality test, states:

> Clearly, these criteria [for the proportionality test] are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? … The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.[19] (Parenthesis supplied)

Lord Bingham's speech suggests that the proportionality and Wednesbury unreasonableness tests will provide the same answer in most cases, but not in all. Crucially, proportionality is seen as going further than traditional Wednesbury unreasonableness in a number of ways, with Lord Bingham outlining three of them. Firstly, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention

[18] *DG Cement* (n 2), para [21].
[19] [2001] 2 WLR 1622, para [27] (Lord Bingham).

to be directed to the relative weight accorded to interests and considerations. Thirdly, proportionality standard might be more appropriate for the protection of human rights.[20] To illustrate the third point, Lord Bingham cited *R v Ministry of Defence, Ex p Smith*, in which the United Kingdom Court of Appeal reluctantly felt compelled to accept a limitation on homosexuals in the army.[21] The challenge failed despite a very strict application of the Wednesbury unreasonableness test, but the European Court of Human Rights came to the opposite conclusion when it heard the appeal in *Smith and Grady v United Kingdom*, leading to suggestions that the proportionality test may be more suitable for the protection of Human Rights.[22]

This supposed greater intensity of the proportionality test is seen by numerous judges and academics as the reason why proportionality cannot replace Wednesbury as the test for review of administrative actions. It has even been suggested that *Wednesbury* should remain the test for cases that require greater judicial deference, while proportionality should be the standard used in cases where a more exacting review is required. For instance, Michael Taggart argues for a 'rainbow of review', in which a context-specific variable-intensity Wednesbury test is gradually replaced by a context specific variable-intensity proportionality test.[23] The 'rainbow', as it were, is formed by a merger of two spectrums. Movement along the first spectrum denotes an increase in the intensity with which the Wednesbury unreasonableness test is applied as the context changes. On one end of this spectrum, for cases presumably involving matters with which the courts have historically not intervened, an extremely strict version of the test may be suitable. This has been termed the super-Wednesbury test and an example of it can be found in Lord Bridge's speech in *R v Secretary of State, ex parte Hammersmith and Fulham LBC,* where he states:

> … statue confers powers on the Secretary of State which involve formulation and implementation of national economic policy, not open to challenge on grounds of irrationality short of extremes of bad faith, improper motive, or manifest absurdity because formulation of economic policy requires political judgment, which is not for courts.[24]

On the other end of this spectrum, when important human rights may be involved, the courts have applied what may be called the sub-Wednesbury approach. An

[20] Ibid.
[21] [1996] QB 517, 554.
[22] [1999] 29 EHRR 493.
[23] Michael Taggart, 'Proportionality, Deference, Wednesbury' (2008) NZL Rev 423.
[24] [1991] 1 AC 521, 597.

illustration of this can be found in Sir Bingham MR's speech in *R v Ministry of Defence, ex parte Smith*, when he states:

> ... [b]ut in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.[25]

According to Taggart, the point at which the sub-Wednesbury test ends is the point at which proportionality review must begin, and from here on the proportionality review gets increasingly intrusive as the context changes towards more fundamental and absolute rights.[26]

Taggart's rainbow suggests that deference is somehow hardwired into the Wednesbury unreasonableness test to the effect that it will always remain more deferential than proportionality. According to him, even the most lenient application of the Wednesbury test will prove to be more deferential than even the strictest application of proportionality. It is argued below that this is not the case. Even if proportionality test, *prima facie*, provides for greater scrutiny, this can be cut back depending on the context. In this manner, proportionality can be an appropriate test even for cases that require a great degree of judicial deference to the decision- maker. It will be argued below that when the nature of the proportionality inquiry is analysed, its versatility and suitability become evident. In particular, it will be shown that the variable intensity review under proportionality test can be just as sensitive to deference as Wednesbury.

Part IV: The Nature of the Proportionality Inquiry and its Suitability as the Sole Standard for Review

When the content of the proportionality test, as outlined in *De Freitas* above, is analysed, it becomes evident that the test calls for a calculus to be made. The court must attach some weight to the legislative aim (which has given rise to the administrative action being challenged) on one hand and the right being infringed upon on the other. Then it must ascertain whether the action that has led to the infringement of the right is rationally connected to the aim set out, and lastly it must determine whether there was another possible way in which the same aim may have

[25] [1996] QB 517, 554 (Sir Thomas Bingham MR).
[26] (n 23).

been achieved which was less intrusive. At the heart of the inquiry is balancing exercise between the rights of the individual and the rights of the community. The clarity of the framework provided by proportionality is seen as a great strength of the test. At the same time, the balancing exercise has led some, including Lords Bridge and Roskill in *R v Secretary of State for the Home Department Ex p. Brind*, to argue that the proportionality inquiry distorts the distinction between appeal and review.[27] Their Lordships argued that proportionality requires the judge to attach weight to each side's case, and ultimately determine which side has the heavier scale. By doing so, the judge is evaluating the merits of the decision, thereby acting as a primary decision-maker analogous to a judge sitting in appeal, as opposed to adopting the more deferential stance of a secondary decision-maker sitting in review. Their Lordships argue that such a position undermines the democratic legitimacy by giving an unelected judiciary too much control over democratically accountable bodies.

The above-mentioned argument is mistaken when it assumes that by attaching weight to each side, the judge is simply substituting his own judgment. In fact, the doctrine of deference plays as much a part in the proportionality test as it does in Wednesbury. To elaborate this point further, it may be useful to divide deference into *institutional* and *constitutional* deference. Institutional deference relates to the relative expertise of the court and the primary decision- maker over the subject matter of the decision. Since courts lack the specialised knowledge often possessed by primary decision-makers, they defer to the opinion of the decision-maker regarding crucial questions such as the likely success of a policy or its cost effectiveness. Such deference will play a part in determining the weight attached to the administrative aim being pursued. For instance, if the primary decision-maker feels that an increase in the number of school hours will lead to an overall increase in the level of education, the court is unlikely to replace this view with its own view on the merits and demerits of over-schooling. On a second level, constitutional deference relates to the constitutional role assigned to each body, and will determine the strictness with which the court will assess the overall balance of the scale. Where the subject matter of a decision is detached from the constitutional responsibility of the judiciary, the court may be expected to condone it even if it does not correspond to its own balancing exercise. Furthermore, the argument assumes that there will be one 'correct' decision, which the court will reach for itself and then enforce upon the primary decision-maker. In fact, administrative actions usually do not have one 'correct' decision, and the court's job is to determine whether the decision taken falls within the *range* of reasonable decisions open to the decision-maker.

[27] [1991] 1 AC 696 (HL).

A second refutation to the above argument can be made by relying upon the Wednesbury unreasonableness test itself. Recent dicta of the United Kingdom Supreme Court in *Kennedy v Charities Commission* has confirmed that the Wednesbury test also involves consideration of weight and balance.[28] If the argument is to be accepted that the determination of weight and balance by itself inevitably leads to merits review, then the Wednesbury test is just as guilty as proportionality. The Supreme Court clarified that considerations of weight and balance depend upon the context of the case, which ultimately determines the intensity of review. Lords Mance elaborates upon the role of these factors in Wednesbury test, stating, '[t]here seems no reason why such factors should not be relevant in judicial review even outside the scope of the Convention and EU law [where proportionality applies]'.[29] (Parenthesis added)

When the proportionality test is conceived of as a function of the competing consideration plus deference, it becomes clear that the intensity of review varies depending upon the level of deference. Hence, the test and the level of scrutiny depends upon context. Taggart's suggestion that deference is somehow hardwired into the Wednesbury unreasonableness test in a manner that cannot be replicated by proportionality fails to withstand this analysis. Furthermore, particular examples of the proportionality test being applied in a deferential standard are not hard to find. For instance, in *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa*, even though the court applied the proportionality test, it did so in a deferential manner, holding that 'the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate',[30] and that 'the Council committed no manifest error in that respect'.[31] Such application of Wednesbury standard provides an analytically clearer framework for judicial review while not improperly infringing upon the domain of the democratically accountable decision-maker.

[28] [2014] UKSC 201, para [54] (Lord Mance).
[29] Ibid.
[30] [1990] ECR 1–4023, para [14].
[31] Ibid, para [16].

Conclusion

Proportionality test provides a more structured and transparent method through which reasonableness of administrative actions may be challenged. While it brings forward the competing considerations in a given case in a clearer manner, this does not make it an inherently more intrusive test than the present Wednesbury unreasonableness test. It can be seen from the above discussion that even the Wednesbury test ultimately scrutinises the cost benefit analysis that led to a decision, but does so in an opaque and circular manner, such as by terming an unreasonable decision as one which no reasonable decision-maker would make. Proportionality test provides a clear analytical framework to guide the inquiry. The degree of deference accorded to the primary decision-maker still plays an important role in proportionality standard, and will ensure that courts do not improperly infringe upon the domain of the executive. It may be argued that the very introduction of proportionality test will signal a change in judicial attitude towards a necessarily more rigorous inquiry. This need not be the case, since the higher judiciary can make it abundantly clear that proportionality test is being adopted *as part of a* context-specific variable intensity review.