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## **Constitutional Review Of Administrative Actions: Development In United Kingdom, India, Malaysia, South Africa And Hong Kong**

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### **Abstract**

The 21st century saw the rapid development of the administration of the nations of the world. With the development, it is essential to ensure that administrator entrusted with the administration of the country perform its duties in accordance with the rule of law. It must not act arbitrarily. Discretionary power if given to the administrator, it is limited. This is to guarantee that administrator in performing its duties would not infringe rights of an individual or community, especially fundamental rights. To make certain that this is achieved, an effective mechanism for the protection of rights, especially human or fundamental rights in state administration is needed. Judicial review is one of the effective mechanism to supervise and control action of the administrator. This mechanism is available in Administrative Law. Under the instrument, grounds of judicial review is made available to review action of the administrator. Currently, there are two streams of judicial review: Administrative Review and Constitutional Review. The former is a non-right based review of administrator's power founded on the traditional common law using *Wednesbury* objective test or *CCSU* grounds not involving violation of fundamental and human right and the procedures. Meanwhile, the latter is a right-based review involving the exercise of administrative powers that violate the constitutional right of an individual or community, particularly, fundamental rights. The traditional common law, nevertheless, are inadequate in addressing review of administrative action involving violation of fundamental rights. For that reasons constitutional review as another stream in judicial review was developed. This was illustrated looking into the development in United Kingdom, India, Malaysia, South Africa and Hong Kong. With the expansion, mentioned the common law countries are capable of providing a more comprehensive and meaningful protection to an individual or community against unlawful act of the administrator that violates rights, especially human and fundamental rights. Consequently, state integrity is strengthen and be more accountable to the community. Hence, state can develop administration that is sound, and efficient in human, natural, economic and financial management. The proper enforcement of human rights will promote political and socio-economic stability, provide legal certainty and it encourages investors to invest in the country.

**Keywords:** Administrative Law; Administrative Action; Constitutional Review

### **I. INTRODUCTION**

The 21st century saw the rapid development of the administration of the nations of the world. This makes the administration of one country more challenging to ensure that the administrator entrusted with the administration of the country can perform its duties in accordance with the rule of law. According to Dicey rule of law means (Dicey, 1987):

1. Absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.
2. Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.
3. The general principles of the Constitution are the result of judicial decisions that determine the rights of private persons.

The above postulation indicates that an administrator must act in accordance with law. Administrator must not act arbitrarily. Discretionary power if given to the administrator, it is limited. Besides, promotion and effective mechanisms for protecting rights, especially human rights in state administration will guarantee accessibility, accountability and transparency in government administration. With that, state can development administration that is sound, and efficient in human, natural, economic and financial management. The proper enforcement of human rights will promote political and socio-economic stability, provide legal certainty and it encourages investors to invest in the country. Additionally, it provide a basis for developing economic markets. Hence, it activates the country's economic growth.

To ensure sustainable development is maintained, the Rule of Law must be respected. Good administration arrangements provide a strong and durable management system. Therefore, it is necessary to build good governance based on the rule of law so that laws and regulations for sustainable development can be implemented effectively.

To ensure that governments administrators act in accordance with rule of law, Administrative Law provides for judicial review mechanism in overseeing the actions of the administrator. Administrative Law according to M.P. Jain, deals with structure, powers and functions of organs of administration; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions; the methods by which their powers are controlled; the legal remedies available to a person against them when his rights are infringed by their operation (Cremean, 2011).

From the formulation presented by MP Jain, it can be concluded that Administrative Law can provide an instrument governing the actions of the administrator. One of the most effective mechanisms in controlling the actions of administrators is judicial review.

## **II. RESULT AND DISCUSSION**

### ***Two streams of Judicial Review***

Traditionally, the common law countries' grounds of judicial review are based on the common law grounds. Nevertheless, with the emergence of right-based approach in judicial review, the mechanism of review is divided into two streams. The two streams are: Administrative Review and Constitutional Review. Administrative Review is the review of administrator's power based on the traditional common law using *Wednesbury* objective test or CCSU grounds not involving violation of fundamental and human right and the procedures (Hashim, 2012). Meanwhile, Constitutional review involved the exercise of administrative powers that infringe the constitutional right of an individual or public, especially fundamental rights (Hashim, 2012). The review of the latter is broader and it went beyond the traditional common law grounds (Hashim, 2012). For the purposes of this paper, analysis is made on the constitutional review of administrative action that violates human or fundamental rights or constitutional rights of an individual or community.

### ***Constitutional Review***

#### ***General observation***

Constitutional review relates to allegations of violation of constitutional or fundamental rights by an administrator. Constitutional review as a ground for unlawful act of the administrator is the current development in some countries that practices common law such as United Kingdom, India, Malaysia, Hong Kong and South Africa.

#### ***United Kingdom***

The grounds of judicial review in United Kingdom has always been the *Wednesbury* or CCSU common law grounds not involving violation of fundamental and human right and the procedures. Hence, the common law grounds could not be used in cases of infringement of human rights. To enhance the weaknesses under the common law grounds, principle of proportionality was eventually accepted and applied by the English courts as a structured test in cases of infringement of rights under

European Community Law and Human Rights Act 1988, and constitutional common law rights<sup>1</sup>. The structured test is to engage the court in the exercise of constitutional review to address a series of questions in assessing whether the impugned decision of the public authorities is justifiable (Woolf, Smith, Jowell, Sueur, & Donnelly, 2007).

In *R v Ministry of Defence ex parte Smith & others*<sup>2</sup> the court in its judgment commented that the old *Wednesbury* test was insufficient where human rights were concerned. According to the court, if an administrative decision deals with human rights, the court would require proportionately greater justification before being satisfied that the action was within the range of responses open to a reasonable decision-maker, according to the seriousness of the interference with those rights<sup>3</sup>. Sir Thomas Bingham MR in his judgment had accepted passage from the applicants' submission, which was as follows:

*The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that is beyond the range responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above*<sup>4</sup>.

In *R (Daly) v Secretary of State for Home Department*<sup>5</sup>, the House endorsed the three steps structured test on proportionality formulated by Privy Council in *de Freitas*, which are as follow<sup>6</sup>:

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

In *R (on the application of Farrakhan) v Secretary of State for Home Department*<sup>7</sup> the Court of Appeal said:

*Before the Human Rights Act 1998 came into force, the approach to judicial review in this country involved the application of the test in Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223. It was appropriate for the court to overturn an administrative decision if it was one which no reasonable decision maker could have reached. Using the language of the Starsbourg jurisprudence, this test left a very wide margin of appreciation to the decision maker. Indeed, the margin was far too wide to accommodate the demands of the convention. In deciding whether restriction of a convention right can be justified, it is necessary to apply the doctrine of proportionality. In applying that doctrine, the width of the margin of appreciation that must be accorded to the decision maker will vary, depending upon the right that is in play and the facts of the particular case. Applying a margin of appreciation is a flexible approach; the Wednesbury approach is not.*

*For this reason, in cases involving convention rights, the courts have moved from the Wednesbury test towards the application of the principle of proportionality, via the stepping stone of the judgement of Bingham MR in R v Ministry of Defence, exp Smith...The following passage in the speech of Lord Steyn in R (on the application of Daly) v Secretary of State for the Home Dept....is now generally accepted as the best source of guidance in judicial review cases where human rights are in play*<sup>8</sup>.

The development and acceptance of principle proportionality in reviewing actions of administrator affecting human rights shows that the English courts are willing to move forward in facilitating constitutional review in United Kingdom.

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

2. [1996] QB 517.

3. [1996] QB 517 at 554.

4. *Ibid*.

5. [2001] 2 AC 532.

6. [2001] 2 AC 532 at 547.

7. (2002) 4 All ER 289.

8. (2002) 4 All ER 289 at 307-308

### *Constitutional review in India*

Indian jurisprudence on constitutional review is well developed. Articles 32 and 226 of the Indian Constitution are the provisions used by the Indian Supreme Court in establishing constitutional review of administrator's unlawful act that infringe fundamental or constitutional rights of an individual or a public. With the dynamic approach adopted by the Indian Supreme Court in *Maneka Gandhi*<sup>9</sup> on fundamental rights, the Indian courts post *Maneka Gandhi* were capable to be creative in developing further constitutional review as one of the grounds of judicial review. The recent is the case of *Prabhan D. Kanan*<sup>10</sup> where the Indian courts formulated constitutional review as one of the grounds of judicial review without amending the Constitution (Hashim, 2012).

In *P.B. Khet Mazdoor Samity v State of W.B*<sup>11</sup> the Supreme Court used Article 32 in reviewing action of the administrator. In the case, the petitioner fell of a train at Mathurapur Station in West Bengal and suffered serious head injuries. He was sent to several government hospitals for treatment but was not accepted because the necessary facilities were not available. Eventually, he was admitted at the Calcutta Medical Research Institute and incurred expenditure of approximately Rupees 17,000 in treatment. He filed for judicial review under Article 32. The Supreme Court held that since the Government failed to provide adequate medical facilities for the people there was a deprivation of fundamental right that was protected under the Constitution. The Government was held responsible. Hence, the petitioner was awarded adequate compensation under Article 32.

Meanwhile, in *Rudul Sah v State of Bihar A.I.R*<sup>12</sup> the petitioner was detained illegally in prison for over 14 years after his acquittal in a full dressed trial. The petitioner amongst others, applied for habeas corpus and compensation against the administrator. It was decided the Supreme Court amongst others said that Article 21 which guaranteed the right to life and liberty was not only limited to passing orders of release from illegal detention but also payment of monetary compensation by the violaters.

The active and creative attitude of the Apex court the Indian judges allows the dynamic moves of the Indian jurisprudence in recognizing constitutional review as ground to effectively review actions and decisions.

### *Constitutional review in Malaysia*

Another jurisdiction that is working on the promotion of constitutional review of administrative action is Malaysia. Malaysia is a common law country with a written constitution. By virtue of Article 4 (1) of the Federal Constitution 1957, the supreme law guarantees certain fundamental rights as stipulated in Articles 5 to 13, and other constitutional rights. Amongst the provisions that commonly used as constitutional ground to challenged action of the administrator are Articles 5 and 8 of the Constitution. For instance, in the case of *Tan Tek Seng* to determine the fairness of the punishment imposed by the administrator, the Court of Appeal interpreted Article 8(1) read together with Article 5(1) of the Constitution. In interpreting the provisions, the court accepted the interpretation by the Supreme Court of India in *Maneka Ghandi* and observed that Article 8(1) strikes at arbitrariness in State action and ensures fairness and equal treatment (Hashim, 2012). In stressing the substantive fairness required of the administrator in making decision, the Court of Appeal said that the administrator must decide fairly. In its decision the Court said that the fairness required of under Article 8(1) read together with Article 5(1), ensure that not only a fair procedure is adopted but also a fair and just punishment is imposed according to the facts of a case<sup>13</sup>.

*Tan Tek Seng*'s decision was accepted by the Federal Court in *Rama Chandran v The Industrial Court of Malaysia & Anor*<sup>14</sup>. Constitutional review was also adopted by the Court of Appeal in *Palm Oil Research and Development Board Malaysia v Premium Vegetable Oils Sdn Bhd*<sup>15</sup>. It was decided amongst others, when adjudicating upon a public law dispute pertaining to State action, the Court in making decision refer to not only to the terms of any relevant written law but also provisions of the

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9. 1978 SC 59.

10. (2006) 11 SCC 67.

11. (1996) 4 SCC 37.

12. (1983) S.C. 1086.

13. [1996] 2 AMR 1617 at 1655.

14. [1997] 1 MLJ 145.

15. [2005] 3 MLJ 97.

Federal Constitution, in particular the fundamental liberties guaranteed by Part II.

The above pronouncement illustrates that Malaysia is not left behind in moving forward in developing jurisprudence on constitutional review of administrative action in state administration.

#### *Constitutional review in South Africa*

With the new constitutional era, the system applied the doctrine of supremacy of the constitution and rule of law. The system had also merged both common law and constitutional stream into one regime on judicial review. This is done through its 1996 Constitution where it practices supremacy of the constitution in place of parliamentary supremacy that provides rights and liberties, which includes right to just administrative action as enumerated under section 33. Based on section 33 of the 1996 Constitution, the Promotion of Administrative Justice Act of South Africa (PAJA) was enacted<sup>16</sup>. PAJA is currently the source of constitutional review in South Africa. In addition, the jurisdiction too applied the constitutional principles of legality in strengthening its constitutional review.

In *Pharmaceutical Manufacturers*<sup>17</sup> the court said<sup>18</sup>:

*The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution.*

Chaskalson P further stated<sup>19</sup>:

*It is the requirement of rule of law that the exercise of public power by Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose of which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.*

It is also essential to refer to the case of *Minister of Health and Others v Treatment Action Campaign and Others*<sup>20</sup> (Treatment case) the applicants, Treatment Action Campaign<sup>21</sup>, challenged the government's policy on the prevention of mother-to-child transmission of HIV. Under the policy a programme was devised whereby antiretroviral drug, nevirapine, was used to prevent mother-to-child transmission of HIV at birth. Under the program, a limited number of pilot sites were chosen, resulted only about 10%. Amongst the issues raised was whether the government was justified in refusing to make nevirapine available to pregnant women living with HIV and who gave birth in public health facilities outside the pilot sites? In making the decision, the Court had taken into account whether the applicants had shown the measures adopted by the government to provide access to health care services for HIV-positive mothers and their new born babies fell short of its obligations under the Constitution. It was ruled by the Court that the policy violated the negative obligation implicit in the right to access to health care services under the Constitution in so far as it confined the use of nevirapine to research and training sites only. The Court decided that the policy was unconstitutional and issued a number of mandatory orders to the government.

The legal framework established under the South African Constitution allowed the South African court to effectively implement constitutional review as one of the ground in judicial review of administrative action.

#### *Constitutional review in Hong Kong*

Hong Kong is also not left behind. To make certain that administrator respected fundamental rights of the individual or the community the standards provided by the Hong Kong Basic Law must be

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16. This Act came into effect on 30 November 2000.

17. *Pharmaceutical Manufacturers Association of South Africa and Another* 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)

18. *Pharmaceutical* para 20.

19. *Pharmaceutical* para 85.

20. 2002 (5) SA 721 (CC).

21. The action was taken by Dr Haroon Sloojee and the Children's Rights Centre.

complied with. The Basic Law consist of three standards, that is, the labour, civil and political rights standards. Thus, in reviewing powers of the public authorities the three standards must be taken into account to see the constitutionality of the administrative decisions or actions. To further ensure that international on human is observed, Article 39 requires that the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economics, Social and Cultural Rights is enforced in Hong Kong.

In *Ng Ka Ling and Others v Director of Immigration*<sup>22</sup> the court decided that the courts under the Basic Law are given the power to enforce and to interpret the law. If the law or the acts of the administrator contravened with the Basic Law, the law or act is invalid.

In *Chong Ching Yuen v HKS*<sup>23</sup> Athe observed<sup>24</sup>:

*In determining whether defence incompetence has rendered a conviction unsafe or unsatisfactory our appellate courts should, in my view, focus firmly on the standard of trial that our system insists upon of these, the first is the relevant parcel of constitutional rights found in the Basic Law and in the Bill of Rights as entrenched by art. 39 of the Basic Law. The second is the traditional standard of the common law. And the third is what the public expects I have no doubt that the sort of trial that our system insists upon is a fair trial to be effective, a trial must be fair. If defence incompetence has resulted in the trial being something less than a fair trial, such incompetence constitutes a ground for quashing a conviction. There is a direct correlation between the fairness of the trial and the viability of a conviction.*

The above illustrates Hong Kong commitment on the implementation of constitutional review of administrator's action. Adopting the international standard on the on the civil and political right of the people under Article 39, the administrator is constitutionally bound to protect the people. Thus, judicial review in Hong Kong is vibrant in maximizing constitutional review.

### III. CONCLUSION

The grounds of judicial review of the common law countries in Administrative Law is the traditional common law grounds based on *Wednesbury* or *CCSU*. The traditional common law, nevertheless, are inadequate in addressing review of administrative action involving violation of fundamental rights. In the effort to guarantee individual or community could be effectively protected, some common law countries such as United Kingdom, India, Malaysia, South Africa and Hong Kong had taken the initiative to creatively develop jurisprudence and legal framework two streams of judicial review: Administrative Review and Constitutional Review. The former is a non-right based review of administrator's power founded on the traditional common law using *Wednesbury* objective test or *CCSU* grounds not involving violation of fundamental and human right and the procedures. Meanwhile, the latter is a right-based review involving the exercise of administrative powers that violate the constitutional right of an individual or community, particularly, fundamental rights. With the establishment of constitutional review as one of the grounds against unlawful action of the administrator, an adequate protection could be given to an individual or community in addressing fundamental rights infringement. As constitution is the supreme law to those countries that have written constitution such as India, Malaysia, South Africa and Hong Kong. Meanwhile, United Kingdom although there is no written constitution, it does not hinder the development of constitutional review in its jurisdiction. In giving protection on human rights as stipulated under the European Union Convention of Huma Right and Human Act 1998 to an individual or community, the English Court has creatively used principle of proportionality. To conclude, with the establishment of constitutional review, together with the well develop traditional common law grounds on judicial review, the common law countries are now able to provide for a more comprehensive and meaningful protection to an individual or community against unlawful act of the administrator that violates human and fundamental rights, and normal rights.

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