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The Evolution of Judicial Review in United Kingdom

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Introduction

Judicial review is the power of the courts to determine the constitutionality of legislative acts. It determines the ultra vires or intra vires of the Act challenged before it. In the words of Smith & Zurcher "The examination or review by the courts in cases actually before them, of legislative statutes and executive or administrative acts to determine whether or not they are prohibited by a written constitution or are in excess of powers granted by it and if so, to declare them void and of no effect."[1] Edward S. Corwin opines that judicial review is the power and duty of the courts to disallow all legislative or executive acts of either the central or the state government, which in the court's opinion transgresses the constitution.[2] Judicial review has however, a more technical significance in public law, particularly in countries having a written constitution where the courts perform the role of expounding the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent and impartial arbiter of constitutional issues and also to restrain governmental organs from exercising powers which may not be sanctioned by the constitution.

[1] Edward Conard Smith & Arnold Zurcher, Dictionary of AmericanPolitics,Barnes&Noble,NewYork,1959,p.212
[2] S. Corwin, a Constitution of Powers in a Secular State. The Michie Company, US, 1951, pp.3-4.

HISTORICAL DEVELOPMENT OF JUDICIAL REVIEW IN UNITED KINGDOM

- **SCOPE OF JUDICIAL REVIEW**

When one talks of Judicial Review in the context of Constitutional Law, one would think that a necessary ingredient is a Written Constitution. Therefore, as a layman's view point, it is a review by a competent court, regarding the validity of a law passed by the legislature on the touchstone of the Constitution. However, this does not mean to say that the concept is not prevalent in countries having an unwritten constitution or it cannot be comprehended in a different manner in other branches of law. [3]Therefore in United Kingdom, judicial review deals with public law wherein a judge reviews the decision or an action of a public body and its lawfulness. Here the challenge is based on an allegation that an unlawful decision has been made by the public body and there is no adequate alternative remedy available with an individual. Thus, one needs to understand the basis wherein the decision can be termed as unlawful and the grounds of the same will be enumerated in the later sections.[4] Furthermore, though Judicial Review is an accepted norm in many scenarios, it should be remembered that it is not without its limitations, therefore to understand this concept and its development, one needs to go into the structure under which the courts in United Kingdom function. Till recently, the Courts were meant to enforce the will of the Parliament, thus keeping this in mind; it will be inconceivable to think that they were allowed to review the Acts of Parliament itself, therefore judicial review was not present in respect of primary legislations but only for subordinate or delegated legislations.[5] However this position has been

[3] Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225, 1225-30, 1269-85 (1999)
[4] Ibid.
[5] Pollock, A Plea for Historical Interpretation (1923) 39 L. Q. Rev. 165

changing with time, not just due to the Acts of Parliament itself but also because of the active role that the judiciary has started taking in this respect.

- **JUDICIAL REVIEW OF DELEGATED LEGISLATION PRIOR TO PRIMARY LEGISLATION**

Judicial Review is a procedure in English Administrative law by which the court supervise the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a minister, local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to administrative court for judicial review of the decision and have it set aside and possible obtain damages. The English Constitutional theory as expounded by A V Dicey does not recognize a separate system of Courts that would review the decisions of public bodies.[6] Instead it considered that the government should be subject to jurisdiction of ordinary common law courts. At the same time the Parliamentary Sovereignty does not allow for the judicial review of primary legislation (Acts of Parliaments). This limits the Judicial Review in English law to the decision of public bodies and delegated legislation, against which the common law court remedies as well as special prerogative order are available in certain circumstances. The Constitutional History of Judicial Review has long been dominated by the Doctrine of Ultra Virus, under which a decision of public authority can only be set aside if it exceeds the power granted to it by the parliament. The role of the court was seen as enforcing the will of Parliament in accordance with the Parliamentary Sovereignty. However the decision has been widely interpreted to includes the error of Law[7] and of the fact and the court have also declared the decision take under the Royal Prerogative to be amenable to Judicial

[6] Dr. Jt. A.S. Anand, Jt. N.D.Krishna Rao Memorial Lecture Protection of Human Rights- Judicial Obligation or Activism, (1997) 7 SCC (Jour) 11.

[7] Anisminic v. Foreign Compensation Comm.(1969) 2 AC 147

Review.[8] Therefore, it seems that today the constitutional position of Judicial Review is dictated by the need to prevent the abuse of the power by the executive as well as to protect individual rights.

- **PARLIMENARTY SOVEREIGNTY AND JUDICIAL REVIEW**

Parliamentary Sovereignty has been regarded as the core and the most basic principle of the British Constitution for a long time. A.V. Dicey has elaborated on the concept in great detail and was of the view that "the sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions." Further, he went on to describe the doctrine classically as:

"The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament... has, under the English constitution, the right to make or unmake any law or whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[9]

Thus from an analysis of the aforementioned exposition of Parliamentary Sovereignty, one can cull out two components. Firstly, only Parliament has the authority to enact or repeal any legislation and secondly, no one (not even the Courts) has an authority to question the same or to set it aside. Also it is not just the scholars or the Parliament that believes in this doctrine, but the judiciary also abides by the principle and what the same entails. The views of the Judiciary can be recounted by looking into various judgments and they have made it clear time and again, that the

[8] Council of Civil Services Unions v. Minister for the civil Services, (1984)3 ALL E R 935 (HL)
[9] A.V. Dicey, Law and Public Opinion in England, p.345

Courts are not concerned with the making of the Acts of Parliament; their task is to merely apply the legislation that has been passed by both the Houses and has received Royal Assent.[10]

This approach has been crystallized with numerous decisions and the same was confirmed in **British Railways Board v. Pickin**[11] wherein Lord Simon of Glaisdale stated that:

"The system by which, in this country, those liable to be affected by general political decisions have some control over the decision-making is parliamentary democracy. Its peculiar feature in constitutional law is the sovereignty of Parliament. This involves that, contrary to what was sometimes asserted

before the 18th century, and in contradistinction to some other democratic systems, the courts in this country have no power to declare enacted law to be invalid. It was conceded before your Lordships (contrary to what seems to have been accepted in the Court of Appeal) that the courts cannot directly declare enacted law to be invalid."[12]

Thus this view has been prevalent in United Kingdom till very recently, and though a certain change has been brought about by some developments as will be elucidated in later sections, it can easily be said that Parliamentary Sovereignty remains a general principle of their constitution. However this concept has started undergoing a change in the recent times and this is mostly due to the fact that Judges have started believing in the concept of judicial activism and the need to check the abuse of power by the executive as well as to protect the individual rights. In defence of Parliamentary Sovereignty, it can be said that the concept ensures that major issues relating to public policy are decided by a democratically elected institution that are representatives of the public and are ultimately accountable to the public. However the critics of this concept say that it

[10] warwick.ac.uk/fac/sock/law/research/centres/ , Visited on 25 April, 2018
[11] (1974) AC 765
[12] Ibid.

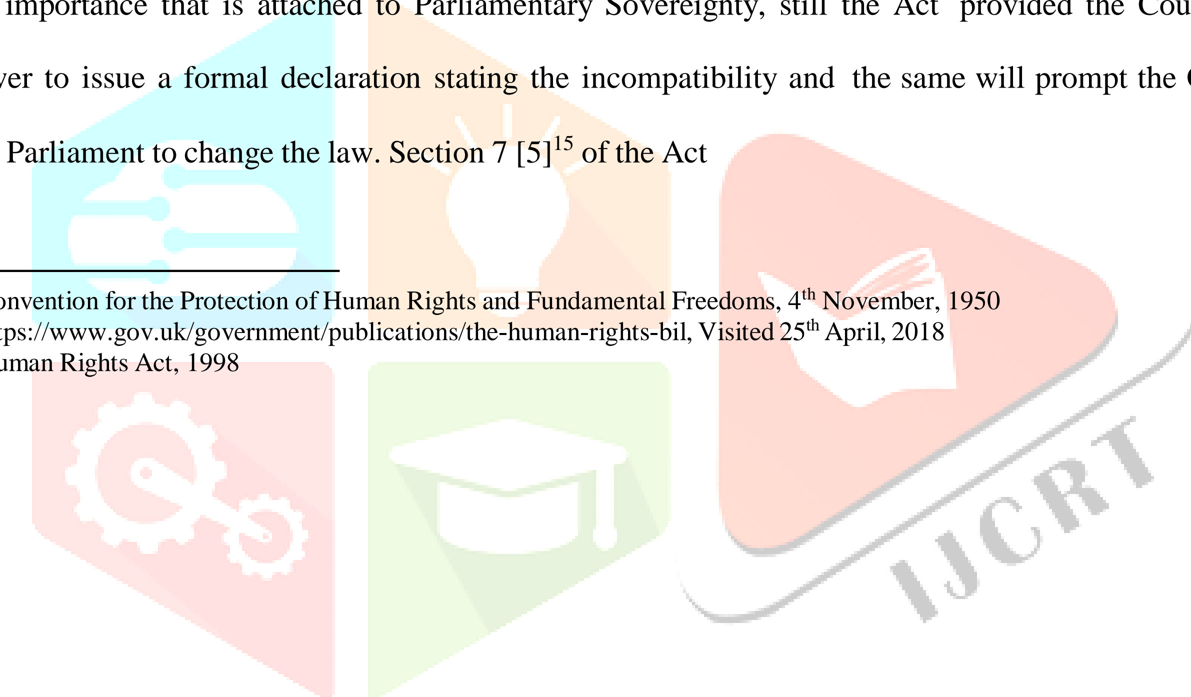
merely guarantees the use of arbitrary power of the executive. Therefore the question always remains as to who else besides the Court can question the authority of the Parliament and if they fail to do so, then no other recourse is left with an individual to check the abuse of an arbitrary legislation. This was the need that was recognized in order to bring in the enactment of Human Rights Act.

- **EXPANSION OF JUDICIAL REVIEW**

Enactment of Human Rights Act, 1998 which was passed on the basis of The European Convention for the Protection of Human Rights and Fundamental Freedom[13], heralded in the new era for Judicial Review. The White Paper of the Act specifically mentions in its Introduction that:

"Although the courts will not, under the proposals in the Bill, be able to set aside Acts of the United Kingdom Parliament, the Bill requires them to interpret legislation as far as possible in accordance with the Convention. If this is not possible, the higher courts will be able to issue a formal declaration to the effect that the legislative provisions in question are incompatible with the Convention rights. It will then be up to the Government and Parliament to put matters right."[14]

From its very beginning it was recognized that this rule of construction will be applied not only to future legislations but also the past legislations in order to give effect to the Convention Rights. Though the right to strike down the legislation was not given even to the Higher Courts and this was primarily, due to the importance that is attached to Parliamentary Sovereignty, still the Act provided the Courts with the power to issue a formal declaration stating the incompatibility and the same will prompt the Government and Parliament to change the law. Section 7 [5][15] of the Act



[13] Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November, 1950
[14] https://www.gov.uk/government/publications/the-human-rights-bil, Visited 25th April, 2018
[15] Human Rights Act, 1998

gives a person the right to approach a court to get a declaration of incompatibility or any other order as is deemed appropriate. Apart from the theoretical aspect, the concern is in relation to its practical applicability. One needs to understand the circumstances wherein one can ask for judicial review. Numerous declarations of incompatibility have been made and some have resulted in amendments of the primary legislations but almost an equal number have been overturned by the House of Lords or the Court of Appeals on an appeal by the Home Office.

An illustration of the change in the legislation can be seen in **Bellinger v Belligner**,[16] wherein it was declared by the courts that Section 11(c) Matrimonial Cases Act, 1973 was incompatible with Section 8 and Section 12 in so far as it makes no provision for recognition of gender assignment. This was remedied by the Gender Recognition Act, 2004. However the trend is not that it favors declarations of incompatibility with a repeal or enactment by the Parliament but there are numerous cases wherein the formal declaration has had no effect on the Parliament. Irrespective of the pattern, enactment of this Act brought primary legislations under the purview of judicial review as against the prior doctrine of ultra vires, wherein only those acts or decisions were subject to judicial review which were outside the scope of authority of the public official/body. The impact of Human Rights Act, 1998 is reflected in the words of Lord Steyn in the case of **Jackson and others v Attorney General**[17] and are as follows:

"*Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the [European Convention on Human Rights] with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in*

[16] [2001] 1 FLR 389
[17] [2006] 1 AC 262

relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom".[18]

Thus Judicial Review is an accepted norm in respect of legislations in contravention of European Convention on Human Rights and wherein a public official has made an unlawful decision. The question that follows is on what grounds will a decision be subject to judicial review? This has been summarized by Lord Diplock in the case of **Council of Civil Services Union v Minister for the Civil Service**[19] in the following words:

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds."[20]

As per this judgment, Lord Diplock elaborated on the meanings of these three heads. Illegality would mean that the decision maker must carefully understand the law and the give effect to it, if he has failed to do the same then it becomes a justiciable question that needs to be decided. Irrationality according to him is something which is also known as Wednesbury principle[21]. This is applicable when the decision is so outrageous in its defiance of logic or acceptable standards that no reasonable person on application of mind could have reached that specific conclusion.

[18] [2006] 1 AC 262
[19] [1985] AC 374
[20] Ibid.
[21] Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223)

Lastly procedural impropriety can be defined to mean failure in observance of basic principles of Natural Justice. Thus the aforementioned grounds are the basis of judicial review in respect of public law. However with enactment of the Human Rights Act, primary legislation also came within the purview of judicial review, as has been established in this section.

Thus, finally in case of **Jackson and others v Attorney General**[22], can be said to be a case of constitutional significance in the recent times. It did not just bring into question the Hunting Act, 2004 but also Parliament Acts of 1911 and 1949. The former Act deals with hunting mammals with dogs, an offence except in certain circumstances. This was directed especially in respect of fox hunting. However the point of significance in this case for the purpose of this Article and also in respect of sovereignty of the Parliament is, strictly speaking, obiter dictum but worth analyzing as they delve into the changing mindset of their Lordship's in respect of core constitutional issues. It was also opined that "*as Parliament Sovereignty is a common law tradition, i.e. it was created by the judges therefore it is also open to the judges to change the concept. Also the judges expressed a view that the courts might have power to strike down a law if the same is incompatible with fundamental values".*[23] Thus it can be seen as an extension of the work of judges and ever increasing role in respect of keeping checks on the executive. However the reason that this case has assumed significance is that this was the first time that such an opinion was expressed by judges in their official capacity, unlike earlier times wherein it has been said that substantive limitations should be placed on the parliament, so the courts have the power of judicial review in respect of legislation not conforming to the fundamental rights or the rule of law, only in their

[22] [2006] 1 AC 262
[23] Ibid.

extra-judicial capacity. Thus, even in Bonham's Case, Court held that if any act of Parliament which is against the Natural equity can be declared as void.[24]

- **CONCLUSION**

As we have seen that the active role of judiciary has little bit diluted the concept of Parliamentary Sovereignty in United Kingdom. Now it has become very important to take consideration the political scenario of England when talking about the future of Judicial Review as increase in the role of Courts would entail limiting the Parliamentary Sovereignty which is absolute in some respect. This aspect of judicial review is not dear to the Conservatives of the Nation as one of their major point in the 2004 manifesto prior to election was repeal of Human Rights Act, 1998. This issue is still a part of ongoing debate in England where Tories want to scrape off the Act and introduce Bill of Rights. On the other hand the Labour Party and the Liberal Democrats are in favor of the Act as it stands, as they are of the belief that the Act serves the purpose of Bill of Rights and is essentially the same thing with a different name. Moreover they want to increase the scope of the Act, so it can lead to a Written Constitution. Leaving the political views aside, even the judiciary is not in complete favor of moving away from the concept of Parliamentary Sovereignty as can be seen through the majority opinion in the Fox Hunting Case. As the belief is that supremacy of Parliament is one of the pillars of modern constitution that has been completely accepted by the courts. Thus, till now the question is remained to be answered whether the judges want an extension in their roles as against other organs of the government or do they want to continue with the orthodox view of mere application and interpretation of law.

[24] (1610) 8 Co Rep 114

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