

## THE STUDENT SCHOLARSHIP BLOG

### The Application of Proportionality Test in Hong Kong Public Law

*Hugo Lai*

*LLB,*

*Class of 2017*

LLAW3093 Administrative Law

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## Introduction

Legal scholars such as Paul Craig and Tom Hickman disagree on whether the proportionality test should be applicable to every exercise of governmental power and also that the proportionality test should be the only substantive ground of judicial review. With the consequence that a reasonableness standard, of whatever hue, Craig and Hickman disagree on whether the proportionality test should be blue-penciled out of administrative law altogether.<sup>1</sup> In this essay, I will attempt to discuss whether Hong Kong should (1) continue its currently adopted position of using the irrationality test; or (2) to follow the English Supreme Court’s contextual approach; or (3) to recognize the proportionality test as a distinct ground of review. For the purpose of this essay, I will only focus on the substantive, rather than procedural, review of decisions. Therefore, the precise standpoint of this essay is “proportionality should be applicable to every substantive review of exercise of governmental power”. With no doubt, if the judicial review does not concern merits of decision, it is unnecessary to apply the proportionality test. This essay shall discuss the above three points, and I propose for the proportionality test should replace the existing irrationality test used in judicial reviews.

## Background- the current test used in Hong Kong

Hong Kong currently adopts “irrationality” as substantive ground of review, applying the “*Wednesbury* unreasonableness test” and the “sliding scale of review”.<sup>2</sup> In the *Wednesbury* case, Lord Greene MR ruled the court could intervene only if a decision is “so unreasonable that no reasonable authority could ever have come to it”.<sup>3</sup> His Lordship suggested the example given by Warrington L.J. in *Shorty Poole Corporation*, that “a red haired teacher was dismissed because she had red hair”, would be *Wednesbury* unreasonable.<sup>4</sup> This example demonstrated the high threshold to satisfy the test, as the

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<sup>1</sup> See Paul Craig, “Proportionality, Rationality and Review” [2010] NZ L Rev 265, 277. See also Tom Hickman, “Problems for Proportionality” [2010] NZ L Rev 303.

<sup>2</sup> *Town Planning Board v Society for Protection of the Harbour Ltd* [2004] HKCU 43.

<sup>3</sup> *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 1 K.B. 223, 229.

<sup>4</sup> *Ibid.*

decision must be “so outrageous in its defiance of logic”.<sup>5</sup>

To avoid undue hardship, subsequent cases introduced the “sliding scale of review”. In 1987, Lord Bridge in *Bugdaycay* ruled that a decision is subject to a “more rigorous examination” according to the gravity of the issue concerned.<sup>6</sup> In 1991, Lord Ackner in *Brind* agreed that when decisions concern “fundamental human rights”, “heightened scrutiny” must be given to justify the interferences.<sup>7</sup>

I suggest that Hong Kong should not continue its currently adopted position. This so-called “irrationality test” with “heightened scrutiny” may not provide adequate protection to human rights. In the following, I will use a European case example. Although European Union (“EU”) laws are not applicable in Hong Kong, Hong Kong courts still have the discretion whether to recognize proportionality solely based on its merits.<sup>8</sup> For example, in *Smith*, the applicant was a member of the Royal Air Force, and she was given an administrative discharge from the Force several months after being investigated as a lesbian.<sup>9</sup> The English Court of Appeal found that the Force’s actions were not *Wednesbury* unreasonable. When the case reached the European Court of Human Rights, the “irrationality test” was criticized for its inherent deficiency in protecting human rights, and the European Court of Human Rights replaced it with “proportionality test”.<sup>10</sup> It was finally held that since the Force failed to offer convincing and substantive reasons for the investigation of the applicant’s sexual orientation and the subsequent discharge, the Force’s actions were disproportionate. The *Smith* case is a significant landmark case in the sense that it demonstrates “proportionality test” can better protect human rights.

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<sup>5</sup> *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] A.C. 374, 410.

<sup>6</sup> *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514, 531.

<sup>7</sup> *R v Secretary of State for the Home Department, Ex p Brind* [1991] A.C. 696, 757.

<sup>8</sup> List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region.

The Official Website of the Department of Justice, <http://www.doj.gov.hk/eng/laws/treaties.html> (accessed on 18 April 2015)

<sup>9</sup> *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554.

<sup>10</sup> *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 543. “The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued ... ”

On the other hand, although the “proportionality test” can arguably better protect human rights, it is not a statutorily available ground of review in the English courts. Proportionality test remains to be a well-established principle in EU law rather than in the English public law.<sup>11</sup> As such, even though Lord Diplock first suggested proportionality in *CCSU* case, subsequent cases such as *Brind* refused to adopt it in English courts if issues in the case do not concern EU law.<sup>12</sup> Although the Human Rights Act 1998 has incorporated EU law to English law, English courts can still refuse to adopt proportionality test if the issue does not concern rights. For these reasons, I believe a possible downside would be, that Hong Kong courts are likely to be reluctant to use the proportionality test if the judicial review case is a “non-rights” judicial review.

### **Following the Recent United Kingdom Supreme Court’s (UKSC) Decisions**

The recent UKSC decisions *Kennedy* and *Pham* adopted the “contextual approach”, encompassing elements of proportionality under “irrationality”.<sup>13</sup> In light of cases like *Bugdaycay*, *Brind* and *Daly*, Lord Mance in *Kennedy* ruled that “the nature of judicial review in every case depends upon the context.”<sup>14</sup> His Lordship suggested that “proportionality” introduces an element of structure into judicial review, by “directing attention to factors” like “legitimate aim” and “necessity”.<sup>15</sup> Since proportionality brings legal certainty, “there seems no reason why such factors should not be relevant in judicial

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<sup>11</sup> Paul Craig, “Proportionality, Rationality and Review” [2010] NZ L Rev 265, 270.

“Proportionality is therefore a general head of judicial review in EU law that is applicable to test the legality of EU action, and of Member State action when the latter falls within the remit of the Treaty.” (emphasis added)

<sup>12</sup> See *Council of Civil Service Unions & Others v Minister for the Civil Service* [1985] A.C. 374, 410. See also *R v Secretary of State for the Home Department, Ex p Brind* [1991] A.C. 696, 763. “Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by European Court can be followed by the courts of this country”.

<sup>13</sup> See *Kennedy v The Charity Commission* [2014] UKSC 20. See also *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

<sup>14</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 545.p.25.

“The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context.”

<sup>15</sup> Generally, proportionality test has three steps: first, whether there is a legitimate aim to make the decision; second, whether the decision is rationally connected to the relevant legitimate aim; third, whether the means of achieving the legitimate aim is proportionate such that it is no more than necessary to do so. The structure of proportionality test will be further discussed in Section 5 below.

review even outside the scope of EU law.”<sup>16</sup> Despite recognizing elements of proportionality, Lord Reed in *Pham* emphasised that “the relationship between ‘reasonableness’ and ‘proportionality’ as principles of domestic administrative law has not been the subject of detailed argument [in this case]”.<sup>17</sup> Hence, the legal effects of *Kennedy* and *Pham* are yet to be crystal clear at this moment. It is uncertain whether future English Courts will simply adopt the “contextual approach”, or will even recognize proportionality as a distinct ground of review. Solely based on the rulings of *Kennedy* and *Pham*, it appears “proportionality” is now encompassed under “irrationality”.

I note that the UKSC replaced the Appellate Committee of House of Lords in 2009 to hear cases of “greatest public and constitutional importance”.<sup>18</sup> However, Hong Kong Courts have the discretion to follow the UKSC’s decisions pursuant to Article 8 and 84 of the Basic Law if they are highly persuasive.<sup>19</sup> As such, I see that Hong Kong Courts, in the future, can consider to (1) review each case depending on its context, with different degree of intensity; and (2) take elements of proportionality into account.

### **To Recognize Proportionality as Distinct Ground of Review**

Admittedly, the proposed position above addressed elements of proportionality under the “contextual approach”. However, since the legal system in Hong Kong has been rather distinguished from that in the United Kingdom since the handover, it is rare for Hong Kong Courts to strictly follow UKSC decisions. In this section, I suggest that Hong Kong courts should recognize proportionality as a distinct ground of review.

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<sup>16</sup> *Supra* n 15; p.27.

<sup>17</sup> *Supra* n 16; p.46.

<sup>18</sup> The Official Website of UKSC. <https://www.supremecourt.uk/index.html> (accessed on 18 April 2015)

<sup>19</sup> See Article 8, *Basic Law*. “The laws previously in force in Hong Kong, that is, the *common law* ... shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.” (emphasis added). See also Article 84, *Basic Law*. “The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and *may refer to precedents of other common law jurisdictions*.” (emphasis added)

Owing to the concern of applicability of EU law, the UKSC adopts the “contextual approach” to allow more flexibility for English courts to review merits of decisions, without explicitly applying proportionality test. In other words, whether proportionality is applicable for domestic UK cases that do not concern EU law is no longer an explicit issue for the court, because the case will be reviewed by its “context”. However, since EU laws and UKSC decisions are not directly applicable and binding in Hong Kong, Hong Kong courts should distinctively adopt proportionality to provide more legal certainty.

In *Jackson v A-G*, Lord Bingham suggested the theoretical basis of judicial review in the United Kingdom might still be the *ultra vires* theory.<sup>20</sup> Under Parliamentary Supremacy, sovereignty lies with the Parliament. Since the Parliament is accorded legislative power from citizens, the court should reflect Parliamentary intent and stay focused on reviewing validity and lawfulness of decisions. If proportionality is adopted, it is questionable whether the court will act *ultra vires* when reviewing merits of decision rigorously.

However, the situation is different in Hong Kong. In the *C* case, Sir Anthony Mason NPJ reiterated the basis of judicial review in Hong Kong is The Rule of Law,<sup>21</sup> which should uphold the values of equality, fairness and preventing arbitration of powers. This inevitably has to be done by reviewing merits of decisions. Meanwhile, Separation of Powers is also the cornerstone of the Hong Kong legal system, where the Judiciary and the Executive check and balance each other. If Hong Kong courts are satisfied that proportionality does not contravene Separation of Powers, there is no appealing reason why proportionality should not be applicable.<sup>22</sup> Section 5 discusses how proportionality test can be adopted in Hong Kong.

### **Proposed Proportionality Test in Hong Kong**

It may be less controversial to apply proportionality test for “rights” cases because decision-makers must also justify why they decided to interfere with the rights under the

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<sup>20</sup> *Jackson v Attorney General* [2006] 1 A.C. 262; Lord Bingham at [9].

<sup>21</sup> *C v Director of Immigration & Anor* (2013) 16 HKCFAR, 280, 307.

<sup>22</sup> The doctrine of Separation of Powers will be discussed in detail in Section 5.1.2.

irrationality test with “heightened scrutiny”.<sup>23</sup> Besides, the proportionality test is already applicable under constitutional review if the decision affects constitutional rights.<sup>24</sup> However, some may argue that it lacks the necessary normative basis to apply proportionality on “non-rights” cases. This Section first discusses the normative justifications, followed by their balancing with the Separation of Powers.

### *Normative Justifications*

First, as a matter of principle, the proportionality test should be applied to all cases, concerning rights or not.<sup>25</sup> Since a decision-maker is accorded power to achieve certain ends that would affect the general public, he should provide reasoned justification for his decision.<sup>26</sup> This point is particularly strong in Hong Kong’s context, since Hong Kong is not entirely democratic, but rather “quasi-democratic”. As an example, the Hong Kong Chief Executive is not elected by universal suffrage, his Executive Council and principal officials theoretically are not accorded power from citizens. The impartial judiciary, therefore, plays an important role to review public decisions. In my viewpoint, for non-rights cases, the rationale of judicial intervention will not be affected, though there may be varying intensity of review.

Second, proportionality is more structured than irrationality test. In *Daly*, Lord Steyn recognized the three-stage proportionality test adopted in *de Freitas*.<sup>27</sup> The three-stage proportionality test is: “*In determining whether a limitation is arbitrary or excessive the court should ask itself: whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than necessary to accomplish the objective.*”<sup>28</sup> His Lordship commented the test is “clearly more precise and sophisticated than the traditional grounds of review”.<sup>29</sup> In *Huang*, Lord Bingham even recognized “the need to balance the

<sup>23</sup> *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554.

<sup>24</sup> *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315.

<sup>25</sup> Paul Craig, “Proportionality, Rationality and Review” [2010] NZ L Rev 265, 271.

<sup>26</sup> *R v Ministry of Agriculture, Fisheries and Food, ex p First City Trading* [1997] 1 CMLR 250, 278.

<sup>27</sup> *de Freitas v Secretary of Ministry of Agriculture, Fisheries, Lands & Housing* [1999] 1 AC 69.

<sup>28</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547.

<sup>29</sup> *Supra* n 34.

interests of society with those of individuals and groups” as the fourth stage.<sup>30</sup> If proportionality test can provide more legal certainty and better protection, it will be unsounded for not applying it.

The last argument is consistency. Sometimes it may be difficult to distinguish a “rights” case from a “non-rights” case.<sup>31</sup> Since the distinction is blurred, proportionality should be applicable to all substantive reviews for consistency.

### ***The Separation of Powers***

The main argument against applying proportionality is the Separation of Powers. In the *HKTv* case, Au J doubted whether every decision review can be subjected to proportionality test, as it would lead to “micro-examination of the actual decision made under the law”.<sup>32</sup> Per Craig, the role of Judiciary is to check and balance against the Executive, rather than reviewing merits of their discretionary determinations.<sup>33</sup> If the decision is in essence “a matter of preference”, the court should adopt a deferential approach and respect the choice of the decision-maker.<sup>34</sup>

However, Separation of Powers should not be an invincible shield for decision-makers to avoid merits review, as “we should not live in a world where ‘public wrongs’ are subject to no meaningful judiciary scrutiny”.<sup>35</sup> It is a weak argument that proportionality should never be applied for “non-rights” cases just because the public body can impose constraint on the applicant. Instead, per Craig, “it is the extent and nature of the constraint that is the issue”.<sup>36</sup> Similar to the contextual approach in *Pham*, the relevant court should apply varying intensity of review depending on context of the case. If the case does not involve “rights”, the court may apply the test with less intensity and give more weight to the discretion of decision-maker. If the subject matter demands more rigorous review, it is justifiable for the court to do so without contravening Separation of Powers.

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<sup>30</sup> *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

<sup>31</sup> This argument will be discussed in greater detail in Section 5.3.3.

<sup>32</sup> *Hong Kong Television Network Limited v Chief Executive in Council*, unreported. HCAL 3/2014. In this case, Au J quashed the decision of the respondent with other grounds.

<sup>33</sup> Paul Craig, “Proportionality, Rationality and Review” [2010] NZ L Rev 265, 277.

<sup>34</sup> *R v Secretary of State for the Environment, Ex p Hammersmith & Fulham LBC* [1991] 1 AC 521, 593.

<sup>35</sup> Paul Craig, “Proportionality, Rationality and Review” [2010] NZ L Rev 265, 279.

<sup>36</sup> *Ibid.*



Since Hong Kong courts are not bound by UKSC decisions, the contextual approach in the UK is not directly applicable; and the proportionality test can be adopted by discretion. Yet should the Hong Kong court adopt it into a Hong Kong case and set a case precedent, it can promote legal certainty that the Hong Kong Courts are willing to apply proportionality test, rather than merely “taking elements of proportionality into account”.<sup>37</sup>

### **Proportionality Should Not Be the Only Substantive Ground of Judicial Review**

Hickman suggested that if proportionality is a distinct ground of review, the whole doctrine of judicial review would be dominated by proportionality because the burden of proof is on the decision-maker rather than the applicant.<sup>38</sup> However, this may not necessarily be the norm. An applicant may still rely on other substantive grounds of review such as “legitimate expectation”, “error of facts” and “error of law”.<sup>39</sup> For example, the *HKTv* case demonstrated that the trial judge may quash governmental decision by “legitimate expectation” rather than “proportionality”.<sup>40</sup> While there is no appealing reason to blue-pencil out the other grounds of reviews, the next issue is whether proportionality should completely replace irrationality.

### **Proportionality Should Replace Irrationality**

#### ***Is There A Need to Keep “Irrationality”?***

In *Daly*, Lord Steyn acknowledged the overlap between irrationality and proportionality, but three differences between them made proportionality test a better one.<sup>41</sup> To avoid redundancy, there are only two solutions. The first is the contextual approach suggested

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<sup>37</sup> The issue of whether the applicant or the respondent should have the burden of proof will be discussed in Section 5.3.2 below.

<sup>38</sup> Tom Hickman, “Problems for Proportionality” [2010] NZ L Rev 303.

<sup>39</sup> *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1.

<sup>40</sup> *Supra* n 39.

<sup>41</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547.

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.”

in *Pham*, in which the elements of proportionality are encompassed under irrationality. The second solution is to replace irrationality with proportionality. If irrationality does not have its own merit(s) over proportionality, there is no need to keep the redundant irrationality test.

### ***Advantage of Keeping Irrationality – Different Burden of Proof (?)***

Taggart and Hickman argued that irrationality test respects the Separation of Powers because the applicant has the burden of proof. In contrast, proportionality test imposes an unjustified burden on decision-maker.<sup>42</sup> I propose that the Courts can solve this issue by explicitly placing the burden of proof on the applicant. Making reference to the Human Rights Act 1998, the applicant should have the onus, whereas the decision-maker only has the “burden” to adduce evidence for defence.<sup>43</sup>

Under the ground of “procedural impropriety”, the decision-maker does not have general duty to give reason for his decision.<sup>44</sup> That is, unless the affected interest is highly important such as human rights. If the burden of proof lies on the decision-maker, proportionality may be misused as a “backdoor” to force the decision-maker to justify his “non-rights” decision. By placing burden on the applicant, the decision-maker will only be rigorously demanded to justify his reason when the case concerns “rights”. This position is therefore consistent with the common law duty of reason-giving.<sup>45</sup>

As such, proportionality is a defence for decision-maker to justify his decision is proportionate. Placing the burden of proof on the applicant not only makes it consistent with other grounds of review, but also serves to prevent the problems of “backdoor” and “floodgate”; since the applicant will still have to prove on the balance of probabilities the decision is disproportionate.

### ***Disadvantage of Keeping Irrationality – Causing Confusion***

Taggart suggested a “bifurcation model” that irrationality should be adopted for

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<sup>42</sup> Mike Taggart, “Proportionality, Deference, Wednesbury” [2008] NZ L Rev 423.; Tom Hickman, “Problems for Proportionality” [2010] NZ L Rev 303.; p.293.

<sup>43</sup> The Human Rights Act 1998.

<sup>44</sup> *R v Secretary of State for the Home Department, Ex p Doody* [1993] UKHL 8.

<sup>45</sup> *Ibid.*

non-rights cases and proportionality for rights cases.<sup>46</sup> However, there is a practical problem as to how to distinguish rights from non-rights cases. In *Zestra*, the Commissioner for Transport rejected the application of personalized vehicle registration mark.<sup>47</sup> Was it a “purely” application case or had it violated the right of freedom of expression? If the bifurcation model is adopted, it may cause confusion as to which test should apply.

If proportionality is recognized without replacing irrationality, it is equally problematic to distinguish among rights. In *Pham*, Lord Sumption ruled that the British nationality citizenship is “manifestly at the weightiest end of the sliding scale”, and hence his Lordship considered the elements of proportionality.<sup>48</sup> It is difficult to reconcile *Pham* with previous cases adopting the irrationality test. While the right of citizenship in *Pham* may be more important than the right to broadcast in *Brind*,<sup>49</sup> it is unsounded to argue that citizenship is more important than the right of life in *Bugdaycay*<sup>50</sup> and the prisoners’ right of privacy in *Daly*.<sup>51</sup> In other words, when it comes to the right of life or right of privacy in future cases, should the court simply adopt the irrationality test with “heightened scrutiny”, or take elements of proportionality into account as well? To avoid confusion, I suggest that the court should replace irrationality with the distinct ground of proportionality.

## Conclusion

If Hong Kong Courts continues to adopt the “*Wednesbury* unreasonableness test” and the “sliding scale of review”, there may not be a desperate need to replace irrationality with proportionality as a matter of outcome. Justice may still be done on other grounds, such as “legitimate expectation” in the *HKTV* case.<sup>52</sup> If Hong Kong follows UKSC and adopts the “contextual approach”, encompassing elements of proportionality under “irrationality”, there may not be a desperate need to replace irrationality with proportionality as a matter of outcome either. Per Lord Reed in *Pham (obiter)*, since the

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<sup>46</sup> *Supra* n 51.

<sup>47</sup> *Zestra Asia Limited v Commissioner for Transport* [2007] 4 HKLRD 722.

<sup>48</sup> *Pham v Secretary of State for the Home Department* [2015] UKSC 19, 45.

<sup>49</sup> *R v Secretary of State for the Home Department, Ex p Brind* [1991] A.C. 696.

<sup>50</sup> *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514.

<sup>51</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

<sup>52</sup> *Supra* n 39.

intensity of review is based on context, both irrationality test with “heightened scrutiny” and proportionality test may yield the same result.<sup>53</sup>

However, I propose that we should take the initiative to decide which test is better to achieving justice in judicial review cases. Quoting Oscar Wilde, “*we are all in the gutter, but some of us are looking at the stars*”.<sup>54</sup> We should not be satisfied by the outcome. We should also be satisfied by the principle that is used to achieve the outcome. As a result, I believe proportionality can better provide legal certainty and protection to the general public. If Hong Kong Courts allocate the burden of proof and adopt the intensity of review appropriately, Hong Kong should replace the irrationality test with proportionality test as the substantive ground of judicial review.

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<sup>53</sup> *Supra* n 16; p.49.

<sup>54</sup> The Official Website of Oscar Wilde. <http://www.cmgww.com/historic/wilde/> (accessed on 25 April 2015).